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PUBLIC INTEREST COMMENT

THE SHARING ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS, AND REGULATORS

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I. INTRODUCTION

The Mercatus Center at George Mason University is dedicated to advancing knowledge about the impact of regulation on society. As part of its mission, the Mercatus Center conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment before the Federal Trade Commission (FTC) does not represent the views of any particular affected party or special interest group. Rather, it is designed to assist the commission as it weighs the costs and benefits of regulation that affects the sharing economy. Our comments to the commission are derived from recent Mercatus Center working papers on these issues.[2]

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2. Christopher Koopman, Matthew Mitchell, and Adam Thierer, "The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change," *Journal of Business, Entrepreneurship, and the Law* 8 (forthcoming 2015); Adam Thierer, Anne Hobson, Christopher Koopman, and Chris Kuiper, "How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the 'Lemons Problem'" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, May 2015), http://mercatus.org/publication/how-internet-sharing-economy-and-reputational-feedback-mechanisms-solve-lemons-problem.

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II. THE IMPACT OF THE SHARING ECONOMY

In its workshop announcement, the commission asks, **"How have sharing economy platforms affected competition, innovation, consumer choice, and platform participants in the sectors in which they operate? How might they in the future?"**

To understand the impact that the sharing economy has had on competition, innovation, and consumer choice, it is important to define the sharing economy. In its broadest sense, we argue that the sharing economy is any marketplace that uses the Internet to bring together distributed networks of individuals to share or exchange otherwise underutilized assets.[3] Thus, it encompasses all manner of goods and services shared or exchanged for both monetary and nonmonetary benefit. The sectors in which the sharing economy has seen substantial growth—and has created the most disruption—include transportation, hospitality, dining, goods, finance, and personal services.

We have identified five ways the sharing economy is creating value for both consumers and producers:

1. By giving people an opportunity to use other people's cars, kitchens, apartments, and other property, it allows underutilized assets or "dead capital" to be put to more productive use.[4]

2. By bringing together multiple buyers and sellers, it makes both the supply and demand sides of its markets more competitive and allows greater specialization.

3. By lowering the cost of finding willing traders, haggling over terms, and monitoring performance, it cuts transaction costs and expands the scope of trade.[5]

4. By aggregating the reviews of past consumers and producers and putting them at the fingertips of new market participants, it can significantly diminish the problem of asymmetric information between producers and consumers.[6]

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3. See, for example, Rachel Botsman, "The Sharing Economy Lacks a Shared Definition," Fast Company website, November 21, 2013, http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition. It may be helpful to think of a sharing economy as a special case of a two-sided or platform market. It is special because it typically employs technology to bring together large numbers of buyers and sellers. For more on platform markets, see Alex Tabarrok, "Jean Tirole and Platform Markets," *Marginal Revolution*, October 13, 2014, http://marginalrevolution.com/marginalrevolution/2014/10/tirole-and-platform-markets.html. See also Stewart Dompe and Adam Smith, "Regulation of Platform Markets in Transportation" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, October 27, 2014).

4. Daniel M. Rothschild, "How Uber and Airbnb Resurrect 'Dead Capital,'" *Umlaut*, April 9, 2014, http://theumlaut.com/2014/04/09/how-uber-and-airbnb-resurrect-dead-capital. On the broader concept of dead capital, see Hernando de Soto, *The Mystery of Capital: Why Capitalism Succeeds in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

5. Carl J. Dahlman, "The Problem of Externality," *Journal of Law and Economics* 22 (1979): 141.

6. George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics* 84, no. 3 (August 1970): 488–500.

5. By offering an end run around regulators who are captured by existing producers, it allows suppliers to create value for customers long underserved by those incumbents that have become inefficient and unresponsive because of their regulatory protections.

These factors can improve consumer welfare by offering new innovations, more choices, more service differentiation, better prices, and higher-quality services. In short, as the commission's workshop notice puts it, "The development of the sharing economy can stimulate economic growth by encouraging entrepreneurship and promoting more productive and efficient use of assets." Irrespective of *how* the sharing economy creates value, the revealed preferences of both consumers and producers suggest that it *does* create a substantial amount of economic value. As the commission notes, "Sharing economy transactions have increased rapidly in recent years, reaching an estimated value of $26 billion globally in 2013, and some estimates predict that the sharing economy will generate as much as $110 billion annually in the near future."

Much of this value flows to individuals who would otherwise be unable to compete in these markets. For those entering the sharing economy as producers, these new platforms create opportunities to generate income from sources that were historically available only to a select few. In the recent past, only those with access to the capital necessary to build hotels could offer rooms as short-term rentals. But firms such as Airbnb and HomeAway allow individuals to penetrate markets traditionally dominated by large incumbents such as Hilton Worldwide and Marriott International. In 2014, for example, guest stays through Airbnb totaled nearly 22 percent more than Hilton Worldwide.[7] And recent projections estimate that the sharing economy has the potential to increase over twentyfold in terms of revenue by 2025.[8]

As we have noted in our previous research, the increased competition from the continued growth of the sharing economy will have direct, positive effects on consumer welfare.[9] First, and most obviously, these firms give consumers access to a broader range of goods and services. The ease of entry and innovation in the online world mean that new entrants in the sharing economy can provide better options and address consumer needs in ways that more traditional business models cannot. According to surveys, consumers currently take advantage of sharing economy services primarily because they offer better prices, a sense of community, greater convenience, and higher quality.[10] In terms of greater convenience and quality, comparisons of Yelp ratings in almost any major city where ride-sharing firms operate demonstrate

7. PricewaterhouseCoopers, "Customer Intelligence Series: The Sharing Economy," April 18, 2015, http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf.
8. Ibid.
9. Koopman, Mitchell, and Thierer, "Sharing Economy and Consumer Protection Regulation," 2.
10. Jeremiah Owyang, "People are Sharing in the Collaborative Economy for Convenience and Price," Web-Strategist.com, March 24, 2014, http://www.web-strategist.com/blog/2014/03/24/people-are-sharing-in-the-collaborative-economy-for-convenience-and-price/; PricewaterhouseCoopers, "The Sharing Economy," 7.

overwhelming consumer satisfaction.[11] Moreover, a recent survey of US adults familiar with the sharing economy found that 86 percent agree it makes life more affordable, and 83 percent agree that it makes it more convenient and efficient.[12]

The sharing economy, through its use of the Internet and information technology, also offers consumers more information about products and services, and it empowers consumers to act on that information. Many economists have worried about the existence of information asymmetries between producers and consumers, and they have argued that this asymmetry justifies many consumer protection regulations. However, the Internet largely solves this problem by providing consumers with robust search and monitoring tools so that they may find more and better choices.[13] These tools lower the transaction costs of searching for willing trade partners, haggling with them over terms, and monitoring them for compliance. We will discuss these tools, especially reputational mechanisms, in more detail in section VI.

III. BALANCING REGULATION, COMPETITION, AND INNOVATION

The commission asks, **"How can state and local regulators meet legitimate regulatory goals (such as protecting consumers and promoting public health and safety) in connection with their oversight of sharing economy platforms and business models, without also restraining competition or hindering innovation?"** Additionally, the commission's notice observes that "the rapid expansion of commercial activity involving smaller suppliers on these platforms may tax the abilities and resources of regulators, who are confronted with the challenge of applying regulations that were written with conventional suppliers in mind."

As the debate surrounding the sharing economy moves forward, policymakers must keep in mind that merely because regulations were once justified on the grounds of consumer protection does not mean they accomplished those goals or that they are still needed today.[14] Even well-intentioned policies must be judged against real-world evidence.[15] Unfortunately, the evidence shows that many traditional consumer protection regulations hurt consumers;

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11. See, for example, Matthew Mitchell, "An Uber Challenge to Tacky Taxis," *Washington Times*, August 28, 2013; see also Matthew Mitchell and Christopher Koopman, "Ride-Sharing Shows How Slow Governments Can Be," *Pittsburgh Post-Gazette*, July 6, 2014.
12. PricewaterhouseCoopers, "Sharing Economy," 9.
13. Thierer et al., "How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the 'Lemons Problem.'" See also Alex Tabarrok and Tyler Cowen, "The End of Asymmetric Information?," *Cato Unbound*, April 6, 2015, http://www.cato-unbound.org/2015/04/06/alex-tabarrok-tyler-cowen/end-asymmetric-information.
14. Joseph Epstein, "ObamaCare and the Good Intentions Paving Co.," *Wall Street Journal*, December 31, 2013, http://online.wsj.com/news/articles/SB10001424052702304020704579276942556236158. ("Unfortunately, when it comes to public policy, good intentions are only slightly better than bad intentions, and not always even that.") See also Milton Friedman, interview with Richard Heffner, December 7, 1975, https://www.youtube.com/watch?v=HTHj5RAGHTo. ("One of the great mistakes is to judge policies and programs by their intentions rather than their results.") Finally, see Peter Schuck, *Why Government Fails So Often and How It Can Do Better* (Princeton, NJ: Princeton University Press, 2014), 50. "Good intentions, intuition, caprice, political power, abstract philosophical theories, or coin flips are not acceptable bases for sound policy making."
15. Don Boudreaux, "Unintended Consequences," *LearnLiberty.org*, June 29, 2011, http://www.learnliberty.org/content/unintended-consequences. ("Intentions are not results.")

in the words of New York Attorney General Eric Schneiderman, they are often "cumbersome, and some are just plain protectionist."[16]

Markets, competition, reputational systems, and ongoing innovation often solve problems better than regulation when they are given a chance to do so. There are two reasons for this. First, market imperfections create powerful profit opportunities for entrepreneurs who are able to find ways to correct them.[17] Second, regulatory solutions too often undermine competition and lock in inefficient business models.

As FTC Commissioner Joshua Wright recently explained, when an incumbent faces competition from innovative firms, such as those making up the sharing economy, the potential responses can be broken into three categories: (1) competition on the merits, (2) exclusionary conduct, and (3) raising rivals' costs through "public competition."[18] The first category of conduct—competition on the merits—is the ideal response and requires little to no involvement on the part of regulators. The second category of conduct–exclusionary conduct–is typically corrected through antitrust enforcement. However, the third category of conduct—what Wright refers to as public competition—often uses regulators and regulations to limit the ability of new entrants to compete in the market.

In some cases, regulations are conspicuously protectionist. Such was the case when the District of Columbia City Council originally proposed legislation requiring ride-sharing firms to charge no less than five times what taxis charge. The "explanation and rationale" section of the legislation declared that "these requirements would ensure that sedan service is a premium class of service with a substantially higher cost that does not directly compete with or undercut taxicab service."[19]

More often, however, regulations that ultimately protect incumbents from competition begin as "consumer protection" measures. This is because in "public competition" a small number of incumbent firms are often able to exert greater pressure on policymakers than can either the consumers or the new entrants against whom regulatory protections discriminate. A large body of research documents this phenomenon of "regulatory capture" and offers a number of explanations for it.[20] First, by being small in number, incumbent firms typically find it easier

16. Eric T. Schneiderman, "A New Regulatory Paradigm for the Sharing Economy" (remarks before the Sharing City, Sharing Economy: Urban Law and New Economy Conference, April 24, 2015), http://www.ag.ny.gov/pdfs/A_New_Regulatory_Paradigm_for_the_Sharing_Economy_4_24_15.pdf.
17. Israel Kirzner, *Market Theory and the Price System* (Indianapolis, IN: Liberty Fund, 1963); Israel Kirzner, *Competition and Entrepreneurship* (Indianapolis, IN: Liberty Fund, 1973).
18. Joshua D. Wright, Commissioner, Federal Trade Commission, "Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC" (Big Ideas about Information lecture, Clemson University, South Carolina, April 2, 2015), https://www.ftc.gov/public-statements/2015/04/regulation-high-tech-markets-public-choice-regulatory-capture-ftc.
19. Matthew Mitchell, "Uber Deal Not Uber-Awesome," *Washington Examiner*, December 15, 2012, http://www.washingtonexaminer.com/op-ed-uber-deal-not-uber-awesome/article/2515896.
20. George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2, no. 1 (April 1, 1971): 3–21, doi:10.2307/3003160; Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19, no. 2 (August 1, 1976): 211–40; Ernesto Dal Bó, "Regulatory Capture: A Review," *Oxford Review of Economic Policy* 22, no. 2 (June 20, 2006): 203–25.

than either competitors or consumers to overcome the collective action problem and to organize on behalf of their interests.[21] Second, because there appear to be increasing returns to political engagement, firms that pursue public competition tend to get better at it the more they do it.[22] Third, incumbents tend to enjoy information asymmetries relative to their regulators. These firms therefore often become an important source of information for regulators, allowing the firms to exercise a great deal of influence on the regulatory process.[23] Finally, firms often exercise outsized influence over their regulators because a revolving door creates constant personnel flows back and forth between regulators and the firms they oversee.[24]

Often, incumbents who oppose new entry or increased competition from innovators will lobby legislators and regulators to apply otherwise outmoded regulations on new entrants in the name of fairness. Incumbents argue that they still face these various regulatory burdens and that new entrants should as well. These burdens include licensing requirements, price controls, service area restrictions, marketing limitations, and technology standards.

Licensing procedures are of particular concern for the sharing economy because they have the potential to create serious barriers to entry. A recent Supreme Court amicus brief signed by over 50 leading antitrust and public choice scholars noted that

> occupational licensing, once limited to a few licensed professions, is widespread and growing—from 5% of the U.S. workforce in the 1950s, to 15% in the 1970s, to 30% today. Occupational licensing has been abused by incumbent market participants to exclude rivals, often in unreasonable ways, and to raise prices. This disturbing trend already costs consumers billions of dollars every year and impedes job growth.[25]

As our colleague Veronique de Rugy has noted, "Licensing can become a powerful tool to limit innovation and competition and act to limit upward mobility."[26] Therefore, the commission should highlight how incumbents might use licensing practices to serve their narrow interests at the expense of new sharing economy entrants.

On the other hand, exempting newcomers from traditional regulations could place incumbents at a disadvantage. Such regulatory asymmetries represent a legitimate policy problem. But the

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21. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 2nd printing with new preface and appendix (Cambridge, MA: Harvard University Press, 1965).
22. Kevin Murphy, Andrei Shleifer, and Robert Vishny, "Why Is Rent-Seeking So Costly to Growth?," *American Economic Review Papers and Proceedings* 83, no. 2 (1993): 409–14; Lee Drutman, *The Business of America Is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (New York: Oxford University Press, 2015).
23. Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, MA: MIT Press, 1993), chap. 11; Dal Bó, "Regulatory Capture," 203–5.
24. Jordi Blanes i Vidal, Mirko Draca, and Christian Fons-Rosen, "Revolving Door Lobbyists," *American Economic Review* 102, no. 7 (December 2012): 3731–48.
25. Brief of Antitrust Scholars as Amici Curiae in Support of Respondent, North Carolina State Board of Dental Examiners v. FTC (August 6, 2014), 2.
26. Veronique de Rugy, "Occupational Licensing: Bad for Competition, Bad for Low-Income Workers," Mercatus Center at George Mason University, March 25, 2014, http://mercatus.org/publication/occupational-licensing-bad-competition-bad-low-income-workers.

solution is not to discourage new innovations by simply rolling old regulatory regimes onto new technologies and sectors. The better alternative is to level the playing field by "deregulating down" to put everyone on equal footing, not by "regulating up" to achieve parity.[27] Policymakers should relax old rules on incumbents as new entrants and new technologies challenge the status quo—especially when new innovations seem to correct market imperfections better than the outmoded regulations. By extension, new entrants should only face minimal regulatory requirements as more onerous and unnecessary restrictions on incumbents are relaxed.

As noted next, to the extent other harms need to be addressed, there exist many alternative remedies to consider instead of traditional top-down and preemptive regulation.

IV. ADDRESSING HARM AND LIABILITY

The commission asks, **"What particular concerns or issues do sharing economy transactions raise regarding the protection of platform participants? What responsibility does a sharing economy platform bear for consumer injury arising from transactions undertaken through the platform?"**

Preemptive, precautionary regulation is not the only way to address accidents or bad corporate behavior. Alternative remedies are available. And these alternatives have the added benefit of not discouraging innovation or competition, as traditional regulation often has.

By trying to head off every hypothetical worst-case scenario, preemptive regulations actually discourage many best-case scenarios from ever coming about.[28] For that reason, ex post remedies are often preferable to ex ante regulation. Private insurance, contracts, torts and product liability law, antitrust enforcement, and other legal remedies can be utilized here when things go wrong, just as they are used in countless other segments of our economy. Patience is essential in this regard. New legal standards and liability norms tend to evolve gradually through a body of common-law cases. This evolutionary process is one of the chief virtues of ex post remedies because it gives innovators room to discover new ways of solving problems.

Consider, for example, ride-sharing insurance. The advent of ride sharing presented a challenge to the existing insurance model. At $8,000 to $10,000 a year, commercial-grade auto insurance is much more expensive than personal insurance, and many part-time ride-sharing drivers would not do it if they had to pay the premiums themselves.[29] To accommodate this need, Uber offered its own $1 million commercial-grade insurance policy for all Uber rides. But in order to ensure that drivers didn't sign up for Uber as a way to get free insurance, the company stipulated that this $1 million coverage only applied when a passenger was in the vehicle. A driver's own insurances would apply when his app was off. And when the app was

27. See Koopman, Mitchell, and Thierer, "Sharing Economy and Consumer Protection Regulation," 2.
28. Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Arlington, VA: Mercatus Center at George Mason University, 2014).
29. R. J. Lehmann, "Blurred Lines: Insurance Challenges in the Ride-Sharing Market," R Street Policy Study No. 28, R Street Institute website, October 2014, http://www.rstreet.org/wp-content/uploads/2014/09/RSTREET28.pdf.

on but there was no passenger in the car, the driver's own insurance would apply and Uber would supplement this with contingent liability coverage for damages not covered by personal insurance. Problems arose, however, when some insurance companies canceled drivers' personal insurance policies as soon as they learned that drivers were Uber partners.

The state and local policy responses to these problems have run the full spectrum, including complete bans of ride-sharing companies, prohibitively expensive insurance requirements, and comparatively open models.[30] Recognizing the profit opportunity, however the industry itself evolved: In January of 2015, insurance companies began offering a new grade of insurance. It covers drivers when their apps are on and no passengers are in the vehicle. At an additional $6 to $8 per month, it is slightly more expensive than personal insurance but not as costly as commercial insurance[31] It took some time for the market to discover this model, and it will likely continue to evolve.[32] But the important thing to recognize is that it would not have evolved at all if a few states had not taken a relatively permissive approach to ride-sharing insurance, thus guaranteeing a large enough market for the solution to be profitable.

Meanwhile, the common law continues to evolve to deal with cases and controversies involving new sectors and disruptive technologies.[33] As Brookings Institution scholar John Villasenor observes, "When confronted with new, often complex, questions involving products liability, courts have generally gotten things right."[34] He further notes that "products liability law has been highly adaptive to the many new technologies that have emerged in recent decades," and, by extension, it will adapt to other technologies and developments as cases and controversies come before the courts.[35] There is no reason, therefore, to believe that the common law will not adapt to new technological realities, especially since firms have powerful incentives to improve the security of their systems and to avoid punishing liability claims, unwanted press attention, and lost customers.[36]

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30. Policy is changing very rapidly almost everywhere. For a relatively recent survey, see Andrew Moylan et al., "Ridescore 2014: Hired Driver Rules in U.S. Cities," R Street Policy Study No. 29, R Street Institute website, November 2014, http://www.rstreet.org/wp-content/uploads/2014/11/RSTREET29.pdf.
31. Timothy B. Lee, "Why Uber's Deal with Big Insurance Companies Matters," *Vox*, March 24, 2015, http://www.vox.com/2015/3/24/8285963/why-ubers-deal-with-big-insurance-companies-matters.
32. Israel M. Kirzner, "Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach," *Journal of Economic Literature* 35, no. 1 (March 1, 1997): 60–85, doi:10.2307/2729693.
33. For further discussion regarding how the common law evolves to deal with adverse selection and moral hazard problems in conflicts of law, see Nita Ghei and Francesco Parisi, "Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order," *Cardozo Law Review* 25, no. 4 (March 2004).
34. John Villasenor, "Who Is at Fault When a Driverless Car Gets in an Accident?," *Atlantic*, April 25, 2014, http://www.theatlantic.com/business/archive/2014/04/who-is-at-fault-when-a-driverless-car-gets-in-an-accident/361250. See also John Villasenor, "Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation," Brookings Institution website, April 24, 2014, http://www.brookings.edu/research/papers/2014/04/products-liability-driverless-cars-villasenor.
35. Villasenor, "Who Is at Fault When a Driverless Car Gets in an Accident?"
36. For more on the efficient evolution of common law, see Paul Rubin, "Why Is the Common Law Efficient?," *Journal of Legal Studies* 6, no. 1 (January 1977): 51–63; George L. Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6, no. 1 (January 1977): 65–82; Richard A. Posner, Economic *Analysis of Law*, 9th ed. (New York: Wolters Kluwer Law & Business, 2014).

Thus, instead of trying to preemptively micromanage sharing economy technologies and platforms in an attempt to plan for every hypothetical risk, policymakers should be patient while the common law evolves, liability norms adjust, and new insurance policies emerge. In particular, policymakers need to be cognizant of the dynamic effects that preemptive, anticipatory regulations have on continued innovation and competition. For example, a number of states have rushed to regulate ride-sharing companies as transportation network companies (TNCs). However, this designation may have serious, unintended consequences as these companies continue to innovate and expand. Recent news that Uber is testing a merchant delivery program provides one example of how these companies may have already outgrown the TNC designation.[37] Framing these regulations in the way they are (i.e., a regulatory model built on the idea that drivers will be transporting people rather than objects) begins to introduce new, unnecessary questions regarding a ride-sharing company's legal status. Is a ride-sharing company that also offers delivery for merchants a licensed TNC when driving people but an unlicensed motor carrier when transporting packages in a state like Virginia, which has separate regulations, licensing, and permitting for each activity?

Moreover, as ride-sharing companies continue to experiment with autonomous vehicles,[38] these TNC regulations may foreclose the opportunity for firms like Uber to employ these technologies.[39] Bringing these services to consumers will likely require regulators to redefine terms such as partner within these TNC laws as well as to redefine the TNC framework with regard to the relationship between the driver, the passenger, and the ride-sharing company. Regardless of how those questions are resolved, these issues would need to be rehashed, re-debated, and settled each time ride sharing outgrows its current classification.

37. Jordan Crook, "Uber Is Quietly Testing a Massive Merchant Delivery Program," *Tech Crunch*, April 28, 2015, http://techcrunch.com/2015/04/28/uber-is-quietly-testing-a-massive-merchant-delivery-program/#.f3fhqj:m94Z.
38. "Uber and CMU Announce Strategic Partnership and Advanced Technologies Center," Uber website, February 2, 2015, http://blog.uber.com/carnegie-mellon.
39. Christopher Koopman, "Today's Solutions, Tomorrow's Problems," *Cato Unbound*, February 17, 2015, http://www.cato-unbound.org/2015/02/17/christopher-koopman/todays-solutions-tomorrows-problems.

V. CONSTRUCTIVE SOLUTIONS TO SPECIFIC CONSUMER PROTECTION ISSUES

The commission asks, **"What consumer protection issues—including privacy and data security, online reviews and disclosures, and claims about earnings and costs—do these platforms raise, and who is responsible for addressing these issues?"**

Like many other companies and sectors in today's economy, the sharing economy's success—indeed, its very existence—has been built upon data.[40] Data is the fuel that powers the modern information economy.[41] The widespread collection and use of data helps expand the array of services available and keeps prices low—or even at zero—for a great number of digital services.[42] In the case of the sharing economy, data about interactions is also what facilitates the reputational feedback mechanisms that have been so crucial to the development of trust among diverse parties. (The importance of those reputational mechanisms is discussed at greater length in section VI.)

It is vital, therefore, that policymakers exercise extreme caution when addressing concerns about privacy and security in this context, at least to the extent that they are considering regulations that would limit data collection and use.[43] Privacy and security are highly subjective values[44] that are constantly reshaped as societal attitudes adjust to new cultural and technological realities.[45] Often that adjustment process occurs quite rapidly and in ways we probably could not have predicted.[46] For example, some of the technologies and business practices that are essential to the sharing economy—such as geolocation capabilities, which allows real-time "tracking" of individuals—would have been far more controversial even just a generation ago.

40. See John Deighton and Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation and Efficiency in the U.S. Economy* (Data-Driven Marketing Institute, 2013), http://ddminstitute.thedma.org/#valueofdata; Software & Information Industry Association, "Data-Driven Innovation, A Guide for Policymakers: Understanding and Enabling the Economic and Social Value of Data" (SIIA white paper, May 2013), http://www.siia.net/Divisions/PublicPolicyAdvocacy Services/Priorities/Data-DrivenInnovation.aspx; James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity, McKinsey & Company*, May 2011, http://www.mckinsey.com/insights/business_technology /big_data_the_next_frontier_for_innovation.
41. See J. Howard Beales and Jeffrey A. Eisenach, "An Empirical Analysis of the Value of Information Sharing in the Market for Online Content" (2014), http://images.politico.com/global/2014/02/09/beales_eisenach_daa_study.html.
42. US Chamber of Commerce Foundation, "The Future of Data-Driven Innovation," October 7, 2014, http://www.us chamberfoundation.org/future-data-driven-innovation.
43. See Adam Thierer, "A Status Update on the Development of Voluntary Do-Not-Track Standards" (testimony before the Senate Committee on Commerce, Science, and Transportation, April 24, 2013), http://mercatus.org/publication /status-update-development-voluntary-do-not-track-standards.
44. See Fred H. Cate and Robert Litan, "Constitutional Issues in Information Privacy," *Michigan Telecommunications and Technology Law Review* 9, no. 1 (2002): 60. ("The term can mean almost anything to anybody.") See also Jim Harper, "Understanding Privacy—and the Real Threats to It" (Policy Analysis No. 520, Cato Institute, August 4, 2004), 1, www.cato.org/pub_display.php?pub_id=1652. ("Properly defined, privacy is the subjective condition people experience when they have power to control information about themselves.") See also Betsy Masiello, "Deconstructing the Privacy Experience," *IEEE Security & Privacy* 7, no. 4 (July–August 2009): 68–70. ("On the social Web, privacy is a global and entirely subjective quality—we each perceive different threats to it.")
45. Cate and Litan, "Constitutional Issues in Information Privacy," 61. ("The public's expectations of privacy are changing, as are the many influences that shape those expectations, such as technology, law, and experience.")
46. Adam Thierer, "Muddling Through: How We Learn to Cope with Technological Change," *Medium*, June 30, 2014, https://medium.com/tech-liberation/muddling-through-how-we-learn-to-cope-with-technological-change -6282d0d342a6.

Today, however, consumers have come to appreciate the benefits of such technologies because they give rise to new services—such as real-time traffic updates and the ability to quickly locate friends and family—that offer them tremendous benefits.

For these reasons, privacy and security best practices will need to evolve gradually in response to new marketplace realities, and they will need to be applied in a more organic and flexible fashion, often outside the realm of public policy.[47] Rigid top-down regulatory approaches to addressing these concerns will impose significant costs on consumers and the economy. If data can't be collected and used to facilitate transactions or to target new and better services, consumers will suffer.[48]

Nonetheless, legitimate privacy and security concerns remain. In particular, some worry about how much data sharing economy operators are collecting about consumers and the potentially sensitive nature of some of that data. That does not mean, however, that a top-down, heavily regulatory approach to privacy or security concerns is wise.[49] Instead, a balanced and "layered" approach is needed that incorporates many solutions.[50]

When considering privacy-related concerns about sharing economy platforms and technologies, contract law will play a role. The enforcement of contractual promises is one of the most powerful ways to curb potential privacy- or security-related abuses associated with new technologies. When companies make promises to the public about new services or devices, the companies can and should be held to these promises. There are two primary ways to hold firms accountable when they fail to live up to the promises they make to consumers regarding privacy and security practices.

First, firms can be held accountable in the courts. The United States "has a vibrant privacy litigation industry, led by privacy class actions," notes Google global privacy counsel Peter Fleischer.[51] Class-action lawsuit activity is remarkably intense following not just major privacy violations but also data breaches,[52] and there is evidence that "how federal courts define the damages people suffer from data breaches is broadening dramatically, leaving unprepared

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47. See Adam Thierer, "Privacy Law's Precautionary Principle Problem," *Maine Law Review* 66, no. 2 (2014), http://www.mainelawreview.com/wp-content/uploads/2014/06/05-Thierer.pdf.
48. See Christopher Wolf, "Is the New Consumer Privacy Bill Overkill? A Q&A with Adam Thierer," *IAPP Privacy Perspectives*, International Association of Privacy Professionals, March 11, 2015, https://privacyassociation.org/news/a/is-the-new-consumer-privacy-bill-overkill-a-qa-with-adam-thierer.
49. See Adam Thierer, "A Framework for Benefit-Cost Analysis in Digital Privacy Debates," *George Mason University Law Review* 20, no. 4 (Summer 2013): 1055–1105, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309995.
50. See Adam Thierer, "The Pursuit of Privacy in a World Where Information Control Is Failing," *Harvard Journal of Law and Public Policy* 36, no. 2 (March 2013): 409–55, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234680.
51. Peter Fleischer, "Privacy-Litigation: Get Ready for an Avalanche in Europe," *Peter Fleischer: Privacy . . . ?*, October 26, 2012, http://peterfleischer.blogspot.com/2012/10/privacy-litigation-get-ready-for.html?m=1.
52. Ibid. According to Fleischer, "Within hours of any newspaper headline (accurate or not) alleging any sort of privacy mistake, a race begins among privacy class action lawyers to find a plaintiff and file a class action. Most of these class actions are soon dismissed, or settled as nuisance suits, because most of them fail to be able to demonstrate any 'harm' from the alleged privacy breach. But a small percentage of privacy class actions do result in large transfers of money, first and foremost to the class action lawyers themselves, which is enough to keep the wheels of the litigation-machine turning."

companies at a greater risk of big payouts in class-action lawsuits."[53] Such action by the courts disciplines firms that violate privacy and data security norms while sending a signal to other online operators about their data policies and procedures.[54]

Second, the FTC itself will continue to play a major role in forcing companies to live up to the privacy- and security-related promises they make to the public. The commission possesses broad consumer protection powers under section 5 of the Federal Trade Commission Act.[55] Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce."[56] The FTC formalized its process for dealing with unfairness claims in its 1984 *Policy Statement on Unfairness* and noted, "To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[57] (Importantly, however, the *Policy Statement* stipulated that "the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms. . . . Emotional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair."[58]) In recent years, the FTC has brought and settled many cases involving its section 5 authority to address identity theft and data security matters and, generally speaking, has been able to identify clear harms in each case.[59]

Importantly, the commission can use it advocacy and awareness-building role to push for greater consumer education and corporate transparency. Transparency and disclosure policies are generally more sensible than restrictive rules, which preemptively foreclose innovation opportunities.[60]

Finally, the commission's workshop notice mentioned concerns about the consumer protection issues surrounding "claims about earnings and costs." But to the extent that these

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53. Antone Gonsalves, "Courts Widening View of Data Breach Damages, Lawyers Say," *CSO Online*, October 29, 2012, http://www.csoonline.com/article/720128/courts-widening-view-of-data-breach-damages-lawyers-say.
54. For example, in October 2012, the web analytics company KISSmetrics agreed to settle a class-action lawsuit associated with its use of "supercookies," which tracked users online without sufficient notice or choice being given beforehand. The firm agreed to pay each consumer who was part of the suit $2,500. See Wendy Davis, "KISSmetrics Settles Supercookies Lawsuit," *Online Media Daily*, October 19, 2012, http://www.mediapost.com/publications/article/185581/kissmetrics-settles-supercookies-lawsuit.html#ixzz2A306a5mq.
55. See J. Howard Beales III, "The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection" (speech before the Federal Trade Commission's Marketing and Public Policy Conference, May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection; J. Thomas Rosch, "Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence" (speech before the California State Bar, Los Angeles, May 18, 2007), http://www.ftc.gov/speeches/rosch/070518evolutionandconvergence.pdf; Andrew Serwin, "The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices," *San Diego Law Review* 48 (Summer 2011).
56. 15 U.S.C. § 45(a).
57. Federal Trade Commission, *Policy Statement on Unfairness*, 104 F.T.C. 949, 1070 (1984) 15 U.S.C. § 45.
58. Ibid.
59. Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Washington, DC: Federal Trade Commission, 2012), i–ii, http://ftc.gov/os/2012/03/120326privacyreport.pdf.
60. See Adam Thierer, "Why Permissionless Innovation Matters," Medium website, April 24, 2014, https://medium.com/tech-liberation/why-permissionless-innovation-matters-257e3d605b63.

concerns grow to be a problem, it is unclear why policymakers should approach sharing economy operations any differently than they do the rest of the economy. As with misleading privacy and security claims, if fraudulent claims about earnings and costs are made by sharing economy operators, the commission and other government bodies (including state attorneys general) already possess tools to address such unfair and deceptive practices. And an extensive body of financial reporting rules already exist to address such issues as well. No additional authority is needed for financial reporting in the sharing economy.

VI. THE POWER OF REPUTATIONAL FEEDBACK MECHANISMS

The commission asks, **"How effective are reputation systems and other trust mechanisms, such as the vetting of sellers, insurance coverage, or complaint procedures, in encouraging consumers and suppliers to do business on sharing economy platforms?"**

A new Mercatus Center working paper squarely addresses the effectiveness of modern reputational feedback systems and trust-building mechanisms, and compares them to other systems that have been used throughout history.[61] The study shows that, by facilitating greater trust while simultaneously opening up new innovations and opportunities, these new Internet-based mechanisms promise to revolutionize modern marketplace interactions and help market actors overcome information asymmetries, or what is sometimes referred to as the "lemons problem."[62]

Reputational mechanisms have always existed, but they were somewhat crude in the past. More than 250 years ago in his classic *The Theory of Moral Sentiments*, Adam Smith observed, "We desire both to be respectable and to be respected." People's success in life, he noted, "almost always depends upon the favour and good opinion of their neighbours and equals; and without a tolerably regular conduct, these can very seldom be obtained. The good old proverb, therefore, that honesty is the best policy, holds, in such situations, almost always perfectly true."[63] Unfortunately, however, before the Internet, "reputations travel[led] haphazardly through word of mouth, rumor, or the mass media," making it much more challenging to build trust between strangers involved in commercial interactions.[64]

The Internet and the information revolution have given rise to new online feedback mechanisms that have made it easier than ever for honesty to be enforced through strong reputational incentives. This has, in turn, alleviated many traditional concerns about informational deficiencies. With the recent growth of the sharing economy, even more robust reputational feedback mechanisms now exist that help consumers solve information problems and secure

61. See Thierer et al., "How the Internet, the Sharing Economy and Reputation Feedback Mechanisms Solve the 'Lemons Problem.'"
62. Akerlof, "Market for 'Lemons.'"
63. Adam Smith, *The Theory of Moral Sentiments and on the Origins of Languages*, 1759 (facsimile of 1853 edition, Liberty Fund website), 63, http://oll.libertyfund.org/titles/2620.
64. Paul Resnick, Richard Zeckhauser, Eric Friedman, and Ko Kuwabara, "Reputation Systems," *Communications of the ACM* 43, no. 12 (December 2000): 47, http://dl.acm.org/citation.cfm?id=355122.

a greater voice in commercial interactions. These mechanisms have been integrated into the platforms connecting buyers and sellers and have become an essential feature of these sectors.

By providing constructive solutions to the lemons problem that decades of regulations have failed to overcome, the Internet and real-time reputational feedback mechanisms should force a reevaluation of traditional regulations aimed at addressing perceived market failures based on asymmetric information. Such regulations have typically failed to improve consumer welfare and have undermined innovation and competition. This may explain why, when recently surveyed by PricewaterhouseCoopers, 64 percent of US consumers said that in the sharing economy, peer regulation is more important than government regulation.[65]

From the perspective of the regulator, as Commissioner Maureen Ohlhausen has noted in recent speeches, this reality requires a level of "regulatory humility" that recognizes the inherent limitations of most traditional regulatory approaches, as well as the rapid speed of technological change and "creative destruction" taking place within these sectors.[66]

Uber's ban in Las Vegas reveals the stark difference between traditional regulation and the textbook ideal. As Firefox founder Blake Ross explains, for years authorities have been trying to keep taxis from scamming tourists by taking them the wrong way from the Las Vegas airport to the Vegas Strip.[67] Using the tools available to a regulator, the Nevada Taxicab Authority tried everything from roadside checkpoints to giant signs to creating a system for passengers to submit reports when they were taken to the strip by the wrong route. All to no avail.

In contrast, the sharing economy is able to solve a problem that has stymied the Nevada regulators over several decades. Through its five-star rating system and electronic ride records, Uber is able to learn instantly when a passenger believes a driver has taken the wrong route and can easily verify whether or not a long haul occurred.[68] However, in the name of consumer protection, Uber was banned. As a result, tourists in Las Vegas are unable to take advantage of this service, and they are left with the Taxicab Authority's patchwork of solutions that are not serving them well.

The question facing federal policymakers, as noted in the next sections, is whether and in what ways they can respond to and challenge local regulations with anticompetitive effects that ultimately reduce consumer welfare.

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65. PricewaterhouseCoopers, "The Sharing Economy," 16.
66. Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, "Regulatory Humility in Practice" (remarks before the American Enterprise Institute, Washington, DC, April 1, 2015), https://www.ftc.gov/public-statements/2015/04/regulatory-humility-practice-remarks-ftc-commissioner-maureen-k-ohlhausen.
67. Blake Ross, "Uber.gov—It's Time to Let the Government Drive," *Quartz*, December 4, 2014, http://qz.com/305941/uber-gov-its-time-to-let-the-government-drive/.
68. For further discussion regarding Uber's five-star rating system see Thierer et al., "How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the 'Lemons Problem.'"

VII. FEDERAL RESPONSES TO LOCAL ANTICOMPETITIVE REGULATIONS

The commission possesses two primary tools to address public restraints of trade created by state and local authorities: advocacy and antitrust.[69]

Through its advocacy program, the commission can provide specific comments to state and local officials regarding the effects of both proposed and existing regulations.[70] Commissioner Joshua Wright has noted that "for many years, the FTC has used its mantle to comment on legislation and regulation that may restrain competition in a way that harms consumers."[71] Thus, at a minimum, the commission can and should shine light on parochial government efforts to restrain trade and limit innovation throughout the sharing economy.[72] By shining more light on state or local anticompetitive rules, the commission will hopefully make governments or their surrogate bodies (such as licensing boards) more transparent about their practices and more accountable for laws or regulations that could harm consumer welfare. However, to be successful, the commission's advocacy efforts depend upon the willingness of state and local legislators and regulators to heed its advice.[73]

The commission has already used its advisory role in its recent guidance to state and local policymakers regarding the regulation of ride-sharing services. The commission noted then that "a regulatory framework should be responsive to new methods of competition," and it set forth the following vision regarding what it regards as the proper approach to parochial regulation of passenger transportation services:

> Staff recommends that a regulatory framework for passenger vehicle transportation should allow for flexibility and adaptation in response to new and innovative methods of competition, while still maintaining appropriate consumer protections. [Regulators] also should proceed with caution in responding to calls for

69. See Maureen K. Ohlhausen, "Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity" (remarks before the Heritage Foundation, Washington, DC, March 31, 2015), 19–20.
70. Ibid., 20. ("The primary goal of such advocacy is to convince policymakers to consider and then minimize any adverse effects on competition that may result from regulations aimed at preventing various consumer harms.") See also James C. Cooper and William E. Kovacic, "U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition," *Boston University Law Review* 90, no. 4 (August 2010): 1582. ("Competition advocacy helps solve consumers' collective action problem by acting within the regulatory process to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens.")
71. Wright, "Regulation in High-Tech Markets," 15.
72. Cooper and Kovacic, "U.S. Convergence with International Competition Norms," 1610. ("Competition agencies could devote greater resources to conduct research to measure the effects of public policies that restrict competition. A research program could accumulate and analyze empirical data that assesses the consumer welfare effects of specific restrictions. Such a program could also assess whether the stated public interest objectives of government restrictions are realized in practice.")
73. Cooper and Kovacic, "U.S. Convergence with International Competition Norms," 1582. ("The value of competition advocacy should be measured by (1) the degree to which comments altered regulatory outcomes times (2) the value to consumers of those improved outcomes. For all practical purposes, however, both elements are difficult to measure with any degree of certainty.")

> change that may have the effect of impairing new forms or methods of competition that are desirable to consumers. . . . In general, competition should only be restricted when necessary to achieve some countervailing procompetitive virtue or other public benefit such as protecting the public from significant harm.[74]

This view represents a reasonable framework for addressing concerns about parochial regulation of the sharing economy more generally.

Unfortunately, in areas relevant to the regulation of the sharing economy (e.g., taxicab regulations and rules governing home and apartment rentals) anticompetitive regulations have remained on the books—and in some instances have expanded—in spite of more than 30 years of commission comment and advocacy.[75] In fact, as Public Citizen, the consumer advocacy organization, noted in a recent Supreme Court filing,

> Many more occupations are regulated than ever before, and most boards doing the regulating—in both traditional and new professions—are dominated by industry members who compete in the regulated market. Those board member-competitors, in turn, commonly engage in regulation that can be seen as anticompetitive self-protection. The particular forms anticompetitive regulations take are highly varied, the possibilities seemingly limited only by the imaginations of the board members.[76]

In these instances, the commission's antitrust enforcement authority may need to be utilized when its advocacy efforts fall short with regard to regulations that favor incumbents by limiting competition and entry.[77] Many academics have endorsed expanded antitrust oversight of public barriers to trade and innovation.[78] As Commissioner Wright has argued, "The FTC is in a good position to use its full arsenal of tools to ensure that state and local regulators do not thwart new entrants from using technology to disrupt existing marketplaces."[79] He notes

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74. Federal Trade Commission, *FTC Staff Comments before the Colorado Public Utilities Commission in the Matter of the Proposed Rules Regulating Transportation by Motor Vehicle*, 4 Code of Colorado Regulations (March 6, 2013), http://ftc.gov/os/2013/03/130703coloradopublicutilities.pdf.
75. Marvin Ammori, "Can the FTC Save Uber?" *Slate*, March 12, 2013, http://www.slate.com/articles/technology/future_tense/2013/03/uber_lyft_sidecar_can_the_ftc_fight_local_taxi_commissions.html. ("Not only does the FTC have the authority to take these cities to impartial federal courts and end their anticompetitive actions; it also has deep expertise in taxi markets and antitrust doctrines.") See also Edmund W. Kitch, "Taxi Reform—The FTC Can Hack It," *Regulation*, May/June 1984, http://object.cato.org/sites/cato.org/files/serials/files/regulation/1984/5/v8n3-3.pdf.
76. Brief of Amicus Curiae, Public Citizen in Support of Respondent, North Carolina State Board of Dental Examiners v. FTC (August 2014), 24.
77. Brief of Antitrust Scholars, North Carolina State Board of Dental Examiners v. FTC, 24. ("Antitrust review is entirely appropriate for curbing the excesses of occupational licensing because the anticompetitive effect has a similar effect on the market—and in particular consumers—as does traditional cartel activity.")
78. See Mark A. Perry, "Municipal Supervision and State Action Antitrust Immunity," *University of Chicago Law Review* 57 (Fall 1990): 1413–45; William J. Martin, "State Action Antitrust Immunity for Municipally Supervised Parties," *University of Chicago Law Review* 72 (Summer, 2005): 1079–102; Jarod M. Bona, "The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction," *University of St. Thomas Journal of Law & Public Policy* 5 (August 2011): 28–51; Ingram Weber, "The Antitrust State Action Doctrine and State Licensing Boards," *University of Chicago Law Review* 79, no. 2 (Spring 2012); Aaron Edlin and Rebecca Haw, "Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?" *University of Pennsylvania Law Review* 162 (2014): 1093–164.
79. Wright, "Regulation in High-Tech Markets," 28–29.

specifically that he is "quite confident that a significant shift of agency resources away from enforcement efforts aimed at taming private restraints of trade and instead toward fighting public restraints would improve consumer welfare."[80] We agree.

The Supreme Court's recent decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* made it clear that local authorities cannot claim broad immunity from federal antitrust laws.[81] This is particularly true, the court noted, "where a State delegates control over a market to a nonsovereign actor," such as a professional licensing board consisting primarily of members of the affected interest being regulated.[82] "Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants," the court held, "for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy."[83]

The touchstone of this case and the court's related jurisprudence in this area is political accountability.[84] State officials must (1) "clearly articulate" and (2) "actively supervise" licensing arrangements and regulatory bodies if they hope to withstand federal antitrust scrutiny.[85] The court clarified this test in *N.C. Dental*, holding that "the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls."[86] In other words, if state and local officials want to engage in protectionist activities that restrain trade in pursuit of some other countervailing objective, then they need to own

80. Ibid, 29.
81. North Carolina State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).
82. Ibid.
83. Ibid. See also Edlin and Haw, "Cartels by Another Name," 1143. ("Who could seriously argue that an unsupervised group of competitors appointed to regulate their own profession can be counted on to neglect their selfish interests in favor of the state's?"); Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Respondent, North Carolina State Board of Dental Examiners v. FTC (August 2014), 3, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-534_resp_amcu_plf-cato.authcheckdam.pdf. ("Antitrust immunity for private parties who act under color of state law is especially problematic, given that anticompetitive conduct is most likely to occur when private parties are in a position to exploit government's regulatory powers.")
84. See Ohlhausen, Reflections on the Supreme Court's North Carolina Dental Decision, 16. ("States need to be politically accountable for whatever market distortions they impose on consumers."); Edlin and Haw, "Cartels by Another Name," 1137. ("Political accountability is the price a state must pay for antitrust immunity.)
85. See *Federal Trade Commission*, Office of Policy Planning, Report of the State Action Task Force (2003), 54, https://www.ftc.gov/policy/policy-actions/advocacy-filings/2003/09/report-state-action-task-force, ("Clear articulation requires that a state enunciate an affirmative intent to displace competition and to replace it with a stated criterion. Active supervision requires the state to examine individual private conduct, pursuant to that regulatory regime, to ensure that it comports with that stated criterion. Only then can the underlying conduct accurately be deemed that of the state itself, and political responsibility for the conduct fairly placed with the state.") This test has been developed and refined in a variety of cases over the past 35 years. See California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97 (1980); Community Communications v. City of Boulder, 455 U.S. 40, 48–51 (1982); City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991); FTC v. Ticor Title Insurance, 504 U.S. 621 (1992).
86. North Carolina State Board of Dental Examiners v. FTC.

up to it by being transparent about their anticompetitive intentions and then actively oversee the process to ensure it is not completely captured by affected interests.[87]

Some might argue that this does not go far enough to eradicate anticompetitive barriers to trade at the state or local level that could restrain the innovative potential of the sharing economy. While that may be true, some limits on the commission's federal antitrust discretion are necessary to avoid impinging upon legitimate state and local priorities.

Over time, it is our hope that, by empowering the public with more options, more information, and better ways to shine light on bad actors, the sharing economy will continue to make many of those old regulations unnecessary. Thus, in line with Commissioner Ohlhausen's wise advice, the commission should encourage state and local officials to exercise patience and humility as they confront technological changes that disrupt traditional regulatory systems.[88]

But when parochial regulators engage in blatantly anticompetitive activities that restrain trade, foster cartelization, or harm consumer welfare in other ways, the commission can act to counter the worst of those tendencies.[89] The commission's standard of review going forward was appropriately articulated by Commissioner Wright recently when he noted that "in the context of potentially disruptive forms of competition through new technologies or new business models, we should generally be skeptical of regulatory efforts that have the effect of favoring incumbent industry participants."[90]

Such parochial protectionist barriers to trade and innovation will become even more concerning as the potential reach of so many businesses in the sharing economy grows larger. The boundary between *intra*state and *inter*state commerce is sometimes difficult to determine for many sharing economy platforms. Clearly, much of the commerce in question occurs within the boundaries of a state or municipality, but sharing economy services also rely upon Internet-enabled platforms with a broader reach. To the extent that state or local restrictions on sharing economy operations create negative externalities in the form of "interstate spillovers,"

87. Edlin and Haw, "Cartels by Another Name," 1156. ("Requiring that the state place its imprimatur on regulation is at least better than the status quo, in which states too often delegate self-regulation to professionals and walk away.") See also North Carolina State Board of Dental Examiners v. FTC. ("[Federal antitrust] immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.")
88. Ohlhausen, "Regulatory Humility in Practice."
89. Edlin and Haw, "Cartels by Another Name," 1094. ("State action doctrine should not prevent antitrust suits against state licensing boards that are comprised of private competitors deputized to regulate and to outright exclude their own competition, often with the threat of criminal sanction.") See also Brief of the Pacific Legal Foundation and Cato Institute, North Carolina State Board of Dental Examiners v. FTC, 2, 21. ("[Courts] should presume strongly against granting state-action immunity in antitrust cases. It makes little sense to impose powerful civil and criminal punishments on private parties who are deemed to have engaged in anti-competitive conduct, while exempting government entities—or, worse, private parties acting under the government's aegis—when they engage in the exact same conduct. . . . Whatever one's opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight.")
90. Wright, "Regulation in High-Tech Markets," 7.

the case for federal intervention is strengthened.[91] It would be preferable if Congress chose to deal with such spillovers using its Commerce Clause authority (Article 1, Section 8 of the Constitution),[92] but the presence of such negative externalities might also bolster the case for the commission's use of antitrust to address parochial restraints on trade.

VIII. CONCLUSION: NEXT STEPS

We will conclude with a few possible next steps for the commission to consider:

- **The commission should continue to utilize its advocacy role to provide guidance to state and local officials grappling with how to adjust traditional regulatory practices in light of new disruptive technologies.** The commission has already provided good advice to some state and local regulators seeking guidance in reforming public transportation regulations that impact new entry and innovation in the ride-sharing sector. That advice can be formalized and extended to cover other sharing economy platforms. And the commission should push this advice out to state and local officials even if input is not formally requested.[93]

- **The commission should shift enforcement efforts away from stopping private restraint of trade and toward stopping public restraint of trade.** In light of George Stigler's observation that "the state has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce,"[94] the commission would be wise to adopt Commissioner Wright's approach and shift resources toward fighting public restraint of trade.

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91. FTC, *Report of the State Action Task Force*, 44 ("An unfortunate gap has emerged between scholarship and case law. Although many of the leading commentators have expressed serious concern regarding problems posed by interstate spillovers, their thinking has yet to take root in the law. Such spillovers undermine both economic efficiency and some of the same political representation values thought to be protected by principles of federalism."); Brief of the Pacific Legal Foundation and Cato Institute, North Carolina State Board of Dental Examiners v. FTC, 13 ("Allowing states expansive power to exempt private actors from antitrust laws would also disrupt national economic policy by encouraging a patchwork of state-established entities licensed to engage in cartel behavior. This would disrupt interstate investment and consumer expectations, and would have spillover effects across state lines."); Cooper and Kovacic, "U.S. Convergence with International Competition Norms," 1598 ("When a state exports the costs attendant to its anticompetitive regulatory scheme to those who have not participated in the political process, however, there is no political backstop; arguments for immunity based on federalism concerns are severely weakened, if not wholly eviscerated, in these situations.").
92. See Adam Thierer, *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age* (Washington, DC: Heritage Foundation, 1998), 81–118.
93. FTC, *Report of the State Action Task Force*, 66. ("In many instances, competition advocacy essentially serves as a means for the Commission to communicate antitrust concerns to state governments that would otherwise be communicated only through litigation.")
94. Stigler, "Theory of Economic Regulation," 4.

- **The commission should consider updating its 2003 *State Action Task Force* report in light of recent developments in the sharing economy.** This would also be wise in light of the Supreme Court's recent decision in *N.C. Dental*. Following that case, the commission and the courts now have a better idea how the "clear articulation" and "active supervision" tests will be interpreted going forward. But the commission could clarify these legal principles for both other policymakers and industry. The commission could also use the opportunity to better explain its potential advocacy and enforcement agenda on this front.

The commission should avoid applying any sector- or technology-specific privacy- or security-related policies to sharing economy operators. The commission's existing best practice guidance for other digital economy operators can be applied more generally to sharing economy operators. And the commission's section 5 "unfair and deceptive practices" authority is already sufficient to deal with missteps on this front. But to the extent that the commission wishes to remind sharing economy operators of the agency's current approach, it could undertake efforts to push that guidance out to more operators in the hope that they take steps to implement "privacy by design" and "security by design" when formulating their business models.[95] But the commission should be cautious to avoid disadvantaging certain data-driven business models over others.[96]

95. FTC, *Protecting Consumer Privacy in an Era of Rapid Change*.
96. See Adam Thierer, "Privacy Law's Precautionary Principle Problem."