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Public Values, Private Regulators: Between Regulation and Reputation in the Sharing Economy

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Abstract: In traditional sectors, the intervention of private parties in the regulatory system tends to be justified by their enhanced expertise, government cuts or efficiency gains. In the sharing economy (e.g., home-sharing services offered by Airbnb), quality control and regulatory tasks (e.g., inspections) are to, a great extent, informally delegated to online platforms and peer-to-peer communities that rate and review performance. These communities consist of users that do not have more than their personal experience and the guidance of online platforms to underpin their assessments. Existing literature has extensively criticized the reliability of these online reputational mechanisms, but it has overlooked other far-reaching effects of outsourcing regulatory tasks to private parties. This Article offers a more complete analysis of the regulatory value of online reputation. I argue that reputational mechanisms have the potential of creating democratic spaces where users can provide unique, regular, and first-hand insights that would otherwise be disregarded in a traditional regulatory system. Nevertheless, in their current form, these mechanisms still offer inadequate protection to the public values that typically underlie the regulation of certain services. This Article explains this problem by comparing the protection of public values in the sharing economy to that of traditional regulated sectors.

This Article contributes to the literature by reflecting on whether the sharing economy is inviting us to rethink the broader involvement of citizens in the protection of public values and the challenges thereof. It suggests a framework to improve online reputational mechanisms and a better dialogue between traditional regulation and online reputation.

Keywords: online reputation, public interest, regulation, sharing economy, online platforms, discrimination, peer-to-peer economy, professions, automation

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Introduction

In the last decades, traditional institutions of administrative law have been disrupted by multiple forces including globalization, the growing use of technology in regulatory proceedings, the privatization of public sectors, and the outsourcing of public tasks to private actors (e.g., prison management, schools).¹ Multiple legal scholars have extensively analyzed the multiple shortcomings of traditional forms of privatization including the challenge of holding private corporations accountable, protecting less profitable public services, and safeguarding the protection of human rights.² Nevertheless, existing scholarship has overlooked a new and less obvious form of privatizing the public interest: the informal outsourcing of regulatory tasks to online platforms and peer-to-peer communities (“P2P communities”).³ This phenomenon is particularly visible in the sharing economy in which unlicensed services are intermediated by an array of online platforms (e.g., Airbnb, Eatwith, Uber) in the context of home, food or ride-sharing, and prospective users attach great importance to the ratings and

1 Eoin Carolan, *The Legitimacy of Public Service Reform: Democracy, Accountability and Experimentalism in the Big Society*, PUB. L. 240 (2013); Giulio Napolitano, *Looking for a Smarter Government (and Administrative Law) in the Age of Uncertainty*, in COMPARATIVE ADMINISTRATIVE LAW 352, 361-62 (Susan Rose-Ackerman, Peter Lindseth & Blake Emerson eds., 2d ed., 2017); ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA (1992); on privatization, see, e.g., Alex Kozinski & Andrew Bentz, *Privatization and its Discontents*, 63 EMORY L.J. 263 (2013) (providing an overview of the legal challenges of privatization in different fields). See also Manuel Tirard, *Privatization and Public Law Values: A View from France*, 15 INDIANA J. GLOBAL LEG. STUD. 285 (2008); Dara O’ Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL’Y STUD. J. 1 (2003); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422 (2002); GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009).

2 See, e.g., Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2005) Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L. J. 697 (2010); Emily Taylor, *The Privatization of Human Rights: Illusions of Consent, Automation and Neutrality*, Paper Series No. 24 (2016), <https://www.cigionline.org/publications/privatization-human-rights-illusions-consent-automation-and-neutrality>.

3 For a broader analysis of online peer-to-peer communities and how they challenge the regulatory state, see Julie Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQ. L. 369 (2016); Rainer Lenz, *Peer-to-Peer Lending: Opportunities and Risks*, 17 EUR. J. RISK REG. 688 (2016) (discussing the regulatory challenges of crowdfunding). See also my previous work, Sofia Ranchordás, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, 5(1) CRITICAL ANALYSIS L. 127 (2018).

reviews of past consumers of services.⁴ This growing reliance on online reputational mechanisms is, nevertheless, problematic. In the sharing economy, online reputational mechanisms are not a mere complement to existing regulations and public inspections of hotels and restaurants. In several cities throughout the world, hosts are not required to fulfill licensing requirements as long as they welcome guests on a sporadic basis.⁵ Online reputational mechanisms are therefore the only piece of information regarding the quality and safety of home or food-sharing services that prospective consumers may have at their disposal. Even though these reputational mechanisms are supported by the private regulatory mechanisms implemented by online platforms (e.g., online dispute resolution mechanisms), they seem insufficient to address negative externalities such as the nuisance caused by guests, the impact of home-sharing on urban planning, and public health and safety considerations.⁶ Moreover, online rating and reviews are far from being a consensual, fully reliable, and expert-based form of assessing performance. As a number of scandals show, these mechanisms may be built upon wrongful or inaccurate information and does not account for the global character of platforms and the difference in cultural backgrounds and preferences of their users.

This Article explores how the growing reliance on online reputational mechanisms that are employed by online platforms is reshaping and, to a certain extent, outsourcing the protection of public values in the sharing economy. This reliance is problematic for a number of reasons. To illustrate, in the sharing economy the protection of the interests of local communities, the impact of home-sharing on real estate prices, and the danger of limiting the access of services to minorities are unlikely to be users' top priority when reviewing a service.⁷ This reputational-regulatory model of the sharing economy is thus

⁴ Lene Pettersen, *Rating Mechanisms among Participants in Sharing Economy Platforms*, 12 FIRST MONDAY (2017), <http://firstmonday.org/ojs/index.php/fm/article/view/7908/6586>. See generally Chris Dellarocas, *The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms*, 49 MGMT. SCI. 1407 (2003) (discussing online reputation).

⁵ A growing number of European cities is requiring hosts to register at their municipalities and have their homes inspected by local authorities for fire and construction safety. This is already the case in Brussels and all major Portuguese cities.

⁶ But see David S. Evans, *Governing Bad Behavior by Users of Multi-Sided Platforms*, 27 BERKELEY TECH. L. J. 1201 (2012) (arguing that online platforms can sanction bad behavior including negative externalities of users more efficiently than regulators).

⁷ See, e.g., Jasper Dag Tjaden, Carsten Schwemmer & Menusch Khadjavi, *Ride with Me—Ethnic Discrimination, Social Markets, and the Sharing Economy*, 31 EUR. SOC. REV. 418 (2018) (analyzing ethnic discrimination in online carpooling marketplaces); Isak Ladegaard, *Hosting the Comfortably Exotic: Cosmopolitan Aspirations in the Sharing Economy*, 66 SOC. REV. 381 (2018) (analyzing how Airbnb can help individuals bridge people together across cultural differences).

currently putting at stake the protection of public values and human rights.⁸ I explain this problem in this Article by comparing the ability of the sharing economy's mechanisms to protect public values to that of traditional command-and-control regulation in the context of similar regulated sectors (home and food-sharing).

Drawing on the review of legal and interdisciplinary literature (business, economics, tourism management), this Article's main aim is to contribute a complete account of how sharing-economy platforms are outsourcing the protection of public values to P2P-communities through the use of online reputational mechanisms. It does so by assessing the type of conveyed information, how they engage citizens in the regulatory process, and offering suggestions to promote a dialogue between traditional regulation and online reputational mechanisms. This Article innovates in relation to existing scholarship that has up until now either highly praised or totally dismissed online reputational mechanisms.⁹ Nevertheless, one-sided attempts to disregard the regulatory value of these mechanisms overlook multiple important arguments: First, consumers and service providers in the sharing economy—and more generally in

8 Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015); Faris Natour, *Respecting Human Rights in the On-Demand Economy: Closing the New Governance Gap*, 1 BUS. & HUM. RTS. J. 315 (2016); JOSÉ VAN DIJCK, THOMAS POELL & MARTIJN DE WAAL, *DE PLATFORMSAMENLEVING: STRIJD OM PUBLIEKE WARDEN IN EEN ONLINE WERELD* [THE PLATFORM SOCIETY: THE STRUGGLE FOR PUBLIC VALUES IN AN ONLINE WORLD] 11, 25-30 (2016) [in Dutch]; Janneke Gerards, *Grondrechten onder spanning. Bescherming van fundamentele rechten in een complexe samenleving*, (Inaugural lecture, University of Utrecht, 2017), https://www.uu.nl/sites/default/files/gerards_oratie_uu_2017_grondrechten_onder_spanning_v2017.03.20.pdf [in Dutch]; in 2017 in the Netherlands, the think tank Rathenau Institute published an extensive report on the sharing economy and public interests, see RATHENAU INSTITUUT, *EERLIJK DELEN. WAARBORGEN VAN PUBLIEKE BELANGEN IN DE DEELECONOMIE EN DE KLUSECONOMIE* (2017) [in Dutch], <https://www.rathenau.nl/nl/publicatie/eerlijk-delen-waarborgen-van-publieke-belangen-de-deeleconomie-en-de-kluseconomie>.

9 See, e.g., FEDERAL TRADE COMMISSION, *THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATIONS*, STAFF REPORT (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf (suggesting that online reputational mechanisms reduce information asymmetries and consumer risks in the sharing economy); Adam Thierer, Christopher Koopman, Anne Hobson & Chris Kuiper, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem,"* 70 U. MIAMI L. REV. 830, 864-69 (2015) (describing how online reputational mechanisms effectively regulate the sharing economy and arguing that these mechanisms solve information asymmetries); Lior Jacob Strahilevitz, *Less Regulation, More Reputation*, in *THE REPUTATION SOCIETY* 63, 71 (Hassan Masum & Mark Tovey, eds., 2011) (arguing that online reputational mechanisms can detect bad behavior and reduce the need for governmental regulation).

our economy—rely on these instruments to make decisions. Second, reputation historically precedes regulation and is a key element in the regulation of behavior that has been embraced by both public and private regulators in multiple sectors.¹⁰ Third, the effectiveness of traditional regulation has been under attack for decades and online reputational mechanisms have the potential to address some of these objections. For example, hotels and restaurants are not regularly inspected by public authorities and little is known about the effects of inspections on compliance records.¹¹ Online reviewers evaluate service providers on a regular basis and could help public regulators filter problems and identify problematic facilities that should be subject to more frequent inspections. Fourth, online reputational mechanisms create a democratic space where users can voice both their compliments and concerns, it allows users to praise, influence and sanction behavior, involving them to a much larger extent than traditional regulation.¹² The broad participation of users in the review of sharing services fits within the broad context of citizen initiatives and the outsourcing of the protection of public values. Examples of these initiatives are neighborhood watches, communities of practice, and the so-called “Community Right to Challenge” that demonstrate precisely the growing interest of citizens in being actively involved in the protection of public values and services and the importance of designing collaborative frameworks where citizens can participate and work together with public bodies.¹³

10 See, e.g., Barak Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 L. & SOC. INQUIRY 383 (2006); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994).

11 See generally Richard Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256 (1981). See specifically K.B. Newbold, M. McKeary, R. Hart & R. Hall, *Restaurant Inspection Frequency and Food Safety Compliance*, 71 J. ENVIRON. HEALTH 56 (2008) (discussing the frequency of restaurant inspections).

12 See, e.g., DIANA SACO, *CYBERING DEMOCRACY: PUBLIC SPACE AND THE INTERNET* (2002); RICHARD HAWKINS & MICHAEL KEREN, *SPEAKING POWER TO TRUTH: DIGITAL DISCOURSE AND THE PUBLIC INTELLECTUAL* (2015).

13 See, e.g., Huw Evans, “Can We All Join in?": *Developing an Evaluative Framework for Group Processes to Aid Decisions about Their Use in Approaches to Participative Engagement*, 82 POL. J. 50 (2009); Harold A. McDougall, *Social Change Requires Civic Infrastructure*, 56 HOWARD L. J. 801 (2012); see also OECD, *PROMISE AND PROBLEMS OF E-DEMOCRACY: CHALLENGES OF ONLINE CITIZEN ENGAGEMENT* (2003), <http://www.oecd.org/dataoecd/9/11/35176328.pdf>. The “Community Right to Challenge” originated in the United Kingdom in 2011 in order to challenge the traditional monopoly of public local services. It gives the right for community organizations to submit an

This Article proceeds as follows. Part I delves into the notions of public interest and public values and discusses how traditional regulation seeks to protect these values. Part II offers a critical analysis of how online reputational mechanisms compare to the traditional regulation of public values in the sharing economy. The term “sharing economy” has been defined in multiple and ambiguous ways in the last years: broader definitions encompass almost any service advertised by online platforms, while narrower definitions focus on the sustainable sharing of idle capacity.¹⁴ For the purposes of this Article, I embrace the rather comprehensive definition of “sharing” or “collaborative economy” adopted by the European Commission which refers to “business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.”¹⁵ This definition includes services intermediated by multiple online platforms including Airbnb, HomeAway, Wimdu, and Eatwith since this Article focuses in particular on home and food-sharing services, which in the traditional economy tend to be heavily regulated.¹⁶ As Part II shows, in the sharing economy, private and public values tend to be regulated through two mechanisms: first, through a non-conventional forms of “mediation” of conflicts, customer report services, and the exclusion of users that misbehave by online platforms; second, by reputational mechanisms. This Article discusses the

expression of interest in running services of local authority and fire and rescue authorities on behalf of that authority. The legal framework of this right to challenge can be mainly found in Part 5, Chapter 2 of the Localism Act of 2011. See Ministry of Housing, Communities & Local Government, *Community Right to Challenge: Statutory Guidance*, GOV. UK. (June 27, 2012), <https://www.gov.uk/government/publications/community-right-to-challenge-statutory-guidance>.

14 Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENV'T. INNOV. & SOCIETAL TRANSITIONS 3 (offering an overview of the definitional problems of the sharing economy); see also Sofia Ranchordás, *On Sharing and Quasi-Sharing: The Tension between Sharing-Economy Practices, Public Policy, and Regulation*, in THE RISE OF THE SHARING ECONOMY: EXPLORING THE CHALLENGES AND OPPORTUNITIES OF COLLABORATIVE CONSUMPTION 263 (Pia Albinsson & B. Yasanthi Perera, eds., 2018).

15 EUROPEAN COMMISSION, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A EUROPEAN AGENDA FOR THE COLLABORATIVE ECONOMY 356 (2016), <https://www.eesc.europa.eu/resources/docs/com2016-356-final.pdf>.

16 See, e.g., Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIAL. 103 (2015); Bertus de Villiers, ‘Airbnb’ in Western Australia: New Issues for Policy Makers Arising from a ‘Disruptive Innovation’, 19 U. NOTRE DAME AUSTRALIA L. REV. 1 (2017); Eric Biber, Sarah E. Light, J.B. Ruhl & James Salzman, *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561 (2017); Michelle Maese, *Rethinking “Host” and “Guest” Relations in the Advent of Airbnb and the Sharing Economy*, 2 TEXAS A&M J. PROP. L. 482 (2015).

relevance and limitations of both instruments. Part III delves into the legitimacy of online reputational mechanisms as a regulatory instrument. Part IV reflects upon the need to improve online reputational mechanisms in order to promote a co-regulatory framework that delves into the collaboration between command-and-control regulation and online reputation for the sake of the protection of public and private values.

I Regulation and the Protection of Public Values

In the last half century, public interest theories have been criticized and deemed as obsolete.¹⁷ However, a close look at the impact of the sharing economy—and more broadly, the platform economy—shows that the debate about public values and the protection of the public interest is far from being outdated or limited to national administrative law debates.¹⁸ The global power of online platforms, the increasing globalization, internationalization, and the development of multi-level governance no longer allow national governments to unilaterally determine what public values should be protected.¹⁹ With digitalization, citizens have access to more information, feel more able and willing to participate in the regulatory process, and even perform tasks that were once in the exclusive hands of licensed professionals.²⁰

Citizens are not the only actors participating in traditional regulation, also international online platforms have reshaped conventional regulatory instruments and the way in which certain services are licensed. The sharing economy is a good illustration of this phenomenon. Online platforms have been partially able to grow because they do not comply with the same regulatory requirements as traditional services (e.g., hotels). They deviate from traditional regulations and are directly or indirectly allowed to self-regulate their businesses. While most sharing-economy platforms started out as an informal and sporadic

17 BARRY BOZEMAN, PUBLIC VALUES AND PUBLIC INTEREST: COUNTERBALANCING ECONOMIC INDIVIDUALISM 1-2 (2007).

18 See RICHARD C. BOX, PUBLIC SERVICE VALUES (2014).

19 WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID, HET BORGEN VAN PUBLIEK BELANG [THE PROTECTION OF THE PUBLIC INTEREST] 118-19, 131-32 (2000) [in Dutch] (analyzing the meaning of the public interest and explaining the impact of globalization, internationalization, digitalization in the protection of public values). See also WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID, PUBLIEKE ZAKEN IN DE MARKTSAMENLEVING [PUBLIC AFFAIRS IN THE MARKET SOCIETY] (2012) [in Dutch].

20 See generally ALBERTO ALEMANNO, LOBBYING FOR CHANGE: FIND YOUR VOICE TO CREATE A BETTER SOCIETY (2017).

practice of sharing excess capacity and providing (or intermediating) temporary access to underused goods, in the meanwhile, they have become part of a multi-million dollar economy.²¹ In the self-regulatory model implemented by sharing-economy platforms, the protection of public and private interests is no longer in the hands of national or local authorities. It is informally delegated to global platforms and user communities composed by citizens from different countries and with divergent values who rate and review unlicensed service providers. It is in this context that the definition of the public interest in the digital age and the protection of public values and human rights are being brought back into the academic and political debate.²²

In 2017, the Dutch think tank Rathenau alerted the Dutch Parliament of the need to take legislative action, arguing that the sharing economy's self-regulatory model was putting a number of public values at stake.²³ Nevertheless, this conventional perspective has also been questioned for decades: Is it only up to regulators to define and protect the public interest? Does it make sense to separate public from private interests and instruments? Is command-and-control legislation and regulation an efficient instrument to protect it? In order to understand whether this is the case, this part starts with an analysis of the meaning of the public interest and public values, two complex concepts that tend to justify regulatory intervention. This terminological clarification is followed by an analysis of how public values are protected in traditional command-and-control regulation and in the sharing economy (*Part II*).

21 KELLEN ZALE, *When Everything is Small: The Regulatory Challenge of Scale in the Sharing Economy*, 53 SAN DIEGO L. REV. 950 (2016); see also RUSSELL BELK, *Sharing*, 36 J. CONS. RES. 715 (2010); GIANA M. ECKHARDT & FLEURA BARDHI, *The Sharing Economy Is Not About Sharing at All*, HARV. BUS. REV. (Jan. 28, 2015), <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all>; GEMMA NEWLANDS, CHRISTOPHER LUTZ, & CHRISTIAN FIESELER, RECOMMENDATION FOR THE SHARING ECONOMY: (RE-)BALANCING POWER, REPORT FROM THE EU H2020 RESEARCH PROJECT PS2SHARE (2018), <https://www.bi.edu/globalassets/for skning/h2020/working-paper-version-for-web-power.pdf>. See also Mareike Möhlmann, *Collaborative Consumption: Determinants of Satisfaction and the Likelihood of Using a Sharing Economy Option Again*, 14 J. CONSUMER BEHAV. 193 (2015).

22 See, e.g., Natour *supra* note 8; VAN DIJCK, POELL, & DE WAAL, *supra* note 8.

23 RATHENAU INSTITUUT, EERLIJK DELEN. WAARBORGEN VAN PUBLIEKE BELANGEN IN DE DEELECONOMIE EN DE KLUSECONOMIE (2017) [FAIR SHARING, GUARANTEERING PUBLIC INTERESTS IN THE SHARING ECONOMY AND THE DIY ECONOMY] [in Dutch], <https://www.rathenau.nl/nl/publicatie/eerlijk-delen-waarborgen-van-publieke-belangen-de-deeleconomie-en-de-kluseconomie>.

A Public Interest and Public Values

1 Definition

There is no consensus on what “the public interest” is or how “public values” should be defined.²⁴ It remains unclear whether these concepts can be made intelligible and both are rarely explained by courts or legislators.²⁵ Not surprisingly, the existence of an overriding public interest has been famously contested by public choice theorists.²⁶ According to this position, the public interest could be easily captured by interest groups who, even when claiming to protect the public interest, would primarily try to promote their own business interests.²⁷ Yet, the public interest has been elected for centuries as the primary guiding standard for most government authorities when making decisions.²⁸

The literature has tried to advance multiple definitions for decades (if not centuries) for the public interest. Brian Barry defined “public interests” as “the interests which people have in common as members the public.”²⁹ This definition has been, nonetheless, criticized as members of society rarely have genuine common interests.³⁰ An alternative definition of the “public interest” reads as follows: “in a particular context, the public interest refers to the outcomes best serving the long-run survival and well-being of a social collective construed as the public.”³¹ The definition of “public interest” tends to be a mutable,

24 For a critical approach to the use of the public interest as a guiding standard, see, e.g., GLENDON A. SCHUBERT, *THE PUBLIC INTEREST: A CRITIQUE OF A POLITICAL CONCEPT* (1960); Clarke E. Cochran, *Political Science and the “Public Interest,”* 36 J. POL. 327 (1974); LESLIE A. PAL & JUDITH MAXWELL, *ASSESSING THE PUBLIC INTEREST IN THE 21ST CENTURY: A FRAMEWORK* (2004).

25 Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B. C. L. REV. 789, 790 (2000).

26 Frank Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1339 (1994); KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES*, 2-6, 59-60, 89 (2d ed. 1963).

27 Berenson *supra* note 26, at 804. On regulatory capture, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

28 Jodie L. Hierlmeier, *“The Public Interest”: Can It Provide Guidance for the ERCB and NRCB?*, 18 J. ENV. L. & PRAC. 279, 280 (2008); M. Deborah MacNair, *In the Name of the Public Good: “Public Interest” as a Legal Standard*, 10 CAN. CRIM. L. REV. 175, 179 (2006).

29 BRIAN BARRY, *POLITICAL ARGUMENT* 208 (1965).

30 Hierlmeier, *supra* note 29, at 283; Frank J. Sorauf, *The Public Interest Reconsidered*, 19 J. POL. 616 (1957).

31 BOZEMAN, *supra* note 17, at 12.

ambiguous, and context-dependent concept.³² Virginia Held demonstrated this complexity, by distinguishing between different theories such as the preponderance theory that defines the public interest by reference to the preponderance of power (Hobbes), opinion (Hume), utility (Bentham); and the unitary theory inspired by Rousseau that considers that a policy is only in the public interest if and only it is in the interests of all the members of the public.³³ The public interest is thus an ideal that is shaped by each generation, on a case-by-case basis by a society motivated to secure its common interests.³⁴ The literature has demonstrated that the public interest tends to be defined in regulatory settings as the result of a process of compromise, negotiation, or a cost-benefit analysis.³⁵

The notions of public values and the public interest are closely connected. Indeed, even when the public interest cannot easily be defined, many academics would agree that the public interest can be viewed as a set of substantive values that are shared by society.³⁶ Public values have been defined as the values of a society that provide “normative consensus about (a) the rights, benefits, and prerogatives to which citizens should (and should not) be entitled; (b) the obligations of citizens to society, the state, and one another; and c) the principles on which governments and policies should be based.”³⁷ Public values are those standards that society has decided to give collective attention to and in a Western society, this may mean that there is often a public interest in the protection of transparency, accountability, the safeguarding of democratic processes, good decision-making, and the best use of public resources.³⁸

Much of the debate about the relationship between public and private actors, privatization, and the definition of the public interest has had a political character and it has often been limited to inquiring to what extent it is constitutionally permissible to delegate certain powers to private actors.³⁹ In some

³² Jane Johnston, “Whose Interests?” *Why Defining the “Public Interest” Is Such A Challenge*, THE CONVERSATION (Sept. 21, 2017), <https://theconversation.com/whose-interests-why-defining-the-public-interest-is-such-a-challenge-84278>; Stephen M. King, Bradley S. Chilton & Gary E. Roberts, *Reflections on Defining the Public Interest*, 41 ADMIN. & SOC. 954 (2009).

³³ See VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUALS INTERESTS* (1970).

³⁴ BOZEMAN *supra* note 18, at 12-13 (drawing on JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927)).

³⁵ Hierlmeier *supra* note 29, at 285.

³⁶ *Id.* at 294.

³⁷ BOZEMAN *supra* note 18, at 132.

³⁸ VAN DIJCK, POELL, & DE WAAL, *supra* note 8, at 24; Gillian Black & Leslie Stevens, *Enhancing Data Protection and Data Processing in the Public Sector: The Critical Role of Proportionality and the Public Interest*, 10 SCRIPTED 93, 112.

³⁹ David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L. J. 647 (1985).

jurisdictions, this is understood in the sense that some tasks should primarily or exclusively be performed by public bodies. In the United States, the limits of privatization for the sake of the protection of the public interest are drawn around the concept of the so-called “inherently governmental functions.”⁴⁰ An “inherently governmental function” in the United States has been defined as “a function that it is so intimately related to the public interest as to require performance by Federal Government employees.”⁴¹ Under the “nature of the function” test, a task will be regarded as “inherently governmental” if it involves “exercising sovereign power,” for example, that of depriving someone of liberty in the name of public safety.⁴² Similarly, in France, the Constitutional Council also declared in 1986 that “core governmental activities and corresponding public services” such as justice, police, defense, education, and health care, cannot be privatized. This perspective reflects the view that certain functions should not be privatized because of the unsurmountable differences between the public and private sectors.⁴³ Governments, civil servants and government lawyers are regarded as the trustees of citizens’ interests who are expected to protect the public interests at that time and in a specific context in the most effective, transparent, and proportionate manner.⁴⁴

The protection of public values and the public interest involves not only a definition of the limits of privatization but also the adoption of regulatory measures that safeguard the quality of certain services as well as their affordability, sustainability, and equal access.⁴⁵ However, in the digital age and in the specific context of the sharing economy, it is particularly challenging to suggest a definition of the public interest and list what public values may be at stake.⁴⁶

⁴⁰ In the United States, the limits of outsourcing are defined by the concept of “inherently governmental functions” which means that certain tasks can only be carried out by government employees. See Simon Chesterman, “We Can’t Spy ... If We Can’t Buy!” *The Privatization of Intelligence and the Limits of Outsourcing* “Inherently Governmental Functions,” 19 EUR. J. INT’L L. 1055, 1069 (2008).

⁴¹ Tirard *supra* note 1, at 292. But see for the United Kingdom, Tony Prosser, *Social Limits to Privatization*, 21 BROOK. J. INT’L L. 213, 218 (1998) (analyzing the limits of privatization from a comparative perspective and stating that the “United Kingdom experience shows quite clearly that there is no core of governmental activity which cannot be privatized.”).

⁴² Fiona O’Carroll, *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers*, 67 EMORY L. J. 293 (2017).

⁴³ JOHN P. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 11 (1989).

⁴⁴ See Richard C. Box, *The Administrator as a Trustee of the Public Interest*, 24 ADMIN. & SOC. 323 (1992).

⁴⁵ See generally WOLF SAUTER, *PUBLIC SERVICES IN THE EU* (2015).

⁴⁶ Catherine Cherry & Nick Pidgeon, *Is Sharing the Solution? Exploring Public Acceptability of the Sharing Economy*, 195 J. CLEANER PRODUCTION 939 (2018) (exploring public perceptions and

Such an effort should nevertheless take into account some of the elements of the definition of public interest discussed in this section: the definition of the public interest evolves with the needs of society, it results from a broad discussion with different stakeholders, it is a political process that should combine perspectives from national and local communities but it should not ignore the importance of global online platforms and innovation. Nevertheless, as the following section explains, this multi-dimensional approach to the public interest and public values does not always match the traditional approach of regulators.

2 Traditional Protection of Public Interests

Regulators have developed extensive responses to negative externalities and bad behavior by members of offline communities who endanger the public interest. This has included not only police power but also the regulation of entry to several professions and urban planning.⁴⁷ The regulation of services is in most cases justified by the existence of a public interest, often a scarce public good which is particularly valuable to society and would not be adequately safeguarded by private parties without any regulatory intervention.⁴⁸

Traditional regulation of hospitality and restauration services such as licensing procedures seeks to safeguard a number of public interests that are relevant for communities as a whole, such as the access and good functioning of public services, social and territorial cohesion, and access to affordable housing. In these sectors, public bodies tend to issue licenses and permits to individuals and businesses to enter a business, acting in many cases as single authoritarians for resource allocation and use.⁴⁹ Operating, business or liquor licenses, permits, certifications and registration requirements are designed to control professional aptitude and respond in different ways to information asymmetries between service providers and customers as well as to specific risks to public health or

public values at stake in the sharing economy and concluding that besides private values, citizens also expect the sharing economy to foster social equality, encourage and support local communities, fair economic practices).

⁴⁷ Alex Bryson & Morris M. Kleiner, *The Regulation of Occupations*, 48 BRIT. J. IND. RELATIONS 2 (2010).

⁴⁸ Michelle Hersh, *A Study on the Role of Spectrum Usage Rights without Dispute*, 12 COLO. TECH. L. J. 445 (2014).

⁴⁹ *Id.* at 452-53.

to personal, food, road or fire safety, and financial stability.⁵⁰ Local public bodies require for example that hotels have fire escape routes, ventilation, keep first-aid kits, have someone available in case of emergencies, and require daily cleaning services in order to guarantee public health and safety. Public accommodation laws designed to prevent establishments such as hotels from discriminating against customers on the grounds of race or color, are another example of a traditional way of protecting public interests.⁵¹

In the attempt to protect multiple interests (including a public body's budget), regulation has sometimes erased the traditional borders between public and private law and relied upon both public and private law instruments.⁵² The regulation of occupations has been for centuries the result of the cooperation between public and private actors, particularly guilds and, more recently, professional associations.⁵³ Regulation distinguishes professions from unregulated commercial trade on the grounds of the public interest: the regulation of the former is thought to be necessary to ensure a socially optimal result. Commercial trade is, on the contrary, left, to a great extent, in the hands of consumers, despite the recent development of stricter consumer laws.⁵⁴

The interests of the public and third parties are also preserved by zoning regulations that limit the area in which an activity can take place in an attempt to contribute to the stability of the real estate market and the livability and safety of residential neighborhoods.⁵⁵ In the context of land use, private and

50 Thomas G. Moore, *The Purpose of Licensing*, 4 J. L. & ECON. 93 (1961); Julia Black, *The Role of Risk in Regulatory Processes*, in THE OXFORD HANDBOOK OF REGULATION 302, 303 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010).

51 Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L. J. 1271 (2017).

52 Martine Lombard, *La régulation et la distinction du droit public et du droit privé en droit français*, in THE PUBLIC LAW/PRIVATE LAW DIVIDE: UNE ENTENTE ASSEZ CORDIALE?, 81, 83 (Mark Freedland & Jean-Bernard Auby eds., 2006) [in French]. Jean-Bernard Auby, *Le rôle de la distinction du droit public et du droit privé dans le droit français*, in *supra*, at 11-19.

53 Shirley Baker, *History of Licensure in Several Occupations in the Health Professions*, 1 J. HEALTH OCCUPATIONS 1 (1983) (providing a historical background of early licensing of physicians); Avner Greif, Paul Milgrom, & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994).

54 Roger van den Bergh, *Self-Regulation of the Medical and Legal Professions: Remaining Barriers to Competition and EC Law*, in ORGANIZED INTERESTS AND SELF-REGULATION 89 (Bernardo Bortolotti & Gianluca Fiorentini, eds., 1999); Roger van den Bergh & Michael Faure, *Self-Regulation of Professions in Belgium*, 11 INT. REV. L. & ECON. 165 (1991).

55 WILLIAM A. FISCHER, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS (1985); Robert H. Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979). See also Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City without Zoning)*, 50 WAYNE L. REV. 1171 (2004).

informal instruments (e.g., covenants, nuisance rules, and contracts) have been used alongside public regulation to minimize nuisance and manage urban space.⁵⁶

The emergence of the sharing economy has disrupted the existing regulatory system and the traditional protection of the public interest through licenses, permits, and inspections.⁵⁷ In the European Union, online platforms have insisted that national or local licensing requirements should not be applicable to them as they are information society services and thus mere “middlemen” that match supply and demand.⁵⁸ The burden to comply with traditional regulation has been thus shifted to users who often wonder exactly what rules are applicable to these informal transactions, particularly in cities where local authorities have not yet adopted any specific regulatory measures.

Airbnb and other sharing-economy platforms emerged during the financial crisis as well-intended and informal initiatives that were meant to help individuals make ends meet.⁵⁹ They did not fit immediately into the scope of existing regulation and because of the informal and sporadic character of these transactions (e.g., offering an air mattress or sofa bed to a tourist), it made sense in

56 Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682 (1973).

57 Daniel Guttentag, *Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector*, 18 CURRENT ISSUES IN TOURISM 1192 (2015); see, e.g., Abbey Stemler, *Between and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 34 (2016); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413; Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEGIS. 147; Raymond H. Brescia, *Regulating the Sharing Economy: New and Old Insights into An Oversight for the Peer-to-Peer Economy*, 95 NEB. L. REV. 88 (2016).

58 The Court of Justice of the European Union has further clarified this qualification in the Uber Spain case by distinguishing platforms on the grounds of their ability to control the service (subject to local or national regulations on regulated services) or merely advertise or intermediate without controlling the service or performance of users (information society services not subject to licensing requirements), see Case C-434/15 Asociación Profesional Elite Taxi v Uber Spain [2017] ECLI:EU:C:2017:981. See generally VASSILIS HATZOPOULOS, *THE COLLABORATIVE ECONOMY AND EU LAW* (2018). The case of Uber, a ride-sharing platform, will not be further discussed in this Article as Uber is in its current form often not qualified as a sharing-economy platform. A similar case involving Airbnb is, nonetheless, pending before the Court of Justice of European Union at the time of writing. In this case, the national judge also asked Luxemburg to qualify this home-sharing platform. See Christoph Busch, *The Sharing Economy at the CJEU: Does Airbnb Pass the ‘Uber Test’?*, 4 EUCML 172, 173 (2018).

59 For an early analysis of the sharing economy and the need for a differentiated approach, see Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147; Sofia Ranchordás, *Does Sharing Mean Caring: Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413 (2015).

the early days of the sharing economy not to intervene and allow platforms and communities to “self-regulate.”⁶⁰ The sharing economy has been able to grow partially due to the alleged inexistence of clear regulatory burdens (or the low risk of enforcement) and its own regulatory system based on reputational mechanisms.⁶¹ Moreover, national or local authorities have often been overwhelmed with the rapid growth of the sharing economy and the challenge of adopting new rules.⁶² Furthermore, scholars and platforms have contested the efficiency and applicability of traditional regulations to the sharing economy.⁶³ Several cities (e.g., Brussels, Berlin, Lisbon, Paris) have, nonetheless, adopted new regulatory measures to limit the expansion of home-sharing or facilitate its public oversight.⁶⁴ Thus far, the traditional approach of more stringent cities has consisted in requiring the registration of houses with local authorities, limiting the number of days someone can rent an accommodation, and subjecting rented houses to potential inspections.

In the meanwhile, despite demonstrations and complaints against home-sharing platforms, the sharing economy remains a popular alternative to traditionally regulated services as the system put in place by the sharing economy appears to work. The relatively small number of incidents does not mean, nonetheless, that the regulatory system employed by the sharing economy is able to protect both private and public values. Part II offers a critical account of both issues.

60 Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIAL. 116 (2015); cf. European Economic and Social Committee, Opinion on the Sharing Economy and Self-Regulation 2016 OJ C 303, 36–44 (May 25, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016AE0933&from=EN> (underlining the potential risks of the sharing economy and the need for clear principles and a “solid architecture and reliable self-regulation or co-regulation at EU level).

61 See, e.g., Rebecca Leshinsky & Laura Schatz, “I Don’t Think My Landlord Will Find Out:” *Airbnb and the Challenges of Enforcement*, URBAN POL’Y & RES. 1476 (2018).

62 See Eric Biber, Sarah E. Light, J. B. Ruhl, & James Salzman, *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561 (2017).

63 For an overview of this position, see, e.g., Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, U. CHI. L. REV. DIALOGUE 116 (2015); Gregory E. Lines, *Hej, Not Hejda: Regulating Airbnb in the New Age of Arizona Vacation Rentals*, 57 ARIZONA L. REV. 1163 (2015); Adam Thierer, Christopher Koopman, Anne Hobson & Chris Kuiper, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem,”* 70 U. MIAMI L. REV. 830, 864–69 (2015).

64 See Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215 (2016); Michele Finck & Sofia Ranchordás, *Sharing and the City*, 49 VAND. J. TRANSNAT’L L. 1299 (2016).

II The Protection of Public Interests in the Sharing Economy

While the power to regulate public and private values can be delegated to private actors under certain conditions and on the grounds of their expertise, in the sharing economy, there is no explicit framework for the outsourcing of public values to P2P-communities. In the sharing economy, online platforms seek to protect public and private values in two ways: First, by employing *reputational mechanisms* that encourage users to develop and maintain a good reputation; second, by adopting self-regulatory measures based on the right to exclude users who misbehave. The efficiency of these self-regulated systems has been praised in the literature and thus far, this system has been favorable to the development of the sharing economy.⁶⁵ Nevertheless, it is unclear how these approaches compare to the traditional protection of public values. This part explores in particular the first mechanism, its regulatory potential and shortcomings.

A Regulation by Reputation

1 Trust and Reputation

When the first sharing-economy initiatives emerged, platforms struggled with one important element: while many would agree that it was a good idea to share underused goods with strangers, most wondered how platforms could generate trust between strangers.⁶⁶ At the end of the day, guests would be sleeping or eating at a stranger's place and would be therefore exposed to numerous risks.⁶⁷ Sharing-economy practices have existed for centuries but very often they were practiced between family, friends, and acquaintances as any exchanges with strangers would be characterized by a certain sense of mistrust.⁶⁸ Reputational

⁶⁵ Michal S. Gal, *The Power of the Crowd in the Sharing Economy*, 13(1) L. & ETHICS HUM. RTS. 29 (2019).

⁶⁶ See Juho Hamari, Mimmi Sjöklint & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, J. ASS'N INFO. SCI. & TECH. 1 (2015).

⁶⁷ Daniel Guttentag, *Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector*, 18 CURRENT ISS. TOURISM 1192.

⁶⁸ Jamilla Jefferson-Jones, *Airbnb and the Housing Segment of the Modern 'Sharing Economy': Are Short-Term Rental Restrictions an Unconstitutional Taking?* 42 HASTINGS CON. L. Q. 557 (2015); Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENVIRON'TL INNOV. & SOCIETAL TRANSITIONS 3, 4 (2017).

mechanisms emerged as an essential instrument in the development of trust between parties that did not have prior experience with each other.⁶⁹ Airbnb and several other digital platforms followed the model already successfully implemented by eBay which included allowing users to provide online feedback on their transactions.⁷⁰ Indeed, word-of-mouth (WoM) and reputational mechanisms are far from being new instruments in the regulation of trade.⁷¹ Rather, reputation has been employed for centuries in different communities to decide whether to trade with new parties as an alternative to formal enforcement instruments or as a complement to it.⁷²

Reputational systems proliferate nowadays both in the business-to-consumer and peer-to-peer sectors: in the former, managing ratings and reviews has become the primary business of digital platforms like TripAdvisor or Yelp and it has helped large platforms like Amazon sell the products of less known brands or sellers; in the latter, online reviews offer valuable insights into a stranger's sharing services. In both cases, online reputational mechanisms operate as the friendly advice that tends to get lost in the digital age due to the lack of social trust that characterizes modern cities.⁷³ Online reputational mechanisms reconnect anonymous citizens who give each other's advice and reestablish a form of social capital that decades ago used to exist in small communities.⁷⁴ Online reputation has become an even more valuable asset as individuals become increasingly connected and dependent on social media networks.⁷⁵

The trust generated by reputational mechanisms can be perceived as empowering as it allows users to engage with their peers in a more flexible way, compare service providers on the grounds of their reputation, and share information with each other without the intervention of the "experts."⁷⁶

69 Yannis Bakos & Chris Dellarocas, *Cooperation Without Enforcement? A Comparative Analysis of Litigation and Online Reputation as Quality Assurance Mechanisms*, 57 MGMT. SCI. 1944 (2011).

70 Bob Rietjens, *Trust and Reputation on eBay: Towards a Legal Framework for Feedback Intermediaries*, 15 INFO. & COMM. TECH. L. 55 (2007).

71 Johan Arndt, *Role of Product-Related Conversations in the Diffusion of a New Product*, 4 J. MARKETING RES. 291 (1967).

72 Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Greif, *supra* note 11.

73 Nestor Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 216 (2016).

74 Mariana Zuleta Ferrari, *Beyond Uncertainties in the Sharing Economy: Opportunities for Social Capital*, 7 EUR. J. RISK REG. 664 (2016).

75 See Michael Anderson & Jeremy Magruder, *Learning from the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database*, 122 ECON. J. 957 (2012).

76 Ann Marie Marciarille, "How's my Doctoring?" *Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361 (analyzing online patient feedback on physicians in

2 The Regulatory Value of Reputation

The value of reputation rests in two central pillars: First, reputation operates as an informational vehicle that aggregates past experiences and conveys quality signals; second, it generates the appearance that future good behavior can be predicted based on past information and by doing so, it generates trust and promotes cooperation.⁷⁷ Reputation protects parties in a similar way to brand names and it is used to address information asymmetries in the “market for lemons,” that is, in a market where consumers are not able to assess the quality of products beforehand.⁷⁸ Reputation conveys quality or the lack thereof as well as the potential risk that the seller has more to lose than the buyer if the former underperforms.⁷⁹ Good reputation attracts more customers but because of its fragility, it can be easily destroyed if service providers do not live up to their reputation. Reputation is closely connected to the social apprehension that individuals have of one another.⁸⁰ Reputation has hence been defined as a form of property, as honor, and an extension of human dignity.⁸¹

In the sharing economy, reputational systems can be, nonetheless, only trusted if online ratings and reviews accurately represent the quality of past transactions, providing a clear idea of the pros and cons of engaging with a service provider and if online platforms or users cannot tamper with their content.⁸² These conditions are not always verified. On the contrary, the literature has criticized the accuracy of online reviews because of their limited content and inability to reproduce reality; the fact that reviews tend to be primarily positive; and their subjective and biased character of reviews.⁸³

the broader context of growing user-generated context on platforms such as Yelp or Angie’s List).

⁷⁷ Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). But see however Greif, *supra* note 11.

⁷⁸ George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

⁷⁹ *Id.*

⁸⁰ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692 (1986).

⁸¹ *Id.* at 693.

⁸² Abbey Stemler, *The Myth of the Sharing Economy and its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 218 (2017).

⁸³ Chris Nosko & Steven Tadelis, *The Limits of Reputation in Platform Markets: An Empirical Analysis and Field Experiment*, (NBER Working Paper No. w20830), available at SSRN <https://ssrn.com/abstract=2548349>.

3 Shortcomings of Reputational Mechanisms

A rough observation of the content of online reviews on Airbnb or another home-sharing platform provides us a clear impression of what most reviews are about: the friendliness of the host, the decoration of the house, the comfort of the accommodation, and the location. Ratings and reviews convey primarily private beliefs and experiences that are formulated in short sentences, follow a predetermined or suggested pattern, or respond to suggested questions. Airbnb, for example, provides a star rating-system that allows “[g]uests to give ratings on” rate their trip on a scale of 1-5 for overall experience, cleanliness, accuracy, value, communication, arrival, and location.”⁸⁴

The ability of users to communicate information in a significant way depends not only on the review form and the questions reviewers are given but also the goods they are asked to review.⁸⁵ In this context, the literature tends to distinguish between search goods (e.g., a piece of clothing) and experience goods (e.g., a stay at a hotel). Experience goods, that is, goods and services that have qualities that are difficult to ascertain before purchase, are the main reviewed goods in the sharing economy.⁸⁶ Consumers tend to rely primarily on reviews or WoM to acquire experience rather than search products.⁸⁷ Empirical research has also shown that online reviews are considered more carefully by consumers in the case of experience products, as they do not have the ability to obtain further information about these goods from other sources.⁸⁸ Nevertheless, these are also the goods that might be more difficult to describe in brief reviews than search goods. In addition, sharing-economy users have different backgrounds and expectations from experience goods: They may expect less from an Airbnb than from a hotel, and have different hygiene standards or value for money.⁸⁹ While online platforms understand that there are different consumer

84 Airbnb, *How Do Star Ratings Work?*, <https://www.airbnb.com/help/article/1257/how-do-star-ratings-work> (last visited Oct. 15, 2019).

85 Vasiliki Baka, *The Becoming of User-generated Reviews: Looking at the Past to Understand the Future of Managing Reputation in the Travel Sector*, 53 *TOURISM MGMT.* 148 (2016) (discussing how the sharing of experiences has become part of everyday organizational life).

86 For the definition of experience goods, see Philip Nelson, *Information and Consumer Behavior*, 78 *J. POL. ECON.* 311 (1970).

87 Jun Yang & Enping Mai, *Experiential Goods with Network Externalities Effects: An Empirical Study of Online Rating System*, 63 *J. BUS. RES.* 1050, 1052 (2010).

88 Pranjal Gupta & Judy Harris, *How e-WOM Recommendations Influence Product Consideration and Quality Choice: A Motivation to Process Information Perspective*, 63 *J. BUS. RES.* 1041 (2010).

89 Vasiliki Baka, *The Becoming of User-generated Reviews: Looking at the Past to Understand the Future of Managing Reputation in the Travel Sector*, 53 *TOURISM MGMT.* 148, 158 (2016).

segments with varied preferences, prospective consumers reading reviews might fail to read between the lines.⁹⁰ Moreover, trust is also generated by formalistic elements such as the personal photos of hosts and guests and the way in which reviews are formulated.⁹¹

Another challenge of online reputational mechanisms resides in the fact that reviews tend to be overwhelmingly positive. This positive character of online reviews is explained by several reasons. First, online reputational instruments are two-way systems that tend to promote strategic reciprocity.⁹² As users are asked to rate each other at the same time, a bad review of a host might also have repercussions for the user's reputation as a guest. Although reviews are released simultaneously, hosts might be suspicious of guests that have written critical reviews. Reviews tend to be not only positive but also incomplete or cautious.⁹³ Second, consumers fear that a low rating or a critical review will not be sufficient for a service provider to be successful on the competitive market of the sharing economy, particularly at a time when multiple providers are rated positively.⁹⁴ Users easily disregard flaws in the service because they are provided by non-professionals and give individuals a more generous score than they deserved.⁹⁵ Some concerns regarding the quality or safety of the premises may also fail to be disclosed.⁹⁶

Although negative reviews are scarce in the sharing economy, they have a disproportionately high impact on consumers' choices.⁹⁷ Moreover, an online negative review permeates different dimensions of the life of an individual due to the connection with social media where unflattering information may be

⁹⁰ Christoph Lutz & Gemma Newlands, *Consumer Segmentation within the Sharing Economy: The Case of Airbnb*, 88 J. BUS. RES. 187 (2018).

⁹¹ Eyal Art, Aliza Fleischer, & Nathan Magen, *Trust and Reputation in the Sharing Economy: The Role of Personal Photos*, 55 TOURISM MGMT. 62 (2016); Zhiwei Liu & Sangwon Park, *What Makes a Useful Online Review? Implication for Travel Product Websites*, 47 TOURIST MGMT. 140 (2015).

⁹² Georgios Zervas, Davide Proserpio, & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 54 J. MARKETING RES. 687 (2017).

⁹³ For a more extensive analysis of this aspect of reviews, see JOSEPH M. REAGLE, *READING THE COMMENTS* (2015).

⁹⁴ Ethan Wolff-Mann, *Here's Everything Wrong with Online Reviews and How to Fix It*, TIME (July 22, 2016), <http://time.com/money/page/online-reviews-trust-fix/>.

⁹⁵ *Id.*

⁹⁶ Lior Jacob Strahilevitz, "How's My Driving?" for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1713-14 (2006).

⁹⁷ M.S. Balaji et al., *Determinants of Negative Word-of-Mouth Communication Using Social Networking Sites*, 53 INFO. & MGMT. 528 (2016).

difficult to delete.⁹⁸ Individuals may not be able to reestablish their reputation after a couple of very negative reviews and may feel forced to make a new account which means starting anew.⁹⁹

Online reputation is built by users who often do not disclose their real identities, present themselves as well-traveled individuals in order to gain the trust of other platform users, and who might be driven by personal agendas.¹⁰⁰ The literature has, therefore, highlighted that the trustworthiness of online reviews can also be undermined by the biased and inaccurate character of these mechanisms.¹⁰¹ According to a study published by the Dutch Competition Authority in 2017, consumers make regular use of online reviews but remain critical of their content and veracity.¹⁰² Prospective consumers might not trust blindly online reviews but they rely upon this information in the orientation phase to flag potential serious risks regarding for example the lack of hygiene of an Airbnb accommodation.

B Regulation by Exclusion

Online reputational mechanisms are supported by three instruments of self-regulation employed by online platforms: first, the terms and conditions of the platform — which are often presented as community values; second, online dispute resolution mechanisms; and third, the exclusion of members that misbehave or reduce the value of the platform.

The sharing economy provides the illusion that its users are part of a community with shared values. To illustrate, Airbnb has formulated “[c]ommunity standards to help guide behavior and codify the values that underpin our

98 DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007). Reputation is however traditionally a relative asset that is valid for a certain platform of context as it is sign of how well someone can perform in a certain context, see HASSAN MASUM & MARK TOVEY, *THE REPUTATION SOCIETY* (2011).

99 Frank Pasquale, *Reforming the Law of Reputation*, 47 *LOYOLA U. CHI. L. J.* 515 (2015).

100 P. Tussyadiah & Sangwon Park, *When Guests Trust Hosts for Their Words: Host Description and Trust in the Sharing Economy*, 67 *TOURISM MGMT.* 261 (2018).

101 Kate Mathews Hunt, *Gaming the System: Fake Online Reviews v. Consumer Law*, 31 *COMP. L. & SECURITY REV.* 3 (2015).

102 Dutch Authority for Consumers & Market, *Press Release: ACM Calls for Increased Transparency in Online Reviews* (May 11, 2017), <https://www.acm.nl/en/publications/publication/17222/ACM-calls-for-increased-transparency-in-online-reviews/>, full report available at <https://www.acm.nl/nl/publicaties/publicatie/17217/Eindrapportage-ACM-verkenning-naar-online-reviews-Reviews-gereviewd/> [in Dutch].

global community.”¹⁰³ Even though Airbnb does not control the content of services to the same extent as other platforms (e.g., Uber), it seeks to offer both safety and hospitality rules.¹⁰⁴ Airbnb’s community values include safety, security, fairness, authenticity, and reliability standards. On the platform’s website, Airbnb underlines that the trust required to be a member of this community means that its users should refrain from “threatening anyone,” “harming [themselves] or others,” “creating hazardous situations.”¹⁰⁵ Airbnb underlines that members of criminal organizations and racist groups are not welcome in their community but there does not appear to be any other form of preventing these individuals from joining. Nevertheless the community as Airbnb’s background check remains limited.

Platform dispute resolution mechanisms and customer support services are a second type of instrument put in place to solve conflicts between users. These instruments do not operate as conventional online dispute resolution mechanisms but as extended forms of customer assistance that aim to dissuade users from using formal institutions, promising immediate answers to their problems and solutions that meet the community’s values.¹⁰⁶ Nevertheless, existing scholarship has explained the pitfalls of these internal dispute resolution mechanisms such as the lack of transparency, the excessive reliance on property rights and the right to exclude, and the potential to enhance inequality.¹⁰⁷

Online platforms try to exclude members that misbehave.¹⁰⁸ This right to exclude is also applicable to users who can also decide not to trade with other peers who have built a “bad reputation.” This means that sharing-economy providers can not only share their property with whoever they wish but also that they rely on their property rights to refuse to do so, even when no one intends to misbehave or endanger public or private interests. In the sharing economy, users’ race, age, and gender may, nonetheless, exacerbate the wish not to contract with certain parties in sectors where past generations have

103 Airbnb, *Trust & Safety: Community Standards*, <https://www.airbnb.com/trust/standards> (last visited Oct. 15, 2019).

104 Busch *supra* note 59, at 173.

105 *Id.*

106 Rory van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 553 (2016).

107 *Id.*; on the use of property rights to sanction bad behavior in online transactions, see Evans *supra* note 6, at 1220-26; Lior Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006).

108 Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 650 (2013).

fought to avoid the exclusion of minorities.¹⁰⁹ It is also worth asking who this instrument aims to protect: Does the right to exclude protect primarily the community and its values or the platform's economic interests? Does this right flow from the violation of the general terms or conditions?

C Sharing-Economy Platforms, Reputation, and Public Values

Brian Chesky, Airbnb's CEO, stated in 2013: "[C]ities can't screen as well as technologies can screen. Companies have these magical things called reputation systems ..."¹¹⁰ While reputational mechanisms may be adequate to promote the flow of commercial information, it is unclear whether rating stars and brief comments are also magical when it comes to the protection of the public interest concerns such as public health, urban planning and negative externalities such as the nuisance experienced by neighbors.¹¹¹ In this section, I analyze how the platform reputational and self-regulatory approaches compare to the conventional command-and-control protection of public values.

A first objection to the way in which the sharing economy seeks to protect private and public values refers to the scope of its mechanisms. Sharing-economy platforms operate *ex post* and the effects of their sanctions are limited to that platform community (e.g., deleting a listing from Airbnb and not allowing the user to advertise any more services on the platform). Traditional regulation operates both *ex ante* and *ex post*, by limiting entry, setting social norms, and sanctioning those who misbehave. The scope of this rules has an impact both in the online and the "real world." Users who rent a house that is unsafe, without the permission of their landlords, or that discriminate against users may be evicted, their "illegal hotels" may be closed down and they may be sanctioned and made to pay heavy fines. Obviously, platforms do not have the same powers as public authorities, but this statement is also a reminder of the need for a

109 See, e.g., Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORDHAM URB. L. J. 2 (2016); Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig Economy*, 47 SETON HALL L. J. 393 (2017).

110 Jason Clampet, *Airbnb CEO Responds to Illegal Rentals Story: "First of All It's Not Illegal Everywhere,"* SKIFT (Jan. 11, 2013), <https://skift.com/2013/01/11/airbnb-responds-to-illegal-rentals-story-first-of-all-its-not-illegal-everywhere/>; Stemler *supra* note 58, at 675.

111 For an analysis of the nuances of positive reviews on Airbnb, see Judith Bridges & Camilla Vásquez, *If Nearly All Airbnb Reviews Are Positive, Does that Make Them Meaningless?*, CURRENT ISSUES IN TOURISM (2016), <https://www.tandfonline.com/doi/full/10.1080/13683500.2016.1267113>.

complementarity relationship between traditional regulation and online reputational mechanisms.

A second objection to the regulation of public values by the sharing economy refers to the fact that their trust and reputational systems are prone to bringing a number of biases to the surface. At the beginning of the sharing economy, ride-sharing platforms claimed to use algorithms to address a well-known case of discrimination — negative biases against African Americans hailing taxicabs. They did so by not disclosing users' profile pictures until after the driver had accepted the fare.¹¹² Nowadays, empirical research has demonstrated that this strategy does not work for many platforms (e.g., home-sharing services) as users base their decision to contract on pictures, name of the host, and description of the service or accommodation.¹¹³ This is precisely the information that is often used to discriminate against users or that may influence the ability to assess someone's performance in an unbiased way.¹¹⁴ Moreover, when some products or services have hundreds of reviews, prospective consumers try to look for comments or elements that meet their mental script and help them relate to previous reviewers.¹¹⁵ The disclosure of the reviewer's country of origin or identity will nonetheless be affected by the same type of subjective perceptions that tend to influence the evaluation of a service, including discrimination on the basis of gender, age, and appearance.¹¹⁶ In the context of home-sharing, the host's race and ethnicity is one of the elements used to differentiate between participants in the sharing economy.¹¹⁷ Empirical research has demonstrated that in the United States, Hispanic Airbnb-hosts charge less than White users with comparable homes because they anticipate the effect of discrimination and try to compensate this effect with competitive prices.¹¹⁸ In the context of traditional regulation, hosts and guests tend not to have information regarding the race or ethnic background of each other or be protected by public accommodation laws against potential discrimination.¹¹⁹

¹¹² Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1042 (2017).

¹¹³ Leong & Belzer, *supra* note 51, at 1292.

¹¹⁴ *Id.* at 1293. See particularly Benjamin Edelman, Michael Luca & Daniel Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017).

¹¹⁵ Thomas L. Ngo-Ye, Atish P. Sinha & Arun Sen, *Predicting the Helpfulness of Online Reviews Using a Scripts-Enriched Regression Model*, 71 EXPERT SYSTEMS WITH APPLIC. 98 (2017).

¹¹⁶ Strahilevitz, *supra* note at 9.

¹¹⁷ Benjamin Edelman, Michael Luca & Daniel Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017).

¹¹⁸ Venoo Kakar, Joel Voelz, Julie Wu & Julisa Franco, *The Visible Host: Does Race Guide Airbnb Rental Rates in San Francisco?*, 40 J. HOUSING ECON. 25 (2018).

¹¹⁹ Leong & Belzer *supra* note 51, at 1293.

Online reputational mechanisms and self-regulatory instruments suffer from a third deficiency when it comes to the protection of public interests: They are primarily designed to convey information that protects commercial and private interests rather than the interests of third-parties or public values.¹²⁰ Multiple cities have been experiencing the negative effects of the explosive development of home-sharing platforms like Airbnb or Wimdu: Streets flooded with tourists on Friday evenings that stay through the weekend in residential buildings; apartments once inhabited by families, now transformed into guest houses with noisy tourists; and the high price of real estate as the alleged result of the increase in the number of tourists.¹²¹ While online reputational mechanisms may disclose commercial elements regarding the qualities of home-sharing services, the literature has not explained how third-parties negatively affected by the sharing economy can be heard and protected, in a relatively comparable way to the protection they receive from traditional regulation. Although Airbnb allows neighbors to make a complaint about a host causing nuisance, the “neighbor webpage” requires the mediation of the platform and does not specify how and whether the reputation of a host will be affected.¹²² Only users can write reviews and perhaps neighbors should not be directly involved in this reputational mechanism but instead their input could be used to correct someone’s reputation.

In conclusion, it is difficult to compare regulation and online reputational mechanisms when it comes to the protection of public values. The protection of some public values in the sharing economy has not been formally privatized or outsourced to online platforms. The delegation of regulatory tasks happened slowly and informally in the context of unregulated online sharing initiatives. Although online platforms are becoming increasingly important in our economy, they refuse to be subject to public law precepts— similar to what happens in

120 Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015); Stemler *supra* note 83, at 224.

121 We write “alleged” as there is mixed evidence as to whether Airbnb is driving up rents in cities. See, e.g., Keren Horn & Mark Merante, *Is Home Sharing Driving Up Rents? Evidence from Boston?* 38 J. HOUSING ECONOMICS 14 (2017); Caroline Hunter, Andrew Brookes & Giles Peaker, *Airbnb—Issues for Housing Lawyers*, 20 J. HOUSING L. 39 (2017); Neil Collar, *Regulating the Occupancy of Homes*, 180 SCOT. PLANNING & ENVTL. L. 37 (2017); Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL’Y REV. 229 (2016); John Levendis & Mehmet F. Dicle, *The Neighborhood Impact of Airbnb on New Orleans* (Oct. 20, 2016), available at SSRN <https://ssrn.com/abstract=2856771> or <http://dx.doi.org/10.2139/ssrn.2856771>.

122 See Airbnb and Your Neighborhood, <https://www.airbnb.com/neighbors> (last visited Oct. 11, 2019) (on this webpage, Airbnb states that their team “will review the complaint. If [they] match it with an active Airbnb listing, [they]’ll send [their] message to the host when possible.”

many countries when public tasks are officially privatized.¹²³ Also, private regulators like platforms do not necessarily have incentives to address these public values and increase social welfare.¹²⁴ Instead, they invest in maximizing the value of their platforms, which may also involve in some cases an indirect reduction of negative externalities, for example, if a socially responsible image helps them attract additional users. David Evans has argued that online platforms have several advantages over public regulators in the control of negative externalities as they have better information, can monitor the community closely and modify practices, and face fewer legal constraints.¹²⁵ Nevertheless, in practice, only part of the negative externalities will be addressed by these private mechanisms: Many third-parties do not have a voice in online reputational mechanisms, the monitoring of online platforms is limited to dispute resolution, and it does not include the individual inspection of facilities.¹²⁶

In addition, platforms solve conflicts between users, as well as other problems by excluding users from their “community” without further sanctions being applied. Moreover, the daily regulators and guardians of the quality and safety of services in the sharing economy are not platforms but the users that write online reviews. These users are not experts, they provide biased and subjective information, and their word is not supported by traditional instruments or thorough self-regulation. Regulation and reputation do not complement each other in the sharing economy but rather are alternatives one to the other. However, despite these shortcomings, online reputational mechanisms have expanded in the last decades and have become one of the supporting pillars of the sharing economy. This begs a more careful analysis of the role of sharing-economy users as regulators in the sharing economy.

III Users as Regulators?

Technology has facilitated the emergence of P2P-networks that allow users to share information directly. This has been visible not only in the sharing economy but more broadly in different economic, social, and political areas, including crowdsourcing of legislation, P2P-lending systems, and Wikipedia or similar

¹²³ Tirard *supra* note 1, at 297.

¹²⁴ Evans *supra* note 6, at 1241-42.

¹²⁵ Evans *supra* note 6, at 1242.

¹²⁶ See Caroline Hunter, Andrew Brookes & Giles Peaker, *Airbnb—Issues for Housing Lawyers*, 20 J. HOUSING L. 39 (2017); Karolina Zurek, *Food Sharing in Europe: Between Regulating Risks and the Risks of Regulating*, 7 EUR. J. RISK REG. 675 (2016).

community-built knowledge networks.¹²⁷ Online platforms create communities of users with shared interests who will benefit from reciprocate interactions.¹²⁸

Common attempts to dismiss the regulatory value of P2P-communities and their regulation tend to overlook the practical importance of online reputational mechanisms to users' decisions as well as the business model of the sharing economy. Moreover, online reputational mechanisms facilitate the broader participation of users in the economy, by giving every consumer a voice regardless of their educational background and allowing for the free flow of information. The existence of decentralized sources of information without central control mechanisms has in theory the potential to enhance personal freedom.¹²⁹ In this part, I start by exploring the legitimacy of P2P-regulation. I then discuss whether P2P-regulation is a form of self-regulation or a new regulatory instrument that should receive renewed attention from regulators and academics.

A Privatization and the Legitimacy of P2P-Regulation

Privatization and self-regulation are often justified by the need to delegate regulatory tasks to private experts (e.g., peer-review of science).¹³⁰ Contrary to traditional sectors that have embraced self-regulation on the grounds of the industry's expertise (e.g., environmental law, international labor standards), in the sharing economy, the source of expertise of online reputational mechanisms must be found elsewhere. In this Section, I discuss two potential ways of understanding the legitimacy of P2P-regulation: crowd or democratic legitimacy and informational legitimacy.

127 YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006)

128 Evans *supra* note 6, at 1213.

129 Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y. J. LEG. & PUB. POL'Y 15 (2005).

130 Scientific peer-review and the regulatory value thereof are also presented as controversial topics in the literature, see, e.g., Lutz Bornmann, *Does the Journal Peer Review Select the "Best" from the Work Submitted? The State of Empirical Research*, 27 IETE TECHNICAL REV. 93 (2010); Gilles Hilary & Clive Lennox, *The Credibility of Self-Regulation: Evidence from the Accounting Profession's Peer Review Program*, 40 J. ACCOUNTING & ECON. 211 (2005); Hans-Dieter Daniel, *Peer Review as an Instrument for the Self-Regulation of Science*, in *GUARDIANS OF SCIENCE: FAIRNESS AND RELIABILITY OF PEER REVIEW* ch. 1 (Hans-Dieter Daniel & William E. Russey eds., 1993); DARYL E. CHUBIN & EDWARD J. HACKETT, *PEERLESS SCIENCE: PEER REVIEW AND U.S. SCIENCE POLICY* (1990).

1 “Democratic” Legitimacy

The question of whether online sharing-economy communities can legitimately create rules that are valid for prospective users requires an analysis of their data sources. Reputational information is sourced from multiple data points: information about the quality and safety of services in the sharing economy is not exclusively in the hands of one or two public officials but it is rather distributed through a large number of users.¹³¹ This “crowd” or “democratic legitimacy” is explained by the Hayekian idea that “knowledge of [regulatory] circumstances (...) is never in concentrated or integrated form,” it exists rather as dispersed bits of contradictory information which all individuals possess.¹³² P2P-networks embody this metaphor of dispersed knowledge which is often described as the “wisdom of the crowds.”¹³³ Digital platforms and in particular, online reputational mechanisms empower users by giving them a voice and an opportunity to contribute to the regulation of sharing-economy services.¹³⁴ Instead of relying on traditional licenses that might follow obsolete procedures or annual inspections and restrict the decision-making power to public authorities, any user in their role of “regulators” can provide frequent and valuable input.

Contrary to other P2P-communities with discussion forums (e.g., Wikipedia), sharing-economy platforms do not give directly the opportunity to users to deliberate and reach consensus on the regulation of goods and services.¹³⁵ The ranking of listings is performed automatically by algorithms—sometimes in an obscure way—and parallel discussion groups such as “AirbnbHELL”¹³⁶ which are located outside the sharing-economy platform.¹³⁷ Therefore, this democratic empowerment of P2P-communities is only apparent. Furthermore, the value of online reputational mechanisms also becomes eroded when digital platforms are entitled to rearrange the ranking of comments or delay the release of negative

131 Stemler *supra* note 58, at 686.

132 Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520 (1945).

133 See JAMES SUROWIECKI, *THE WISDOM OF THE CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (2004).

134 Frank Pasquale, *Reforming the Law of Reputation*, 47 LOYOLA U. CHI. L. J. 515 (2015).

135 Ayelet Oz, *Legitimacy and Efficacy: The Blackout of Wikipedia*, 17 FIRST MONDAY (Dec. 2012), <https://journals.uic.edu/ojs/index.php/fm/article/view/4043/3380>

136 *Uncensored Airbnb Stories & Reasons Not to Use Airbnb*, <https://www.airbnbhell.com/> (last visited Oct. 11, 2019).

137 See Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Prediction*, 89 WASH. L. REV. 1 (2014) (discussing the lack of transparency).

reviews. In reality, online platforms manage information, reshaping the identity of users and influencing the public sphere.¹³⁸

Similar to other crowd-initiatives (e.g., crowdsourcing legislation), the democratic legitimacy of online reputational mechanisms remains limited because of the uncertain connection between the content of reviews and the follow-up decisions made by platforms.¹³⁹ In other words, it is unclear whether service providers will be sanctioned by digital platforms if users leave a negative review but do not file a complaint.

2 Informational Legitimacy

Online reviews offer unique and first-hand insight from a large number of consumers and are imbued with “informational legitimacy,” as long as platforms do not tamper with their content.¹⁴⁰ However, online reviewers are only self-appointed experts. Peer-review has become widespread in a number of sectors and has a decisive impact on the receiver’s reputation. However, if the value of expert peer-review has been under attack, for example in the academic sector, what can be said about the value of reviews written by ordinary consumers? There is, nonetheless, a difference between professional peer-review and the type of peer-review performed in the sharing economy. Academic peer-reviewers are involved in the “regulation” of academic careers (e.g., publications, tenure-track evaluation) because they are thought to be able to deliver expert-feedback. Publishers and universities use them (e.g., review of tenure procedures) — and sometimes even suggested by academics themselves — because they have previous experience in that field or are well-established professionals.

In the case of the sharing economy, the “expertise” of P2P-communities can be derived from two elements: first, their direct contact with a service or a host;

138 See Ryan Calo & Alex Rosenblatt, *The Taking Economy: Uber, Information, and Power*, 117 *Columbia L. Rev.* 1623 (2017); For an insightful analysis of the power of private corporations to reshape the public sphere, Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law*, in *PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY* 34 (Martha A. Fineman, Titti Mattson & Ulrika Andersson eds., 2016).

139 On crowdsourcing legislation and political legitimacy, see Henrik Serup Christensen, Maija Karjalainen & Laura Nurminen, *Does Crowdsourcing Legislation Increase Political Legitimacy? The Case of Avoim Ministerio in Finland*, 7 *POL’Y & INTERNET* 25 (2015).

140 For the relationship between legitimacy and reputation, see Brayden G. King & David A. Whetter, *Rethinking the Relationship between Reputation and Legitimacy: A Social Actor Conceptualization*, 11 *CORP. REPUTATION REV.* 192 (2008).

second, their “subjective experience” as reviewers. Users that have written several reviews on multiple visits to Airbnb sites can compare each their experiences, are well-acquainted with reputational systems, and are thus more likely to be perceived as “experts” by prospective customers because they are “frequent reviewers.” When we look closely at the average skills of these reviewers, we realize that their expertise is very different from the one of scientific peer-reviewers and the experts involved in the traditional regulatory process.

B Self-Regulation or a New Form of Regulation?

Up until now, online reputational mechanisms have not been disassociated from self-regulatory policies implemented by digital platforms and have thus been regarded as a manifestation of self-regulation.¹⁴¹ I argue, in this Article, that the outsourcing of regulatory activities to P2P-communities does not entirely fit within the traditional understanding of self-regulation and other alternatives for command-and-control regulation.

First, self-regulation is traditionally based on efficiency and expertise arguments that are not applicable to the P2P-regulations.¹⁴² Peers are not experts; they have variable standards and understandings of what “quality” is and tend to offer subjective judgments. Second, with reputational mechanisms, users do not regulate themselves, they regulate others. P2P-regulation is thus a new form of privatization that is distinct from traditional types of outsourcing. The outsourcing of regulatory tasks to peer-to-peer communities raises important questions regarding broader involvement of consumers in regulation, the de-professionalization and automation of once highly regulated professions (e.g., taxi drivers), and the need to rethink the meaning and protection of public interests in the digital age. Should once “regulated actors” become “regulators”?¹⁴³

Despite the potential misalignment of incentives between private actors and the pursuit of public good, there are several successful examples of private action. For example, business improvement districts, as well as other forms of private law enforcement that work closely with public bodies (e.g.,

¹⁴¹ Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIAL. 116 (2015).

¹⁴² Anthony Ogus, *Rethinking Self-Regulation*, 15 OX. J. LEG. STUD. 97 (1995).

¹⁴³ See Martin F. Halstead, *The Regulated Become the Regulators—Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L. REV. 195 (2002) (discussing a similar issue in the area of copyright law).

neighborhood watches), have shown that private action in security can be effective in protecting public values (e.g., preventing local crime).¹⁴⁴ Private action is often perceived to complement rather than substitute public law enforcement.

The informal outsourcing of regulatory powers to P2P-communities constitutes a modern example of the retreat of the state before the advancement of large digital platforms.¹⁴⁵ Although this retreat is narrated as an example of self-regulation that can stimulate innovation, this informal delegation of regulatory tasks to P2P-communities does not constitute a satisfactory form of self-regulation. Instead, this retreat of the state from enforcing the regulation or introducing an adequate regulatory framework for the sharing economy is contrary to the state's perception as the trustee for the public interest.¹⁴⁶ This fiduciary relationship means that the state will protect not only the public interest but also seek to protect weaker against stronger individuals. Despite the different sources of legitimacy of P2P-communities, these dispersed private actors are not able to perform similar tasks, even though they should be allowed to voice their concerns and participate more actively in the regulatory process. Digital platforms may not ignore the presence of public interests in the sharing economy and should be held accountable for the growing class divisions, inequality, and security concerns in the sharing economy.¹⁴⁷

IV Online Reputation Meets Traditional Rules

Administrative law has changed in the last decades. It has not only “gone to the market” but it has also become digital.¹⁴⁸ The emergence of the sharing economy has questioned the way in which traditional administrative law has protected public values. If so many users book Airbnb rooms and few incidents take

144 Philip J. Cook & John MacDonald, *Public Safety through Private Action: An Economic Assessment of BIDS*, 121 ECON. J. 445, 458-60 (2011).

145 Donyets-Kedar, *supra* note 139; see DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005). For a more recent perspective on private economic domination, see K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

146 Donyets-Kedar, *supra* note 139.

147 *Id.* at 144 (defending a system of enhanced liability for large corporations); Sukumar Ganapati & Christopher G. Reddick, *Prospects and Challenges of Sharing Economy for the Public Sector*, 35 GOV. INFO. Q. 77 (2018).

148 Harry Arthurs, *The Administrative State Goes to the Market (and Cries “Wee, Wee, Wee” All the Way Home)*, 55 U. TORONTO L. J. 797, 802-03 (2005).

place, are all traditional rules and inspections truly necessary? The informal delegation of regulatory tasks to P2P-communities and private actors (the platforms) may have allowed the sharing economy to expand but, as the previous parts explain, this successful story of innovation should not come at the cost of protecting the public interest. In other words, regulation of the sharing economy by P2P-communities and platforms—at the expense of other technological developments—is also a privatization narrative for which there should be normative limits.¹⁴⁹

Existing reputational and self-regulatory systems that are implemented by several sharing-economy platforms could be improved to ensure that the information obtained through ratings and reviews is more accurate, objective, and less likely to be manipulated. One of the first improvement elements should focus on the design and compulsory character of review forms.¹⁵⁰ While several sharing-economy platforms already have quasi-compulsory reviews (e.g., Airbnb), users are not sanctioned for not providing complete reviews. In the current system, users will not be able to use the service again until they have left a review. The limited content or amount of reviews influence, nonetheless, their accuracy. Another aspect refers to the evaluation categories of these review forms. Some platforms have been trying to make these forms more useful by including rating categories that relate more closely to public interests such as hygiene and safety. For example, the Dutch food-sharing platform AirDnD asks its users to evaluate the hygiene of the chef's house.

The protection of online reputations through defamation law has also been suggested as a way of broadening the scope of legal protection of speech, good name, and data protection.¹⁵¹ The power of online reputational mechanisms to support the expansion of the sharing economy teaches us that citizens can also be regulators. Citizens trust one another and provide information perceived as useful. Moreover, they often feel engaged with their communities by doing so. However, this Article also shows that P2P-regulation requires background support. The regulation of digital platforms should involve these communities and go beyond the traditional dialogue between large corporations and governmental actors.¹⁵² The informal outsourcing of regulatory tasks to P2P-communities

¹⁴⁹ See Victoria D. Baranetsky, *Social Media and the Internet: A Story of Privatization*, 35 PACE L. REV. 304 (2014).

¹⁵⁰ Stemler, *supra* note 58, at 703.

¹⁵¹ Daniel Joyce, *Data Associations and the Protection of Reputation Online in Australia*, BIG DATA & SOCIETY 1 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/2053951717709829>.

¹⁵² Natali Helberger, Jo Pierson & Thomas Poell, *Governing Online Platforms: From Contested to Cooperative Responsibility*, 34 INFO. SOC. 1 (2017) (discussing a dynamic interaction between platforms, users, and public institutions for the governance of online platforms).

should not be an easy “way out” for digital platforms to expand their power without accepting any responsibility or for regulators who do not have the capacity to enforce existing regulation or quickly enact new and innovation-friendly regulation. Rather, this informal form of privatization of the public interest shows that there are important ongoing changes in the regulatory process that include the challenging of the role of traditional regulation, conventional experts, and the need to listen to consumers.

In the last years, multiple cities have changed their regulatory framework and imposed new rules on home sharing. In Europe, homeowners must register their houses and may be subject to a general or fire safety inspection — for example in Lisbon or Brussels. This traditional approach will, however, be costly for all parties involved. The literature has thus far suggested an alternative design of co-regulatory frameworks for digital platforms and for reforming intermediary liability in the platform economy.¹⁵³ Collaborative governance approaches also seek to promote collaboration between different stakeholders (e.g., platforms and regulators). This type of framework could serve as inspiration to promote a dialogue between traditional and reputational regulators.

Conclusion

Sharing economy promised to disrupt capitalism and its traditional regulation: professions, public inspections, traditional licenses, and permits. It was to a great extent successful. The sharing economy has become a “reputation-economy” in which traditional regulation plays a secondary role. Nevertheless, in the post-Gilded Age, capitalism remains alive and well and platforms have become the new capitalists that are being accused of exploiting labor and promoting racial bias and inequality without the countervailing power of unions or local communities.¹⁵⁴ P2P-online communities and online reputational systems do not yet offer this power: While in practice they regulate the performance of service providers in the sharing economy with online ratings and reviews, their regulatory power is directly or indirectly filtered by online platforms.

¹⁵³ See, e.g., Busch, *supra* note 59; Finck & Ranchordás, *supra* note 65; Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. U. L. REV. 19 (2017); Abbey Stemler, *Regulation 2.0: The Marriage of New Governance and Lex Informatica*, 19 VAND. J. ENT. & TECH. L. 88 (2016).

¹⁵⁴ K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 TEX. L. REV. 1329, 1330 (2016).

Platform industries have been historically regulated by command-and-control regulation.¹⁵⁵ In the last century, these industries have evolved. The platforms of the twenty-first century primarily monetize information, human capital, and speech, rather than railways or oil.¹⁵⁶ Scholars claim that a number of online platforms have become public utilities and their regulation should thus be driven by public interest concerns to avoid discriminatory access.¹⁵⁷ Instead, the protection of public and private interests is largely being outsourced to online P2P-communities and their online reputational mechanisms.

Reputational mechanisms remain what they have always been: a form of sending quality or commercial signals. As such, the trust placed by users on online reputational mechanisms is built upon fragile foundations. Reputation relates to appearances and correlates with desirable attributes but is not a proxy for them.¹⁵⁸ Nevertheless, this Article has explained why it remains rational to rely on reputational signals: First, considering the importance of reputation, most users will indeed strive to perform better and avoid negative reviews.¹⁵⁹ Second, online reputational mechanisms benefit from the wisdom of the crowd, empower users, and allow individuals to participate in the regulation of the economy with regular updates on the quality of service. Third, these mechanisms offer unique first-hand information that would not be available to public regulators. Considering these advantages, this Article suggests a collaborative normative framework that allows regulators to draw on information provided in online ratings and reviews to reduce enforcement costs. To illustrate, user complaints can signify that additional enforcement and inspections may be necessary, compliments regarding the condition of facilities could spare them a visit. After all, online reputational mechanisms are meant to be a signal of what is going well and what is going wrong. These signals can, nevertheless, become more significant if complemented by traditional regulation. This Article

155 Steven Semeraro, *Regulating Information Platforms: The Convergence to Antitrust*, 1 J. TELECOMM. & HIGH TECH. L. 143 (2002) (arguing that regulation of information platforms could be solely carried out by antitrust law).

156 For a thorough reflection on this evolution and novel forms of economic domination, see K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

157 Leong & Belzer, *supra* note 51. *But see* Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMMLAW CONSPECTUS 249 (2013) (arguing against the classification of platforms as public utilities on the grounds of the inadequacy of public utility regulation to regulate innovate businesses).

158 Strahilevitz, *supra* note at 10.

159 See, e.g., Peter Coe, *The Value of Corporate Reputation and the Defamation Act of 2013: A Brave New World or Road to Ruin?*, 18 COMMS. L. REV. 113 (2013) (discussing the corporate value of reputation).

did not address all the dimensions of the public interest and public values that may be at stake in the sharing economy. Weak employee protection, gender gap in payment, and discriminatory role of algorithms used by online platforms are only some examples of the limited protection of public values in an economy that has tried to disrupt existing legal frameworks without always offering better alternatives.¹⁶⁰

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160 See Schoenbaum, *supra* note 110; Barzilay & Ben-David, *supra* note 110.