

2016

Pluralizing the 'Sharing' Economy

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Citation Details

Erez Aloni, "Pluralizing the 'Sharing' Economy" (2016) 91:4 Wash L Rev 1397-1459.

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PLURALIZING THE “SHARING” ECONOMY

Erez Aloni*

Abstract: The so-called “sharing” economy presents one of the most important and controversial regulatory dilemmas of our time—yet, surprisingly, it remains undertheorized. This Article supplies needed analysis. Specifically, the Article offers a regulatory model that distinguishes between two separate kinds of transactions: conventional economic transactions and those that rely on temporary access to goods and services that would otherwise go underutilized (what I call “access-to-excess” transactions). The regulatory regime that this Article proposes would distinguish between true access-to-excess transactions and conventional transactions. The model is rooted in a version of pluralist theory that posits that the state is responsible for cultivating a range of social institutions that offer meaningful economic and social alternatives to individuals.

Recognizing access-to-excess transactions in a separate legal regime does not mean countenancing all access-to-excess activity in an under-regulated Wild West of markets. Pluralism has something to offer here as well: I argue that, properly understood, pluralistic principles do not endorse free-market and hands-off policies. Rather, they require state intervention to preserve existing choices, embed and balance diverse values (not only autonomy), ensure fair competition, and protect consumers and employees from strategic and opportunistic behaviors. Thus, pluralistic principles offer the normative foundation for inventive regulation—neither conventional nor free market—that can restrain some of the “sharing” economy’s harms without impeding innovation.

Finally, the Article reverses the lens: The “sharing” economy serves as a real-life laboratory to reveal the operation of pluralistic theory and, thus, sheds light on the theory’s limitations. In particular, the “sharing” economy shows how the plasticity of pluralistic theory may enable harmful free-market policies to masquerade as “choice.”

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*Assistant Professor, Whittier Law School. I would like to thank Anita L. Allen, Michael Boucai, Leslie Cohen, Melissa J. Durkee, Elizabeth F. Emens, Andrew Gilden, Catherine Hardee, Yafit Lev Aretz, Gideon Parchomovsky, William W. Patton, Carol Sanger, Elizabeth Scott, Marc Spindelman, and Allison Tait as well as workshop participants at the SoCal Junior Faculty Workshop for helpful, insightful, and generous comments. I am further indebted to Chris Walsh and Sara Gold for superb research assistance. Finally, special thanks to the editors of the *Washington Law Review* for their thoughtful and thorough suggestions and edits.

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INTRODUCTION

*“The more things change, the more they stay the same.”*¹

Much tumult surrounds the rise of what commentators commonly refer to as “collaborative consumption,” the “sharing economy,” the “on-demand economy,” the “gig economy,”² the “access economy,”³ or the “peer-to-peer (P2P) economy”—an economic activity in which web platforms facilitate peer-to-peer exchanges of diverse types of goods and services.⁴

1. Nikos Valance, *Not Your Father's Mine: The Rosemont Copper Mine and Dry Stack Tailings*, 3 ARIZ. J. ENVTL. L. & POL'Y, 2012, at 29 n.7 (citing JEAN-BAPTISTE ALPHONSE KARR, LES GUÊPES, vi (1849) (Fr.) (“[P]lus ça change, plus c'est la même chose.”)).

2. The term “gig economy” was recently used by presidential candidate Hillary Clinton in a speech outlining her economic vision. See Noam Scheiber, *Growth in the “Gig Economy” Fuels Work Force Anxieties*, N.Y. TIMES (July 12, 2015), <http://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html> [<http://perma.cc/4DX5-SA56>].

3. Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, HARV. BUS. REV. (Jan. 28, 2015), <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all> [<https://perma.cc/YM9V-A4M3>] (“[T]he sharing economy isn't really a ‘sharing’ economy at all; it's an access economy.”).

4. As I detail in section I.A., *infra*, there are many misconceptions about what this economic model entails, and its name. To avoid this pitfall, I call this model the “peer-to-peer” economy, or, in short, the “P2P” economy. I use this term generally to address an economic model in which for-profit web platforms or mobile apps facilitate peer-to-peer exchanges of goods, services, space, and money.

People agree on little about this economic model—everything from its name to its claimed virtues—is a cause for fierce controversy.⁵ In fact, people have greeted the rise of the P2P economy with sharply polarized responses. Opponents file lawsuits concerning labor law violations⁶ or zoning regulations,⁷ confront P2P firms companies with huge demonstrations across the globe,⁸ and strongly urge lawmakers for direct regulation.⁹ Proponents tout the model as innovative, choice-enhancing, and transformative of consumerist models, and exhort lawmakers to let it flourish with minimal or no regulation.¹⁰

What everyone does agree on is that this model has a powerful; economic effect on various industries and employment structures;¹¹ and that it is here to stay.¹² For example, Uber, the P2P transportation

5. See, e.g., Koen Frenken, Toon Meelen, Martijn Arets & Pieter van de Glind, *Smarter Regulation for the Sharing Economy*, THE GUARDIAN (May 20, 2015, 2:00 PM), <https://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy> [https://perma.cc/48D8-VAE9] (“Discussions about the sharing economy lack clear definitions. This bogs public debate down in platitudes and slogans, voiced by both proponents . . . and opponents . . .”); Brad Tuttle, *Can We Stop Pretending the Sharing Economy Is All About Sharing?*, TIME (June 30, 2014), <http://time.com/money/2933937/sharing-economy-airbnb-uber-monkeyparking/> [https://perma.cc/QC8A-C5CC].

6. See, e.g., Annie Lowery, *How One Woman Could Destroy Uber’s Business Model – And Take the Entire “On-Demand” Economy Down with It*, N.Y. MAG. (Apr. 30, 2015, 7:30 AM), <http://nymag.com/daily/intelligencer/2015/04/meet-the-lawyer-fighting-ubers-business-model.html> [https://perma.cc/S9J6-DS38] (discussing a lawsuit against Uber for violating labor standards); *O’Connor v. Uber Tech., Inc.*, 2013 WL 6354534, at *5–7 (N.D. Cal.).

7. *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786 (N.Y. App. Div. 2014).

8. Lisa Fleisher, *Taxi Drivers Plan Big Protest Against Uber Technologies Across Europe*, WALL ST. J. (June 10, 2014, 7:43 PM), <http://www.wsj.com/articles/taxi-drivers-plan-big-protests-against-uber-technologies-across-europe-1402432899> [https://perma.cc/7YGC-B2S5]; Dave Evans, *Coalition Gathers at City Hall to Protest Airbnb*, ABC 7 NEWS (Sept. 12, 2014), <http://7online.com/business/coalition-gathers-at-city-hall-steps-to-protest-airbnb/306200/> [https://perma.cc/YTL9-3YJB].

9. Rebecca R. Ruiz, *Washington Scrutinizes the Sharing Economy*, N.Y. TIMES (June 9, 2015, 6:06 PM), <http://bits.blogs.nytimes.com/2015/06/09/washington-scrutinizes-the-sharing-economy/> [https://perma.cc/3R7G-YKD8].

10. See, e.g., Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. 69 (2015) (“[E]xisting regulatory structures often discourage such innovations, reducing their popularity and slowing their development.”).

11. The expansion of the P2P economy—in terms of number of users, economic growth, areas of trade, effect on established industries, and geography—is immense. It has now grown to include the transportation, hospitality, personal services, financing, errands, and consumer goods industries, to name just a few. Jeremiah Owyang, *Infographic: A Day in the Life of the Collaborative Economy*, WEB STRATEGIST (Sept. 29, 2014), <http://www.web-strategist.com/blog/2014/09/29/a-day-in-the-life-of/> [https://perma.cc/V7CZ-K3AT].

12. See Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, HARV. J. ON LEGIS. 147, 156 (2016); Darcy Allen & Chris Berg, *The Sharing Economy: How Over-Regulation*

company, is only seven years old and already valued at \$41 billion—while disrupting the traditional model of taxi cabs by eschewing corporate ownership of cars or medallions (alienable licenses, worth tens of thousands of dollars, to operate taxis in regulated cities).¹³ The company now operates in fifty-seven countries on five continents.¹⁴ Other companies have joined the market as well (e.g., Lyft and Hitch), a trend recently dubbed “Uberification” or “Uberization.”¹⁵ In the hospitality arena, Airbnb, a company that facilitates short-term rentals, is valued at \$13 billion¹⁶ and arranged 155 million stays last year—22% more than Hilton Worldwide Holdings, Inc.¹⁷ Similar companies in various sectors of industry also flourish, and many businesses now structure their services so that they will fall under the complimentary halo of the “sharing” economy.¹⁸

Lawmakers’ responses to the rapid growth of the model have been slow, confused, and scattered.¹⁹ Their approaches vary from

Could Destroy an Economic Revolution, 25 INST. PUB. AFF. (2014), https://ipa.org.au/portal/uploads/Sharing_Economy_December_2014.pdf [<https://perma.cc/3D2S-TTZX>].

13. Douglas MacMillan, Sam Schechner & Lisa Fleisher, *Uber Snags \$41 Billion Valuation*, WALL ST. J. (Dec. 5, 2014), <http://www.wsj.com/articles/ubers-new-funding-values-it-at-over-41-billion-1417715938> [<https://perma.cc/P6SP-SHA8>].

14. *Cities*, UBER, <https://www.uber.com/cities> [<https://perma.cc/2TY7-5XGB>] (last visited July 2, 2015).

15. Scheiber, *supra* note 2 (“In retrospect, the Uberization of the economy began innocently enough back in the late 1970s.”); Maria Gonzalez, *The Uberification of Society*, MOBILE WORLD CAP. (July 11, 2014), <http://mobileworldcapital.com/503/> [<https://perma.cc/L9E2-UPCJ>].

16. Tim Bradshaw, *Airbnb Valued at \$13B Ahead of Staff Stock Sale*, CNBC (Oct. 23, 2014), <http://www.cnbc.com/id/102117120> [<https://perma.cc/L9E2-UPCJ>].

17. PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, (2015), <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf> [<https://perma.cc/YN9X-RPZR>] [hereinafter CONSUMER INTELLIGENCE SERIES].

18. Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE, at 1 (Oct. 2014) (“Many organizations have been eager to position themselves under the ‘big tent’ of the sharing economy because of the positive symbolic meaning of sharing, the magnetism of innovative digital technologies, and the rapidly growing volume of sharing activity.”).

19. The P2P economy presents a regulatory dilemma because providers are often not sophisticated, traditional players who know how to engage with licensing and regulation—and sometimes deal with relatively small amounts of money. *See, e.g.*, Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed*, 93 WASH. U. L. REV. 990, 996 (2016). In addition, the P2P economy encompasses a range of activities that different administrative agencies have traditionally regulated. Miller, *supra* note 12, at 175. Finally, lawmakers face opposing political pressures—from incumbent providers, on the one hand, who are often politically organized, and from users of the services and capital investors in the P2P companies, on the other. *Id.*

nonintervention, to creating new regulatory regimes,²⁰ to sporadically cracking down on some of these services,²¹ to complete bans.²²

Scholarly responses to the phenomenon have been similarly deficient. The burgeoning scholarly literature—coming from such different fields as law, business, sociology, and economics—has insisted on a sectorial approach to regulation. That is, scholars have asserted that the best way to evaluate the model and to craft appropriate policy is in silos: examining each market, or each regulatory aspect, alone.²³ For example, because the short-term rentals market is markedly different from the transportation market, these scholars contend that the only way to craft pertinent regulation is through separate inspection of the two markets and recommendations for regulations relevant to each market respectively.²⁴ Proposals such as keeping the tax aspect separate from employment issues and zoning laws exemplify the common prerogative of addressing each legal aspect of the P2P economy individually.²⁵ Thus, a comprehensive theory—rather than fragmented policymaking proposals—is what is missing from the growing literature.

Further, most scholars mistakenly embrace the narrative of sharing (that is, the idea that altruistic or communal interests define the market), or they overstate the innovation of the P2P economy as transforming

20. See, e.g., PORTLAND, OR. ADMIN. R. § 3.30.040(D)(5) (2015) (creating a unique regulatory regime for regulation of short-term rentals); Miller, *supra* note 12, at 186–91 (providing a detailed explanation of the regulations in San Francisco and Portland); Andrew Bender, *New Regulations to Wipe Out 80% of Airbnb Rentals in California's Santa Monica*, FORBES (June 15, 2015, 3:55 PM), <http://www.forbes.com/sites/andrewbender/2015/06/15/new-regulations-to-wipe-out-80-of-airbnb-rentals-in-californias-santa-monica/> [<https://perma.cc/4DMM-GWVR>] (describing the new regulations in Santa Monica, California).

21. *Sharing Economy 2.0: Can Innovation and Regulation Work Together?*, KNOWLEDGE@WHARTON (Nov. 5, 2014), <http://knowledge.wharton.upenn.edu/article/the-next-phase-for-the-sharing-economy/> [<https://perma.cc/JS8N-ND3B>] (describing an incident in which the Philadelphia Parking Authority conducted a sting operation on UberX cars in Philadelphia).

22. NEW ORLEANS, LA., CODE OF ORDINANCES § 54-491.1, http://cityofno.granicus.com/MetaViewer.php?view_id=2&clip_id=1819&meta_id=243027 [<https://perma.cc/24S8-8SFK>] (declaring short-terms rentals illegal).

23. See, e.g., Miller, *supra* note 12, at 151 (arguing that “a regulatory response to the sharing economy requires recognition that the types of transactions occurring differ substantially in how they affect the real world and thus require a differentiated regulatory response”); Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015) (focusing solely on Uber’s effect on society); Oei & Ring, *supra* note 19 (focusing solely on tax aspects); Barry & Caron, *supra* note 10 (focusing solely on tax aspects of transportation sector).

24. Miller, *supra* note 12, at 151.

25. See, e.g., Oei & Ring, *supra* note 19, at 6–8; Michael N. Widener, *Shared Spatial Regulating in Sharing-Economy Districts*, 46 SETON HALL L. REV. 111, 114 (2015).

models of consumption—from owning to borrowing.²⁶ Some literature has failed to look critically at what is really at stake in terms of economic activity and innovation. Finally, some commentators advocate dichotomist approaches to regulations, either calling for self-regulation or imposing traditional regulation on the P2P economy.²⁷

Meanwhile, in the world of legal theory—a terrain that seems far away from the debate about the P2P economy—a concept that I label “autonomy-based pluralism” (I use the term “pluralistic theory” interchangeably) has gained immense traction.²⁸ Briefly, legal pluralistic theory posits that the state ought to facilitate different options, or diverse social and legal spheres, across a spectrum of activities in order to allow people to self-govern (to exercise their autonomy).²⁹

On closer scrutiny, it is apparent that there are some striking resemblances between arguments in favor of the P2P economy and the defense of pluralistic theory. That is, supporters of the P2P economy and advocates of pluralistic theory adopt remarkably similar rhetoric and reasoning. For instance, one of Uber’s main slogans is “Choice is a beautiful thing”;³⁰ likewise, P2P proponents, as their core justification, often rely on the heterogeneity of goods and increased choice that the P2P economy affords—to providers and consumers alike.³¹

26. See, e.g., Barry & Caron, *supra* note 10, at 70–71 (embracing the principles of “sharing”); Allen & Berg, *supra* note 12, at 6 (“The sharing economy is about sharing the knowledge of goods and services to better exchange them.”); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 416 (2015) (“The sharing economy presupposes two elements: the existence of physical ‘shareable goods that systematically have excess capacity,’ and a sharing attitude or motivation.”); Widener, *supra* note 25, at 111 (embracing the sharing definition); Oei & Ring, *supra* note 19, at 8–10 (providing a more nuanced description of the activity but still embracing the term “sharing”). *But see* Rogers, *supra* note 23, at 87 (“Uber describes this as ‘ride-sharing,’ but that is a misnomer—nothing is shared.”).

27. See *infra* section II.A. (describing approaches to regulations).

28. See, e.g., Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915, 915 (2012); Bertram Lomfeld, *Contract as Deliberation*, 76 LAW & CONTEMP. PROBS. 1, 8 (2013) (“A newer camp of scholars offers genuine pluralistic multi-value theories of contract law.”); Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 538 (2013) (arguing that “all normative legal theories should be pluralist”).

29. Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1435 (2012) [hereinafter Dagan, *Pluralism and Perfectionism*]. For definitions and discussion of pluralistic approach, see *infra* section II.B.

30. James C. Courtovich, *What Uber and School Choice Have in Common*, WALL ST. J. (Sept. 28, 2014, 6:57 PM), <http://www.wsj.com/articles/james-courtovich-what-uber-and-school-choice-have-in-common-1411945071> [<https://perma.cc/PH5G-7HYT>] (“Satisfied passengers, drivers and investors are singing Uber’s tagline: Choice is a Beautiful Thing.”).

31. Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535656 [<https://perma.cc/4PMG-EBWB>] (enumerating among the benefits of the P2P economy “[g]reater product

Analogously, pluralistic theory applauds the existence of diverse human values and valuations and the right to choose among them; it celebrates the state’s role as facilitator of a multiplicity of options.³² Indeed, defeating the argument that legal scholarship has little relevancy to practical dilemmas (at least on the surface), one of the most influential current legal theories and the most important regulatory dilemma of the time actually align.

I therefore suggest a contextual perspective that guides the sectorial approach to regulation of the P2P economy, building on insights from pluralistic theory.³³ Pluralistic theory offers a comprehensive theoretical framework for the understanding and assessment of the P2P model’s social benefits and consequences. The theory generates diffusible principles that scholars and lawmakers can turn to later in the context of sectorial analyses.

Looking at P2P-generated activity through the lens of pluralistic theory reveals that the model does not present activities or legal dilemmas unfamiliar to the law. Rather, the virtue of the P2P economy is that it reflects the ideal of pluralistic principles by accommodating and vindicating different types of human experiences, thus expanding meaningful choice for consumers and providers alike.

Essentially, P2P technology enables economic activity that is based on what I call “access to excess,” which means temporary access based on excess capacity. These are exchanges that employ infrastructures—in this case, time, skills, space, or goods—that are not being fully exploited to create value and do not require new infrastructures to leverage or sell.³⁴ In such transactions the provider offers the consumer temporary

and service variety.”); *Workers on Tap*, THE ECONOMIST (Jan. 3, 2015), <http://www.economist.com/news/leaders/21637393-rise-demand-economy-poses-difficult-questions-workers-companies-and> [<https://perma.cc/YZ4M-2KTH>] (“Techno-optimists dismiss all this as teething trouble: the on-demand economy gives consumers greater choice, they argue, while letting people work whenever they want.”); Maynard Webb, *The Sharing Economy Offers More Choices for Consumers*, WALL ST. J. (Apr. 15, 2014, 1:30 PM), <http://blogs.wsj.com/accelerators/2014/04/15/maynard-webb-the-sharing-economy-offers-more-choices-for-consumers/> [<https://perma.cc/S7AC-9PEL>] (“What these new services are adding are not just rides or rooms. They are also offering choice. Choice is always a great thing.”).

32. Dagan, *Pluralism and Perfectionism*, *supra* note 29, at 1423 (“[T]he ideal of personal autonomy [is] that people should, to some degree, be the authors of their own lives, choosing among worthwhile life plans and being able to pursue one’s choice.”).

33. I do not argue that the sectorial approach to regulation is meritless. Clearly there are field-specific concerns and considerations that lawmakers should address in crafting regulations. Rather, I suggest that we must suppress the particularities and differences of the contexts in which the P2P economy is popping up—in order to find what unites the different modes of the P2P economy under one umbrella (at some level of abstraction).

34. See, e.g., Stemler, *supra* note 31, at 22–23.

access to her underutilized goods, space, or skills.³⁵ Examples include car owners' giving someone the benefit of their private cars while the former are not using them, renters' loaning someone the use of their apartments while they are away, or skilled laborers' using their trade competence while outside of their primary employment. As I explain in Part I, the intermediaries (the platforms) use technological advances to recognize and capitalize upon efficiencies that were more expensive and difficult to realize before. The excess capacity is thus taken advantage of through the rise of technological forms that allow it to be efficiently apportioned. Access-to-excess-based activity reduces barriers to entry into transactions, allows nonexpert participants to exchange services and goods and to sell smaller segments of their labor, and therefore enables another layer of market choice.

But, as I explain in Part I, not all P2P economic activity is based on access to excess capacity, and lack of regulation allows the P2P economy to encompass conventional activity under the façade of access. By "conventional activity," I mean the same types of services that incumbents provide—work that is not temporary and is not grounded in use of excess capacity—and where the only major change is the intermediary. For example, taxi drivers who switched to Uber and work full time with a car that they use predominantly for that kind of work; in such scenario, Uber serves the role of traditional dispatcher—no different from traditional cabs that use an app.³⁶

This Article's contribution is in arguing that autonomy-based pluralism commends creation of a separate regulatory regime that distinguishes between standard economic activity and activity that relies on access to excess. That is, access-to-excess capacity should be regulated differently from conventional activities, out of recognition of the important role of individual choice that drives this model. At the same time, a separate category would prevent conventional firms from masquerading as providing access-to-excess-based activity in order to evade regulation—while subverting the policy goals of regulation and

35. See *infra* text accompanying notes 54–69 (defining the different activities that fall under the P2P economy).

36. For instance, in Long Beach, California, the traditionally regulated cabs use an app that is similar to that of Uber. See Laura J. Nelson, *Long Beach Allows Taxis to Lower Fares as They Compete with Uber, Lyft*, L.A. TIMES (May 14, 2015), <http://www.latimes.com/local/california/la-me-long-beach-uber-20150514-story.html> [<https://perma.cc/B2CV-ND97>] (reporting that, to assist taxi drivers in the competition with P2P transportation, Long Beach relaxed some of its regulations, and that taxi drivers use a "new Uber-like app (Ride Yellow)"). Thus, in a situation where the Uber driver is a full-time worker, the only major difference between Uber and the traditional cab industry is the level of government regulation. Such a transaction is what I mean by "access in disguise."

distorting the marketplace. The result is that different sets of rules should apply to access-to-excess-based activity, while conventional activity should be subject to the more rigorous requirements of traditional industry. To clarify, much of the current scholarship is occupied with the question of whether the existing legal framework should apply to the P2P economy. I do not contend that the current legal regime is inapplicable; rather, I argue that, as a normative matter, the state should create new sets of laws that fit the economic activity of the access-to-excess economy.

In fact, pluralistic principles offer a theoretical justification for regulating the P2P economy—even of the separate category of access-to-excess-based transactions. This is because pluralistic theory does not endorse free-market and hands-off policies; rather, it requires state intervention to preserve existing choices (the traditional services), embed and balance diverse values (not only autonomy), protect individuals from discrimination, shelter them from employment exploitation, and protect consumers and other businesses from strategic and opportunistic behaviors.³⁷

Importantly, pluralistic principles offer the normative foundation for inventive regulation of the new category—neither traditional nor free market. Such regulation would restrain some of the P2P economy’s harms without impeding innovation. The theory essentially lays out the foundation of the state’s political-legal obligation to provide a new framework for regulating the P2P economy. For example, the state should create at least one intermediate status of employment between a 1099-MISC worker and a W2 worker—distinctions I explain in depth later on.³⁸

Finally, after evaluating the P2P economy through the lens of pluralism, this Article reverses that lens and considers what the P2P economy has to offer to pluralistic theory. The P2P economy can be viewed as a real-life laboratory that—although imperfectly—reflects the basic principles of pluralistic theory. Therefore, it offers a novel and critical opportunity to examine the effectiveness and weaknesses of pluralistic theory. The P2P economy, especially, demonstrates how the plasticity of pluralistic theory can operate as a comfortable breeding ground for the adoption of free-market policies under the guise of choice.

37. See *infra* section II.C (discussing the differences between pluralistic principles and a free-market approach).

38. See *infra* section II.C (discussing the regulatory regime of access-to-excess-based activity and the creation of a new employment status).

The remainder of this Article proceeds as follows: Part I defines the P2P economy, lays out the debate about its regulation, and critically frames its innovation. Part II canvasses the development of pluralistic theory and explores the lessons that can derive from it vis-à-vis the P2P economy. Part III uses the P2P economy as a real-life laboratory to shed light on the risks and shortcomings of pluralistic theory. A brief conclusion follows.

I. UNDERSTANDING THE P2P ECONOMY

This Part delves into the definition of and debate about the P2P economy. Section A defines and characterizes the P2P economy—particularly the types of markets that this Article addresses. Section B lays out the debate about the model’s benefits and harms. Using a critical lens, section C explores the innovation of the P2P economy and its distributional effect.

A. *Defining the P2P Economy: On Sharing, Access, and Excess*

In order to craft suitable regulation for the P2P economy we must first define the economic model at stake. Definition is especially important in this context because the model covers a variety of economic activities, transcends various industries (e.g., hospitality, transportation, and services), and, most importantly, receives varying characterizations from scholars and commentators.³⁹ Indeed, much of the controversy about the P2P economy begins with its definition, its portrayal, and the evaluation of the type of economic activities it entails.⁴⁰

It is useful to begin by eliminating what this economic model does *not* involve, since existing definitions often embed some value judgment.⁴¹ Part of the squabble stems from the frequent use of the words “sharing”

39. See *infra* notes 93–112 (discussing divergent views of the sharing economy’s benefits and flaws).

40. See, e.g., Ruiz, *supra* note 9 (discussing different reactions to the definition of the P2P economy); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 509–10 (2016) (“The debate over the sharing economy thus remains frustrating and controversial in large part because we lack a doctrinally cohesive and normatively satisfying way of talking about the underlying activities occurring within the sharing economy.”).

41. Professors Giana M. Eckhardt and Fleura Bardhi provide one notable exception. They argue that access—not sharing—defines the model. Accordingly:

When ‘sharing’ is market-mediated—when a company is an intermediary between consumers who don’t know each other—it is no longer sharing at all. Rather, consumers are paying to access someone else’s goods or services for a particular period of time. It is an economic exchange, and consumers are after utilitarian, rather than social, value.

See Eckhardt & Bardhi, *supra* note 3.

and “collaboration”—terms that already paint the activity as altruistic, communal, and environment-friendly.⁴² P2P firms often use these terms in their marketing, with slogans like “helping out your neighbors,”⁴³ in order to portray the activity as consumer-friendly. And many scholars adopt the implied or explicit value of sharing as a main aspect of the model.⁴⁴ Indeed, one commentator has already coined the term “sharewashing,” meaning using sharing rhetoric to disguise conventional economic activities—particularly when the term is used by companies that treat their competitors and providers (employees) unfairly.⁴⁵

In fact, “sharing” and kindred designations are misnomers. Even if there are some altruistic or communal motives among those in the P2P economy, the heart of the industry is financial gain and not altruistic exchanges.⁴⁶ All sides to the transaction are motivated, to some extent, by individualism and pursuit of self-interest. Facilitators gain from the increasing number of dealings, as they take a slice of each transaction.⁴⁷ Consumers pay for the services and goods, and providers enjoy an additional, or main, source of income. All types of transactions are monetized. In contractual terms, we can say that all these exchanges are supported by consideration (as I explain below, I am limiting my discussion to for-profit platforms and am *not* including those that advance more altruistic endeavors).⁴⁸ As Donald Kochan put it,

the sharing economy can be tagged as what’s mine is still mine but you may use it, access it, and maybe pretend that it is yours for a limited time and under limited conditions—for a fee—but

42. Maia Szalavitz, *Is Human Nature Fundamentally Selfish or Altruistic?*, TIME (Oct. 8, 2012), <http://healthland.time.com/2012/10/08/is-human-nature-fundamentally-selfish-or-altruistic/> [<https://perma.cc/VPG5-7DS7>].

43. Tom Slee, *Sharing and Caring*, JACOBIN MAG. (Jan. 24, 2014), <https://www.jacobinmag.com/2014/01/sharing-and-caring/> [<https://perma.cc/XK8G-W2XS>] (“Running errands is another major sector of the sharing economy, building on the sharing idea of ‘helping out your neighbors.’”).

44. *See supra* note 26.

45. Anthony Kalamar, *Sharewashing Is the New Greenwashing*, OPED NEWS (May 13, 2013), <http://www.opednews.com/articles/Sharewashing-is-the-New-Gr-by-Anthony-Kalamar-130513-834.html> [<https://perma.cc/8SF9-MXH2>].

46. *Cf.* Rogers, *supra* note 23, at 87 (“Uber describes this as ‘ride-sharing,’ but that is a misnomer—nothing is shared.”). *See also* Caleb Holloway, *Keeping Freedom in Freelance: It’s Time for Gig Firms and Gig Workers to Update Their Relationship Status*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 299, 303 (2016) (“[G]ig work is not about ‘sharing.’”).

47. *See* Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1071–72 (2015) (“[T]ransaction fees can range from 3 to 20%.”).

48. *See infra* notes 65–66 and accompanying text.

while you are doing those things it is still mine and when you are done doing those things it will still be mine.⁴⁹

To avoid the misnomers, I adopt a definition based on two elements: “temporary access” and “excess capacity” (I refer to this approach as “access to excess”). *Black’s Law Dictionary* defines “access” as: “A right, opportunity, or ability to enter, approach, pass to and from”⁵⁰ Temporary access, standing alone, is not unique to the P2P economy. A passenger gets temporary access to a taxi while using it, and a guest gets temporary access to a hotel room. To differentiate between these traditional marketplace activities and the P2P economy, I combine access with excess capacity. “Excess capacity,” according to the Organization for Economic Co-operation and Development (OECD), “refers to a situation where a firm is producing at a lower scale of output than it has been designed for.”⁵¹ The context of excess capacity “exists when marginal cost is less than average cost and it is still possible to decrease average (unit) cost by producing more goods and services.”⁵² Excess capacity allows a business to use existing production tools and infrastructure to produce more goods and services without the need to invest more in infrastructure.

Taken together, I refer to transactions that consist of temporary access to “underutilized goods” or “dead capital.”⁵³ Access to excess, in these contexts, describes transactions in which one exchanges her goods, skills, or space when she is not using them/it—and in which the other person to the transaction (the purchaser) receives temporary access to the goods, the skills, or the space.⁵⁴ To be sure, providers using excess capacity often add marginal costs when supplying goods or services in these markets. For instance, the Lyft driver needs to purchase gasoline

49. Donald J. Kochan, *I Share, Therefore It’s Mine*, 51 U. RICH. L. REV. __ (forthcoming May 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820456 (last visited Dec. 16, 2016).

50. *Access*, *Black’s Law Dictionary* (10th ed. 2014).

51. *Excess Capacity*, OECD: GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 42 (1993), <https://stats.oecd.org/glossary/detail.asp?ID=3209> [<https://perma.cc/FB4T-35KS>].

52. *Id.*

53. Kochan, *supra* note 49, at 23 (“This idea of maximizing the use of unused or under-utilized assets is a critical, unifying characteristic in what defines sharing.”).

54. A report written by the Mercatus Center at George Mason University, a libertarian-oriented think tank, defines “sharing economy” as “any marketplace that brings together distributed networks of individuals to share or exchange otherwise underutilized assets.” Koopman, *infra* note 93. *See also* Oei & Ring, *supra* note 19, at 2 (“While there is no universal definition of the term ‘sharing economy,’ commentators have described it as a model of production, consumption and distribution of goods and services whereby people ‘share’ their assets or other resources on an excess capacity basis via a peer-to-peer arrangement.”) (citation omitted).

and pay for extra maintenance when working as a driver—just as a traditional taxi driver does. Yet, the Lyft driver maximizes the use of her private car—which otherwise would be parked at home and go unused.

Two important caveats follow. One, scholars and commentators often use the term “access economy” in reference to the P2P economy to describe an economic model that offers easier access to goods, spaces, and skills.⁵⁵ The result, the argument goes, is that access replaces ownership. In the words of Sofia Ranchordás, “[Y]ou are now what you can access, and not what you have.”⁵⁶ There are some misconceptions in this framing, too, and I take these on in section I.C.

Second, not all the activities that scholars refer to as part of the P2P economy fall under the definition of access to excess, as I conceive it. Although the idea that the P2P market is based on access to otherwise underutilized goods or skills describes a fairly substantial portion of this economic activity, it cannot account for other sizeable aspects of P2P economic activity. This is because the market frequently does not revolve around “otherwise underutilized assets.” Rather, providers in the P2P economy are intermittently professional players with assets designed for the particular trade. For example, several hosts use Airbnb to post properties designated for the particular purpose of short-term rental, and thus are akin to a hotel operation.⁵⁷ Indeed, a new study conducted by researchers at Pennsylvania State University (with funding from the hotel industry) found that nearly 30% (\$378 million) of Airbnb’s revenue in twelve cities came from “full-time operators,” with rentals available the entire year.⁵⁸ Similarly, while some platforms facilitate short-term rental of noncommercial cars (such as Getaround),⁵⁹

55. See, e.g., Ranchordás, *supra* note 26, at 416 (“In this new model, access is ‘the new form of ownership.’”).

56. *Id.* at 415–16.

57. For example, one study shows that significant numbers of renters in New York City have had multiple listings. Slee, *supra* note 43. Indeed, in 2014, Airbnb announced that it removed more than 2,000 listings made by property managements. David Hantman, *New York and the Airbnb Community*, THE AIRBNB PUB. POL’Y BLOG (Apr. 21, 2014), <http://publicpolicy.airbnb.com/new-york-airbnb-community/> [https://perma.cc/37N5-ZTH2]. Moreover, an independent report recently found that Airbnb manipulated its data by terminating full-time hosts just a few days before releasing data about the number of full-time rentals using its services. Jonah Bromwich, *Airbnb Purged New York Listings to Create a Rosier Portrait, Report Says*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/business/airbnb-purged-new-york-listings-to-create-a-rosier-portrait-report-says.html> [https://perma.cc/9G4W-QZD5]; see also *infra* text accompanying note 256 (describing the number of units in San Francisco that are offered for rent the entire year).

58. John W. O’Neill & Yuxia Ouyang, PENN. ST. U., *From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb* (2016), http://www.ahla.com/uploadedFiles/_Common/pdf/PennState_AirBnbReport_.pdf [https://perma.cc/K4SD-FKUJ].

59. GETAROUND, <https://www.getaround.com> [https://perma.cc/JR7F-L765].

Uber assists some of its drivers in buying a car—rather than driving their underutilized privately owned cars.⁶⁰ And, recently, Uber even started leasing vehicles to its drivers.⁶¹

Due to lack of regulation in some jurisdictions that distinguishes between access-to-excess-based activities and conventional activities that do not leverage existing excess capacity or are not temporary, the law often does not distinguish between these activities; likewise, some scholars and commentators treat the two types of transactions interchangeably.⁶² The bottom line is that increased utilization is not a dispositive characteristic, nor always an accurate description, of the market.⁶³

To distinguish between the different types of activities, this Article delineates the P2P economy as an economic model where people *exchange* goods, services, space, and money with each other via peer-to-peer platforms.⁶⁴ Hence, I use the term “P2P economy” to describe the market as it operates now (which includes a mix of conventional activity *and* increased access-to-excess activity), while I refer to “access-to-excess-based activity” as a subset of activities within the P2P economy.

The typical transaction in the P2P economy includes three parties: the provider (supplier), the user (consumer), and the facilitator (the website platform). For example, in the hospitality market the provider is the homeowner or renter (“host,” using Airbnb’s terminology), the user is the traveler who pays to stay on the property (“guest,” using Airbnb’s terminology), and the facilitator is Airbnb.

60. Emily Badger, *Uber’s Program to Buy You a Car Sounds Like a Sweet Deal But It’s Actually Really Risky*, WASH. POST (Nov. 6, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/06/ubers-program-to-help-you-buy-a-car-sounds-like-a-sweet-deal-but-its-actually-really-risky/> [https://perma.cc/PB2Z-7CHB].

61. Carmel DeAmicis, *Uber Starts Directly Leasing Cars in Program That Could Appeal to Short-Term Drivers*, RECODE (July 29, 2015, 8:38 PM), <http://recode.net/2015/07/29/uber-offers-revised-car-leasing-program-that-could-be-more-appealing-for-drivers/> [https://perma.cc/VZAZ-R9HS].

62. To be clear, a single platform can be for both access-to-excess activities and conventional activities. Airbnb can be used by students who sublet their apartment for a summer (access-to-excess capacity) or by those who avail themselves of the property as a unit for the entire year (conventional activity).

63. See Stemler, *supra* note 31, at 7.

64. In this definition, I modify Miller’s designation, in which he uses “the term ‘sharing economy’ inclusively to mean an economic model where people are creating and sharing goods, services, space and money with each other.” I replaced the word “sharing” with the word “exchanging” and added the peer-to-peer element, which is the basic component that allows these arrangements. Miller, *supra* note 12, at 150.

An additional important characteristic of what I refer to as the P2P economy is the facilitator’s motive—i.e., social or financial incentive. The P2P economy model includes for-profit and nonprofit platforms alike; although a developing market for nonprofit exchanges has emerged,⁶⁵ this Article focuses only on the for-profit market because this is the one that raises the major regulatory and political dilemmas.⁶⁶ For the same reason, I also exclude from discussion the platforms that are for-profit on the facilitator’s side but cultivate nonprofit activities (for example, Couchsurfing, a for-profit that facilitates free places to stay).⁶⁷

Another distinction to be aware of is between peer-to-peer exchanges and business-to-peer exchanges. The latter include companies that communicate directly with consumers (for example, Zipcar, which owns vehicles and rents them to individuals by the hour or day).⁶⁸ This Article looks only at peer-to-peer exchanges and not at business-to-peer, as the former is the one that raises the notable regulatory debates.⁶⁹

65. Schor, *supra* note 18, at 4; STEVEN HILL, RAW DEAL: HOW THE “UBER ECONOMY” AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS 192 (2015) (describing businesses that “truly” maintain sharing components).

66. See Ranchordás, *supra* note 26, at 436 (“It is important to distinguish between mainly socially innovative activities, which are not primarily profit-oriented, and innovative activities that might have a beneficial impact on a community, but at the same time have become someone’s main source of income.”). This is not to say that nonprofits that facilitate noncommercial exchanges do not raise any legal dilemma or should be completely left unregulated. Rather, many of the controversies concerning the P2P economy revolve around paid services—e.g., questions related to employment law and taxation—that are irrelevant to the nonprofit sector of the P2P economy. Yet, this sector raises other relevant regulatory questions, such as those regarding discrimination and safety. However, nonprofit activity triggers its own set of unique considerations and addressing them will extend the scope of this Article more than required to answer the questions I am addressing, and more than possible to accomplish in one article. Nevertheless, in a nutshell, a pluralistic approach suggests that nonprofit work validates different types of experiences and values—and should be regulated differently from conventional, for-profit activity. At the same time, pluralistic theory does not advocate for nonintervention but, rather, for prevention and prosecution of fraud and other possible harms.

67. As I explain in section II.C, the main reason that the state ought to regulate access-to-excess activity is to prevent some likely market failures, such as by assuring nonexploitation of the workers and basic safety of consumers, while enabling and easing the small-scale transactions that are the subject of access-to-excess activities. Most of these problems are not applicable to a market that is based on more genuine nonmarket transactions—which is why such transactions are not part of the scope of the paper.

68. Schor, *supra* note 18, at 4.

69. As the main purpose of regulating the access-to-excess economy is to assure ease, efficacy, and safety to small-scale players, when business is one of the parties, these special rules are irrelevant (but other rules, pertaining to sophisticated merchants, are relevant).

The main feature of P2P exchanges is the use of advanced technology that provides some benefits that characterize the model.⁷⁰ First, the technology cuts transaction costs—by reducing information and search costs.⁷¹ With traditional services, consumers had to invest more effort and funds in locating services and goods (such as paying a babysitting agency, paying for an ad to sublet one’s apartment, indirectly paying for taxi dispatchers, etc.). With the P2P model, they can have all this information in one website or app, typically with payment reduced to the fee charged by the facilitator. Second, P2P companies aggregate verified reviews by users and providers—making relevant information (including price comparison) readily available and easy to evaluate.⁷² For example, the service platform TaskRabbit offers a list of accessible service providers ranked and reviewed by verified users; this is likewise the case regarding the Uber driver or the apartment posted on Airbnb.⁷³ The technology thus dispenses information necessary to appraise the service or goods, easing a problem of informational asymmetry. Third, the platforms adopt measures to safeguard users from possible fraud, which helps them overcome some issues of trust.⁷⁴ Fourth, the technology is typically user-friendly and available to everyone who has a smartphone (sometimes a computer is sufficient) and a credit or debit card.⁷⁵

Beyond technology, a major feature of part—but not all—of the P2P economy is that a good portion of P2P firms offer accessibility to cheaper services because they operate outside existing laws and regulations.⁷⁶ I discuss this issue in more detail in the next section.

In summary, this Article considers only for-profit, peer-to-peer platforms that facilitate exchanges of durable assets and services on demand. Narrowing the scope of activities to these types of undertakings helps us to uncover what is at stake in the P2P economy, without falling into too-broad generalizations. The next section delves into the debate about the virtues and harms of the P2P economy.

70. Cf. Ranchordás, *supra* note 26, at 433 (“[T]he creation of an online platform or a smartphone application that connects users in a simple way constitutes the innovative element of the practice.”).

71. Miller, *supra* note 12, at 151.

72. See, e.g., Barry & Caron, *supra* note 10, at 70; Koopman, *infra* note 93.

73. Katz, *supra* note 47, at 1075.

74. See Stemler, *supra* note 31, at 4.

75. See *infra* notes 153–54 and accompanying text (discussing availability of smartphones and its effect on the diffusion of the benefits of the P2P economy).

76. Miller, *supra* note 12, at 161–63.

B. *The Debate About the P2P Economy*

The use of P2P economy services is growing rapidly. In a survey that PricewaterhouseCoopers (PwC) conducted in 2014, 18% of U.S. adults indicated that they have participated in the “sharing” economy as a consumer.⁷⁷ Advertising agency Leo Burnett recently surveyed 4,000 adults in the United States. It found that, for 41% of those surveyed, the P2P economy did not play any role in their lives; 48% said that it played a minor role; and 12% stated that it played a major role.⁷⁸ A Morgan Stanley survey found that 12% of travelers have used Airbnb at least once in 2015; the number is expected to grow in 2016 to 18% for leisure travelers and 16% for business travelers.⁷⁹

Consumers have expressed mixed feelings about, and various motivations for, participating in the P2P economy. Consumers who view the P2P economy favorably mention the lower price of services and goods, along with convenience—for example, the ability to find a ride easily.⁸⁰ Indeed, in the recent PwC survey, 86% of respondents who were familiar with the P2P economy agreed that it makes life more affordable, and 83% agreed it makes life more convenient and efficient.⁸¹ Likewise, 55% of Airbnb users in the Morgan Stanley survey indicated that price was the most important factor for them.⁸² Some consumers also point to environmental benefits—such as those from renting rather than owning a car—although there are some questions as to whether the P2P economy in fact contributes to a greener environment.⁸³ While the industry claims that social factors (e.g., the chance to interact

77. CONSUMER INTELLIGENCE SERIES, *supra* note 17.

78. Leo Burnett, *The Sharing Economy: Where We Go from Here*, SLIDESHARE (Nov. 21, 2014), <http://www.slideshare.net/LeoBurnettWorldwide/the-us-sharing-economy-leo-burnett-report-final?ref=http://humansbeing.leoburnett.com/> [<https://perma.cc/8PD5-L5WW>].

79. MORGAN STANLEY, INTERNET, LODGING, LEISURE AND HOTELS; GLOBAL INSIGHT: WHO WILL AIRBNB HURT MORE—HOTELS OR OTAS? 1 (2015) [hereinafter INTERNET, LODGING, LEISURE AND HOTELS].

80. CONSUMER INTELLIGENCE SERIES, *supra* note 17, at 9.

81. *Id.*

82. INTERNET, LODGING, LEISURE AND HOTELS, *supra* note 79, at 14.

83. Bryan Walsh, *Today's Smart Choice: Don't Own. Share.*, TIME (Mar. 17, 2011), http://content.time.com/time/specials/packages/article/0,28804,2059521_2059717_2059710,00.html [<https://perma.cc/25CM-S3PV>]. The assumption that the P2P economy is more sustainable is debatable since the result of the transaction may be increased use of the activity at stake. For example, due to the lower prices of staying at a short-term rental or ordering an Uber driver, people can use such services more than they have used traditional accommodations and services. This creates more economic activity but can also produce higher carbon emissions. *See, e.g.*, Schor, *supra* note 18, at 7 (probing the arguments that the P2P economy has a positive ecological impact).

with new people) are among people's main reasons for participating in the P2P economy,⁸⁴ controversy exists about whether consumers care about the social aspect of it.⁸⁵ Some studies show that users are indifferent to this aspect and are motivated primarily by utilitarian aims. For example, research involving the users of Zipcar (a business-to-peer platform) discovered that consumers do not feel commitment to the company's purpose or to the car itself; rather, they use it for its convenience and lower price.⁸⁶ Additionally, other research indicates that exchanges rarely result in social ties, and that "[s]haring economy sites can also reproduce class, gender, and racial biases and hierarchies."⁸⁷

On the other hand, consumers who expressed some reservations toward the P2P economy indicated concern about the risks of exchanging goods with strangers, preferred ownership over borrowing, and cited hygiene issues.⁸⁸ In addition, in a survey of consumers conducted by Radius Global Market Research, 81% of respondents agreed that sharing-economy companies do not adequately safeguard private information.⁸⁹ Likewise, in the Morgan Stanley survey, 32% noted that privacy concerns are the main reason they will not use

84. See, e.g., Walsh, *supra* note 83 ("But the real benefit of collaborative consumption turns out to be social. In an era when families are scattered and we may not know the people down the street, sharing things—even with strangers we've just met online—allows us to make meaningful connections.").

85. One study confirms that those in the "sharing" economy actually participate in it for reasons that are more ideological. However, the study examined participants who were registered to Sharetribe—a company whose:

[S]tated mission is to help people connect with their community and to help eliminate excessive waste through making it easier for everyone to use assets more effectively by sharing them. Most of the "Sharetribes" are narrow local communities such as organizations or neighborhoods where the benefits of CC [collaborative consumption] are emphasized in the forms of trust and information access, and also in the decrease in transaction costs.

With this specific subject, no wonder that the results indicated commitment to altruistic motives. See Juho Hamari, Mimmi Sjöklint & Antti Ukkoonen, *The Sharing Economy: Why People Participated in Collaborative Consumption*, 67 J. ASS'N INFO. SCI. TECH. 2047, 2053 (2016).

86. Zipcar is a business-to-peer model, which may explain some of the attitudes toward it. Yet, the rhetoric of sharing and borrowing underlies the service's branding. Fleura Bardi & Giana M. Eckhardt, *Access Based Consumption: The Case of Car Sharing*, 39 J. CONSUMER RES. 881 (2012).

87. Schor, *supra* note 18, at 8; see also Rogers, *supra* note 23, at 95–96 (discussing concerns that passengers will give Uber drivers bad reviews based on their race and that drivers may refuse to pick up some passengers when learning that they are from a racial minority group).

88. CONSUMER INTELLIGENCE SERIES, *supra* note 17.

89. Radius Market Global Research, *Study: Consumers Undecided About the Sharing Economy*, PR NEWSWIRE (Sept. 30, 2015, 10:00 AM), <http://www.prnewswire.com/news-releases/study-consumers-undecided-about-the-sharing-economy-300151553.html> [https://perma.cc/A3XF-AS4H].

Airbnb.⁹⁰ Finally, in a survey conducted by the National League of Cities, 61% of the 245 city leaders who responded were most concerned with public safety issues resulting from an increased use of P2P services.⁹¹ Potential Airbnb users expressed similar worries about safety—27% mentioned that safety is the reason they will not use Airbnb.⁹²

Commentators and scholars supporting the P2P economy cited the model’s numerous benefits, some of them reflecting sentiments expressed by consumers: use of otherwise-less-used resources;⁹³ creation of flexible employment opportunities;⁹⁴ reduction in transaction costs;⁹⁵ freeing of industries from regulations deemed dated and inefficient;⁹⁶ boosting of innovation and increased economic and entrepreneurial activity;⁹⁷ expansion of choice (especially of low-cost services);⁹⁸ and a

90. INTERNET, LODGING, LEISURE AND HOTELS, *supra* note 79.

91. NICOLE DUPUIS & BROOKS RAINWATER, SHIFTING PERCEPTIONS OF COLLABORATIVE CONSUMPTION 2 (2015), <http://www.nlc.org/Documents/Find%20City%20Solutions/City-Solutions-and-Applied-Research/Brief%20-%20Shifting%20Perceptions%20of%20Collaborative%20Consumption2015.pdf> [<https://perma.cc/J7RP-KCYA>].

92. INTERNET, LODGING, LEISURE AND HOTELS, *supra* note 79 (reporting on a survey finding that 27% of respondents did not use Airbnb due to safety concerns).

93. *E.g.*, Rogers, *supra* note 23, at 90; Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529 (2015).

94. *See, e.g.*, Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), <http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html> [<https://perma.cc/3YQB-9ZKV>] (“Providers in the peer economy really value the independence and flexibility; for lots of people, it has been transformational,” says Shelby Clark, the founder of RelayRides, a car-sharing marketplace . . .”).

95. *See, e.g.*, Rogers, *supra* note 23, at 87 (“Uber’s key innovation lies in having reduced the transaction costs that otherwise plague the sector and provided the justification for its extensive regulation in the first place.”).

96. *See, e.g.*, Koopman, *supra* note 93, at 534 (“While many regulations are initially justified with the hope they will serve the public interest, the reality is many persist even when they no longer (or perhaps never did) correct any identifiable market failure.”).

97. DuPuis & Rainwater, *supra* note 91; Samuel Fraiberger & Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy* 28 (NYU Stern School of Business Research Paper, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574337 [<https://perma.cc/YH8F-SS3L>] (asserting that increasing tourist activity through hospitality P2P market can create economic boost to the neighborhood).

98. The Mercatus Center asserts five benefits of the P2P economy: (1) using underutilized goods or “dead capital”; (2) increasing competition by creating accessible markets; (3) providing a pool of traders who reduce transaction costs; (4) providing data on past performance of providers and users, which offers informational benefits; and (5) circumventing existing regulations on account of operating outside regulations that make incumbents inefficient. Koopman, *supra* note 93, at 531–32; *see also* Allen & Berg, *supra* note 12, at 17–25 (contending that the P2P economy encourages more use of underutilized resources and reduces costs, while warning that regulations will restrain it);

possibly “disproportionately positive effect on lower-income consumers.”⁹⁹ Thus, the Mercatus Center report concludes that the P2P economy “can improve consumer welfare by offering new innovations, more choices, more service differentiation, better prices, and higher-quality services.”¹⁰⁰

Critics of the P2P economy argue that part of the model’s success stems from ripping off profit by evading regulations.¹⁰¹ The main claim is that P2P firms operate outside the traditional regulatory regime and thus do not abide by rules that incumbent providers must follow. These evasions include facilitating transactions that dodge taxes, breaking zoning laws, and escaping safety regulations.¹⁰² For example, in the hospitality market, most Airbnb users do not pay hotel taxes, which are used to improve travel services and attract more tourists.¹⁰³ Additionally, lessors often violate zoning rules, which can create problems concerning safety, noise, and parking.¹⁰⁴ Further, renting a unit all or most of the time creates a financial incentive to transform residential property into short-term rentals. The result may be a reduction in available housing in the rental market that then drives up housing prices.¹⁰⁵ Similarly, Uber and Lyft do not follow the regulatory requirements that standard transportation or taxi companies must follow. For instance, they do not comply with the rigorous regulatory demands of the taxi industry regarding price regulation, safety, and insurance.¹⁰⁶

David Streitfeld, *Air BnB Listings Mostly Illegal, New York State Contends*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/16/business/airbnb-listings-mostly-illegal-state-contends.html> [https://perma.cc/PHG2-PK5G] (“Admirers say these stars of the so-called sharing economy are breaking up monopolies that have grown greedy and lazy.”).

99. Fraiberger & Sundararajan, *supra* note 97, at 28.

100. Koopman, *supra* note 93, at 532.

101. Dean Baker, *Don’t Buy the ‘Sharing Economy’ Hype: Airbnb and Uber Are Facilitating Ripoffs*, THE GUARDIAN (May 27, 2014, 7:30 PM), <http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation> [https://perma.cc/83TJ-VH7M] (“[M]any boosters have overlooked the reality that this new business model is largely based on evading regulations and breaking the law.”).

102. *See, e.g.*, Miller, *supra* note 12, at 153 (“[M]ost sharing economy companies often explicitly violate local government ordinances and state statutes.”); Rogers, *supra* note 23, at 92 (discussing problems of Uber’s compliance with safety requirements).

103. Miller, *supra* note 12, at 173.

104. *Id.*

105. *Id.* at 175–79.

106. Ranchordás, *supra* note 26, at 464.

Finally, some fear that P2P practices undermine protection against discrimination—both for consumers and workers.¹⁰⁷ For example, Uber arguably violates the Americans with Disabilities Act by not providing reasonable accommodations for disabled passengers.¹⁰⁸ And a recent study by Harvard Business School researchers found that Airbnb users (guests) with names that are distinctively African American were 16% less likely to be accepted by hosts than users with identical profiles but who had distinctively white names.¹⁰⁹

Opponents are also concerned about the harm to incumbent industries and their employees resulting from unfair competition because P2P firms are not bound by the same regulations as they are (or they are bound by these regulations but do not conform to them).¹¹⁰ Complying with regulatory demands (such as insurance requirements and operating taxis with medallions) and being responsible for employees’ taxes and benefits increase the cost of incumbents’ services.¹¹¹ This competition sometimes harms the smaller and more vulnerable incumbents. For example—at least, according to one study—fancy hotels are less likely to be disadvantaged by Airbnb than are smaller, lower-end hotels.¹¹²

Moreover, others worry that P2P companies often exploit their own providers; these providers are often categorized as “independent contractors” (1099-MISC workers) and thus lack basic employee rights

107. *The Disrupter Series: How the Sharing Economy Creates Jobs, Benefits Consumers, and Raises Policy Questions: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the U.S. H.R. Comm. on Energy and Commerce*, 114th Cong. (2015) (written testimony of Dean Baker, Co-Director, Center for Economic and Policy Research) [hereinafter *The Disrupter Series* testimony].

108. Complaint at *14–20, Nat’l Fed’n of the Blind of Cal. v. Uber Tech., Inc, No. 3:14-cv-4086 (N.D. Cal. Sept. 9, 2014) (arguing that “Uber has failed to ensure that blind riders with service animals, including members of Plaintiff NFB of California, can access Uber’s taxi services”).

109. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment 1* (Harv. Bus. Sch., Working Paper No. 16-069), http://www.hbs.edu/faculty/Publication%20Files/RacialDiscriminationAirbnb_9d996103-e448-4396-8a2f-c4509a5e1a7f.pdf [<https://perma.cc/KM8Z-EAZQ>].

110. See, e.g., Miller, *supra* note 12, at 181 (“[T]he illegality of the sharing economy [activities], in fact, provides a shield for these companies from their more established counterparts that participate in, and dominate, the legal markets like hoteliers.”); *The Disrupter Series* testimony, *supra* note 107, at 12 (“[Sharing economy] technology can also be used as a mechanism to evade taxes and necessary regulation. It will be important to modernize and redesign regulations to prevent economy companies from going this route.”).

111. See, e.g., Miller, *supra* note 12, at 161–63.

112. Georgios Zervas, Davide Prosperio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 30 (Boston U. Sch. Mgmt. Research, Working Paper No. 2013-16), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898 [<https://perma.cc/LE97-PXKT>] (“Our analyses pinpoint lower-end hotels, and hotels not catering to business travelers, as those that are most vulnerable to increased competition from rentals enabled by firms like Airbnb.”).

and protections.¹¹³ In 2015, both the Florida Department of Economic Opportunity and the California Labor Commission ruled that Uber drivers are “employees” rather than “independent contractors.”¹¹⁴ The following year, Uber agreed to settle a class-action lawsuit on the issue, agreeing to pay up to \$100 million to California and Massachusetts Uber drivers in order to avoid having the federal courts determine whether Uber drivers are entitled to employee status.¹¹⁵ As such, the issue of whether Uber and similar firms must recognize their drivers as employees has yet to be judicially decided.

Providers for service companies—such as Handy, a home-cleaning and handyman P2P platform—argue that they are not compensated for extra workhours, are not paid for time in which consumers were late, and are not reimbursed for cleaning supplies.¹¹⁶ The web platforms—designed to match the provider with the consumer—also present disadvantages from the providers’ point of view. For instance, TaskRabbit recently changed its platform to an on-demand system in which a potential provider can easily lose a job to a second provider if the former does not commit to the job within thirty minutes.¹¹⁷ Providers can also get fired at any time—as a result of complaints or bad reviews by users—which can create pressure on the provider to respond to every whim of the consumer.¹¹⁸ More generally, many critics point out that the

113. Gillian B. White, *In the Sharing Economy, No One’s an Employee*, THE ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/> [https://perma.cc/V84X-5AKY]; *The Disrupter Series* testimony, *supra* note 107 (“Most sharing economy firms treat the people who work for them as independent contractors. This denies them the range of protections they would have as employees.”).

114. Davey Alba, *In California, Uber Loses Another Round in Driver Debate*, WIRED (Sept. 10, 2015), <http://www.wired.com/2015/09/california-uber-loses-another-round-driver-debate/> [https://perma.cc/8TAM-7JLD]. See also Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html> [https://perma.cc/ZCK5-J44X].

115. Tracey Lien, *Uber Will Pay Up To \$100 Million to Settle Suits with Drivers Seeking Employment Status*, L.A. TIMES (Apr. 21, 2016), <http://www.latimes.com/business/technology/la-fi-tn-0422-uber-settlement-story.html> [https://perma.cc/S29Q-ZZW6].

116. Sarah Kessler, *The Gig Economy Won’t Last Because It’s Being Sued to Death*, FAST COMPANY (Feb. 17, 2015, 6:00 AM), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> [https://perma.cc/3LFF-DUEN].

117. Andrew Leonard, *TaskRabbit Workers Receive a Useful Lesson in Capitalist Exploitation*, SALON (July 24, 2014, 7:05 AM), http://www.salon.com/2014/07/24/taskrabbit_workers_receive_a_useful_lesson_in_capitalist_exploitation/ [https://perma.cc/545U-UAR3].

118. See Rogers, *supra* note 23, at 97 (“To stay above a certain rating, drivers may need to be friendly, and perhaps a bit servile.”).

P2P economy intensifies the “freelance” society, in which employees just move from gig to gig, without job security and stability.¹¹⁹

Additionally, consumer safety is a major concern for critics of the P2P economy.¹²⁰ For instance, one of the oft-cited arguments against the P2P transportation companies is that they are not conducting sufficient background checks on their drivers, especially compared with the rigorous background checks that incumbents are mandated to follow (traditional taxi drivers must go through significant, sometimes annual, background checks).¹²¹ Uber and Lyft advertise the fact that they do background checks; however, critics argue that because they do not employ “Live Scan,” and they fail to take fingerprints, their background checks are “completely worthless.”¹²² The background checks are especially relevant as P2P passengers have reported—and received wide publicity about—number of incidents in which P2P drivers have attacked them.¹²³

Finally, questions have arisen about liability allocation in the P2P market. Some commentators are critical of P2P firms for shifting the risk of possible civil or criminal liability—resulting from injury to the provider, the consumer, or the goods of either—from the companies to the providers or users.¹²⁴ The main problem is that providers are sometimes nonprofessional participants who do not have the incentive or knowledge to anticipate future risks—and thus do not take sufficient

119. See, e.g., HILL, *supra* note 65, at 35.

120. *Ridesharing Incidents: Reported List of Incidents Involving Uber and Lyft*, WHOSDRIVINGYOU.ORG, <http://www.whosdrivingyou.org/rideshare-incidents> [https://perma.cc/Z85K-T3NP] (a website documenting reported incidents involving P2P transportation companies).

121. Aimee Picchi, *The Rising Safety Issues That Could Throttle Uber*, CBS NEWS (Dec. 11, 2014), <http://www.cbsnews.com/news/the-rising-safety-issues-that-could-throttle-uber/> [https://perma.cc/USU2-JVNB].

122. HILL, *supra* note 65, at 74; Mike Isaac, *Uber Agrees to Settle Class-Action Suit Over Safety Claims*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/technology/uber-settles-class-action-suit-over-safety-background-checks.html> [https://perma.cc/E99U-D966] (discussing that Uber has agreed to settle a lawsuit brought by customers arguing that Uber misrepresented the quality of its safety practices and the fees it charged passengers).

123. See, e.g., Complaint & Demand for Jury Trial, *Doe v. Uber Tech., Inc.*, No. 3:15-CV-04670 (N.D. Cal. Oct. 8, 2015) (alleging that Uber’s “negligence,” “fraud,” and “misleading statements” led to the sexual assaults of the two women).

124. Catherine Rampell, *The Dark Side of ‘Sharing Economy’ Jobs*, WASH. POST (Jan. 26, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-the-dark-side-of-sharing-economy-jobs/2015/01/26/4e05daec-a59f-11e4-a7c2-03d37af98440_story.html [https://perma.cc/DAD9-LUFT].

measures to protect themselves from possible future liability.¹²⁵ To take just one recent incident, an Airbnb guest died when he sat on the host's tree swing and the branch broke and fell on him.¹²⁶ The question that arises in such situation is whether the host, the facilitator, or the guest is liable. Clearly, many safety issues arise for users and providers of P2P services and goods.¹²⁷ However, Airbnb does not owe the same legal duty to their hosts and guests as hotels do,¹²⁸ and homeowner insurance often does not cover commercial use (such as in case of renting the property to a guest). Similarly, insurance policies for P2P drivers may not apply when they operate for-profit vehicles¹²⁹ (although Uber provides some commercial coverage to its drivers).¹³⁰

In conclusion, the debate on the P2P economy—its benefits and drawbacks—is a heated and complicated one. It involves approaches toward innovation, regulation, consumer protection, and fair competition. Both sides have hefty arguments. The next subsection aims to clarify one aspect of the debate by looking at what, in fact, is the innovation of the P2P economy.

C. *Exploring the Innovation of the P2P Economy*

Similar to the definition of the P2P economy, understanding the innovation in the model is essential to evaluation and regulation of the activity. And much like the discussion surrounding the definition—explorations of the innovation that underlies the P2P economy are filled with what I argue are misconceptions. Particularly, I challenge the prevailing perception that the P2P economy changes models of

125. Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA COMPUT. & HIGH TECH. L.J. 23, 36 (2015).

126. Ron Lieber, *Death in Airbnb Rental Raises Liability Questions*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/11/14/your-money/death-in-airbnb-rental-raises-liability-questions.html> [https://perma.cc/3KL5-Y44Y].

127. Katz, *supra* note 47, at 1100 (“In many cases, providers are just as vulnerable as users. For example, TNC riders have reported incidents of assault and battery, sexual assault, and reckless driving while using the platform.”).

128. Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329, 332–34 (2015). Although jurisdictions vary in how they legally categorize Airbnb guests for the purposes of determining hosts' tort duties, the general principle is that Airbnb hosts owe their guests lesser duties than would an innkeeper or hotel manager. Rather than viewing Airbnb guests as hotel guests or gratuitous licensees, many jurisdictions apply a landlord-tenant paradigm to Airbnb hosts and their guests.

129. *Id.* at 337.

130. Hannah A. Posen, *Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber?*, 101 IOWA L. REV. 405, 415 (2015).

consumerism from ownership to borrowing. In addition, I scrutinize the social innovation of the P2P economy in terms of the socioeconomic distribution that the P2P economy supposedly promotes.

Innovation stands at the heart of the controversy surrounding regulation of the P2P economy. Innovation is a hard concept to define.¹³¹ It is sometimes, inaccurately, used interchangeably with “creativity” and “invention.”¹³² Invention involves the development of a novel idea.¹³³ Innovation, however, is broader: it is the application of a new idea to a successful commercial operation *and* its effective dissemination.¹³⁴

Innovation has an additional social aspect: harnessing the development of novel technologies to promote human progress or using existing technologies to solve new problems. Social innovation connotes “the design and implementation of creative ways of meeting social needs.”¹³⁵ This aspect of innovation compels us to think beyond innovation’s translation of new ideas into commercial products—by also considering its diffusion of those ideas. This diffusion, and its effect on the promotion of social progress, means that we must account for “the context that surrounds a technology—such as personal and social values, maintenance, use, and compatibility with existing laws.”¹³⁶ That is, we should think through the way an innovation affects different social cohorts.¹³⁷ With that in mind, I turn to examining the innovations embedded in the P2P economy.

The innovation of the P2P economy is not grounded in the novelty of its types of services and goods; that is, the types of services and goods that are exchanged are not innovative.¹³⁸ Short-term rentals have been an option for a long time, although the connection between lessor and

131. Cf. Doris Estelle Long, *Crossing the Innovation Divide*, 81 TEMP. L. REV. 507, 510 (2008) (“Like every good watchword, ‘innovation’ has no precise meaning.”).

132. See Gaia Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257, 2271 (2010).

133. *Id.*

134. Ranchordás, *supra* note 26, at 427; Bernstein, *supra* note 132, at 2271.

135. Ranchordás, *supra* note 26, at 428 (citation omitted).

136. Bernstein, *supra* note 132, at 2291.

137. We can think about social innovation as types of innovation distinguished from market (or technological) innovation, when the former refers to innovation that enhances social welfare and aims to create social value by addressing substantive human needs, and the latter focuses more on consumers’ needs and market value. See Peter Lee, *Social Innovation*, 92 WASH. U. L. REV. 1, 9 (2014) (distinguishing between social innovation and other types of innovation). Or, as I prefer, we can think of social innovation as an inherent aspect of innovation—because innovation is not only deployment and dissemination of the technology but also the progress and improvement it offers (although the degree of market innovation varies among different innovations). See Ranchordás, *supra* note 26, at 433–36.

138. Ranchordás, *supra* note 26, at 456–58.

lessee was made through traditional methods, such as ads in a university magazine. Paid share rides and carpooling date back to the beginning of the twentieth century,¹³⁹ and errand and concierge services predate the invention of the internet. Genuine sharing practices, or collaborative consumption, are also not new at all.¹⁴⁰

The P2P economy's innovation lies in its process of connecting consumers and providers—and in the social benefits that the transactions confer. However, scholars' accounts about the innovation of this process are often inaccurate or overstated. Many scholars and commentators discuss P2P innovation without defining precisely what is innovative.¹⁴¹ Others define that economy's innovation as its reduction of barriers to entrance into and exit from professions, services, and goods; in short, its innovation lies in exchanges that involve better access to a variety of goods and services. Such descriptions typically follow the assertion that P2P transactions allow consumers to “own less and have access to more.”¹⁴² A different way to describe the same innovation is that it promotes “a shift away from ownership.”¹⁴³ But does the P2P economy really enable such changes in the consumerist model—and is borrowing really less consumerist than owning? The short answer is no.

Characterizing the P2P economy's innovation as motivating or as enabling a switch from ownership to borrowing is mistaken—because the P2P market often enough deals with goods and services that are not about ownership to begin with (e.g., miscellaneous services, short-term rentals, or cars when commuting is not required). As an example, people who look for short-term vacation rentals via Airbnb would not have purchased a property instead (they would have stayed in a hotel or with a friend). Indeed, a study by Morgan Stanley affirms that almost half of

139. Jeff Cozza, *The History of Carpooling, from Jitneys to Ridesharing*, SHAREABLE (Feb. 7, 2012), <http://www.shareable.net/blog/the-history-of-carpooling-from-jitneys-to-ridesharing> [https://perma.cc/T4XE-Y2CC].

140. Ranchordás, *supra* note 26, at 456–58.

141. *See, e.g.*, Oei & Ring, *supra* note 19, at 4 (in an article on regulating the P2P economy, the authors discuss the “appropriate relationship between regulation and innovation,” thus conflating “innovation” with the sharing economy); Miller, *supra* note 12, at 193 (“[T]he need for this discussion is clear because of the innovative and personal nature of the [short-term rental] market.”).

142. Ranchordás, *supra* note 26, at 474.

143. *The Sharing Economy: A Shift Away from Ownership?*, NAT'L PUB. RADIO, <http://www.npr.org/series/244583579/the-sharing-economy-a-shift-away-from-ownership> [https://perma.cc/5QGG-CDJD]; Ranchordás, *supra* note 26, at 462 (“users of sharing practices prefer sharing to ownership for a number of reasons”); LISA GANSKY, *THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING* (2010) (characterizing the “mesh” as the transition from the ownership model to the access model).

Airbnb’s demand comes at the expense of traditional hotels.¹⁴⁴ Others use Airbnb to replace staying with friends or family (31%) or in vacation units (20%).¹⁴⁵ Further, P2P transportation services do not serve as an alternative to efficient public transportation, and only infrequently can they serve as replacements for car ownership;¹⁴⁶ they mainly serve as an alternative to taxis. Finally, hiring someone from TaskRabbit does not replace having a full-time housekeeper for those who can afford it. This is not to say that the model does not extend the scope of existing markets.¹⁴⁷ It just does not—at least not significantly—encourage people to prefer borrowing to ownership, because it deals with services and goods that users frequently do not own in any case.

Furthermore, many consumers do not really face the option of buying versus borrowing; they do not have the means to buy a home,¹⁴⁸ a car, a vacation unit, or even a few days in a hotel.¹⁴⁹ It is plausible, then, to assume that those who can afford to own (the affluent) will continue to own, while the others are left with only the option to borrow. Thus, the P2P economy is not transforming consumers’ preferences from owning to borrowing but, in this sense, only entrenching existing economic and social practices.

Theoretically, borrowing that replaces ownership can have an effect on ownership from the producer side. That is, since the P2P economy allows existing owners to monetize excess resources, a smaller number of hotels or cars are needed to accommodate the same number of consumers because previously “trapped” excess resources are entering

144. INTERNET, LODGING, LEISURE AND HOTELS, *supra* note 79, at 1.

145. *Id.*

146. A recent analysis by NerdWallet studied, across all 50 states, the costs of using Uber and Lyft as compared to owning a car. It found that car ownership is cheaper than taking Uber or Lyft for every trip. Especially in cities where a commute is required, P2P transportation services are not a good or cheaper alternative to car ownership. John Kuo, *Can I Avoid Car Insurance by Using Lyft and Uber?*, NERDWALLET (Oct. 14, 2014), <http://www.nerdwallet.com/blog/insurance/2014/10/14/avoid-car-insurance-costs-lyft-uber/> [<https://perma.cc/Q4R2-Q53X>].

147. Miller, *supra* note 12, at 194.

148. In 2015, for example, the homeownership rate dropped to be the lowest quarterly rate since early 1993. See THE JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, THE STATE OF THE NATION’S HOUSING 2015 19 (2015), <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-ch4.pdf> [<https://perma.cc/23SD-X6ER>].

149. For instance, about 42% of Americans said they did not take a single vacation day in 2014. Almost half of Americans with annual incomes of less than \$25,000 did take days off. Rafat Ali, *Travel Habits of Americans: 42 Percent Didn’t Take Any Vacation Days in 2014*, SKIFT (Jan. 5, 2015, 6:00 AM), <http://skift.com/2015/01/05/travel-habits-of-americans-41-percent-didnt-take-any-vacation-days-in-2014/#> [<https://perma.cc/YPT5-7BXN>].

the market.¹⁵⁰ However, this assumption is not without its problems, too. First, we have indications that the P2P economy encourages a greater level of consumption—that is, it increases the number of transactions.¹⁵¹ Therefore, if the P2P economy increases consumption, it does change consumerism’s model by switching the ownership from hotel or cab owners to less institutionalized players. But it does not change the level of ownership required. Second, as mentioned before, significant numbers of providers operate businesses rather than capitalize on their existing capacity.

If the P2P economy does not transform consumers’ model from owning to borrowing—what is its social innovation? In terms of such innovation, the distributional effect of the P2P is quite difficult to evaluate. On the one hand, by making some services more widely available at reduced prices, the P2P economy arguably promotes increased use of these services by lower-income consumers. Indeed, a study (financed by Uber) found that Uber provides more accessible ride services than do traditional taxis (in terms of time of arrival) to low-income neighborhoods in Los Angeles.¹⁵²

On the other hand, P2P services are not available to everyone because they require a credit or debit card, an internet-connected computer, and sometimes a smartphone. Smartphone ownership, however, correlates with income level and age. A 2015 Pew Center research study indicates

150. See Jamie Lane & R. Mark Woodworth, *The Sharing Economy Checks In: An Analysis of Airbnb in the United States*, CBRE HOTELS’ AMERICAS RES. 1, 1 (2016), http://cbrepkfprod.blob.core.windows.net/downloads/store/12Samples/An_Analysis_of_Airbnb_in_the_United_States.pdf [<https://perma.cc/FX2X-QS73>]. The researchers identified New York as the city whose hotel industry is most affected by Airbnb, followed by San Francisco, Miami, Oakland, and Oahu. *Id.* at 13 (“[I]ncreased competition resulting from new supply can hurt a hotel’s ability to raise rates and can even cause management to lower their rates to stay competitive . . . Airbnb may be an impediment to traditional hotel construction and may reduce traditional hotel supply growth in many markets.”). Regarding implications for the taxi industry, see Laura J. Nelson, *Uber and Lyft Have Devastated L.A.’s Taxi Industry*, *City Records Show*, L.A. TIMES (Apr. 14, 2016, 5:26 PM), <http://www.latimes.com/local/lanow/la-me-ln-uber-lyft-taxis-la-20160413-story.html> [<https://perma.cc/R475-A7NE>] (“The decline mirrors what’s happening across the country, as taxis—regulated by local governments on everything from price to the color of their cars—struggle to compete with cheaper, more nimble start-ups.”).

151. Steven Hill, *Is the Sharing Economy Truly Green?*, SIERRA CLUB (Mar. 14, 2016), <http://www.sierraclub.org/sierra/2016-2-march-april/green-life/sharing-economy-truly-green> [<https://perma.cc/8JZJ-465Y>] (arguing that ride-sharing services increase consumption, negatively affecting the environment and traffic congestion).

152. Rosanna Smart et al., *Faster and Cheaper: How Ride-Sourcing Fills a Gap in Low-Income Los Angeles Neighborhoods*, BOTEC ANALYSIS CORP. 1, 4 (2015), <http://botecanalysis.com/wp-content/uploads/2015/07/LATS-Final-Report.pdf> [<https://perma.cc/NQ5P-PYCV>].

that only 27% of Americans 65 and older own a smartphone.¹⁵³ And only 50% of adults with incomes under \$30,000/year—and 72% of adults who earn \$50,000–\$74,999—own a smartphone. Thus, due to the smartphone interface through which many P2P economy services operate, P2P services are less accessible to consumers with low incomes. Indeed, “with few exceptions, most sharing firms do not do much business in poor communities.”¹⁵⁴

Similarly, it is doubtful how much the short-term rental market of the P2P economy is helpful to people with lower incomes, as hosts are often the already-affluent and users are usually at the higher end of income distribution. Airbnb recently released data to combat allegations that it contributes to the lack of affordable housing because its hosts take apartments off the long-term rental market to rent them to Airbnb guests. Airbnb provided data on approximately 59,000 assets that its New York City hosts offered for rent from November 2014 to November 2015.¹⁵⁵ Accordingly, 16% of hosts offered their apartments for terms longer than 121 days a year, and 3% did so for more than 271 days.¹⁵⁶ However, this small minority provides a disproportionate share of Airbnb’s revenue—around 24% of its total whole-home revenue.¹⁵⁷ Moreover, Morgan Stanley’s survey found that roughly two thirds of U.S. Airbnb users fall into the \$75,000-plus annual income bracket—i.e., its users are mainly consumers with above-average incomes.¹⁵⁸ All this indicates that the distribution of benefits from the P2P economy may not trickle down from the middle class in the amounts that some proponents suggest.

Furthermore, as I discuss more extensively below, the P2P economy may allow consumers to pay less, but employees pay the price in less stable employment opportunities.¹⁵⁹

For these reasons, we should overstate neither the innovation of the P2P economy nor its social aspect. The P2P economy does not change consumption practices in a major way and, so far, is unevenly

153. Aaron Smith, *Chapter One: A Portrait of Smartphone Ownership*, PEW RES. CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/chapter-one-a-portrait-of-smartphone-ownership/> [https://perma.cc/S566-YK9P].

154. Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 954 (2015).

155. Ben Popper, *Airbnb’s Worst Problems Are Confirmed by Its Own Data*, THE VERGE (Dec. 4, 2015), <http://www.theverge.com/2015/12/4/9849242/airbnb-data-new-york-affordable-housing-illegal-hotels> [http://perma.cc/QS6Z-7C2A].

156. *Id.*

157. *Id.*

158. INTERNET, LODGING, LEISURE AND HOTELS, *supra* note 79, at 18.

159. *See infra* text accompanying notes 209–12.

distributed—with some costs to employees and likely also to minorities. As a result, the P2P economy is more apt to entrench, rather than revolutionize, existing consumeristic and employment practices.

In conclusion, seeing the model for what it really does allows us to more effectively assess it and formulate a useful regulatory response. The next part refines this understanding by looking at the insights derived from pluralistic theory.

II. WHAT PLURALISTIC THEORY TEACHES ABOUT THE P2P ECONOMY

Crafting apt regulatory responses to the P2P economy is a challenge to policymakers and a major subject of debate among commentators. What these commentators—both for and against regulation—have generally overlooked is that, in terms of public policy and justifications for regulation, the P2P economy does *not* present a novel issue for the U.S. legal tradition.¹⁶⁰ While the particular dilemma—regulating the P2P economy—is novel, the issues it brings into discussion are not groundbreaking. The opposite is true: the economic model of the P2P economy is a paradigm realization of what a familiar and well-established legal theory and political model discuss and advance. I will call this theory by the term currently most prevalent in legal scholarship—*pluralism*—but, as explained below, this theoretical model has older roots and different names, and the notion of pluralism has various different valences and interpretations.¹⁶¹ This theory helps greatly to resolve the controversy surrounding the assessment and regulation of the P2P economy.

Section A categorizes the approaches to regulation of the P2P economy into three groups. Section B traces the evolution of pluralistic theory and canvasses its main principles. Section C explores the way that pluralistic theory informs the debate about regulating the P2P economy. Section D discusses the way different municipalities regulate the P2P economy and analyzes which models comply with pluralistic principles and which do not.

160. *But see* Oei & Ring, *supra* note 19, at 994 (arguing that “the application of substantive and doctrinal tax laws to sharing is generally (though not completely) clear and not particularly novel”).

161. Legal pluralistic theory is also a name that denotes a different and important legal concept that this Article does not discuss. This version focuses on the existence of “multiple overlapping normative communities,” including normative rules that are not state-based. *See, e.g.*, Paul Schiff Berman, *From Legal Pluralism to Global Legal Pluralism*, in *LAW, SOCIETY AND COMMUNITY SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 255 (Richard Nobles & David Schiff, eds., 2014), [<https://perma.cc/36MC-NFV7>].

A. *Approaches to Regulation of the P2P Economy*

The debate about structuring appropriate legal regulation follows similar lines to the views on P2P activities. On one end of the spectrum, promoters of the P2P economy strongly oppose imposing “traditional” regulation—i.e., rules that currently apply to existing businesses—on the P2P economy.¹⁶² These promoters contend that such regulation will impede innovation and will favor the incumbents. For instance, the Mercatus Center report contends that “regulations often become formidable barriers to new innovation, entry, and entrepreneurship.”¹⁶³ And a report by the Institute for Public Affairs warns that “[t]he real threat to the sharing economy is government regulation driven by the incumbent industries that are challenged.”¹⁶⁴

In lieu of traditional regulations, many commentators advocate primarily self-regulation of the industry.¹⁶⁵ According to them, traditional regulation is needless in this context because P2P companies have sufficient incentive to self-regulate and, indeed, have created several mechanisms to overcome problems of quality and asymmetrical information that are relevant to incumbent industries.¹⁶⁶ Hence, Molly Cohen and Arun Sundararajan note that, in traditional industry, one role of regulation is to fix asymmetrical information—as when a passenger does not know whether the driver or the host can be trusted, or when the driver knows the route better than the passenger does and therefore can extend the ride beyond what is needed.¹⁶⁷ According to Cohen and Sundararajan, in the P2P economy the facilitators already provide adequate information to overcome this asymmetry: the host and the driver are rated by others, which solves the problem of trust. And the platform provides driving directions that decrease the risk that the driver will unnecessarily extend the route. In addition, because the facilitators

162. See, e.g., Posen, *supra* note 130, at 429 (“Governments should not make Uber comply with already-existing regulations.”); Stemler, *supra* note 31, at 2 (“[E]xisting laws cannot effectively regulate the sharing economy because the sharing economy is uniquely comprised of individuals profiting from their personal excess capacity.”).

163. Allen & Berg, *supra* note 12, at 2.

164. *Id.*

165. See, e.g., Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 458 (2011); Arun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy> [<https://perma.cc/C7W2-Q8QZ>].

166. Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 112–113 (2015).

167. Ranchordás, *supra* note 26, at 464.

have an incentive to increase the number of exchanges, they implement safety requirements without extending the existing regulatory rules. Replying to the argument that traditional regulation is imposed unevenly on incumbents, the Mercatus Center report recommends “deregulating down”—relaxing regulatory demands for both incumbents and P2P economy players—rather than “regulating up.”¹⁶⁸

Conversely, other commentators and incumbent industries advocate for traditional or traditional-like regulation of P2P activities: imposing existing regulatory demands on the P2P market.¹⁶⁹ Similarly, some municipalities that have outlawed certain P2P activities, or banned them almost entirely, proffered arguments against particular industries that were to be regulated.¹⁷⁰ By the same token, the chairwoman of the Federal Trade Commission, Edith Ramirez, criticized the idea of creating a “two-track” regulatory regime. “Regulating established businesses differently from newcomers would confer an unfair advantage to whichever model had the least costly regulations.”¹⁷¹

A third camp has adopted an approach that is somewhere in the middle of the spectrum.¹⁷² This approach rejects traditional regulation as outdated, stringent, and inappropriate for the new P2P economy because it was designed to regulate professional-to-consumer activity rather than peer-to-peer exchanges.¹⁷³ They view such traditional regulation as

168. Koopman, *supra* note 93, at 19.

169. *See, e.g.*, Posen, *supra* note 130, at 420–43 (describing lawsuits against Uber); Ruiz, *supra* note 9; Andrew Leonard, “Sharing Economy” Shams: Deception at the Core of the Internet’s Hottest Businesses, SALON (Mar. 14, 2014, 4:43 AM), http://www.salon.com/2014/03/14/sharing_economy_shams_deception_at_the_core_of_the_internets_hottest_businesses/ [https://perma.cc/8258-339K].

170. Tim Logan, *Santa Monica Comes Down Hard on Airbnb; Will Crackdown Spread?*, L.A. TIMES (May 13, 2015, 4:00 AM), <http://www.latimes.com/business/realstate/la-fi-santa-monica-council-oks-tough-rental-regs-20150512-story.html> [https://perma.cc/UUQ5-5M3F] (reporting that Santa Barbara passed a law that bars renting units for fewer than 30 days); Posen, *supra* note 130, at 423 (“Finally, some states and cities have challenged Uber’s operations by proposing regulations that would prohibit Uber from operating there.”).

171. *See, e.g.*, Jack Karsten & Darrell M. West, *Harmonizing Regulations for Sharing Economy Businesses*, BROOKINGS TECHTANK (Nov. 4, 2015, 7:30 AM), <http://www.brookings.edu/blogs/techtank/posts/2015/11/04-harmonizing-sharing-economy-regulations> [https://perma.cc/5PUC-LBFG].

172. *See, e.g.*, Ranchordás, *supra* note 26, at 465; Shelly Kreiczler-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 67 (2015) (“It advocates a complex set of legal rules that focus on the unique attributes of an intermediate space, instead of banning the sharing economy, regulating transactions such as commercial property, or otherwise ignoring the activity.”).

173. *See, e.g.*, Stemler, *supra* note 31, at 33 (explaining that some “authorities [are] imposing regulatory structures designed for non-sharing economy businesses. These structures are very often ill-fitted for the specifics of the sharing economy . . .”).

likely to stifle innovation. At the same time, those scholars support regulation—albeit a new model of regulation tailored to the new market in a way that would ensure public safety and fair competition while still aiding innovation. Thus, Sofia Ranchordás advocates some restrictions on P2P transportation companies—such as mandating background checks and sufficient insurance—but not the application of all requirements imposed on traditional transportation companies.¹⁷⁴ Similarly, Stephen Miller argues that, in the hospitality arena, traditional regulation is ill-suited to the P2P market. In Miller’s view, banning short-term rentals altogether or allowing only minimal exceptions to zoning laws will fail because enforcement of such regulations will face serious challenges as many services are small-scale transactions and are quite intimate. As such, it is unlikely that violators will be caught—and users will take the risk of being caught.¹⁷⁵ Moreover, cracking down on facilitators will likely result in the creation of new platforms. Finally, regulations will be deemed too invasive. Therefore Miller, who is worried about bad actors in the market, suggests “alternative approaches that rely on markets, information, and perhaps even regulatory structures that model the sharing economy more directly.”¹⁷⁶ Finally, when it comes to labor regulations, the all-or-nothing approach also does not fit the current reality.

Likewise, Alan Krueger, economics professor and former chairman of the White House Council of Economic Advisers, explained that:

Our legal system is not up to this new development [Uber, Lyft, etc.], so these workers very much fall in a gray area . . . [W]e have this bipolar system where a worker is an employee with a lot of benefits and protections, or an independent contractor who has to negotiate his or her own social compact.¹⁷⁷

Pluralistic theory, I argue below, sides with the third position—the intermediate approach—and supplies a needed and missing theoretical basis in support of this standpoint, as well some guidance about how the regulation should look. The next section explains the foundational

174. Ranchordás, *supra* note 26, at 470–71.

175. Miller, *supra* note 12, at 168.

176. *Id.*

177. Alan Krueger, *Is the Sharing Economy the New Normal?*, MILKEN INSTITUTE GLOBAL CONFERENCE, MILKEN INSTITUTE (May 4, 2016), <http://www.milkeninstitute.org/events/conferences/global-conference/2016/panel-detail/6223> [<https://perma.cc/U4WX-LH5C>]. See also Holloway, *supra* note 46, at 316 (“The choice between independent contractor and employee, under current standards, is no longer sufficient to describe what is actually happening in the workforce. There is a need for either newly refined definitions of the two, or a third category.”).

claims of pluralistic theory, and section C makes an explicit connection between the P2P economy and pluralistic theory.

B. The Development of Legal Pluralistic Theory

What we now know as “legal pluralistic theory” (or “autonomy-based pluralism”) began with the rise of legal incommensurability theory at the beginning of the 1990s.¹⁷⁸ At that time, a group of eminent legal scholars, borrowing from established philosophical and political pluralistic theories, introduced the idea of incommensurability in law.¹⁷⁹ The main two arguments of incommensurability theory are, first, because the world is composed of diverse and plural universal values, human beings assign different values or valuations to different goods or experiences.¹⁸⁰ For instance, some goods (e.g., money, objects) are for “use,” while others have intrinsic value (e.g., friendships), and individuals experience and value these things differently.¹⁸¹ Second, because these values or valuations are different, they cannot be ranked or reduced to one “super-concept.” We cannot put them on a single metric and measure which is more important without undermining the different conceptions of the valuations.¹⁸² For instance, an economist may assess the value of meat for consumption in monetary terms, while a vegan might find such assessment offensive since it ignores the rights of animals.¹⁸³ Thus, we cannot evaluate the benefits or harms of meat

178. See Nick Smith, *Incommensurability and Alterity in Contemporary Jurisprudence*, 45 BUFF. L. REV. 503, 504 (1997).

179. See, e.g., Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2142 (1990); Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992).

180. Sunstein, *supra* note 179, at 780.

181. *Id.* at 782–83. The term “value,” in this sense, can refer to abstract values (e.g., justice, equality, liberty), but more typically addresses the *bearers* of the values—the institutions that embed these values. That is, while scholarship uses the term “values,” what is actually compared are concrete reasons for preferring one option or good over another. See Burton, *supra* note 28, at 551. Rather than comparing values in the abstract, modern literature examines our reasons for choosing a certain option. When discussing values, I follow the tradition of using the term “values” both when discussing abstract values and when exploring the bearers of the values (i.e., the options that each legal institution offers).

182. See MARGARET J. RADIN, *CONTESTED COMMODITIES* 11 (1996) (arguing that “there is no scale along which all values can be arrayed in order so that for any value or package of values we can say definitively that it has more or less value than some other”); Sunstein, *supra* note 179, at 784.

183. *Cf.* Smith, *supra* note 178, at 514 (“Examples of incommensurability often occur in environmental issues.”).

consumption using a single metric (such as a monetary or a “well-being” standard), at least not in a way that will do justice to both valuations.

The problem of incommensurability illuminates several insights; a particularly relevant one¹⁸⁴ is that “we should approve of a large degree of diversity in kinds of valuation.”¹⁸⁵ That is, because individuals value things in different ways, the state should make space for different types of valuations (within clear limitations—as when doing so will harm someone).¹⁸⁶ In the words of Cass Sunstein, “[a]n understanding of diverse kinds of valuation helps explain why liberal regimes generally respect voluntary agreements. If people value things in different ways, the state should allow them to sort things out as they choose.”¹⁸⁷

The ideas promulgated by legal incommensurability theorists have recently been reincarnated, albeit leading to other realizations, under the title of “pluralistic theory.” The basic principle of the reemerging pluralistic theory is that the state ought to actively provide the conditions for meaningful choices to exist so that people can exercise their autonomy. The recent version of this argument is most strongly and eloquently laid out by Hanoch Dagan, who relies on the work of the influential legal philosopher Joseph Raz.¹⁸⁸

Raz suggests that personal autonomy is an essential feature of flourishing life.¹⁸⁹ For Raz, human beings can live autonomous lives only if they are given an adequate range of options. In terms of adequate choices, it is variety that matters, not quantity. For instance, adequate

184. A second insight from the problem of incommensurability of values is that policymakers should “disaggregate” different values when considering the effect of a particular policy. That is, in evaluating the proper regulatory response, we cannot measure diverse valuations on one metric (as with cost-benefit analyses) because doing so makes different valuations invisible. Sunstein, *supra* note 179, at 855; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 65 (1995) (“At least in principle, it would be better to have a disaggregated system for assessing the qualitatively different effects of regulatory impositions. Not all benefits are fungible, nor are all costs.”). Therefore, when deliberating about appropriate regulations, a simple cost-benefit analysis is inadequate, as many options offer more than monetary benefits, and the various options cannot be measured against each other. While P2P proponents emphasize innovation and lower-cost services, such measurements yield an unsatisfactory result because they make other considerations invisible.

185. Sunstein, *supra* note 179, at 855.

186. *Id.* at 849.

187. *Id.*

188. For arguments that family law should adopt a similar pluralistic approach—based on Raz’s work—see Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1568 (2009). For a critique of the pluralistic approach in family law, see Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317 (2016).

189. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

choice does not exist if a buyer can choose from among a hundred houses that are all the same; an adequate choice would be, for example, between a town house, a town apartment, and a suburban house.¹⁹⁰ To ensure adequacy of choice, Raz contends, it is not enough that the state be committed to noninterference (negative liberty); rather, the state is obligated to “create conditions which enable [its] subjects to enjoy greater liberty than they otherwise would.”¹⁹¹ Raz’s approach thus takes incommensurability one step further because it posits that not only should the state approve and accommodate different valuations, but that it also actively needs to facilitate adequate choice.

Building on Raz’s view, Dagan celebrates the existence of, and advocates further development of, *structural pluralism*—a private law system that vindicates and embeds diverse values and facilitates meaningful choice.¹⁹² Structural pluralism, thus, is the *mechanism* that incorporates the variety of choices that the state presents—a sort of a menu of options that embeds diverse values. Accordingly, Dagan asserts, “An autonomy-based pluralism must take seriously the state’s obligation to provide a sufficiently diverse set of robust legal frameworks for people to organize their lives.”¹⁹³ That is, the state’s role is to facilitate varied spheres that incorporate diverse values, or balances of values, that will enable effective choice.

The version of pluralism I refer to from here onward—unless otherwise stated—is Dagan’s autonomy-based pluralism. For the sake of simplicity, I often shorten it to “pluralistic theory.”

One should not confuse pluralistic theory with approaches grounded in *laissez-faire* polices. While autonomy is one of the values that we should incorporate into the menu of options, it is not the only one. This pluralistic structure embeds the principles of *value pluralism*: the idea that the world is composed of a plurality of ultimate goods, not just one, and these goods cannot be ranked.¹⁹⁴ A structure that reflects value pluralism is built on a commitment to offer options that integrate and balance various values, rather than a world that vindicates mainly autonomy. Indeed, value pluralism has never been an invitation to

190. *Id.* at 375.

191. *Id.* at 18–19.

192. HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 163, 182 (2013).

193. Dagan, *Pluralism and Perfectionism*, *supra* note 29, at 1424.

194. GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 2 (2002).

celebrate individual freedom over all other competing values.¹⁹⁵ As Dagan notes, “facilitation is rarely exhausted by a hands-off policy and a corresponding hospitable attitude to freedom of contract. Rather, facilitation requires the law’s active empowerment in providing institutional arrangements, including reliable guarantees against opportunistic behavior.”¹⁹⁶

I now move to examine how autonomy-based pluralism informs the regulation of the P2P economy.

C. *Lessons from Pluralistic Theory*

Pluralistic theory warrants that we depart from the dichotomy of self-regulation versus traditional regulation and treat increased access-to-excess activity as a new category with its own sets of regulatory rules—thus allowing individuals substantive choice between activities. In what follows, I first argue that access-to-excess-based activity vindicates diverse human valuations and, as such, the state has an interest in sustaining it. Second, I assert that a noninterventionist approach is anti-pluralistic because the lack of protective regulation will, in fact, diminish choice to providers and consumers. Third, I claim that pluralistic principles justify creation of a separate and novel regulatory regime that is designed specifically to accommodate the distinctive nature of activities in access-to-excess transactions. To entertain diversity of options, pluralistic theory suggests that when the P2P economy is different from the traditional market—and thus serves to extend choice—new regulation that suits these activities is apposite. Fourth, I demonstrate that efficiency considerations also justify the creation of a separate category based on access to excess and thus comply with pluralistic principles. Fifth, I contend that the new category should distinguish between access-to-excess capacity on the one hand, and conventional transactions on the other, to prevent incumbent-like operations to pass as access-to-excess types of activities.

1. *Access-to-Excess-Based Activities Extend Choice and Vindicate Different Human Valuations*

The innovation found at the heart of the P2P economy—in terms both of market and of social innovation—is best viewed as a choice-

195. William A. Galston, *Value Pluralism and Liberal Political Theory*, 93 AM. POL. SCI. REV. 769, 777 (1999).

196. Dagan, *Pluralism and Perfectionism*, *supra* note 29, at 1429.

enhancing apparatus because it augments access to activities based on excess capacity.

The relative ubiquity of cell phones and other technological advances allow P2P facilitators to overcome long-existing problems of supply and demand by easing the connections between providers and consumers. The P2P economy thus reduces barriers to entrance into markets by supporting transactions based on temporary access to excess capacity, resulting in expansion of choice for providers and consumers.

When it comes to consumers, the P2P economy amplifies the multitude of services and goods in the market. Looking through these lenses, we can see that the virtue of the access-to-excess economy for consumers is in accommodating different types of valuations. People perceive what is important in diverse ways and the P2P economy supports such different modes of valuation—in making them more readily obtainable. To clarify, the innovation is not in creating new goods or novel types of exchanges, but in the ease of transactions, which intensifies and increases the availability of these options. Indeed, in the PwC survey, 32% of respondents indicated that “more choice in the marketplace” is a strong selling point for the P2P transportation firms.¹⁹⁷

For instance, if one wants to stay in traditional accommodations, she can choose a hotel; if one wants a cheaper hotel, this is an option, too; and if one is willing to take some risk or wants to experience “living like a local,” then Airbnb offers yet another layer of supply.¹⁹⁸ The same thing holds true for the other industries of the P2P economy. Some people may value the interaction with people they do not know; others may dislike the more intimate nature of some of these transactions; some value their privacy more than others; and some are more risk-averse than others. Some care more about price, while others favor efficiency and predictability. Some want the convenience of using their cell phone to find a low-cost ride; others opt for the safety associated with regulated taxis or finding them spontaneously on the street. Some desire the efficiency and experience of an agency that will conduct appropriate screening in finding a babysitter; others trust the reviews of members, whereas others are more suspicious. Some endorse the perceived benefit of sustaining the environment or the sense of community provided by P2P arrangements. The P2P economy creates the conditions for

197. CONSUMER INTELLIGENCE SERIES, *supra* note 17, at 20.

198. Kaplan & Nadler, *supra* note 166, at 105 (“One of the primary benefits that it provides is that it allows guests to ‘live like a local’ and explore neighborhoods that do not typically cater to tourists, both by providing accommodations in a wide variety of locales and by connecting visitors with local residents.”).

expanding the menu of options that accommodate many of these diverse experiences.

When it comes to providers, the P2P economy extends options by opening flexible employment structures,¹⁹⁹ although change in employment structure also has negative consequences that could decrease choice—a concern that I discuss in subsection 4. Again, the innovation is not in the novelty of freelance employment structures but in their increased availability.²⁰⁰ The P2P economy offers flexible, part-time employment and increases the participation of nonprofessional providers who want to make “some extra money.”²⁰¹ The model reduces barriers to entering markets previously reserved to those whose full-time work or expertise, for the most part, is the provision of such services. For instance, Uber drivers may be former professional taxi drivers or may be new drivers who provide rides only part time.²⁰² Airbnb hosts could be owners of short-term units who have leased their units for years using other platforms, or renters who wish to sublet their apartments while they are away and make some extra income.

Essentially, pluralistic theory provides the theoretical framework for the argument that the state ought to support the P2P economy as a way to proactively cultivate different human choices. Thus, in terms of public policy, the state should encourage the innovation of the P2P economy because such action falls within its charge to facilitate adequate alternatives. By validating people’s various valuations, the state allows people to self-govern. Humans flourish when adequate, effective, and different choices exist.

2. *Deregulation Is Anti-Pluralistic*

The fact that access-to-excess-based activity falls under the aegis of pluralistic principles does not mean that the state should let it operate without constraints. In fact, pluralistic theory also calls for some limits—in the form of direct regulation—on the P2P economy. From a

199. Cf. Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 154 (2011) (describing the flexibility and comfort in working in the crowdsourcing industry).

200. HILL, *supra* note 65, at 4–8.

201. *Id.* at 122 (noting that many P2P facilitators defend their practices as allowing people to make some extra money—and not as a main source of income).

202. Jacob Davidson, *Uber Reveals How Much Its Drivers Really Earn . . . Sort of*, TIME (Jan. 22, 2015), <http://time.com/money/3678389/uber-drivers-wages/> [<http://perma.cc/M3Q9-95KM>] (indicating that the survey conducted by Uber found that “32% of drivers said the major reason for partnering with Uber was ‘to earn money while looking for a steady, full-time job’”).

theoretical standpoint, a noninterventionist approach results in a preference for a narrow notion of autonomy over such other values as labor rights, fair competition, and equity. Pluralistic theory, however, demands a balance of values, which does not occur if the economy is unregulated—as I argue below.

In the first place, a free-market approach is not compatible with the pluralistic model because it would likely result in diminishing other choices. “[T]he state’s obligation to foster diversity and multiplicity cannot be properly accomplished through a hands-off attitude by the law because such an attitude ‘would undermine the chances of survival of many cherished aspects of our culture.’”²⁰³ Adopting a nonintervention policy in this context means conferring an advantage to the P2P economy over other valued options (the incumbents) and thus displacing the other options. If more traditional services use the P2P economy to sell orthodox services—while not being subject to similar regulations—they gain an unfair advantage over incumbents. And if incumbents cannot survive the competition because the P2P intermediaries skirt existing regulations, then the other choices may disappear—resulting in fewer varieties that matter for some people.

For example, recent research found that Airbnb’s impact on the hotel industry in Texas is unevenly distributed, and that Airbnb affects mostly lower-end hotels, making them most vulnerable.²⁰⁴ Likewise, there is some anecdotal evidence that P2P ride companies have already affected the availability of traditional taxi services in New York and San Francisco.²⁰⁵ Indeed, Yellow Cab, the largest taxi company in San Francisco, has recently filed for bankruptcy, citing Uber and Lyft as the main reason for its economic problems.²⁰⁶ Thus, the idea of multiple alternatives becomes illusory if it serves as a cover for a free-market approach to regulation that results in the end, or diminished number, of traditional and valuable options.

203. Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 L. & CONTEMP. PROBS. 19, 27 (2013) (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369, 372 (1986)).

204. Zervas, Proserpio & Byers, *supra* note 112, at 25.

205. Kate Rogers, *Uber, Lyft Put Pressure on Taxi Companies*, CNBC SMALL BUSINESS (Jan. 26, 2016), <http://www.cnbc.com/2016/01/26/uber-lyft-put-pressure-on-taxi-companies.html> [<http://perma.cc/V7GY-3RAN>]; Michael Gartland, *Taxi Shortage as Uber Lures Away Yellow Cabbies*, N.Y. POST (Oct. 19, 2014), <http://nypost.com/2014/10/19/taxi-shortage-as-uber-lures-away-yellow-cabbies/> [<http://perma.cc/36XK-2FHC>].

206. Tim Stenovec, *More Proof That Uber Is Killing the Taxi Industry*, TECH INSIDER (Jan. 7, 2016), <http://www.techinsider.io/more-proof-that-uber-is-killing-the-taxi-industry-2016-1> [<http://perma.cc/96BB-A8TW>].

Commitment to a balance of values also commends that the regulations of the P2P economy ensure equal opportunity for people to participate in the activities—as users and providers. Nonintervention in this context may prevent or decrease the participation of women and racial minorities in the P2P economy. Particularly, people who feel less physically safe—for example, women and transgender people—may be more concerned about taking a P2P ride or renting through Airbnb.²⁰⁷ Indeed, approximately 70% of the providers in the P2P economy are male.²⁰⁸ Not only does nonintervention prevent the participation of certain classes of people, but those same people also pay a premium if traditional services are rarer or more expensive. Racial minorities’ participation can be halted, too, on both ends of the process—either through the mechanism of peer ranking or through the possibility of not hiring them or not accepting their requests to rent a property. Hands-off policies thus create the possibility that certain groups will be shut out of the P2P economy. Pluralistic theory, conversely, requires incorporating diverse values, including equity.

Additionally, genuine choice for providers disappears if the P2P economy results in significant reduction of stable, full-time, protected work.²⁰⁹ Part-time freelance employment may be a valuable commodity to some, but as soon as it is the primary choice, people lose other, substantive choices about their employment.²¹⁰ In addition, the flexibility may be misleading, as often P2P firms reduce the elasticity of this work model by penalizing those who are not available enough (for example, deactivating drivers who do not provide enough services or making it not worthwhile to work only limited hours).²¹¹ The risk here

207. Lauren Kelley, *Is the Sharing Economy Safe for Women?*, SHAREABLE (July 24, 2012), <http://www.shareable.net/blog/is-the-sharing-economy-safe-for-women> [http://perma.cc/MJ98-GG4S]; Mary Emily O’Hara, *Lyft Driver Accused of Threatening Activist Monica Jones in Transphobic Post*, THE DAILY DOT (Feb. 28, 2016), <http://www.dailydot.com/irl/lyft-driver-monica-jones-location-facebook/> [https://perma.cc/Y4Y2-5FXX].

208. Jennifer Rossa, *The Workers*, BLOOMBERG BRIEFS (June 15, 2015), <https://newsletters.briefs.bloomberg.com/document/4vz1acbgfrxz8uwan9/the-workers-demographics> [http://perma.cc/T96B-WSJK].

209. Lauren Weber, *One in Three U.S. Workers Is a Freelancer*, WALL ST. J. (Sept. 4, 2014), <http://blogs.wsj.com/atwork/2014/09/04/one-in-three-u-s-workers-is-a-freelancer/> [http://perma.cc/B39D-8J2H] (reporting that 1 in 3 workers is a freelancer).

210. *Workers on Tap*, THE ECONOMIST (Jan. 1, 2015), <http://www.economist.com/news/leaders/21637393-rise-demand-economy-poses-difficult-questions-workers-companies-and> [http://perma.cc/YZ4M-2KTH] (“But workers who value security over flexibility, including a lot of middle-aged lawyers, doctors and taxi drivers, feel justifiably threatened.”).

211. Sarah Leberstein & Rebecca Smith, *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy*, NAT’L EMP. L. PROJECT 6 (Sept. 9, 2015), <http://www.nelp.org/publication/rights-on-demand/> [http://perma.cc/UEP9-HY38].

from the P2P economy is imminent: we see the rapid proliferation of 1099-MISC employees—part-time workers who are ineligible for various protections that regular employees have and are much cheaper for the employer.²¹² Since voluminous rights and benefits are attached to full-time employment (such as health insurance), the growth of freelance labor constitutes a risk to the future of many employees.

Importantly, deregulation is unwarranted because many of the policies that regulation of the traditional economy intends to promote are still applicable to the P2P economy. For instance, the main reasons that municipalities and the federal government have regulated the taxi market include limiting market entrants to prevent overcrowding and the resulting negative consequences,²¹³ requiring licensing for safety, controlling distribution of risk (in terms of insurance),²¹⁴ and in some instances imposing taxes to incentivize more socially beneficial behaviors such as using mass transit.²¹⁵

Most of these justifications to enact regulations are still relevant today. Problems of safety, distribution of risk, and discrimination have not dissipated with the appearance of the P2P economy. Some of them are, in fact, exacerbated because some of the market operates on the boundaries between market and household. The costs of allowing P2P firms to subvert these regulations can result in overcrowding and increased traffic, decreased safety, price manipulation, and increased competition while neglecting socially beneficial conduct like walking or taking mass transit.²¹⁶ In addition, incumbent participants may have

212. HILL, *supra* note 65, at 6–8.

213. Posen, *supra* note 130, at 409–10.

214. *Id.*

215. Sam Frizell, *A Historical Argument Against Uber: Taxi Regulations Are There for a Reason*, TIME (Nov. 19, 2014), <http://time.com/3592035/uber-taxi-history/> [<http://perma.cc/M6RR-UWBA>]; see also Taxicab, Limousine & Paratransit Ass'n, *Taxis, TNCs and Deregulation: Is History Repeating Itself?*, WHO'S DRIVING YOU, <http://www.whosdrivingyou.org/history-repeating-itself> [<http://perma.cc/H7DJ-FU7E>].

216. Among the detriments of Uber's lack of regulation in some municipalities are: potential for monopoly, unsafe cars and drivers, privacy issues, discrimination, and inadequate pay and working conditions for drivers. See Rogers, *supra* note 23, at 91. Regarding the P2P economy's effect on mass transit, see Hill, *supra* note 151; Tarun Wadhwa, *Could Lyft and Uber Put Public Transit Out of Business?*, FORBES (Nov. 13, 2014, 12:44 PM), <http://www.forbes.com/sites/tarunwadhwa/2014/11/13/will-lyft-and-ubers-shared-ride-service-put-public-transit-out-of-business/#67878d371f58> [<https://perma.cc/PEJ4-L7ZL>] (“Expect this new type of corporate carpooling to serve as both a competitor and a complement to existing public transit.”).

substantial sunk costs—medallions, taxis, business goodwill—and are subject to unfair competition from an unregulated new entrant.²¹⁷

Thus, there is no justification to apply different rules to the P2P economy when the same grounds for regulation still exist. Applying those rules unevenly, by choosing nonintervention in the P2P market, results in an unjustified harm to incumbents. This is particularly so when the only difference between incumbent industries and those in the P2P economy is that operating an under-regulated business is cheaper. In this way, nonintervention is antipluralistic because it erodes variety by allowing unfair competition against the remaining incumbent players.

Certainly, a pluralistic standpoint justifies different regulatory treatments for different activities: multiple regulatory approaches to various activities. For instance, a pluralistic approach justifies and encourages different legal responses to the fact that P2P technology reduces the problem of price manipulation in P2P rides. But it does not mean that policies that are still relevant to preventing harms should be set aside in the name of “choice.” Pluralism does not mean a license to compete unfairly by supplanting existing regulations,—but only that when differences in types of valuations exist, they should be treated disparately in terms of regulation.

3. *Pluralism Commends Novel and Specially Designed Regulation*

While nonintervention is antipluralistic, applying the current regime to access-to-excess transactions will, as well, not further pluralistic principles. Some regulation is necessary, but it need not be the same rules that are imposed on incumbent markets. Pluralistic principles call on the state to actively enhance variety by treating different values and valuations with distinct regulations. New regulation should leverage the role of P2P platforms and preserve the freedom and innovation that the access-to-excess-based activities enable.

Current regulations are too burdensome for (part of) the current market and are ill-suited to the types of actors involved in access-to-excess transactions. Applying the existing regime can result (and has resulted) in a market that operates unlawfully and inefficiently, creating risk for some players and preventing the participation of others. For instance, one of the domains of the P2P economy is in the pop-up restaurant scene, which connects potential clients with amateur chefs for ad-hoc meals outside an established restaurant (often in the chef’s

217. Rogers, *supra* note 23, at 91 (“Uber has faced criticism . . . that it is unfairly competing with taxi drivers by entering their market without following regulations or fare schedules.”).

home).²¹⁸ But even inviting some consumers to a home-cooked commercial dinner potentially requires complying with complex regulations, such as accommodations in line with the Americans with Disabilities Act, environmental regulations, and health and safety regulations.²¹⁹ And while many of these regulations still serve an important function, the organizer of a pop-up dinner can find them overwhelming—thus, they can result either in noncompliance or in preventing entrance into the market. Therefore, even if current regulations fix market failures that still exist or serve an important public health function relevant in access-to-excess transactions, pluralistic principles call on the state to support these transactions by treating them differently than those reflecting traditional commercial undertakings.

In terms of pluralistic principles, the state's obligation to facilitate multiplicity means that the state needs—upon commercial demand, or even without it—to broaden people's choices by proactively enabling innovation in the form of new types of regulation.²²⁰ Innovation, in this sense, means that the state ought to think creatively about different forms of regulations that are suitable to the multiple activities, valuations, and variations that exist in the access-to-excess market. Pluralistic theory then suggests that lawmakers should create additional regulatory choices that champion increased options. That is, choice about regulation of the P2P economy cannot be limited to “traditional” or “none.”²²¹

A pluralistic approach to the regulation of the P2P economy thus directs that the state should create a separate category that governs the access-to-excess model. The existence of a separate category does not mean that its regime should be based on a *laissez-faire* model. Rather, this novel category should have its own set of rules—neither traditional nor deregulatory—that will enable substantive choice between options. Pluralistic theory insists that the state ought to fix market failures, thus allowing effective choice by maintaining the viability of different

218. Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16 (2015).

219. *Id.* at 20.

220. See HANOCH DAGAN & MICHAEL HELLER, *Freedom of Contracts: The Choice Theory of Contractual Obligation* (forthcoming 2017) (on file with author) [<https://perma.cc/PEJ4-L7ZL>].

221. While Dagan contends that the state should promote even less desirable alternatives (i.e., those that are not often used) and such options that embed “utopian” views, I believe that too many options can result in less choice. See *infra* note 230 and accompanying text.

services.²²² A separate category requires regulation that encourages innovation but still prevents exploitation and barriers to participation.

Lawmakers should tailor such regulations to their particular contexts. As the players in this market are unsophisticated microbusinesses that do not repeat transactions between identical parties, the regulations should take a form that enables participation.²²³ Lawmakers should design procedures that are simple to understand—“in plain English” for “ordinary” (nonbusiness) people. Information must be effortlessly accessible. And the compliance process should not be overly burdensome (e.g., does not require a physical visit to the relevant administrative agency, but can be done via the web). The regulations should not require legal counsel so that following them is not prohibitively expensive.

Such regulations should create an intermediate status befitting the nature of these now-popular access-to-excess-based activities. For example, as Dagan and Heller suggest, the state should create a new category of employment for P2P providers.²²⁴ Rather than employee versus nonemployee, the state should develop an intermediate category of employment suitable for unsophisticated part-timers who use excess capacity—but still work for companies that exercise a strong degree of control over providers. At the least, such a category should enforce both the minimum wage and antidiscrimination protections. Similarly, Doug Hass, a labor law attorney, proposes the creation of a new employment category of “dependent contractor status” to give some basic protection to P2P providers—while still recognizing the flexibility inherent in such employment structure.²²⁵ Alan Krueger and Seth Harris likewise

222. For instance, while many municipalities limit the number of taxi medallions, Uber and the other P2P transportation companies do not need to follow the same process; thus, they can flood the market with their drivers and harm the ability of traditional taxi drivers to earn a decent salary (devaluing the worth of the medallion). An intervention that prevents unfair competition supports the existence of a marketplace that allows effective choice. See Rogers, *supra* note 23, at 87, 89–90; Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years. Now Uber May Be Changing That*, WASH POST (June 20, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/20/taxi-medallions-have-been-the-best-investment-in-america-for-years-now-uber-may-be-changing-that> [<https://perma.cc/2QDH-ZPDQ>].

223. Administrative work, as Elizabeth Emens recently argued, takes time and mental energy that is typically unrecognized by the law. Therefore, she suggests that the government should reduce the level of administrative work it imposes on people. See Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1464 (2015).

224. DAGAN & HELLER, *supra* note 220, at 139–40.

225. Douglas A. Hass, *Protecting the Sharing Economy: A Proposal for FLSA Dependent Contractor Status*, THE DAY SHIFT (Sept. 22, 2015), <http://dayshift.com/2015/09/22/protecting-the-sharing-economy-creating-an-flsa-dependent-contractor-status/56/> [<https://perma.cc/EPG7-GVKW>].

conceive of an “independent worker” status that would grant employee-like protections to workers in the P2P economy; these benefits would include antidiscrimination protections, employer tax withholding, and employer contributions to Social Security and Medicare.²²⁶ Reflecting this prerogative, the National Employment Law Project offers a policy that assures core labor protections, privacy protections, Social Security benefits, and more, for P2P workers.²²⁷

Pluralistic theory can even direct that more options for flexible employment exist—for example, based on full-time or part-time employment; the period in which the provider works for the company; or other factors, such as exclusivity of the workplace (e.g., whether the provider works solely for one company or for more).²²⁸

The same is true for the concern about risk allocation. A new category should impose insurance requirements that protect users and providers alike. Pluralistic theory prescribes that, because people fail to defend themselves against small probabilities of high-consequence events, the state should impose insurance requirements that mitigate market failures; by so doing, the state actively safeguards players in the P2P economy. At the same time, these state-imposed requirements should not constitute barriers to participation in the market, recognizing that workers in the access-to-excess economy are not full-time workers. Additionally, the state’s commitment to a multiplicity of options requires that it actively seek to offer a range of insurance options appropriate to these situations.

4. *Efficiency Rationale for a Separate Category*

Efficiency concerns also serve as an underlying rationale for a regime based on multiple institutions.²²⁹ This is not just to say that the P2P

226. Krueger, *supra* note 177. See also Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”*, THE HAMILTON PROJECT (Dec. 2015), www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris [<https://perma.cc/9uay-cx4m>].

227. Leberstein & Smith, *supra* note 211.

228. While pluralistic principles support creation of more employment structures, they also need to ensure that there are not so many options that the choice becomes too complicated. Too much choice can result in an inability to choose, and thus is inefficient. See generally, BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 3 (2004).

229. Dagan contends that “[a]rguably, efficiency may also serve as the normative foundation of structural pluralism, but for this it is not enough to show that efficiency considerations underlie many rules of various private law institutions.” Dagan, *supra* note 29, at n.7. Dagan explains that autonomy-based pluralism even dictates the creation of alternatives with marginal demand—and the creation of such alternatives is not supported by the efficiency rationale. Discussing efficiency in the particular context does not mean that the state should facilitate multiple regimes only when they are efficient—but, rather, that in the context of the P2P economy, efficiency is a major normative

economy promotes efficiency—but, further, that a menu of options with a particular category of access-to-excess transactions would promote efficiency as another value. In order for the regulatory regimes to provide meaningful choice among institutions, the options should be different from one another, their rules easy to understand, and they should be attractive to users. Put differently, a separate regulatory regime grounded in pluralistic principles must promote efficiency considerations.²³⁰ Efficiency in this context means that the players—consumers and providers alike—can have ex ante, low-cost availability of information about the governing law.²³¹ To choose among options, the players must be able to predict with certainty whether they are operating legally, whether they are risking litigation, and which regulatory obligations they should follow. Conversely, lack of clarity and certainty about the law increases the costs of operating in the market and serves as a barrier to participation.²³² Individuals’ ability to self-govern requires that the options be clear, certain, and effective. As Richard Epstein put it, “permanence and stability are the cardinal virtues of the legal rules that make private innovation and public progress possible.”²³³ This is true in a regime operated by sophisticated players—and thus especially so in one worked by nonprofessionals.²³⁴

Currently, many participants in the P2P economy not only operate unlawfully, but they are also unsure about the paths they need to follow to comply with regulations.²³⁵ Accordingly, creation of a new category would legalize the activity and clarify the regulatory requirements. For

foundation for creation of multiple options and thus provides another rationale for creating a separate regime for access-to-excess-based activities.

230. This is not to say that all options comprising a menu of options must promote efficiency. Dagan argues that the state must also promote lesser-preferred options and “utopian” types of options. However, my concern is that categories that are not used are confusing (because there may be too many options) and can create an administrative burden. *See also* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 599–602 (2013) (discussing the problems in creating a menu of options—in the context of family law—in which regimes are not practical and are not being used). In the case of the P2P economy, the discussion is theoretical because it is clear that a separate category based on access to excess will be used frequently.

231. *Cf.* Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1153 (2000) (explaining efficiency approach as relevant to choice of law rules).

232. *Id.*

233. RICHARD ALLEN EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* xii (1995).

234. Urs Gasser, *The Sharing Economy: Disruptive Effects on Regulation and Paths Forward*, RISK DIALOGUE MAG. (June 16, 2016), http://cgd.swissre.com/risk_dialogue_magazine/Digital_Economy/sharing_economy_disruptive_effects.html [<http://perma.cc/ZC6P-QZ98>] (arguing that regulation is necessary to help nonprofessional consumers and providers understand processes such as collecting taxes and obtaining insurance).

235. *See, e.g.*, Loucks, *supra* note 129, at 338.

example, providers should have easy access to information about their employment status, the insurance requirements, and tax implications in order to make a worthwhile choice to work in the area and in order to maximize wealth.²³⁶ Consumers should be able to find out effortlessly whether they are violating zoning laws, which taxes they need to pay (if any), and whether the ride they are taking is sufficiently safe and insured. Having a category that is different from traditional activity will ensure that people can exchange things lawfully while minimizing the costs of legal uncertainty. This is because imposing the onerous regulations that currently exist would result either in deterring individuals from entering into the market²³⁷ or in driving them to break the law. Conversely, a new regime tailored to deal with small-scale transactions and unsophisticated sellers will enable such transactions.

Furthermore, a separate regime, with clear rules that will increase participation and compliance with the law, will impede the lost benefits that stem from evasion of the law. Without such a regime, the risk is a market that operates underground and without increasing social benefits—such as nonpayment of tax.²³⁸ A separate category that legalizes the activity will be efficient for the state, too.

Finally, having a regime built on access to excess bolsters efficiency because it minimizes Coasean transaction costs, including “search costs, information costs and adverse selection; negotiation and drafting costs; behavioral costs like agency costs, moral hazard, and shirking; and monitoring and enforcement costs.”²³⁹

The way that better access (more choice) intersects with efficiency is evident in the innovation of Uber and other P2P transportation services. Uber’s innovation, Brishen Rogers observes, is in eliminating the taxi marketplace’s main problem: the search cost.²⁴⁰ Two main difficulties increase the search cost in the traditional market place.²⁴¹ First, when (or

236. Shu-Yi Oei & Diane M. Ring, *The Tax Lives of Uber Drivers: Evidence from Internet Discussion Forums*, TUL. PUB. L. RES. PAPER & B.C. L. SCH. LEGAL STUD. RES. PAPER (2016) (study of online interactions of P2P ride providers found that they lacked knowledge—or had confusing and inaccurate knowledge—of some tax aspects).

237. Allen & Berg, *supra* note 12, at 30.

238. O’Hara & Ribstein, *supra* note 231, at 1153.

239. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 231 (2010).

240. Rogers, *supra* note 23, at 88–89.

241. The economic activities of the P2P ride companies can be akin to access-to-excess-based activity in some cases but not in others. It can be an access-to-excess-based activity to the extent that the driver does not use his/her car mainly for professional transportation and that working as a driver gives the customer temporary access to the driver’s skills (for instance, when the driver provides the service as an extra job while being a full-time student). But the driver could have a car

where) cabs are rarely available, consumers will not try to find one. Second, passengers will sometimes take a randomly passing taxi while waiting for their ordered one; and, similarly, cab drivers would prefer picking up a random passenger to answering a call from the dispatcher. Uber, Lyft, and others overcome these problems with their on-demand model. Hence, customers can see when a ride is arriving and are less likely to take a passing alternative (passengers pay a cancellation fee if they cancel rides five minutes after the order); drivers cannot pick up random passengers.²⁴² Therefore, P2P ride services expanded the choice for consumers by providing minute-to-minute supply in a market with minute-to-minute demand—and by minimizing the cost of the ride.

5. *New Regulations Should Prevent Incumbent-Like Firms from Passing as Excess Providers to Evade Regulation*

Another fundamental principle is that a new category must ensure distinctions between activities based on temporary access to excess capacity and conventional activity without excess capacity.²⁴³ The regulations should prevent manipulation, artificial increase of capacity, and exploitation based on a façade of excess capacity. Examples of such manipulations: using a property as a mini-hotel or a car as a full-time taxi—while avoiding the legal requirements that are attached to such activities. Adopting a noninterventionist approach would allow excess-in-disguise types of activities to operate conventional businesses while evading regulation. Such results are contrary to the pluralistic approach and would result in harms to others, as I analyze below.

To respond to this concern, the regulations should distinguish between activities in excess capacity and those that are not. Such distinction, obviously, already manifests some normative judgment of what “excess capacity” means. For example, the use of someone’s sofa for an entire year can be seen as capitalizing excess capacity or as a conventional use of space for sale. But pluralistic theory does not shy

that is used mainly for transportation—as with some taxi drivers—and work full time as a driver. In such cases, this is not an access-to-excess-based activity, as it is not leveraging existing capacity.

242. Rogers, *supra* note 23, at 88.

243. Distinguishing between access-to-excess-based activities and standard exchanges depends on the particular sector and requires a flexible framework. However, the basic principle is capitalizing *existing* capacity—not creating a new one. In distinguishing between the categories, the two relevant factors are the period that the provider works and the existing utilization. Using one’s capacity (for instance, one’s space or car) without acquiring another more capacity is evidence of excess capacity. Conversely, long and constant use of assets, goods, or skills indicates that the provider is not capitalizing or increasing capacity—but, rather, operating a traditional business.

away from normative judgments—it embraces what Dagan calls “moderate perfectionism” in ascertaining the appropriate balance between competing values.²⁴⁴ So, the decision of what falls under the separate category is based upon the principle of balanced values—an examination of the balance of values that are embedded within each category.

The regulation of the P2P economy should thus require that directives separate traditional activity from excess-capacity activities to assure fair competition. As I discuss in section D,²⁴⁵ a few municipalities have already established such policies—in the areas of short-term rentals and transportation—that distinguish between activities that are based on excess capacities and traditional exchanges in disguise.

Regarding employment, the category of access to excess must distinguish between workers who use excess time and energy and workers who substitute their labor in the P2P market for time they would otherwise spend in incumbent markets. The latter group includes providers who work full time, similarly to conventional employees.²⁴⁶ Indeed, many workers in the P2P economy do not rely on it as their primary source of income—one survey found that 38% of P2P workers are students.²⁴⁷ However, 29% of workers in this survey indicated that 75–100% of their income comes from working in the P2P economy.²⁴⁸ Working as a full-time employee but without employee rights and protections harms these workers because they are ineligible for basic protections such as those provided by the Fair Labor Standards Act and by antidiscrimination laws.²⁴⁹ Additionally, having these workers operate as independent contractors allows the P2P companies to compete unfairly. In 2016, Uber drivers filed a class-action lawsuit in which they argue that the company lowers its operating costs by misclassifying its drivers as “independent contractors” rather than “employees.”²⁵⁰ In this

244. Dagan, *supra* note 29, at 1429–37 (“Although private law, loyal to its pluralism, is careful not to impose one-size-fits-all prescriptions, it is still a profoundly normative—indeed perfectionist—practice.”).

245. *See infra* section II.D.

246. By “full time,” I mean not only the number of hours per week that the driver works—but also the period of time in which she does so. Thus, working full time during a limited period is different from driving full time the entire year.

247. Rossa, *supra* note 208.

248. *Id.*

249. Felstiner, *supra* note 199, at 170.

250. *Zawada v. Uber Techns., Inc.*, No. 16-cv-11334 (E.D. Mich. Apr. 12, 2016). The plaintiffs posit that, under Michigan state law, the independent contractor status mischaracterizes the

way, the plaintiffs argue, the company is able to compete with traditional taxi providers, who are required to pay their drivers all that the law mandates.²⁵¹

The law already recognizes that designating employees as “independent contractors” does not mean that they really are. The law employs a multifactor test that examines the function of the worker, rather than her title.²⁵² Therefore, courts already have the tools to compel companies to distinguish between employees-in-disguise and those who genuinely work in an excess capacity.²⁵³ When a provider works full time for a P2P company, she is more akin to a taxi driver and should have heightened employee protections. As for those who work part time and for whom the P2P work is not their main source of income, they should be included in the special category of access to excess, explained in subsection 3.

Of course, the distinction between who is a “standard” full-time worker and who is an access-to-excess-based worker is not as binary. Yet, the law of employment—pertaining to the definition of “employee”—is rarely rigid and typically deals with distinctions.²⁵⁴

One could argue that designating approximately 30% of current P2P workers as “employees” would decrease their choice, as—most likely—P2P firms would deactivate (discharge) them. I argue that pluralistic principles justify such result. This is because full-time access-to-excess-based workers are not using their excess assets or skills and, as a result,

relationship between Uber and its employees: Uber closely oversees each part of the process, including performing background checks on prospective drivers, regulating driver performance via user ratings, and setting nonnegotiable salaries. The company also prohibits drivers from soliciting their own customers and retains the sole discretion of firing an Uber driver based on failure to meet Uber’s nonnegotiable metrics. As a result, Uber drivers unjustifiably lose traditional employee benefits, such as minimum wage, itemized wage statements, overtime premium pay, workers’ compensation, paid vacation time, and health insurance.

251. In recent years, other P2P-economy companies outside of the transportation arena have been accused of misclassifying workers as “independent contractors” in order to compete unfairly. See, for example, *Zenelaj v. Handybook, Inc.*, 82 F. Supp. 3d 968 (N.D. Cal. 2015), in which a class-action lawsuit was brought against Handybook, a housecleaning P2P service, by its workers, and *Otey v. Crowdfunder*, No. 12-5524 (N.D. Cal. 2014). In *Otey v. Crowdfunder*, a P2P service that outsources miscellaneous tasks to workers, was sued by its workers, who cited minimum wage violations on account of the workers’ misclassification as independent contractors. *Id.* Rather than allow a court to decide the worker classification issue, Crowdfunder settled the case for more than \$500,000. *Id.*

252. See Felstiner, *supra* note 199, at 171–72.

253. Leberstein & Smith, *supra* note 211, at 1 (“[M]any individuals working in the on-demand economy are employees, and their employers should treat them as such.”).

254. See, e.g., Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT’L L. 43, 45–46 (2009) (discussing the value of labor flexibility).

gain an unfair advantage over professional workers who are subject to regulation. As such, the full-time-workers-in-disguise are harming other professionals—i.e., those who participate in the same market, but whose workforce is more expensive because they comply with regulations. When incumbent-like actors masquerade as members of the P2P marketplace, they do not add variety, they erode it—both by competing unfairly against the remaining incumbent players and by occupying the space that a true innovator would otherwise occupy. To wit, if someone uses her private car to operate a taxi-like service, she is doing the same work as others but devaluing the medallions that the latter had to purchase.²⁵⁵ Similarly, if someone offers handyman services on a full-time basis, he competes with companies that hire employees and give them paid sick days, benefits, and so forth. Workers should be free to choose between working at a job that offers benefits but provides less autonomy, or giving up security and benefits in favor of flexibility and entrepreneurship. But this does not mean that workers should do the same work—except, without any rights—as one who works for a non-app-based company. Such pattern supports unfair competition and generates “second-class” workers without job security and basic benefits. So, distinguishing between increased excess capacity and traditional services—even if doing so does not allow some professionals to participate in this market—still adheres to pluralistic principles by preserving consumers’ and providers’ abilities to make meaningful choices in varied markets of satisfactory goods and services.

There are still open questions about what such “pluralistic-vision” regulations will look like. The next section moves to real-life examples, discussing regulatory regimes that conform to the normative orders of pluralistic theory and some that do not.

D. Test Cases

Since the rise of the P2P economy, state and municipality policymakers have experimented with a variety of regulatory schemes. Some are good examples of a pluralistic approach while others adopted regulations that are inconsistent with pluralistic principles.

255. As a result of P2P transportation companies’ entrance into industry, the price of medallions has fallen sharply. See Gartland, *supra* note 205. The way that municipalities have allocated medallions has long been a problem, as they have often allocated an insufficient amount, which created a taxi shortage. This does not mean that lawmakers should allow the market to solve this problem by flooding the market with taxi-like cars that do not need medallions—but, rather, that cities should allocate more medallions.

In both the short-term rentals and transportation arenas there are, in general, three common approaches: nonintervention (or unsuccessful attempts to intervene); regulation that is akin to banning—or drastically limiting—the P2P economy; and an intermediate approach that supports the activities but restrains their harms.

In the short-term rentals sector, a nonintervention approach is antipluralistic. Such approach allows providers to operate residential property as hotels. The result of such regimes can be a decrease in rental housing and lost tax revenue to the municipality—in addition to other nuisances to the neighbors.²⁵⁶ Such an approach perhaps increases choice for some tourists and affords extra income for renters, but those limited benefits come at the price of harm to others—neighbors, hotels, and taxpayers.

On the other end of the spectrum are municipalities that chose a complete ban or very restrictive rules. In Santa Barbara, California, for example, short-term residential rentals, including vacation rentals and “time share projects,” are regulated as “hotels,” meaning, in effect, that they need to comply with burdensome regulations and, in effect, are prohibited.²⁵⁷ Such an approach is antipluralistic, too. The consequence of such a regime is that short-term rentals go “underground” and all tax revenues are lost. Simultaneously, short-term rental visitors may choose to vacation in other places that offer such options. And owners of short-term rentals lose the benefit of the extra income and of capitalizing on their under-utilized properties.

Between these two poles are varieties of regulatory approaches that facilitate the use of excess capacity but prevent the harmful consequences of nonintervention. The principles of one such approach are promulgated by the U.S. Conference of Mayors (USCM).²⁵⁸ This

256. See, e.g., Carolyn Said, *The Airbnb Effect*, S.F. CHRON. (July 12, 2015), <http://www.sfchronicle.com/airbnb-impact-san-francisco-2015/#1> [<http://perma.cc/V8LQ-JJKX>] (finding that in San Francisco at least 350 entire homes listed on Airbnb appear to be full-time vacation rentals—in a city “wracked by a housing crisis, where a typical year sees just 2,000 new units added, a few hundred units off the market makes a significant dent”).

257. Santa Barbara states the scope of hotel regulation as:

A building, group of buildings or a portion of a building which is designed for or occupied as the temporary abiding place of individuals for less than thirty (30) consecutive days including, but not limited to establishments held out to the public as auto courts, bed and breakfast inns, hostels, inns, motels, motor lodges, time share projects, tourist courts, and other similar uses.

SANTA BARBARA, CAL., VACATION RENTALS, http://www.santabarbaraca.gov/services/planning/mpe/vacation_rentals.asp [<http://perma.cc/8GZ3-76KU>].

258. THE U.S. CONF. OF MAYORS, ADOPTED RESOLUTION: PROMOTION OF ECONOMIC DEVELOPMENT THROUGH VISITORS INDUSTRY (2012), <http://www.strsantabarbara.org/wordpress/wp-content/uploads/2015/10/STRSB-Exhibit-B.pdf> [<http://perma.cc/LT54-EM2D>].

policy relies on a balance of considerations: on the one hand, hotel taxes are important to the existence of cities, and short-term rentals can provide more of them; tourists bring more economic opportunities to the city; homeowners benefit from renting their home and getting income from their excess capacity; and simple regulations can enforce tax collection and compliance by owners. At the same time, onerous and complicated regulations will result in the industry's going underground and the loss of taxes. The USCM thus announced:

[S]upport for economic development opportunities through the visitors industry by encouraging regulations of the short-term rental industry that (1) establish a reliable way for the municipality to identify and contact the short-term rental owner; (2) make the tax collection and remittance obligations clear to the short-term rental owner; and (3) treat short-term rental tenants the same as long-term rental tenants.²⁵⁹

There are many variations of such intermediate approaches that are compatible with the pluralistic approach, and several municipalities follow such plans. For examples, San Francisco,²⁶⁰ Austin,²⁶¹ and Nashville²⁶² all created special regimes that legalize short-term rental but restrict it to the use of excess capacity. Their approaches differ in the details, but what they have in common is that they allow homeowners to rent their apartments for short times—but also limit and supervise those rentals. Thus, in all of them, the homeowner must register her property or apply for a permit if she wants to use it for short rentals. In San Francisco, the owner or tenant cannot rent for more than ninety days a year—a rule that prevents the creation of units that function as hotels. Renters are also required to pay hotel tax—collected by the facilitator (the P2P firm).²⁶³ In Austin and San Francisco, the owner also needs to give a proof of insurance. All the aforementioned cities have also beefed up enforcements efforts (attempts to find noncomplying rentals).

259. *Id.* These principles are not entirely consistent with pluralistic principles, as they advocate treating short-term rentals the same as long-term rentals—while I propose to treat them differently. Yet, they are helpful in showing a balanced approach and the goals advanced by such approach.

260. *Office of Short-Term Rental Registry & FAQs*, SAN FRANCISCO, CAL., PLANNING DEP'T, <http://www.sf-planning.org/index.aspx?page=4004> [<http://perma.cc/EK83-9DF4>].

261. *Vacation Rental Licensing*, AUSTIN, TX., CODE DEP'T, <http://www.austintexas.gov/str> [<http://perma.cc/5ANZ-7HXW>].

262. *Short Term Rental Property*, NASHVILLE, TN., CONSTRUCTION AND PERMITS, <http://www.nashville.gov/Codes-Administration/Construction-and-Permits/Short-Term-Rentals.aspx> [<http://perma.cc/6MA7-JUPC>].

263. Stephen Fishman, *Overview of Airbnb in San Francisco*, NOLO, <http://www.nolo.com/legal-encyclopedia/overview-airbnb-law-san-francisco.html> [<http://perma.cc/LD7U-QRW9>].

The regulations enacted by these cities are still open to debate and criticism by both sides.²⁶⁴ Some argue that these cities impede innovation by imposing administrative barriers (such as registration) that will be most harmful to those who have difficulty engaging with such administrative tasks.²⁶⁵ But the point is that the regulations are subject to constant reforms and changes.²⁶⁶ I do not claim that they are perfect—only that they try to strike a balance between enabling more choice and preventing the harm of a laissez-faire regime. They encourage increased excess use while banning commercial use in disguise.

In the transportation field, the account is somewhat similar. While some municipalities chose a total ban on Uber-type entities²⁶⁷ and others responded by nonintervention, a third approach—more in accord with pluralistic principles—is starting to emerge. Such a regime subjects the P2P ride companies to some restrictions, typically those relevant to the safety of passengers. California, for instance, created a new category of transportation, “transportation network companies.”²⁶⁸ The providers for P2P ride companies can only operate in their own private cars (thus, restricting the practice to those who use excess capacity). The rules also require companies to “[conduct] criminal background checks for each driver, establish a driver training program, implement a zero-tolerance policy on drugs and alcohol, and require insurance coverage.”²⁶⁹ This

264. See, e.g., Natalia Ciolko, *There Goes the Neighborhood*, THE AUSTIN CHRON. (Aug. 11, 2015, 10:39 AM), <http://www.austinchronicle.com/daily/news/2015-08-11/there-goes-the-neighborhood/> [<https://perma.cc/9LVH-TZNZ>] (reporting how, despite the regulations, the market for short-term rentals still harms the residents in Austin).

265. Indeed, the regulations in San Francisco are also in terms of procedures—they require that hosts register in person. Fishman, *supra* note 263.

266. See, e.g., Lee Romney, Tracey Lien & Matt Hamilton, *Airbnb Wins the Vote in San Francisco, but City’s Housing Debate Rages On*, L.A. TIMES (Nov. 4, 2015, 7:40 AM), <http://www.latimes.com/local/california/la-me-ln-airbnb-san-francisco-vote-housing-debate-20151104-htmlstory.html> [<http://perma.cc/6LEM-AXC6>] (reporting about a measure, rejected in a popular vote, that proposed restricting the number of days a host can rent her apartment).

267. See, e.g., Rachel Weiner, *Virginia Trying to Put Brakes on Taxi-Like Services*, WASH. POST (June 26, 2014), https://www.washingtonpost.com/local/crime/2014/06/26/65d83a3e-fc85-11e3-b1f4-8e77c632c07b_story.html?utm_term=.1835a58f3688 [<https://perma.cc/NQV9-KH38>] (reporting that the Virginia Department of Motor Vehicles issued cease-and-desist letters to both Uber and Lyft).

268. TNC is defined as “an organization . . . that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.” PUB. UTIL. COMM. OF THE STATE OF CAL., PROPOSED DECISION OF COMMISSIONER PEEVEY, DECISION ADOPTING RULES AND REGULATIONS TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS TO THE TRANSPORTATION INDUSTRY 24 (Sept. 19, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K122/77122741.PDF> [<http://perma.cc/RZ4W-G5RK>].

269. *Id.*

kind of regulation is consistent with pluralistic principles because it allows the use of privately owned cars and ensures passenger safety, while still cultivating the economic activity.

A contested and highly charged issue is that of fingerprinting the drivers of P2P ride firms. Uber and Lyft recently left Austin (Texas) after a bill to overturn the fingerprinting requirement was defeated in a referendum.²⁷⁰ Lyft and Uber invested \$8.6 million in this ballot campaign. Similarly, Boston police recently started to fingerprint Uber and Lyft drivers.²⁷¹ A few other municipalities are also debating whether to enact such a requirement.²⁷² On the one hand, opponents of fingerprinting argue that the problem is that, due to deficiencies in the FBI database, it can limit job prospects for people who have not been convicted of a crime. On the other hand, fingerprinting is often required of drivers in traditional transportation firms (in some municipalities, all taxi drivers must be fingerprinted; in some, only limousine drivers). Pluralistic theory principles can help here, too: a separate category based on access to excess does not warrant any differences in terms of safety between conventional and access-to-excess-based activity. Nothing in the creation of a category of access to excess need lead to compromises on safety requirements and different treatment between the categories. Thus, pluralistic principles can support imposing a fingerprinting requirement on drivers. To the extent that the FBI database has problems, not only should a serious effort be made to correct the errors, but also anyone who is unfairly denied a job because of such errors must be allowed to show that the data is mistaken.

Multiple variations of regulations that comport with the pluralistic idea have evolved. But perhaps this is also the shortcoming of pluralistic theory—it may be too elastic and not provide a concrete answer to specific regulatory questions. The next part explores this possible deficiency.

270. Douglas MacMillan & Rachel Emma Silverman, *Uber, Lyft Shut Down in Austin Over Fingerprint Vote*, WALL ST. J. (May 9, 2016), <http://www.wsj.com/articles/texas-capital-city-votes-to-keep-fingerprinting-for-uber-lyft-drivers-1462796972> [<http://perma.cc/A4S2-9RV4>].

271. Curt Woodward, *Boston Police Are Fingerprinting Taxi Drivers, But Uber Says It Won't Budge*, BOS. GLOBE (Feb. 23, 2016), <http://www.betaboston.com/news/2016/02/23/boston-police-are-fingerprinting-taxi-drivers-but-uber-says-it-wont-budge/> [<http://perma.cc/EEM5-3GPX>].

272. Associated Press, *Ex-Obama Official Helps Uber in Opposing Fingerprint-Based Background Checks*, WASH. POST (June 8, 2016), https://www.washingtonpost.com/business/economy/ex-obama-official-helps-uber-in-opposing-fingerprint-based-background-checks/2016/06/08/1d43c174-2da9-11e6-b5db-e9bc84a2c8e4_story.html [<https://perma.cc/YN6R-B6S8>].

III. WHAT THE P2P ECONOMY TEACHES ABOUT PLURALISTIC THEORY

The emerging P2P economy and the regulatory responses provide an important lesson about the limitations of pluralistic theory and its interpretation. In this part, I argue that the P2P economy teaches that while pluralistic theory is valuable in producing general principles, it falls short in instructing vis-à-vis the particular details. Further, pluralistic rhetoric may camouflage the adoption of free-market policies under the guise of pluralism.

The P2P economy can serve as a real-life laboratory to examine the way principles of pluralistic theory function in practice. This is because, although the P2P economy has not embedded some of the main principles of pluralism (so far, many municipalities have taken an approach of nonintervention), it still represents a system that enables different modes of valuation and facilitates individual choice.²⁷³ Therefore, from the debate about possible regulation of the P2P economy, we can glean productive lessons about pluralistic theory and its limitations.

Pluralistic theory helps us to see the need for regulation and the goals of such regulation (to preserve adequate and effective choice). In essence, the theory's principles demand that rational lawmakers cultivate multiple choices while balancing conflicting values. In a world where values are incommensurable and often in conflict, pluralistic theory is constructive in fleshing out policy responses in the face of specific needs. Rather than having one resolution, pluralistic theory can be useful in suggesting that a few options may be the answer.²⁷⁴

273. As of August 2015, twenty-three U.S. states did not regulate P2P ride services, according to a report by the National Conference of State Legislatures. Mark Wolf & Amanda Essex, *Ride-Sharing and the Future of Transportation*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 3, 2015), www.ncsl.org/blog/2015/08/03/ride-sharing-and-the-future-of-transportation.aspx [<http://perma.cc/WS2W-YHDP>].

274. Incommensurability, some argue, presents a dilemma of rational choice when the lawmaker must decide between two options that are not commensurable. The question of whether incommensurability (or incomparability) of values precludes rational choice has been the subject of debate among philosophers for years and is far from being resolved. Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1372 (2001) (“The problems of incommensurability arise when we try to compare plural, irreducible, and conflicting values, or choose between options that exhibit or will result in the realization of plural, irreducible, and conflicting values.”); Ruth Chang, *Introduction to Incommensurability, Incomparability, and Practical Reason*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 13–34 (1997) (surveying seven types of leading incomparability arguments and asserting that none is compelling). For the purpose of this Article, it is unnecessary to examine the various accounts. Rather, suffice it to note that even if incommensurability does not present a problem of rational

While pluralistic theory does not entail that all choices are permissible, it does endorse a wide diversity of ways of life. “It condemns any law that totally precludes citizens from pursuing one of the necessary basic goods. It also condemns any law that prohibits citizens from instantiating a basic good in the only mode of which they are capable.”²⁷⁵ But, “[i]t does not tell lawmakers which rationally permissible resolution they should prefer.”²⁷⁶

Indeed, the flexibility of the theory is a double-edged sword. As noted above, the drawback of legal pluralistic theory is that it does not provide adequate instruction about the specific content of the regulations. Because the theory is amenable to so many configurations, it is open to many interpretations and advocates can use the framework to justify more than one particular policy. For instance, the theory does not give a definitive answer on whether the San Francisco model for short-term rentals (more restrictive in its nature)²⁷⁷ is better than that of Nashville (less stringent).²⁷⁸ Similarly, the theory does not provide enough instruction as to which rights and protections should be included in the status of dependent contractor.²⁷⁹

Eventually, a pluralistic framework cannot resolve regulatory debates solely on its own terms; extrinsic concerns will ultimately drive the precise regulatory choice. Thus, another difficulty with such a flexible framework is that the political process can adversely affect it. Dagan suggests that “[b]oth the existing categories and their underlying values are always subject to debate and reform, so that some institutions may fade away while new ones emerge and yet others change their character or split.”²⁸⁰ The problem with this idealistic view is that it ignores the obstacles to public choice, such as the influence of interest groups over

choice, autonomy-based pluralism, as so far developed, also does not tell much about how to balance and accommodate these competing values.

275. Henry S. Mather, *Law-Making and Incommensurability*, 47 MCGILL L.J. 345, 378 (2002).

276. *Id.* at 388 (emphasis added).

277. See *Office of Short-Term Rental Registry & FAQs*, *supra* note 260.

278. See *Short Term Rental Property*, *supra* note 262.

279. As I detail in section II.C, pluralistic theory supports government regulation designed to create options promoting consumer choice. However, considering the regulatory challenges that the P2P economy presents, pluralistic theory does not endorse one specific regulatory paradigm, leaving the logistics up to interpretation. Several scholars and theorists have proposed variations of an intermediate form of “sharing economy” regulation, in between nonintervention and traditional regulation. See, e.g., Krueger, *supra* note 177 (proposing an “independent worker” status entailing discrimination protections, Social Security benefits, etc.); Hass, *supra* note 225 (proposing a paradigm, similar to Krueger’s, called “dependent contractor status”).

280. DAGAN, *supra* note 192, at 182.

legislators.²⁸¹ Because of these political barriers, pluralistic theory—despite the best-intentioned application of it—can be difficult to translate into legislation in a way that integrates diverse and balanced values.²⁸²

The different forces active in the debate about regulating the P2P economy strongly reflect this limitation. Almost everywhere, the power of the lobbyist—rather than a commitment to a balance of values—is what has dictated the outcome of regulatory considerations. Take, for example, the municipalities that ban short-term rentals—these are cities in which the hotel industry is powerful.²⁸³ What occurred in Anaheim, California, the hometown of Disneyland, encapsulates the hotel industry’s influence in that city vis-à-vis the P2P economy. The Anaheim city council in June 2016 banned all short-term residential rentals in the city, giving residents eighteen months to close their operations or apply for a special license.²⁸⁴ Anaheim has 153 hotels, largely to accommodate visitors to Disneyland, Angel Stadium, and the Anaheim Convention Center.²⁸⁵ Although Anaheim residents had voiced concerns about parking problems, noise, and other nuisances caused by short-term renters, it is also likely that the prominent local hotel industry exerted pressure on Anaheim city officials to eliminate home-sharing services as a competitor to the hotels.²⁸⁶

On the other hand, Silicon Valley companies have been able to exert an enormous amount of political pressure to protect P2P companies from regulation; unsuccessful attempts to place modest limitations on Uber

281. Cass Sunstein, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* 100 (2015).

282. Cf. O’Hara & Ribstein, *supra* note 231, at 1157 (“The winning interest groups are typically those who can organize most cheaply and effectively to raise and spend money, or to mobilize votes and other political resources.”).

283. See, e.g., Bianca Barragan, *Santa Monica Just Banned Airbnb’s Biggest Moneymakers*, CURBED (May 13, 2015), http://la.curbed.com/archives/2015/05/santa_monica_just_banned_airbnbs_biggest_moneymakers.php [<http://perma.cc/7Q2W-SJTL>].

284. Hugo Martin, *Anaheim Bans Short-Term Rentals in Residential Areas*, L.A. TIMES (July 1, 2016, 11:06 AM), <http://www.latimes.com/business/la-fi-anaheim-rentals-20160701-snap-story.html> [<http://perma.cc/P5SP-QTPP>].

285. *Hotel Statistics and Frequently Asked Questions*, VISIT ANAHEIM, <http://visitanaheim.org/planner-tools/hotel-statistics-and-frequently-asked-questions> [<http://perma.cc/5HTW-KX4Z>].

286. In July 2016, Airbnb sued the city of Anaheim, contesting the fact that the newly passed Anaheim law imposes fines on Airbnb and other hosting services for not removing, within 10 days, listings that violate the city ordinance. The Anaheim lawsuit follows on the heels of a similar suit filed in 2016, in which Airbnb challenged a San Francisco ordinance that imposes fines on Airbnb for advertising properties violating city regulations on permits and length of stay. Hugo Martin, *Airbnb Sues Anaheim Over Law That Makes the Rental Site Liable for Hosts Who Violate City Law*, L.A. TIMES (July 28, 2016, 3:40 PM), <http://www.latimes.com/business/la-fi-airbnb-anaheim-20160728-snap-story.html> [<http://perma.cc/QZP2-TAMP>].

and Airbnb in New York City demonstrate the barriers to regulation even in the face of policymakers who are trying to achieve a more balanced solution, one that is consistent with a pluralistic approach.²⁸⁷ Thus, the structure of the menu of options is often influenced and essentially determined by lobbyists and by organizational power—rather than by adherence to pluralistic principles.

Most important, the elasticity of the theory presents a risk that pluralism will serve as a fig leaf for the adoption of free-market policies. Because of its plasticity, lawmakers can fill in the menu of options by a few different structures—including those developed under a neoliberal approach—while creating a false sense of choice.²⁸⁸ As stated by Kent Greenfield, “[s]imply framing a political issue as an issue of choice is a very powerful and successful persuasive technique, especially in the United States.”²⁸⁹ The danger that some advocates will use pluralistic principles to advance unrestrained free-market principles is genuine because pluralistic theory is founded on the notion of autonomy and thus is uniquely susceptible to free-market interpretation. Fundamentally, the theory proffers that adequate choice allows people to self-govern. Consequently, the state—with some limitations—should provide people these options. The essential part of the reasoning adopted by pluralistic theory—i.e., the significance of choice—resembles much of neoliberal and libertarian philosophies that emphasize personal liberty above all, incarnated as the right to choose.²⁹⁰ However, it bears repeating that pluralistic theory does not advocate unrestrained choice: in cases of market failure, harm to third parties, and opportunistic behavior pluralistic theory endorses a system with some restrictions.²⁹¹

287. Matt Flegenheimer, *De Blasio Administration Dropping Plan for Uber Cap, for Now*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html?_r=0 [<http://perma.cc/Q5UY-R5V2>]; Tim Logan, *At Airbnb, Growth Brings Scrutiny, Regulation*, L.A. TIMES (June 10, 2015, 3:00 PM), <http://www.latimes.com/business/la-fi-airbnb-20150610-story.html> [<http://perma.cc/69MA-J6UE>].

288. For a definition of neoliberalism, see Christopher Tomlins, *The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations*, 78 LAW & CONTEMP. PROBS. 1, 10–12 (2015).

289. Kent Greenfield, *Corporate Law and the Rhetoric of Choice*, 24 L. & ECON.: TOWARD SOC. JUST. 69–81 (2009).

290. See, e.g., CASS SUNSTEIN, CHOOSING NOT TO CHOOSE, UNDERSTANDING THE VALUE OF CHOICE 10–11, 87 (2015) (discussing the importance of the right to choose in legal and philosophical traditions).

291. Sunstein, *supra* note 179, at 849 (“[E]ven a system that generally respects freedom of contract may block exchanges on several grounds. Typically such grounds involve some form of market failure . . .”).

Despite the fact that pluralistic theory does not validate principles of unrestrained free market, some of the current debates over the regulation of the P2P economy demonstrate that pluralism can often give rise to a free-market approach in disguise. Hence, although some lawmakers have been able to regulate the P2P economy, in other regions the P2P economy has no restraints, while its advocates embrace the language of choice and autonomy.²⁹²

Moreover, because a pluralistic system is, from its nature, grounded in flexibility and choice, it might lead to entrenchment of existing values and balances rather than to new ideas. As stated by Jedediah Purdy, “[B]eing constituted by well-established social practices, [Dagan’s pluralistic theory] tend[s] toward familiar values and balances of value, not radical innovations.”²⁹³ And as Kent Greenfield explained:

[T]he rhetoric of choice is an excellent way to support existing power relationships. The assertion that people acting within such power relationships are simply choosing their current situation undermines efforts to change those relationships. The powerful stay powerful; the weak stay weak. Everyone involved has chosen their current position, and their choice should be respected.²⁹⁴

Indeed, the P2P economy is an example of this tendency to stick to a familiar balance of values. On the surface, it may seem that the P2P economy is innovative in the balance of values it embeds because it augments nonprofessionals’ opportunities to use excess capacity. However, without regulation to prevent the harms to consumers and providers, it is often the case that the structure entrenches more individual-autonomy and free-market values than other values and principles (it definitely does not advance altruistic values or values that challenge the status quo of ownership and fair distribution of resources). When a pluralistic structure emerges, noninterference is a common result. Moreover, the entrenchment of familiar principles also characterizes the regulatory debate, which oftentimes operates in binary terms of “regulation or nothing.” For instance, providers are either employees or not, with nothing in between; regulation of short-term rentals as hotels or not at all; regulation of ride-share providers as traditional taxi drivers or not at all—but regulatory innovation is too often ignored. Indeed, the pluralistic approach is

292. See, e.g., Flegenheimer, *supra* note 287.

293. Jedediah Purdy, *Some Pluralism About Pluralism: A Comment on Hanoch Dagan’s “Pluralism and Perfectionism in Private Law”*, 113 COLUM. L. REV. SIDEBAR 9, 18 (2013).

294. Greenfield, *supra* note 289, at 63.

recurrently susceptible to adopting existing patterns rather than creative solutions.

The P2P economy lays bare these problems. The rhetoric of diverse choice is compelling and can serve to systematically belie not only the evasion of regulation but also other societal harms. Pluralistic theory demands appropriate regulation, but politics, public opinion, and powerful interest groups can prevent such oversight. The P2P economy demonstrates the implications that pluralism may well have in “the real world”—it can and should serve as a meta principle for regulation, but it also contains the risk of misuse, misinterpretation, and entrenchment of traditional balance of values.

CONCLUSION

The P2P economy keeps growing at an accelerating pace. It presents—and will continue to present—critical questions about regulatory policy. Inevitably, as this business model grows, the calls will increase for regulatory restraint of the participating firms, as will calls to let such firms operate with limited regulatory intervention. While I do not deny the challenges and risks the P2P model entails, I suggest that we not fall into the hysteria created by interested parties. The P2P economy is, to be sure, technologically innovative. But the legal and political questions that the economic model raises are familiar. In fact, digging more deeply into the structure of the P2P economy shows that this “new” system only exacerbates already existing questions about employment structure, ownership, regulation, and fair distribution. As Tim Wu has articulated, history teaches that although significant innovations like the radio, movies, and cable television changed our lives, they did not change “the nature of our existence. For whatever social transformation any of them might have effected, in the end, each would take its place to uphold the social structure that has been with us since the Industrial Revolution.”²⁹⁵ The P2P economy is no different—it entrenches and intensifies existing economic and social practices and approaches.

The fact that the economic model presents familiar tensions does not mean that it poses no risk of harm to employees, to consumers, and to established businesses models. Therefore, the unifying, pluralistic approach this Article has developed provides important insights that illuminate appropriate regulatory responses. While such a theory does

295. TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 6 (2010).

not offer a concrete answer to every regulatory question in a sectorial fashion, it helps in identifying basic principles that should apply to each particular sector. The prism of pluralistic theory offered in this Article also highlights the bigger picture: it points out the main virtue of the model as diversifying and enhancing consumers’ and providers’ choices. The demand for increased choice already justifies the state’s role in facilitating these options.

However, pluralistic theory also poses a warning. The call for the state to facilitate access to effective choice is not a call for a Wild West approach to regulation. Nor does pluralistic theory defend a thin notion of individual autonomy over other values. A state or municipality that is committed to pluralism must maintain regulatory boundaries that advance core democratic values—particularly, *substantive* notions of equality and autonomy.

Ultimately, pluralistic theory is frequently mistaken for a champion of free-market logic—which leads to a noninterventionist approach by the state. In particular, the plasticity of pluralistic theory—and misguided notions that its essence is a commitment to individual autonomy—produces, counterintuitively, a breeding ground for laissez-faire policies. The P2P economy offers a case study to show how such a hands-off approach will result—and has resulted—in unfair competition and possibly the demise of valuable incumbent options, in part resulting from the intensification of a freelance model of employment. Therefore, the P2P economy teaches that a pluralistic approach is only pluralistic to the extent that it advances substantive notions of equality and autonomy. In the realm of the P2P economy, only efficient protective regulation can secure this. Absent these safeguards, producers and consumers will be deprived of some socially valuable choices—the opposite outcome than what pluralism intends.