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"Government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it."

—Ronald Reagan[1]

Innovation always outpaces regulation. In recent years, regulators have struggled to remain relevant in a digital economy that appears to neither want nor need their interference. Taxi medallions were for decades the safest investment in America, always increasing in value as demand for transportation exceeded the supply provided by city-sanctioned taxi cartels. The development of rideshare applications like Uber and Lyft upended that heavily regulated industry practically overnight. Similar things have occurred in the hospitality industry with Airbnb, and even areas like law and medicine have been significantly affected by technological innovation.

The disruption caused by new business models has led to push-back from legislatures and administrative agencies—as well as the entrenched interests those parties serve. These reactions, while ostensibly made with consumer and employee welfare in mind, have actually harmed the ordinary people they claim to protect, with favored insiders benefiting from decreased competition. But even though the legacy interests holding back the sharing economy are taxi cartels and hotel chains, that doesn't mean governments should instead *subsidize* their competitors, the way some cities are beginning to do as a stopgap solution to public-transport problems. Uber is now a nimble, innovative company, but given the opportunity to capture regulators and gain

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1 Remarks to State Chairpersons of the National White House Conference on Small Business (Aug. 15, 1986).

unfair advantage over the next generation of market entrants, it will do so.

In Section I of this article, we describe the costs of restrictive regulations, considering such unintended effects as the stifling of innovation, regulatory capture by established businesses to secure market share, and the disproportionate effects on the poor and marginalized. Section II treats the tendency of subsidization and other forms of patronage to distort prices while raising demand, interfering with incentives, and undermining democracy. Ultimately, there's great arrogance in picking winners and losers. We can't see the future, so any attempt to control the economy *will* have unintended consequences—more often than not trying to preserve established business models and stifling innovation. What the economy of the future needs isn't artisanal regulation for every new technology, but a stable and predictable legal framework that allows companies to plan for the future without being hamstrung in the present.

I. RESTRICTIVE REGULATIONS AND OUTRIGHT BANS

Regulations are generally promulgated in reaction to a perceived problem. A legislature or executive agency sees companies engaging in dangerous activity, or a certain industry failing, or global temperatures rising, and begins working on some sort of solution. It's an incredibly complex process whereby drafters sift through massive amounts of data, respond to the concerns of the many people whom the regulations may affect, and anticipate wide-ranging consequences. This is difficult enough to do with problems that can be directly observed. When regulators try to be forward-thinking and draft regulations to solve *future* problems, it gets even more complicated. Good information is much harder to come by; regulators must rely on sometimes shaky predictions.

A. Generally

1. Stifling Innovation

All regulations will have unintended consequences somewhere down the line. Even when regulators try to anticipate future conditions, they simply don't have the information necessary to completely mitigate the negative consequences of their actions. There are high costs for getting it wrong, especially in situations where technology and business models are changing rapidly. Nobel Prize-winning economist Friedrich Hayek spoke often about how little information central planners tend to actually have about the economies they attempt to control:

"Economists operate with the fictitious assumption that all the relevant data is known, but this is totally unrealistic. Nobody knows all the data. What we have is widely dispersed knowledge, which cannot be concentrated in one mind."[2] It is a special arrogance that allows us to believe that a single person or agency—regardless of how educated and intelligent they may be—can possibly aggregate and apply enough information to craft wide-ranging regulations that neither provide beneficial incentives nor produce unforeseen consequences. Hayek called this the "fatal conceit."

Regulatory costs can be direct, as when new airborne particulate matter standards under the Clean Air Act mandate new filtration systems.[3] While these costs are significant—the Environmental Protection Agency predicts that the annual direct compliance costs for the Clean Air Act will reach $65 billion by 2020[4]—they're dwarfed by the indirect costs, which agencies often conveniently neglect to discuss.[5]

Indirect costs include things such as layoffs or decreased hiring, and reduced investment in firms' capital stock.[6] Shifting resources into compliance forces firms to cut spending elsewhere, meaning that divisions are merged or dropped and planned expansions are held up, with the corresponding jobs lost or never created. Decreased profits also make industries less attractive to investors. These kinds of indirect costs are not only bad for the firms themselves, but for the larger economy, because retarded job growth and capital investment affect labor and investment markets. There are also less tangible costs, such

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[2] DIEGO PIZANO, *A Conversation with Professor Friedrich A. Hayek*, *IN* CONVERSATIONS WITH GREAT ECONOMISTS 9 (2009).

[3] *See, e.g.*, EPA OFFICE OF AIR AND RADIATION, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 6 n. 4 (2011), https://www.epa.gov/sites/production/files/2015-07/documents/summaryreport.pdf [https://perma.cc/7F9D-6BVC].

[4] *Id.* at 2 (where the EPA specifically only looked at "direct" costs when assessing the twenty-year impact of the Clean Air Act).

[5] *See, e.g.*, *id.* at 6. In discussing economists' tendency to consider only those effects that are "seen" and ignoring the "unseen," Frédéric Bastiat tells the story of a shopkeeper whose son breaks a window. His neighbors remark that this hardship is at least good for the local economy, for "[w]hat would become of the glaziers if no one ever broke a window?" Bastiat counters that the money used to replace the window could have been used for new shoes or a new book, and that the only thing that has changed is that the world now has one less window. The "forgotten man" who misses out on a sale due to the broken window "makes us understand how absurd it is to see a profit in destruction. It is he who will soon teach us that it is equally absurd to see a profit in trade restriction, which is, after all, nothing more nor less than partial destruction." Frédéric Bastiat, *What Is Seen and What Is Not Seen*, *in* SELECTED ESSAYS ON POLITICAL ECONOMY 1–4 (George B. de Huszar ed., Seymour Cain trans., William Volker Fund 1964) (1850).

[6] Michael Greenstone, *The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufactures*, 110 J. POL. ECON. 1175, 1198–1202 (2002) (finding statistically significant negative correlations between EPA enforcement against firms with "non-attainment status" in regard to Clean Air Act emission standards and both employment growth and capital stock growth rate).

as that the piling on of complicated and ambiguous regulations increases uncertainty, chills beneficial activity, and ties up in litigation vast amounts of money (public and private) that could be used for creative purposes.[7]

Regulatory costs—both direct and indirect, "seen" and "unseen"—can significantly impede innovation in two major ways that we have already alluded to: (1) as resources are reallocated to account for compliance (or litigation) costs, fewer resources are available for research and development, upgrading equipment, and investing in the young employees most likely to introduce new ideas; and (2) onerous regulations make engaging in innovative behavior both more costly and more risky. The consequences of pushing the regulatory envelope may simply be too high to risk productive activities that could raise regulators' hackles.

There is considerable debate over just how much various regulations cost to implement, and how much benefit they provide in return. There is no shortage of reports conducting some form of cost-benefit analysis on different regulatory efforts, many published by the agencies themselves under the requirements of Executive Order 12,866.[8] For example, the EPA avers that the Clean Air Act will have generated $65 billion in direct costs and almost $2 trillion in direct benefits annually by 2020.[9] A number of scholars have claimed that high regulatory costs are little more than a myth, with the generalized societal benefits of regulation far outweighing any compliance costs firms may face.[10] These studies, however, nearly always underestimate costs by ignoring the *indirect* and *social* costs of regulation, while including generous and attenuated assumptions about the benefits.[11] In contrast, a 2003 paper analyzing the cost-effectiveness of seventy-six regulatory actions taken between 1967 and 2001, that explicitly adjusts for the fact that "organizations public and private tend to overstate the

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[7] *See* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 822–36 (2002) (outlining the ways legal uncertainty in the wake of new legislation or regulation increases compliance costs).

[8] Exec. Ord. No. 12,866, 3 C.F.R. § 638 (1993) (Executive Order 12,866 is the executive order under which the Office of Information and Regulatory Affairs (OIRA) operates. It requires that agencies prepare detailed cost-benefit reports on all economically significant regulations.).

[9] EPA OFFICE OF AIR AND RADIATION, *supra* note 3, at 2.

[10] *See generally, e.g.*, Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071 (2005–2006); E.B. GOODSTEIN, JOBS AND THE ENVIRONMENT: THE MYTH OF A NATIONAL TRADE-OFF (1994), http://epi.3cdn.net/83dfae8d6d0c6151e1_55m6id8x6.pdf [https://perma.cc/M4AT-4WFJ].

[11] *See generally* Ackerman, *supra* note 10; Goodstein, *supra* note 10, at 19–25.

effectiveness of their actions," found that a significant proportion of regulations caused more harm than good.[12]

The industry insiders who usually have significant influence over how their regulations are written and enforced have little incentive to make it easier for innovative upstarts to chip away at their market share. We address regulatory capture at greater length in the next section, but it's important to discuss how this phenomenon is likely to affect innovation. Even when using a scalpel, attempting to carefully balance incentives and formulate nuanced rules, regulators can doom innovation in any number of ways. But government doesn't always use a scalpel—and has been known to bring down the hammer and ban new technologies or business models outright.[13] It should be fairly obvious how such extreme policies stifle innovation: it's hard to innovate when innovation itself is illegal. Yet it's important to note that not all regulation is even close to as tactical and nuanced as the deeply problematic methods discussed throughout this article.

2. Regulatory Capture

Overregulation can have disastrous effects on the economy even when it is a good faith, honest effort to protect employees, the public, the environment, etc. Unfortunately, good faith cannot always be assumed. Much regulation—particularly at the local and less publicly visible levels—is written and enforced with only token justifications that it is in the public interest. Regulators often become "captured" by well-connected industry players, meaning that established interests influence officials to promulgate rules that benefit themselves rather than society as a whole. Occasionally, these interests skip the whole

[12] John F. Morrall III, *Saving Lives: A Review of the Record* 9, 15–17 (AEI-Brookings Joint Center, Working Paper No. 03-6, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=424523 [https://perma.cc/BX8F-YTWW] (The opportunity costs of regulations—some of the resources used "would have been used to reduce risk in the absence of regulation"—led the author to conclude that only twenty-seven of the seventy-six regulations analyzed (more than a third) actually did more harm than good).

[13] In addition to the government reactions to Uber and Airbnb discussed at length in this article, regulators' "shoot first, ask questions later" approach can be seen in some of their reactions to other emerging tech companies such as the DYI legal assistance site LegalZoom, Robert Ambrogi, *Latest Legal Victory has LegalZoom Poised for Growth*, ABA JOURNAL (Aug. 1, 2014), http://www.abajournal.com/magazine/article/latest_legal_victory_has_legalzoom_poised_for_growth [https://perma.cc/FRF9-B2QJ]; daily fantasy sports websites like FanDuel, Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Aug. 27, 2016), http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states [https://perma.cc/CP4J-W4JC]; and homemade food startups like Homemade and Josephine, Sarah Kessler, *The Food-Sharing Economy Is Delicious and Illegal—Will It Survive?*, FAST COMPANY: GIGGED (Jul. 7, 2016), https://www.fastcompany.com/3061498/the-food-sharing-economy-is-delicious-and-illegal-will-it-survive [https://perma.cc/HE2L-KMWS].

"influence" part and simply regulate their competitors directly, as dentists did in North Carolina before the arrangement was struck down by the Supreme Court.[14] It "occurs when most or all of the benefits of a program go to some single, reasonably small interest (an industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers)."[15] And the more heavily regulated an industry, the more incentive there is for firms to work to capture its regulators. This is a particularly dangerous situation, because:

> if a firm succeeds in capturing its regulator, it and perhaps a handful of other incumbents will reap the benefits of enhanced profits, while a large and diffuse group of consumers will bear the costs. . . . [and] small, concentrated interests often find it easier to organize for their collective benefit than do large and diffuse interests.[16]

Thus we arrive at the current situation, with an untold number of anti-consumer "consumer protection" regulations on the books, funneling money and power into private hands.

Barriers to entry are often hidden within consumer or environmental advocacy. For example, traditional African hairbraiders are required to spend thousands of hours in barber schools, ostensibly to protect their customers' safety—even though ninety percent of the curriculum is irrelevant to their profession, hairbraiding is neither taught nor tested, and there's no evidence that unlicensed hairbraiders pose any threat to public health.[17] Both the primary backers of the regulations and those sitting on licensing boards tend to be the very barbers and hairdressers who would be in direct competition with hairbraiders. Wisconsin bans the selling of home-baked goods on public-safety grounds, even though the policy applies to items the state deems "not potentially hazardous" and lobbying to protect the ban has been dominated by incumbent commercial bakers.[18] Attempts by taxi cartels

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[14] *See generally, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S.Ct. 1101 (2015) (where a state dental board consisting of dental professionals tried to exclude others from providing teeth-whitening services after dentists complained about the low prices these competitors charged).

[15] JAMES Q. WILSON, BUREAUCRACY 76 (1989).

[16] Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS., ENTREPRENEURSHIP & L. 529, 534–35 (2015) (citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard Univ. Press rev. ed. 1965)).

[17] *See, e.g.*, Niang v. Carroll, No. 4:14 CV 1100, 2016 U.S. Dist. LEXIS 127885 (E.D. Mo. Sept. 20, 2016).

[18] Complaint at 1–2, 6, 10, Kivirist v. Wis. Dep't of Agric., No. 2016-CV-000006 (Wis. Cir. Ct. Jan. 13, 2016), http://ij.org/wp-content/uploads/2016/01/Wisconsin-complaint.pdf [https://perma.

to keep out ridesharing apps are justified through fearmongering over perceived consumer-safety issues.[19]

Even some of the most obvious examples of benevolent governance turn out to be self-interested attempts at quashing competition when critically examined. This sort of disconnect between appearance and reality is perhaps best illustrated by the famous Supreme Court case *Lochner v. New York,* in which the Court struck down New York's maximum-hours law for bakers.[20] *Lochner*, a part of the popularly reviled "anticanon," is taught in law schools around the country as the worst example of judicial activism.[21] According to the traditional narrative, the Court rejected constitutional precedent in order to force its *laissez faire* politics into law and protect business interests from Progressive reforms. But recent scholarship by David Bernstein and others has shed new light on the case.[22] New York's law, much less than an attempt to protect workers from exploitation, was pushed by the large, unionized bakeries as a way of putting out small entrepreneurs—particularly bakeries owned by recent Jewish, Italian, and French immigrants—who couldn't absorb the increased labor costs.[23] The xenophobic and anti-competitive motivations behind the law have been excised from law school curricula (except, of course, at the fine institution that publishes this law journal).

These are merely a handful of the anti-competitive sham health-and-safety regulations that have recently been challenged in court. When legislatures and agencies insist on controlling the economy at this granular a level, the incentives for incumbents to lobby for barriers to entry are simply too alluring to resist. Large, powerful incumbents will invariably push rules that affect only their potential competitors, and when that fails will support byzantine regulatory regimes because they're the only ones who can absorb the compliance costs—a sort of tribute to the government that's easier than actually competing. It's telling that this kind of cronyism—big business exploiting relationships with regulators to wield state power for pecuniary gain—can even put

cc/RE8Z-FBG2].

19 *See* Part I.B, *infra*.

20 198 U.S. 45 (1905).

21 *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380–81 (2011) ("Each case embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute. Together, they map out the land mines of the American constitutional order, and thereby help to constitute that order: we are what we are not.").

22 *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER (2011).

23 *Id.* at 23–29. The person who filed the complaint against Joseph Lochner was actually a longtime employee with whom Lochner had a "close and longstanding relationship." There is no indication that Lochner's bakery was ever a particularly dangerous, dirty, or unhealthy place to work. *Id.* at 29.

rifle-toting Tea Partiers and drum-circling Occupy Wall Streeters on the same side.

3. How the Poor and Marginalized Always Bear the Highest Cost

Businesses generally respond to increased costs in one or more ways: raising prices, cutting staff, reducing dividends, shifting resources from reinvestment to operations, lowering the quality of the goods or services provided, or simply leaving the jurisdiction altogether. One thing most of these responses have in common is that the negative consequences ultimately fall hardest on the poor. For those earning a middle-class salary, a moderate increase in rent or the price of gas is inconsequential. These costs can be absorbed by the rest of the budget, and requires maybe cutting down the number of meals eaten out or waiting an extra few months to upgrade to the new iPhone. But for a single mom working two jobs, higher rent means having to move to a less-safe neighborhood farther from work. Higher transportation costs mean no more travelling to see relatives over the holidays. Those marginal cost increases—the kind seen by well-meaning policy-makers as reasonable prices to pay for "consumer protection"—can inflict big harms on consumers who simply don't have extra cash.[24]

Low-income people are also the ones working the jobs that are the first to go when companies feel pressured from lower profits; low-skill jobs are the easiest to automate when the companies determine that the payroll is no longer structurally sustainable. The most obvious examples are assembly-line workers whose factories move overseas, or fast-food workers being replaced with self-serve computer terminals in places that raise the minimum wage.[25]

While money may not buy happiness, it does buy options. To the person of means who buys her groceries from Whole Foods and clothes from upscale boutiques—or even Macy's—the local Wal-Mart is an eyesore. It's a giant, ugly building that person will never set foot in, filled with a class of people she never meets and low-quality items she would never buy. Supporting restrictive zoning that prevents big-box

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[24] *See* Dustin Chambers & Courtney A. Collins, *How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation* 20–21 (Mercatus Center, Working Paper, 2016), https://www.mercatus.org/system/files/Chambers-How-Regs-Affect-Prices-v2.pdf [https://perma.cc/M43P-7VAU] (finding that increases in consumer prices associated with increased regulation disproportionately disadvantage low-income households).

[25] *See* Darrell M. West & Jack Karsten, *Rising Minimum Wages Make Automation More Cost-Effective*, BROOKINGS INST.: TECHTANK (Sept. 30, 2015), https://www.brookings.edu/blog/techtank/2015/09/30/rising-minimum-wages-make-automation-more-cost-effective/ [http://perma.cc/LTK4-FD55].

stores from opening is a no-brainer, improving the aesthetic quality of the neighborhood and leaving room for "authentic" mom-and-pop retailers. But that person isn't cutting coupons or buying in bulk to stretch a food budget. She has plenty of options, so why would she care that Wal-Mart is the only store within 25 miles that sells groceries cheap enough for a family to be able to eat nutritious dinners? As Nobel Prize-winning economist Milton Friedman once explained:

> Industrial progress, mechanical improvement, all of the great wonders of the modern era have meant relatively little to the wealthy. The rich in ancient Greece would have benefited hardly at all from modern plumbing: running servants replaced running water. Television and radio—the patricians of Rome could enjoy the leading musicians and actors in their home, could have the leading artists as domestic retainers. Ready-to-wear clothing, supermarkets—all these and many other modern developments would have added little to their life. They would have welcomed the improvements in transportation and in medicine, but for the rest, the great achievements of Western capitalism have rebounded primarily to the benefit of the ordinary person. These achievements have made available to the masses conveniences and amenities that were previously the exclusive prerogative of the rich and powerful.[26]

This is the problem that regulators who refuse to acknowledge the impact their policies have on prices fail to understand. Low-cost consumer goods and services—often sold at razor-thin margins—are extremely important to the well-being of the large number of Americans who cannot afford to purchase more expensive replacements or travel long distances to shop, as are the sorts of jobs that the upper-middle class people making policy decisions might scoff at.

B. Uber

1. Employees vs. Independent Contractors

Uber is currently embroiled in a legal battle over the designation of its drivers. In April 2016, the company reached a proposed settlement in two cases in which the plaintiff drivers argued that they were employees, not independent contractors, and were thus entitled to expense reimbursement and the full gratuity paid by riders through the

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[26] MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 147–48 (1980).

Uber app.[27] The essence of the plaintiffs' arguments is that drivers have to comply with Uber's requirements lest they receive low grades and even be terminated, and yet Uber classifies them as independent contractors not entitled to reimbursement for car maintenance or the protections of wage and labor laws. [28]

In the proposed settlement, the parties did not alter Uber's classification of drivers as independent contractors, but Uber agreed to pay $84 million. Further, Uber agreed to provide drivers with more information about their rating, not deactivate drivers for regularly turning down ride requests, and create a drivers' association to ensure that drivers have a voice in the company's operations. But the judge handling the two cases has now rejected the settlement upon concluding that it "as a whole as currently structured is not fair, adequate, and reasonable."[29]

The strange thing about those purporting to represent the interests of Uber drivers—both in the courts and in the editorial pages—is that they're not particularly representative of actual Uber drivers. The vast majority of Uber drivers do not drive full-time. For the typical Uber driver, taking fares is a side gig to earn extra cash or supplement a fixed income. In a December 2014 survey of 601 active Uber drivers, only twenty-four percent reported that Uber was their only source of income.[30] The most common reasons given for driving with Uber were:

> "to earn more income to better support myself or my family" (91 percent); "to be my own boss and set my own schedule" (87 percent); "to have more flexibility in my schedule and balance my work with my life and family" (85 percent); "to help maintain a steady income because other sources of income are unstable/unpredictable" (74 percent).[31]

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[27] *See* Travis Kalanick, *Growing and Growing Up*, UBER NEWSROOM (Apr. 21, 2016), https://newsroom.uber.com/growing-and-growing-up [https://perma.cc/JQ5H-Q8RL]; O'Connor v. Uber Techs., Inc., No. 13-cv-03826, 2016 U.S. Dist. LEXIS 110281, at *11 (N.D. Cal. Aug. 18, 2016) (merged for settlement with Yucesoy v. Uber Techs., Inc., No. C-15-00262, 2015 U.S. Dist. LEXIS 98515 (N.D. Cal. Jul. 28, 2015)).

[28] *See* Second Amended Complaint at 5, O'Connor v. Uber Techs., Inc., No. 13-03826 (N.D. Cal. Nov. 17, 2014), http://uberlitigation.com/docs/1.pdf [https://perma.cc/E4J7-E9HT]; Rachel Emma Silverman, *Uber, Lyft Cases Focus on Drivers' Legal Status*, WALL ST. J. (Mar. 15, 2015), http://www.wsj.com/articles/uber-lyft-cases-could-help-clarify-drivers-legal-status-1426456519 [http://perma.cc/F9CJ-7T93].

[29] *O'Connor*, 2016 U.S. Dist. LEXIS 110281, at *75.

[30] JONATHAN V. HALL & ALAN B. KRUEGER, AN ANALYSIS OF THE LABOR MARKET FOR UBER'S DRIVER-PARTNERS IN THE UNITED STATES 11 (2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf [http://perma.cc/FTF4-JE8A].

[31] *Id.*

Forty-two percent of women and twenty-nine percent of men said that a major reason for driving with Uber was that they "'can only work part-time or flexible schedules' because of a 'family, education, or health reason,'" and thirty-two percent of drivers said that flexibility in order to find a "steady, full-time job" was "a major reason" for driving with Uber.[32]

For many people who drive for Uber, the current system's flexibility is one of the company's biggest draws. College students, parents of young children, and others who need a source of income that can accommodate irregular schedules would be greatly disserviced by Uber's switching to an employer/employee model—which would mean forcing Uber to fit its new square peg into the old round regulatory hole. Moreover, these kinds of drivers would probably not even qualify for many of the benefits that the activists are advocating.[33] But they would still be stuck with the tradeoffs—such as giving up the ability to choose when and where they work and being limited in the number of hours they can work.[34] This would make driving for Uber much less appealing, and could even force drivers to choose between Uber and their other job or passion. It is quite possible that at least some would lose their jobs as Uber lays off drivers it can no longer afford.

The fight for employee status is defined by the concept of "concentrated benefits, dispersed costs." This holds true among the drivers, only a small percentage of whom actually see driving for Uber as a full-time occupation. It also holds true more broadly. Increased labor costs will be pushed onto consumers in the form of higher rates, fewer drivers, and longer waits. This impact will fall hardest on those consumers who are poor and geographically isolated. Professionals using Uber as a designated driver on a Friday night or as a makeshift car service can afford to pay a premium. They have disposable income and in the absence of ridesharing apps, they would default to higher-priced taxis and black cars. Poor people who don't have access to a car, however, and who rely on Uber as a relatively affordable way to get to

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[32] *Id.* at 11–12.

[33] Many benefits are contingent on hours worked. For example, under the Affordable Care Act, employees do not qualify for employer provided health insurance unless they work at least thirty hours per week. 26 U.S.C. § 4980H(c)(4). This would exclude most of Uber's drivers, half of whom work less than fifteen hours per week and 85 percent of whom work less than 35 hours per week. *Id.* at 18.

[34] One can already see how increased "worker protections" lead to increased corporate control. Uber's voluntary guaranteed-earnings program sets minimum hourly earnings to compensate for cutting fares in certain cities, but brings significant restrictions on drivers' flexibility. Gregory Ferenstein, *Uber to Cut Fares in 48 Cities, Promises to Guarantee Driver Earnings*, VENTURE BEAT (Jan. 8, 2015), http://venturebeat.com/2015/01/08/uber-well-guarantee-driver-earnings-in-every-city-where-were-cutting-prices [http://perma.cc/7MHR-EWMW].

places public transit doesn't reach, don't have the option of simply paying more. Those people have come to rely on Uber to solve this "last mile problem," and regulators have thus far struggled to present any other feasible solution.[35]

2. Over-Regulation/Bans Due to Regulatory Capture by Taxi Cartels

While there has been some effort to cloak ridesharing regulations in the language of consumer protection or labor rights,[36] the predominate force behind most new regulation and legislation has been traditional taxi companies. In many cities, the taxi market has been heavily regulated and dominated by a small number of cartels for decades. Regulations generally have strictly limited the supply of medallions—physical badges placed on each car showing that the owner has a permit to operate in the city—which has allowed these cartels to fairly effectively monopolize the market and keep potential competitors out. By limiting the number of medallions in circulation, regulators created artificial scarcity in the supply of taxis, allowing cabs to charge above-market rates. The scarcity also raised the price of any medallions that go on sale. Along with the myriad regulatory hurdles that an independent driver often needs to jump over to be legally allowed to accept fares, this dynamic has had the effect of raising significant barriers to entry around the taxi industry, entrenching existing cartels and providing them with little incentive to lower fares, adopt new technologies, or improve service.

Once the rideshare app revolution began, however, the cartels' control over for-hire transportation rapidly disappeared. In New York City, medallion prices have plummeted from a peak of around $1.3 million in May 2013 to as little as $325,000 in April 2016[37] and NYC

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[35] *See* CENTER FOR NEIGHBORHOOD TECHNOLOGY (CNT), TRANSIT-ORIENTED DEVELOPMENT IN THE CHICAGO REGION 3 (2013), http://www.cnt.org/sites/default/files/publications/CNT_TODInChicagoRegion.pdf [https://perma.cc/CHN6-4JA3] ("Even dedicated transit users often are forced to buy cars to meet transportation needs that transit cannot efficiently fill."). For further discussion on the difficulties associated with solving the last mile problem, see Hai Wang & Amedeo Odoni, *Approximating the Performance of a "Last Mile" Transportation System*, 50 TRANSP. SCI. 659 (2016).

[36] *See, e.g.*, Matt Richtel, *Distracted Driving and the Risks of Ride-Hailing Services Like Uber*, N.Y. TIMES: BITS (Dec. 21, 2014), http://bits.blogs.nytimes.com/2014/12/21/distracted-driving-and-the-risks-of-ride-hailing-services-like-uber [http://perma.cc/9ACA-3B3Y]; Faiz Siddiqui, *Your Uber Driver Is Twice as Likely to Cancel if You're Black*, WASH. POST (Nov. 1, 2016), https://www.washingtonpost.com/news/tripping/wp/2016/11/01/your-uber-driver-is-twice-as-likely-to-cancel-if-youre-black [http://perma.cc/6XNA-EEEY]. Similar criticisms can be found in the academy. *See, e.g.*, Koopman, *supra* note 16; Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015).

[37] *Compare* New York City Taxi and Limousine Commission, *May 2013 Medallion Transfers*

Yellow Taxis' share of total trips fell by almost twenty-three percent between April 2015 and April 2016.[38] Monopolists are by definition not huge fans of competition, so taxi companies across the country quickly turned to lobbying their cities and states to do something about this Uber startup poaching their business.[39]

Some of the anti-Uber regulations include increased insurance and background check/fingerprinting requirements, fare restrictions (including bans on surge pricing), route restrictions (*e.g.*, no picking up at the airport), medallion requirements, and outright bans.[40] When the D.C. Taxicab Commission issued proposed rulemakings in response to the rise of ride-sharing apps in 2013, the Federal Trade Commission issued a 15-page letter commenting on all the different ways the proposed rules could impede competition.[41] Anti-competitive rules included the requirement that non-taxi for-fare cars (defined as "sedans" within the larger subset of "luxury class vehicles") must *only* accept fares through a digital dispatching service, must "be black or blue-black in color," and weigh at least 3,200 pounds.[42] Proposed rules prohibited any association with existing taxicab companies, "making a 'substantial change' to [Uber's] dispatch or payment solution . . . without DCTC's written approval" for two years, and required extensive daily disclosures of information to the Taxicab Commission.[43] New York City has proposed regulations requiring ride-sharing companies to treat

(May 2013), http://www.nyc.gov/html/tlc/downloads/pdf/may_2013_medallion_transfers.pdf [https://perma.cc/LVB2-NHYB] *with* New York City Taxi and Limousine Commission, *April 2016 Medallion Sales Chart (April 2016)*, http://www.nyc.gov/html/tlc/downloads/pdf/april_2016_medallion_transfers.pdf [https://perma.cc/4MD6-ZJS7].

38 Johana Bhuiyan, *Uber Is Growing in NYC, but Yellow Taxis Still Do Double the Business*, RECODE (Jul. 11, 2016), http://www.recode.net/2016/7/11/12152564/uber-taxis-new-york [http://perma.cc/G6SN-46QU].

39 *See, e.g.*, Emily Badger, *The Taxi Industry Is Crushing Uber and Lyft on the Lobbying Front, 3,500 to 1*, WASH. POST (July 31, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/31/the-taxi-industry-is-crushing-uber-and-lyft-on-the-lobbying-front-3500-to-1 [https://perma.cc/BF8L-EG7B].

40 *See, e.g.*, Mike McPhate, *Uber and Lyft End Rides in Austin to Protest Fingerprint Background Checks*, N.Y. TIMES (May 9, 2016), https://www.nytimes.com/2016/05/10/technology/uber-and-lyft-stop-rides-in-austin-to-protest-fingerprint-background-checks.html [https://perma.cc/FX6X-EPLM]; Harriet Taylor, *Uber and Lyft Are Getting Pushback from Municipalities all over the US*, CNBC (Sept. 2, 2016, 11:51 AM ET) http://www.cnbc.com/2016/09/02/uber-and-lyft-are-getting-pushback-from-municipalities-all-over-the-us.html; Aamer Madhani, *Chicago Taxi Group Asks Appellate Court to Even Playing Field with Uber*, USA TODAY (Sept. 19, 2016) http://www.usatoday.com/story/news/2016/09/19/chicago-taxi-group-asks-appellate-court-even-playing-field-uber/90706852 [https://perma.cc/J6H5-7LEZ].

41 Letter from Andrew I. Gavil et al., FTC to Jacques P. Lerner, General Counsel, District of Columbia Taxicab Commission (June 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf [https://perma.cc/6GM2-32F4].

42 *Id.* at 4–5.

43 *Id.*

drivers as employees and provide benefits, forcing all drivers of for-hire vehicles to be compensated in the same way, and requiring a certain percentage of Uber cars to be wheelchair accessible.[44] Similar regulations have popped up throughout the country, and while "ridesharing has been able to expand in most areas relatively free of burdensome regulations,"[45] the ridesharing industry continues to face constant threats of overly burdensome regulation pushed by entrenched cartels.

Again, the negative effects of these restrictions hurt the poor and geographically isolated people the most. Practices like surge pricing, penalties for riders cancelling rides, drivers' ability to rate riders, and the fact that drivers are using their own cars on their own time incentivize drivers to work a wider variety of hours and operate in underserved areas.[46] Anyone who's ever tried to hail a cab at night in Queens—or who's been forced to choose between walking five miles home or waiting an hour and a half for dispatch to send a cab that may never arrive—understands just how much traditional taxis are failing to serve large portions of the population. Unless you live in the middle of a big (expensive) downtown area or only need to travel between hotels and airports, taxis are expensive, unreliable, or simply not present.

Uber creates jobs for thousands of people. Drivers won't get rich or advance into the company's management, and for most people driving for Uber isn't a great replacement for a full-time job offering benefits and a more predictable paycheck. But it is a decently paying gig that requires no real education or skills: as long as you're a non-felon with a driver's license and access to a fairly modern car, you're probably qualified. The pearl-clutchers may turn their noses up at that, but for millions of individuals with few marketable skills and limited professional networks—particularly recent immigrants and racial minorities—driving for Uber is one of the few opportunities available to start making money and building a résumé. It also tends to pay better than low-skill positions in retail or fast food.[47] And there's a substantial

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[44] OFFICE OF MAYOR BILL DEBLASIO, FOR-HIRE VEHICLE TRANSPORTATION STUDY 8–11 (2016), http://www1.nyc.gov/assets/operations/downloads/pdf/For-Hire-Vehicle-Transportation-Study.pdf [https://perma.cc/TPT7-PB5D].

[45] Jared Meyer, *From Regulating Uber to Subsidizing It*, REASON (Mar. 14, 2016), http://reason.com/archives/2016/03/14/from-regulating-uber-to-subsidizing-it [http://perma.cc/A9PF-BB4R]

[46] *See* ROSANNA SMART ET AL., FASTER & CHEAPER: HOW RIDE-SOURCING FILLS A GAP IN LOW-INCOME LOS ANGELES NEIGHBORHOODS 4 (2015), http://botecanalysis.com/wp-content/uploads/2015/07/LATS-Final-Report.pdf [https://perma.cc/CH3Y-FNX3] (finding that riders in low-income areas of Los Angeles could expect to wait twice as long and pay twice as much for a taxi as for an UberX ride on average).

[47] Calculating the average hourly income of Uber drivers has proved difficult, as factors such

intangible benefit that comes with effectively being your own boss. Uber drivers get to choose when they work, where they work, and for how long—a freedom and independence that people working a typical minimum-wage job lack. Regulations that prevent Uber from operating in a given area or limit the kinds of fares drivers can take kill these opportunities, for the benefit of connected insiders.

Moreover, regulatory schemes that prevent or limit Uber's access to the taxi market harm not only the drivers and consumers interacting directly with the company, but also the public at large. Jurisdictions with no or limited Uber service forego all of the jobs that would be created by the company's presence, as well as the increase in income-tax revenues. Having an affordable, convenient way to get home also encourages people to go out on the town, spending money at stores, restaurants, bars, and entertainment establishments—meaning that anti-Uber cities and states lose out on potentially massive multiplier benefits from increased consumer spending and revitalization of downtown commercial areas. Finally, the 24/7 availability of easy-to-summon and easy-to-pay designated drivers means that areas with widespread Uber use suffer from fewer drunk drivers. According to a report by Mothers Against Drunk Driving, Uber's entry into Seattle was associated with a ten percent decrease in DUIs,[48] and a Benenson Strategy Group survey found that "88% of respondents over the age of 21 agree with the statement that 'Uber has made it easier for me to avoid driving home when I've had too much to drink,'" and 70–80 percent said Uber has made it less likely that their friends drive after drinking.[49]

as age; gender; driving history; make, model, and age of car; city; neighborhood; and choice of hours worked all vary widely from driver to driver (and even over time for the same driver). For example, Uber itself claimed in 2015 that the nationwide average hourly income before expenses is $19 per hour, Hall, *supra* note 30, at 23, while Buzzfeed News calculated the average income for drivers in three cities to range between $8.77 and $13.17 per hour. Caroline O'Donovan & Jeremy Singer-Vine, *How Much Uber Drivers Actually Make Per Hour*, BUZZFEED NEWS (Jun. 22, 2016), https://www.buzzfeed.com/carolineodonovan/internal-uber-driver-pay-numbers?utm_term=.ffgex0gWN#.hegkqgG80 [https://perma.cc/YA4D-VERF]. The Buzzfeed analysis, however, did not account for costs related to miles driven without a paying fare, the double payroll tax independent contractors pay, or the fact that a significant amount of drivers' expenses can be written off on their taxes. *See* Jeremy Singer-Vine & Caroline O'Donovan, *Methodology for Estimating Uber Drivers' Hourly Net Earnings*, BUZZFEED NEWS (Jun. 22, 2016), https://www.buzzfeed.com/jsvine/methodology-for-estimating-uber-drivers-hourly-net-earnings?utm_term=.un2vv3baAn#.goKkk9qzaN [https://perma.cc/WF4B-ZM4G]. It should be noted, though, that even most lower estimates of average driver income are higher than the federal minimum wage of $7.25 per hour.

[48] UBER & MOTHERS AGAINST DRUNK DRIVING, MORE OPTIONS. SHIFTING MINDSETS. DRIVING BETTER CHOICES. 3 (2015), https://2q72xc49mze8bkcog2f01nlh-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/UberMADD-Report.pdf [http://perma.cc/4CJ5-MSPH].

[49] *Id.* at 10. *See also* BENENSON STRATEGY GROUP, STUDY: DRINKING, DRIVING, AND TRANSPORTATION OPTIONS, http://www.bsgco.com/insights/study-drinking-driving-and-transportation-options [http://perma.cc/K69M-PFJ3] (last visited Dec. 12, 2016).

C. Airbnb

1. Regulatory Capture in the Airbnb Context

Much like how the regulatory attacks on Uber have been spearheaded by the taxicab industry, opposition to Airbnb's revolution of the short-term rental market has emanated primarily from the hotel industry. Concerned that the ability of residents to rent out their own homes in a deregulated manner will hurt their bottom line, hotel companies have lobbied for legislation that would hamper the new business model. In the words of Jon Bortz, CEO of Pebblebrook Hotel Trust: while his company used to have an "ability to price at maybe what the customer would describe as sort of gouging rates . . . . I'd say we've lost a lot of that ability at this point within the major markets where these events [large events like Comic-Con International or music festivals] take place."[50] The day before New York Governor Andrew Cuomo signed a new law severely restricting the properties that can be advertised on Airbnb, Mike Barnello, CEO of LaSalle Hotel Properties, said that the new ban "should be a big boost in the arm for the business, certainly in terms of pricing."[51]

New York's new law makes it illegal to advertise renting out an entire apartment for less than 30 days.[52] While it was already illegal under the state's Multiple Dwelling Law for an individual to rent out his home for less than 30 days when they are themselves not physically present,[53] the new law makes the situation worse by making it easier for the government to find and slap nonconforming hosts with a $7,500 fine—and opens Airbnb itself up to equal liability.[54] In October 2016, Airbnb filed a federal lawsuit challenging the law as a violation of the company's and hosts' First Amendment rights and as preempted by the Communications Decency Act, only to drop the case several weeks later after the city promised not to prosecute Airbnb and only target its users.[55] This situation, unfortunate as it is, perfectly illustrates the

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[50] Craig Karmin, *Airbnb Crimps Hotels' Power on Pricing*, WALL ST. J. (Sept. 29, 2015), http://www.wsj.com/articles/airbnb-crimps-hotels-power-on-pricing-1443519181 [http://perma.cc/MD25-HTFE].

[51] Mike Barnello, LaSalle Hotel Properties Q3 2016 Earnings Conference Call Transcript (Oct. 20, 2016), http://seekingalpha.com/article/4013676-lasalle-hotel-properties-lho-ceo-mike-barnello-q3-2016-results-earnings-call-transcript [http://perma.cc/GQT4-RKT4].

[52] N.Y. MULT. DWELL. LAW § 121 (Consol. 2016).

[53] N.Y. MULT. DWELL. LAW § 4(8)(a) (Consol. 2016).

[54] N.Y. MULT. DWELL. LAW § 121 (Consol. 2016).

[55] Complaint, Airbnb v. Schneiderman, No. 16-cv-8239 (S.D.N.Y. Oct. 21, 2016), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2314&context=historical [https://perma.cc/S2QL-C6QW]; *see* Kate Conger, *Airbnb Sues New York City*, TECHCRUNCH (Oct. 21, 2016), https://techcrunch.com/2016/10/21/aibnb-sues-new-york-city [http://perma.cc/N8TP-4FYQ];

problem of regulatory capture, and the danger of assuming businesses and regulators are always adversaries. Airbnb, for all its lofty rhetoric about protecting the rights of its users, ended its opposition to an overbearing law as soon as it was able to make a deal that protected its narrow interests, selling its own users out in the hopes of a cozy relationship with regulators. After all, the only thing better than no regulations are stringent regulations that don't apply to you.

New York's law is merely the best-publicized battle over hotel-backed anti-apartment-sharing regulations. The Santa Monica City Council passed a similar ban in 2015.[56] The first host prosecuted under the ban entered into a plea deal in July 2016, agreeing to a $3,500 fine and two years' probation.[57] In October 2016, a Nashville judge struck down an ordinance that required potential hosts of short-term rentals to first apply for a permit from the city. [58]

2. The Affordable Housing Problem

Most of the backlash against Airbnb, particularly in densely populated cities like New York and San Francisco, has been justified on the ground that nefarious landlords use the service to rent apartments to tourists full-time. Activists and regulators claim that these "illegal hotels" co-opt the already limited supply of affordable housing, contributing to gentrification and forcing poor minorities out of their own communities.

This is a compelling narrative—except that it simply isn't backed up by the facts on the ground. There is no indication that wealthy speculators are buying up normal apartments to skirt regulations on hotels. According to data obtained by the *New York Times*, seventy-five percent of revenue earned by active hosts in New York City who share their entire home came from people who have only one or two rental listings on the platform."[59] Considering that a significant portion of

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Nate Raymond, *Airbnb, New York City Settle Rental Law Lawsuit*, REUTERS (Dec. 5, 2016), http://www.reuters.com/article/airbnb-new-york-idUSL1N1E00GE [https://perma.cc/WM6A-58TA].

[56] Santa Monica, Cal., Home-sharing Ordinance Rules (Jul. 1, 2016), http://www.smgov.net/uploadedFiles/Departments/PCD/Permits/Santa%20Monica%20HomeSharing%20Rules%20-%20FINAL%20EFFECTIVE%20JUNE%2012%202015.pdf [https://perma.cc/BKV4-JTVL].

[57] Hailey Branson-Potts, *Santa Monica Convicts its First Airbnb Host Under Tough Home-Sharing Laws*, L.A. TIMES (Jul. 13, 2016), http://www.latimes.com/local/lanow/la-me-ln-santa-monica-airbnb-conviction-20160713-snap-story.html [http://perma.cc/75ZQ-MXFV].

[58] Nashville, Tenn., Ordinance No. BL2014-951, http://www.nashville.gov/mc/ordinances/term_2011_2015/bl2014_951.htm [https://perma.cc/DMU7-8JZM]; Stacey Barchenger & Joey Garrison, *Judge: Nashville's Airbnb Law Unconstitutional*, TENNESSEAN (Oct. 21, 2016), http://www.tennessean.com/story/news/2016/10/21/judge-metros-airbnb-law-unconstitutional/92431324 [http://perma.cc/R8LP-BWP4].

[59] Mike Isaac, *Airbnb Releases Trove of New York City Home-Sharing Data*, N.Y. TIMES (Dec.

Airbnb rentals are for single bedrooms in host-occupied homes, even that number may be misleadingly low. The vast majority of Airbnb hosts are renting out either their own home or a single investment property (presumably an otherwise vacant vacation home)—a far cry from the robber barons playing Monopoly with other people's homes that people like New York Mayor Bill De Blasio appear to be concerned about.[60]

What one sees after looking at the data Airbnb has released about its users is that the average host is an ordinary person of no great means who occasionally rents out their home in order to make ends meet in a high-rent area. According to Airbnb's New York City Economic Impact Report, seventy-eight percent of New York hosts earn "low, moderate, or middle incomes" and seventy-two percent "use the money they earn sharing their space to stay in their homes."[61] The median income earned from being a host was only $5,110—a substantial sum for an empty nester renting out an extra room, but hardly the amount one would expect for the owner of an illicit hotel in the country's most expensive city.[62]

Opponents of online apartment-sharing like to blame the business model for the housing shortages currently plaguing cities like New York and San Francisco.[63] But New York's housing shortage was a problem long before Airbnb came on the scene in 2008. City and state officials recognized the lack of available housing as an issue as early as 1936.[64]

1, 2015), http://www.nytimes.com/2015/12/02/technology/airbnb-releases-trove-of-new-york-city-home-sharing-data.html [http://perma.cc/QLS8-P9EZ].

[60] Ariel Stulberg, *Airbnb's "Commercial Listings" Should Be Regulated Like Businesses: de Blasio*, REAL DEAL (Mar. 4, 2016), http://therealdeal.com/2016/03/04/airbnbs-commercial-listings-should-be-treated-like-businesses-de-blasio [http://perma.cc/8NPK-Q56Y]; Azi Paybarah, *De Blasio Opposes Airbnb, Quinn Tries to 'Thread the Needle' for Them*, POLITICO (Apr. 26, 2013), http://www.politico.com/states/new-york/city-hall/story/2013/04/de-blasio-opposes-airbnb-quinn-tries-to-thread-the-needle-for-them-000000 [https://perma.cc/D7VL-M9SH].

[61] AIRBNB, ECONOMIC IMPACT REPORT: NEW YORK CITY (Nov. 17, 2015), https://new-york-city.airbnbcitizen.com/economic-impact-reports/data-on-the-airbnb-community-in-nyc/ [https://perma.cc/45C4-VBRM].

[62] *Id.* In 2014, New York had the highest average hotel room in the country, at $271, beating second-place San Francisco by more than $50. *Average U.S. Hotel Prices Increased by Five Percent in 2014*, HOTELS.COM (Mar. 5, 2015), http://press.hotels.com/en-us/hpi/average-u-s-hotel-prices-increased-by-five-percent-in-2014 [http://perma.cc/7JND-XJMB].

[63] *See, e.g.*, Rachel Monroe, *More Guests, Empty Houses*, SLATE: MONEYBOX (Feb. 13, 2014), http://www.slate.com/articles/business/moneybox/2014/02/airbnb_gentrification_how_the_sharing_economy_drives_up_housing_prices.html [http://perma.cc/QD8R-VGR9].

[64] Timothy L. Collins, *"Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide*, 59 ALB. L. REV. 1293, 1312–13 (1996) (stating that the city's first rent-control law was put into effect to deal with the post-WWII housing shortage, but the problem started even earlier: "While a housing shortage began to appear as early as 1936, the shortage was largely concealed because the Great Depression had forced many families to double up.") (citing REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO RECODIFY THE

Indeed, high rents and limited housing have been features of life in Gotham for generations and can hardly be placed, solely or substantially, at the feet of new players like Airbnb.

Research conducted by the National Bureau of Economic Research shows that the primary reason why New York rent is so high is actually over-regulation. The study found that land-use regulations, such as "quantity controls, myriad zoning rules, or taxes and fees" heavily limit and increase the costs of new construction.[65] In 2002, this created a regulatory burden for the median condo in Manhattan that accounted for fifty-six percent of the construction price.[66] The study also concluded that for half of Manhattan condo dwellers, regulations cost at least $5,500 a year; for others, the cost was even higher.[67] Wealthy anti-development New York owners have also misused the city's historical-preservation ordinance to protect their own property values. The law—ostensibly intended to preserve buildings of particular historical, cultural, or architectural importance—now covers more than a quarter of all Manhattan, according to a recent report by the NYU Furman Center.[68] This elitist NIMBYism can be seen clearly when one examines the percent of landmarked buildings by neighborhood: between 30 and 80 percent of wealthy neighborhoods like SoHo, TriBeCa, the Upper West Side, and the Upper East Side are preserved, while lower-income neighborhoods like East Harlem, Harlem, the East Village, and Lower East Side have comparatively low rates of preservation, 0.8–10.5 percent of lots.[69] New York's historical-preservation law, whatever its original purpose, is now largely used to artificially suppress development in wealthy neighborhoods, forcing low and middle income individuals into increasingly crowded and expensive buildings in "less desirable" parts of town.[70]

The other half of the puzzle is rent control, which has long been an urban-progressive shibboleth. Rent-stabilization programs are ostensibly meant to ensure that low-income people don't get forced out of their communities by gentrification. But in practice, rent control

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MULTIPLE DWELLING LAW (1946)).

[65] Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in House Prices* 3–8 (Nat'l Bureau of Econ. Research, Working Paper No. 10124, 2003), http://www.nber.org/papers/w10124.pdf [https://perma.cc/ARZ6-ZTFW].

[66] *Id.* at 18 n. 19.

[67] *Id.* at 19.

[68] INGRID GOULD ELLEN ET AL., FIFTY YEARS OF HISTORIC PRESERVATION IN NEW YORK CITY 21 (2016), http://bit.ly/2930m6y [https://perma.cc/KA64-D4BB].

[69] REAL ESTATE BOARD OF NEW YORK, AN ANALYSIS OF LANDMARKED PROPERTIES IN MANHATTAN 4 (2013), http://bit.ly/1mQKrVp [https://perma.cc/2QLR-8BMN].

[70] *See* REAL ESTATE BOARD OF NEW YORK, LANDMARKING, HOUSING PRODUCTION, AND DEMOGRAPHICS IN NYC 7 (2015), http://bit.ly/29poBbI [https://perma.cc/FD2R-2JWX].

tends to help a relatively small (and wealthy, and white) group of lucky individuals who have been able to keep old apartments off the market and in the family.[71] The primary effect of rent-control programs is that a privileged few get to pay well below market price for their apartments, subsidized by everyone else in the neighborhood, whose rents are increased to compensate.[72] Rent control disincentivizes new construction and investment in residential real estate, which contributes to a housing shortage and higher rents for uncontrolled units.[73]

The fact is that the affordable-housing shortages plaguing many of America's major cities have been caused not by an innovative app, but by decades of heavy-handed regulatory, zoning, and tax policies. While it is not yet entirely clear what the precise effect Airbnb has on rental prices—recent analyses suggest that its use may correlate with modest increases in rents in areas where the app is particularly popular[74]—it is at most a minor factor compared to the various land-use restrictions that limit housing stock. There are reasons to think Airbnb might actually help the situation, because it provides an extra source of income for low-income people living in high-rent areas. This can be especially valuable because it doesn't require taking on a second or third shift, or the sort of manual labor that a disabled or elderly person is unable to do.

II. SUBSIDIES AND OTHER FORMS OF PATRONAGE

The previous section demonstrates how restrictive regulations have often been the tool by which established businesses have maintained market share and guarded against new entrants. This dynamic in essence results in the government pushing down all businesses in a segment of the market—a seemingly neutral action but

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[71] HENRY O. POLLAKOWSKI, WHO REALLY BENEFITS FROM NEW YORK CITY'S RENT REGULATION SYSTEM? 13 (2003), http://www.manhattan-institute.org/pdf/cr_34.pdf [https://perma.cc/A8JL-ZXF9] ("This study finds that tenants in low- and moderate-income areas receive little or no benefit from rent stabilization, while tenants in more affluent locations are effectively subsidized for a substantial portion of their rent.").

[72] *The High Cost of Rent Control*, NAT'L MULTIFAMILY HOUSING COUNCIL, http://www.nmhc.org/News/The-High-Cost-of-Rent-Control/ [http://perma.cc/X8YY-XTSF] (last visited Jan. 23, 2017) (Beneficiaries of rent control in Berkeley and Santa Monica, California were "predominately white, well-educated, young professionally employed and affluent.") (quoting RICHARD J. DEVINE, WHO BENEFITS FROM RENT CONTROLS? (1986)).

[73] *See generally* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741 (1988).

[74] *See* Ariel Stulberg, *Airbnb Probably Isn't Driving Rents Up Much, At Least Not Yet*, FIVETHIRTYEIGHT (Aug. 24, 2016), http://fivethirtyeight.com/features/airbnb-probably-isnt-driving-rents-up-much-at-least-not-yet [http://perma.cc/3EPH-YLMW].

one favoring those who already have their footing. The damning effects for the market and its consumers are clear: the government's downward pressure necessarily lowers the economic level. But what effects result if instead of pushing down on all, the government chooses to *lift up* a few? Do subsidies and other forms of patronage have negative effects equal to restrictive regulations?

A. Generally

1. Distort Prices and Raise Demand

Perhaps surprisingly, subsidies for insiders can be just as damaging to the economy as overly aggressive regulations. That's because, once again, the government is stepping in to meddle with the incentives and response mechanisms that allow a market to function. Subsidies distort and artificially reduce the price that consumers pay while allowing the subsidized company to continue seeing the same return, with the taxpayers generally footing the bill. This "push[es] prices up by making it appear that prices are lower and artificially raising demand."[75] What ends up happening is that consumers still pay something around the original undistorted price, while also paying what amounts to a free gift to the subsidized company through their tax dollars. The company has no incentive to lower its prices or innovate because it now has a leg up on the competition—and the product consumers are paying for drops in quality. Examples of this process in action can be found in the student-loan market,[76] farm subsidies for crops like sugar,[77] and publicly financed professional-sports stadiums,[78] among dozens of other industries that are subsidized in some fashion by at least one level of government.[79]

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[75] Jared Meyer, *From Regulating Uber to Subsidizing It*, REASON (Mar. 14, 2016), http://reason.com/archives/2016/03/14/from-regulating-uber-to-subsidizing-it [http://perma.cc/A9PF-BB4R].

[76] Jared Meyer, *What Was Missing from the GOP Debate? Student Loan Debt*, FORBES (Sept. 17, 2015), http://www.forbes.com/sites/jaredmeyer/2015/09/17/gop-debate-student-loan-debt [https://perma.cc/9L3R-S3MQ].

[77] Jared Meyer, *Big Sugar: Sanders and Rubio Share a Sweet Tooth*, FORBES (Aug. 25, 2015), http://www.forbes.com/sites/jaredmeyer/2015/08/25/sanders-rubio-support-costly-sugar-subsidies [https://perma.cc/PL4N-FUY8].

[78] Jared Meyer, *You Might As Well Watch the NFL Playoffs. You're Paying for Them*, REASON (Jan. 14, 2016), http://reason.com/archives/2016/01/14/you-might-as-well-watch-the-nfl-playoffs [https://perma.cc/KNX9-MQ77].

[79] *See* Niraj Chokshi, *The United States of Subsidies: The Biggest Corporate Winners in Each State*, WASH. POST (Mar. 18, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/17/the-united-states-of-subsidies-the-biggest-corporate-winners-in-each-state [http://perma.cc/CCP8-F8C2].

2. Regulatory Capture Distorts Incentives

Subsidized companies have little incentive to innovate or improve their product or service because the subsidies insulate them from failure and make it more difficult for unsubsidized firms to compete. Depending on the level of subsidy, companies receiving their free money are able to undercut competitors by selling their products at a price below the cost to produce. Subsidies are really another side of the same over-regulatory coin: The selective use of subsidies can be just as effective a weapon against disfavored parties as taxes or compliance costs.

Subsidies and preferential regulatory treatment can also reduce the amount businesses themselves have to invest in order to enter a given market, making them literally less invested in the long-term health of that market. This can be seen in cities like Washington, D.C., and New London, Connecticut, where the government forced businesses and residents out of struggling neighborhoods in order to make room for Wal-Mart and Pfizer, respectively. Both companies reneged on their promises to move in, with the local communities paying the price. The New London debacle gave rise to the infamous 2005 Supreme Court case *Kelo v. City of New London*,[80] and the former site of plaintiff Suzette Kelo's family home still lies vacant, more than 10 years later.[81] The situation in Washington appears likely to reach a similar anticlimax. [82]

3. Subsidies Undermine Democracy

When lobbying has a better return on investment than research and development or capital investment, you can't be surprised when companies focus more on the former than the latter. What may have started as a good-faith effort to stimulate a certain sector of the economy can easily develop into a tacit *quid pro quo* relationship between politicians eager for reelection and companies more than willing to write checks for continued access. The sort of "pay-to-play" system that the liberal use of subsidies encourages not only makes it difficult for consumers to make decisions in a distorted market, but also further

[80] 545 U.S. 469 (2005).

[81] Ilya Somin, *Lessons from a Little Pink House, 10 Years Later*, WALL ST. J. (June 21, 2015), http://www.wsj.com/articles/lessons-from-a-little-pink-house-10-years-later-1434922686 [http://perma.cc/YU2P-8LUZ].

[82] Courtland Milloy, *Walmart Backs Out of D.C. Deal Citing Costs, and City's Poorest Pay the Price*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/local/walmart-backs-out-of-dc-deal-citing-costs-and-citys-poorest-pay-the-price/2016/01/19/af963e00-becb-11e5-9443-7074c3645405_story.html.

removes the average citizen from the actual process of deciding what policies their state or the nation should use.

B. Uber

On March 21, 2016, Altamonte Springs, Florida (an Orlando suburb), became the first city to begin subsidizing Uber rides.[83] According to the city's website: "The City is providing a 20% discount on all Uber trips that both begin and end in the city limits, meaning riders pay less. As an added benefit to encourage increased SunRail [Central Florida's commuter rail system] ridership, all trips starting or ending at the Altamonte Springs SunRail station will receive a 25% discount."[84] Altamonte Springs has since been joined by nearby Pinellas County, Florida, and Dublin, California (a Bay Area suburb), who have also launched one-year pilot programs.[85] And while this may appear to be a smart, market-based alternative to other more expensive public transportation options, creating a new government-backed monopoly to replace the old government-backed monopoly does nothing to solve the underlying cost and quality problems public transportation often faces.

Subsidizing Uber will likely lead to regulatory capture by Uber rather than by the taxi cartels. Uber is now a big, rich company that can afford to keep phalanxes of lawyers and lobbyists on its payroll. The "start-up" may not generally want regulation now, but you better believe that it'll make the most of it once it is there. This can already be seen in the above examples, where cities have singled out Uber by name in their legislation as the target of favorable subsidies. In Altamonte Springs, other ride-sharing apps such as Lyft are now left at a competitive disadvantage and will be incentivized to carve out their own exclusive territories, while the next generation of innovative transportation solutions will face an even greater uphill battle against entrenched companies that have both greater resources and the

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[83] Barbara Liston, *Uber Teams with Florida City on Public Transit Test*, REUTERS (Mar. 3, 2016), http://www.reuters.com/article/us-uber-tech-subsidies-idUSKCN0W52LQ [http://perma.cc/T56V-XLA8].

[84] *Uber*, CITY OF ALTAMONTE SPRINGS, http://www.altamonte.org/index.aspx?NID=736 [https://perma.cc/A2XV-VFTZ] (last visited Dec. 12, 2016).

[85] Pinellas County pays for half of Uber riders' fares (up to $3) for trips to or from a bus stop, and provides up to 23 free intracounty rides per month for "economically disadvantaged riders." *Uber Announces Partnership to Increase Transportation Access in Tampa Bay*, UBER NEWSROOM (Feb. 22, 2016), https://newsroom.uber.com/us-florida/uber-announces-partnership-to-increase-transportation-access-in-tampa-bay/ [http://perma.cc/6C9A-Z4XP]; *Making Ridesharing More Affordable in Pinellas County*, UBER NEWSROOM (Aug. 4, 2016), https://newsroom.uber.com/us-florida/psta-td [http://perma.cc/G65E-DT83]. Dublin subsidizes fares so passengers pay "$3 for trips within West Dublin and $5 within the East Dublin project area." Denis Cuff, *Bay Area Transit System to Subsidize Uber, Lyft Rides*, MERCURY NEWS (Aug. 18, 2016), http://www.mercurynews.com/2016/08/18/bay-area-transit-system-to-subsidize-uber-lyft-rides [http://perma.cc/N7KE-G9V5].

protection of the government on their side. In their eagerness to embrace and support one particular disruptive innovator, governments may unintentionally kill the *next* disruptive innovator. Uber, Airbnb, and others of their kind have been an incredible boon to the lives of millions of Americans, but the business model isn't perfect. No technology is perfect. New "disruptive" companies are starting up constantly, but every barrier to entry—whether a debilitating tax or an anticompetitive subsidy—makes it more difficult for those innovators to survive long enough to move society forward. While we shouldn't let the perfect be the enemy of the good, it's equally true that we shouldn't let the good be the enemy of the better.

III. CONCLUSION

The problems detailed in this article—over-regulation and misguided subsidies stifling innovation, regulatory capture by well-connected insiders—are not unique to government involvement in the sharing economy. They are systemic and common to economic interventions of all types and at all levels. They are the fundamental consequences of centralized attempts to control the lives of large numbers of complex individuals interacting with each other. Good intentions won't prevent powerful economic interests from manipulating the regulatory process to their advantage. No army of policy wonks is going to be able to change the fact that subsidies increase prices by artificially inflating demand, or that price controls create shortages. No amount of data-gathering can possibly give any one individual—or an entire administrative agency, for that matter—the ability to foresee and prevent all of the potentially harmful consequences of regulatory action. Those looking for a regulatory framework that is immune to regulatory capture or that won't have unintended side effects are missing the point.

Legislators and agency officials should seek to roll back existing regulations not clearly and primarily supported by a substantial public-interest rationale. They should seriously examine the practical consequences of even those regulations that appear to serve the public interest, searching for evidence of regulatory capture or good-faith mistaken assumptions. Regulators should always begin from a presumption of liberty and non-regulation—particularly in areas of rapid technological change—and consider whether their proposed regulation is the most narrowly tailored solution available to a genuine market failure.

Courts must likewise take their responsibility of judicial review seriously. They must resist the impulse to blindly defer to the government, and actively strike down regulations that aren't rationally related to legitimate governmental interests.[86]

Ultimately, what we need to do is trust workers and consumers to make good choices for themselves. Give the American people an opportunity to create their own future; you won't be disappointed.

[86] For an in-depth explication of the sort of judicial engagement we advocate for here, see generally CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013).