

THE CHINESE EXPERIMENT:
LESSONS FROM THE REGULATION OF RIDESHARING IN CHINA

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[G]enerally speaking, in the conflict of cultures throughout the ages it has, invariably, been a sign of strength to receive [new legal ideas] as well as to give.

— Basil S. Markesinis¹

INTRODUCTION

Turning on an app, finding a driver nearby with the help of GPS, and quickly catching a ride to your desired destination is now a daily activity for many

¹ BASIL S. MARKESINIS, *FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS* 194 (1997) (discussing the flexibility of English law and arguing that this open-minded willingness to receive foreign legal ideas was a great strength).

people around the world. This arrangement, known as “ridesharing” or “ridehailing,” has especially transformed the way many American and Chinese citizens travel. In the United States, ridesharing is roughly an \$18 billion industry, and in China it is an incredible \$30 billion.² While ridesharing for many Americans might be synonymous with Uber and Lyft, in China the leading ridesharing company is Didi-Chuxing, which facilitates more rides each day in China than Uber does across the entire world.³

The so-called “sharing economy,” of which ridesharing and similar services like homesharing are a part, has unlocked the excess capacity in cars, homes, and schedules, leading to lower prices, higher incomes, improved convenience, and reduction in waste. Despite these benefits and advances, however, the sharing economy has created a dizzying array of problems for communities of all sizes—from tax evasion and pollution to price gouging, lack of worker protections, and consumer safety.⁴ The impact of these problems is exacerbated because sharing economy platforms shape-shift, move fast, and fight to avoid (or find loopholes within) current regulatory frameworks.⁵ As a result, the world has witnessed a barrage of lawsuits, strikes, bans, and rules in opposition to this zeitgeist.⁶

With many differing approaches to regulating the sharing economy, some jurisdictions have more effectively mitigated the novel economy’s negative externalities than others. Thus, it is helpful to look at legal experiments occurring across the globe to identify and understand best practices as they

² Ride Hailing- China, STATISTA, <https://www.statista.com/outlook/368/117/ride-sharing/china#>; Douglas Clark, *China: One-Third of Internet Users Use a Ride Sharing Service*, EMARKETER (Jan. 10, 2018), <http://www.emarketer.com/newsroom/index.php/china-one-third-internet-users-use-ride-sharing-service/#SLF4kp8UGC526E8d.99> (“one-third of Internet users in China will use a ride-sharing service in 2018”).

³ KAI-FU LEE, *AI SUPER-POWERS: CHINA, SILICON VALLEY, AND THE NEW WORLD ORDER* 40 (2018).

⁴ Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 101 (2017).

⁵ Eric Biber, et al., *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561 (2017).

⁶ See generally Greg Dickinson, *How the World Is Going to War with Uber*, DAILY TELEGRAPH (June 26, 2018), <https://www.telegraph.co.uk/travel/news/where-is-uber-banned/>; Andrew Jacobs, *Strikes by Taxi Drivers Spread Across China*, N.Y. TIMES (Jan. 14, 2015), <https://www.nytimes.com/2015/01/15/world/asia/taxi-strikes-spread-across-china.html>; Sherisse Pham, *Didi Has a Crisis and So Does China’s Ride-Hailing Industry*, CNN (Aug. 29, 2018), <https://money.cnn.com/2018/08/29/technology/didi-china-crisis/index.html> (detailing the assorted labor movements and regulatory challenges that have occurred in the US, Europe, and China as a result of the global expansion of ridesharing services).

emerge. This Article does just that by examining China's ridesharing regulations. China's approach provides a useful point of comparison to the U.S.'s, because of its national recognition of ridesharing platforms, shifts in liability protections, and forward-thinking plans to incorporate many of the sharing economy's benefits into the country's strategic planning. Furthermore, this Article contributes to our overall understanding of the Chinese economy and its legal system, which too often goes unexamined in U.S. legal scholarship, despite the fact that the Chinese economy is second only to the U.S.'s and is the largest country in the world by population.

This Article advances a two-pronged thesis. First, it argues that China's approach to ridesharing regulation—while not flawless—nevertheless addresses certain market failures in a more rational and effective manner than have U.S. laws. Chinese law appears to balance effectively its goal of encouraging the positive attributes of ridesharing companies with other practical social goals such as consumer protection and fair competition. Second, this Article argues that U.S. regulators can selectively borrow from China's approach to ridesharing regulation to the benefit of the relevant stakeholders in the U.S. In this way, U.S. law could absorb and encourage the beneficial innovations of sharing economy platforms generally and better address the market failures they provoke.

To build these arguments, this Article proceeds as follows. Part I provides the context for understanding the broad similarities and differences between the U.S. and China's sharing economies, especially with regard to their incorporation into national economic and political goals. Part II provides a brief overview of ridesharing in both the U.S. and China. Part III evaluates the utility of comparative approaches both generally and specifically for innovation. Part IV surveys the regulation of ridesharing in the U.S. and China, focusing in particular on the details of China's shift towards a national approach. Part V provides a functional analysis of the two countries' regulatory approaches vis-à-vis each other. Finally, Part VI provides key insights for regulators considering a shift to a national approach to ridesharing regulation in their own country.

I. THE SHARING ECONOMY

Until recently, most businesses adhered to a linear business model in which goods and services are distributed from a manufacturer or service provider to

the end user.⁷ However, since the Internet has become available in our homes and in our pockets, a massive shift has taken place in the economy. Today, some of the world's largest companies are built on platforms,⁸ which create simple and effective ways to connect consumers and producers more directly.⁹ Their revenues are driven by the fees they collect on each transaction, which essentially eliminates marginal costs.

Many platform-based businesses (“platforms”) are lumped under the umbrella term “sharing economy.” This is a misnomer because the economy is motivated by profits and not altruism, but it generally refers to the sale of individuals’ resources and time via peer-to-peer (P2P)¹⁰ marketplaces.¹¹ Many of these resources are durable goods that may be temporarily shared.¹² Others are supply-side users’ capacity to perform tasks—such as caretaking services (Care.com), errands (TaskRabbit), or food delivery (UberEats).

The benefits of the sharing economy as an economically-efficient set of platforms are said to lie in the autonomy of the supply-side users.¹³ Individuals may use their personal assets or labor as a means to minimize fixed costs and offer a competitive alternative to incumbent firms in various

⁷ ALEX MOAZED & NICHOLAS L. JOHNSON, *MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST-CENTURY ECONOMY* 22 (2016).

⁸ By market capitalization Google (now organized under the umbrella company Alphabet), Amazon, Apple, Facebook, and Microsoft are among the world's largest companies. Will Oremus, *Tech Companies Are Dominating the Stock Market as Never Before*, SLATE (July 29, 2016), http://www.slate.com/blogs/moneybox/2016/07/29/the_world_s_5_most_valuable_companies_apple_google_microsoft_amazon_facebook.html. These companies are also among the top ten most powerful brands save Amazon, which is number twelve. *The List*, FORBES, <https://www.forbes.com/powerful-brands/list> (last visited Apr. 13, 2017).

⁹ See Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRES L. 369, 376–77 (2016) (discussing both the benefits for consumers and complications for regulators created by networked information platforms).

¹⁰ Sometimes also referred as online-to-offline (O2O) platforms. LEE, *supra* note 3, at 16.

¹¹ See Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1406–08 (2016); Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197 (2017); FED. TRADE COMM’N, *THE “SHARING” ECONOMY* 18 (Nov. 2016); Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENV’T. INNOVATION AND SOCIETAL TRANSITIONS 3, 4–6 (Jun. 2017). In this Article, the “supply-side users” refers to the user group that sells goods and services, as opposed to those that purchase them (demand-side).

¹² Yochai Benkler identifies these goods as “shareable goods.” *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 276, 288 (2004).

¹³ *Id.* at 342.

industries, such as transportation (Uber, Lyft, Sidecar); accommodation (Airbnb, Homeaway, VRBO); finance (Prosper, Zopa); and many more.¹⁴ Additionally, platforms routinely collect vast amounts of data to create and feed advanced algorithms to better address the complex matching problems latent in two-sided marketplaces.¹⁵

Despite the benefits and realized market success of the sharing economy broadly, platforms still create various negative externalities, the costs of which are borne by consumers and governments. As such, the need for regulation is strong—yet effective approaches remain elusive because of the delicate balance between innovation on the one hand, and outdated regulatory instruments and approaches on the other.

A. *The Sharing Economy in the U.S.*

The sharing economy in the US grew out of Silicon Valley in the San Francisco Bay Area, as companies drew both on the area's technical talent and tech-optimist culture.¹⁶ In under a decade, an explosion of over 10,000 sharing economy companies¹⁷ sprang up and firmly inserted themselves into both the global markets and the modern zeitgeist, with US firms like Uber, Airbnb, and Lyft leading the charge. The sharing economy in the US has affected a large swath of industries, including transportation, hotels, errands, finance, food delivery, office space, parking spaces, used clothing, broadcasting, and many more.¹⁸ In 2016, as many as 16 sectors and 40 sub-

¹⁴ Fed. Trade Comm'n, Transcript of Sharing Economy Workshop 19 (June 9, 2015), https://www.ftc.gov/system/files/documents/public_events/636241/sharing_economy_workshop_transcript.pdf; Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 95 (2016).

¹⁵ Fed. Trade Comm'n, *supra* note 14, at 1, 20.

¹⁶ See generally Dana Hull, *Silicon Valley Technology Helps Power New 'Sharing Economy'*, MERCURY NEWS (Aug. 13, 2016), <https://www.mercurynews.com/2012/05/09/silicon-valley-technology-helps-power-new-sharing-economy-2/>; Sara Harrison, *Silicon Valley Tech Bros Want to Trick Us into Thinking Capitalism is Revolutionary*, QUARTZ (Oct. 3, 2016), <https://qz.com/797778/silicon-valley-thinks-its-the-heir-to-1960s-counterculture-but-theres-no-revolution-here/>; Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014), <https://www.wired.com/2014/04/trust-in-the-share-economy/> (discussing the initial optimism in Silicon Valley sharing economy companies and how the tech-optimist rhetoric of the sharing economy has been interpreted both positively and negatively).

¹⁷ Joel Stein, *Baby, You Can Drive My Car, and Do My Errands, and Rent My Stuff...*, TIME (Jan. 29, 2015), <http://www.time.com/3687305/testing-the-sharing-economy>.

¹⁸ Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 95 (2016).

sectors of the economy within which sharing economy platforms may have been operating.¹⁹

The ubiquity and growth of US sharing economy companies can be seen in sky-high valuations, massive market sizes, and contributions to projected global growth. Between 2007 and 2017, \$23 billion in venture funding was raised by sharing economy platforms; US firms Uber and Airbnb raised half of all sharing economy venture funding in that time period.²⁰ As a result, Uber had a valuation of \$76 billion²¹ and Airbnb had a valuation of \$31 billion²² by 2018. Additionally, by 2016, the US sharing economy had 44.8 million users and is expected to grow to 86.5 million users by 2021.²³ Estimates also suggest that five of the most prominent sharing economy sectors – P2P finance, online staffing, P2P accommodation, car / ridesharing, and music/video streaming – will grow to create \$335 billion in global revenues by 2025.²⁴ US firms like Uber, Lyft, and Airbnb will likely continue their leadership of the global sharing economy into the foreseeable future.

The US sharing economy has not been folded into any type of national economic or regulatory plan (*see infra* Part III). Despite the market success of the US sharing economy, regulators still worry about market failures yet to be sufficiently addressed by sharing economy platforms.²⁵ As such, the future of the sharing economy regulation in the US will be determined, in

¹⁹ Jeremiah Owyang, *Honeycomb 3.0: The Collaborative Economy Market Expansion*, JEREMIAH OWYANG BLOG (Mar. 10, 2016), <http://www.web-strategist.com/blog/2016/03/10/honeycomb-3-0-the-collaborative-economy-market-expansion-sxsw/>

²⁰ JUDITH WALLENSTEIN AND URVESH SHELAT., BCG HENDERSON INSTITUTE, WHAT'S NEXT FOR THE SHARING ECONOMY? (2017).

²¹ Heather Somerville, *Toyota to Invest \$500 Million in Uber for Self-Driving Cars*, REUTERS (Aug. 27, 2018), <https://www.reuters.com/article/us-uber-toyota/toyota-to-invest-500-million-in-uber-for-self-driving-cars-idUSKCN1LC203>.

²² Biz Carson, *Old Unicorn, New Tricks: Airbnb Has a Sky-High Valuation. Here's Its Audacious Plan to Earn It*, FORBES (Oct. 3, 2018), <https://www.forbes.com/sites/bizcarson/2018/10/03/old-unicorn-new-tricks-airbnb-has-a-sky-high-valuation-heres-its-audacious-plan-to-earn-it/#2159c72f6fa3>.

²³ Number of Sharing Economy Users in the United States from 2016 to 2021, STATISTA, <https://www.statista.com/statistics/289856/number-sharing-economy-users-us/>

²⁴ Press Release, PricewaterhouseCoopers, Five Key Sharing Economy Sectors Could Generate £9 Billion of UK Revenues by 2025 (Aug. 15, 2014), http://pwc.blogs.com/press_room/2014/08/five-key-sharing-economy-sectors-could-generate-9-billion-of-uk-revenues-by-2025.html.

²⁵ Sarah Cannon and Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators>

large part, by two things: first, by the balance regulators choose to strike between the disruptive innovation and troubling market failures of the sharing economy, and second, by the regulatory instruments and approach utilized to shape sharing economy regulation.

B. The Sharing Economy in China

In the United States, the sharing economy is synonymous with the likes of Airbnb and Uber.¹ In China, its scope is much broader.¹ Referred to as *fen xiang*,¹ China's sharing economy involves both platform and linear business models.¹ However, like in the U.S., many Chinese platforms facilitate transactions related to transportation, accommodation, and services. Many of these companies were modeled off of existing U.S. startups and adapted for the Chinese market.

Estimates suggest that by 2020, *fen xiang* will represent ten percent of the country's total gross domestic product (GDP) and by 2025, twenty percent.²⁶ As a result, *fen xiang* has become a part of China's development strategies.²⁷

According to the 13th Five Year Plan and the translation by the Communist Party of China (the "Plan"), "*gong xiang*"—sharing, along with innovation and sustainability—is integrated into the development philosophy of the 13th Five-Year Plan.²⁸ The development philosophy

²⁶ ST. INFO. CTR. OF CHINA, CHINA SHARING ECONOMY DEVELOPMENT REPORT 29 (2016), <http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Htmleditor/201602/20160229121154612.pdf>; ST. INFO. CTR. OF CHINA, CHINA SHARING ECONOMY DEVELOPMENT REPORT 22 (2017), <http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Htmleditor/201703/20170302125144221.pdf> (according to the 2016 and 2017 Reports, in ten years, there will likely be five to ten mega platform enterprises in the sharing economy area. The 2016 report also projected that the sharing economy would increase by 40% annually, and that by 2020, the sharing economy will represent more than 10% of the country's GDP).

²⁶ THE 13TH FIVE-YEAR PLAN FOR ECONOMIC AND SOCIAL DEVELOPMENT OF THE PEOPLE'S REPUBLIC OF CHINA (2016-2020) ch. 26 § 2 (COMPILATION AND TRANSLATION BUREAU, CENT. COMM. OF THE COMMUNIST PARTY OF CHINA trans.) (2016) [hereinafter 13TH FIVE-YEAR PLAN OF CHINA], <http://en.ndrc.gov.cn/newsrelease/201612/P02061207645765233498.pdf> ("We will . . . encourage the establishment of platforms for releasing and sharing resources, explore the creation of national experimental demonstration zones for an information economy, and develop the sharing economy."). The 13th Five-Year Plan of China is not numbered so we approximate using chapter and section numbers.

²⁷ *Id.*

²⁸ *Id.* at ch. 4.

[c]onstitutes a joint body of parts internally linked together and [is] an embodiment of [China's] thinking, direction, and the focus of its efforts related to development during the 13th Five-Year Plan period and beyond; it must permeate all areas of economic and social development over the coming five years.²⁹

Gong xiang is also recognized as the “essence of Chinese-style socialism,”³⁰ which is interpreted by the Party as follows:

We must ensure that development is for the people, that it is reliant on the people, and that its fruits are shared by the people. We will improve our institutions to enable the people to have a greater sense of benefit as they contribute to development and share in its fruits, thus strengthening the impetus for development, increasing unity among the people, and helping them move steadily toward common prosperity.³¹

Gong xiang is referenced frequently throughout the Plan. For instance, the Plan includes “giv[ing] impetus to the open *sharing* of research infrastructure and innovation resources by institutions of higher learning;”³² “improv[ing] innovation resource *sharing*,” enhancing information *sharing*, and so forth.³³ Hence, the idea of sharing permeates most aspects of governmental and social affairs and economic development.

It is not just the Chinese government that is energized by the sharing economy. A national organization on the sharing economy was organized in 2015 by the Internet Society of China, which has over a thousand members, including leading technology companies in China such as Tencent, Alibaba, Xiaomi.³⁴ According to a report prepared by the State Information Center of China, the *China Sharing Economy Development Annual Report 2018*, there are two categories within China's sharing economy—financial and non-

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at ch. 6 § 3.

³³ *Id.* at ch. 7 § 2.

³⁴ The Committee also invited scholars, experts, and entrepreneurs from around the world, such as Robin Chase, Arun Sundararajan, Varsha Rao, to research and discuss the sharing economy in China. See INTERNET SOCIETY OF CHINA, <http://www.isc.org.cn/english/> (last visited Jan. 2, 2019); SHARING ECONOMY COMMITTEE OF INTERNET SOCIETY OF CHINA, <http://www.fenxiangjj.org.cn> (last visited Jan. 2, 2019).

financial.³⁵ The non-financial sharing economy, of which ridesharing is a part, also includes:

- *Lodging*: Airbnb, Xiaozhu.com, Tujia.com, and other homesharing platforms;
- *Consumer Services*: Meituan, an online delivery service; XiangShuiSpace, a sleep capsule sharing service provider; and JJ Umbrella and E-Umbrella, umbrella sharing service providers;³⁶ and
- *Business-to-Businesses Services*: WeWork, office sharing; Yunmanman, logistics information sharing; and MouldLao,³⁷ manufacturing resources sharing.

The sharing economy in the financial sector includes P2P online lending and borrowing service providers, such as iQianJin, AntFinancial, XinXinDai, and online crowdfunding platforms, such as JD Finance, Zhong.com by Pingan Insurance, Taobao Zhongchou.³⁸

³⁵ STATE INFO. CTR. OF CHINA, CHINA SHARING ECONOMY DEVELOPMENT ANNUAL REPORT 30–64 (2018),

<http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Default/20180320144901006637.pdf> [hereinafter SHARING ECONOMY REPORT OF CHINA].

³⁶ *Id.* at 54 (recognizing consumer services sharing as the most diverse and vibrant branch of the sharing economy of China). Note that sleep capsules are no longer permitted because local authorities found that they were not meeting safety standards. *See, e.g., Beijing Police Department: “Sharing Sleep Capsules” Lead to Safety Hazards*, XINHUA (July 21, 2017, 7:21 PM), http://www.xinhuanet.com/fortune/2017-07/21/c_1121360401.htm. And, the umbrella services quickly folded because of the theft of umbrellas. Natt Garun, *Chinese Umbrella- Sharing Startup Loses Most of Its 300,000 in Three Months*, THE VERGE (July 10, 2017) <https://www.theverge.com/tldr/2017/7/10/15947590/chinese-umbrella-sharing-startup-lost-300000>.

³⁷ Shenzhen Wuxin Tech. Co. operates MouldLao. MouldLao provides a space for start-up entrepreneurs who cannot afford to purchase manufacturing equipment and manufacturing space, among other manufacturing essentials. In MouldLao, everything can be used on an as-needed basis: Machines can be leased at an hourly rate and workers can be selected based on areas of expertise. All start-ups working with MouldLao teams share one administrative team to defray overhead costs. *See Big News! Here Comes the “Sharing Factory!” See How 18 Enterprises Share One Factory!*, IFENG (Sept. 6, 2017, 6:37 PM), http://news.ifeng.com/a/20170906/51896422_0.shtml.

³⁸ iQianJin, AntFinancial, XinXinDai are members of the National Internet Finance Association of China—meaning they have been accredited by their local authorities to operate legally. *See Members*, NAT’L INTERNET FIN. ASS’N OF CHINA, <http://www.nifa.org.cn/nifa/2955695/2955742/2962645/index.html>. (last visited Jan. 2, 2019). Currently, there is no rule or regulation that specifically regulates crowd-funding. In 2014, the Securities Association of China released an unofficial draft of Measures on the Regulation of Private Equity Crowd Funding Financing Activities and called for public

All of these various platforms have provided meaningful ways for privately held resources and individual time to be effectively monetized.³⁹ This “sharing” is very much in line with the threads of collectivism that are still woven throughout Chinese society.⁴⁰ Sharing has also significantly increased the employment rate and boosted the economic growth of China, moving it from a production-led economy to an innovation-led economy.

In 2017, the market volume of the sharing economy of China saw an increase of 47.2% from the previous year and amounted to ¥4920.5 billion, which is approximately \$728.48 billion.⁴¹ The market volume of non-financial sectors saw an increase of 66.8% over the prior year and amounted to ¥2094.1 billion, or roughly \$310 billion.⁴² In the next five years, the sharing economy in China is expected to increase by an annual growth rate of 30%.⁴³ As a result, in 2017, an additional 1.31 million people worked in China’s sharing economy, for a total number of about 7.16 million employees.⁴⁴ In cities and towns, of every 100 newly-employed, ten were employed by platform companies.⁴⁵ In 2017, more than 700 million people were involved in the sharing economy, an increase of 100 million from the previous year.⁴⁶

Both the scale and scope of the sharing economy in the U.S. and China indicate recent and significant market successes. However, looking only at

opinion. In 2015, the Ministry of Finance of China, along with nine other government agencies released a Guiding Opinion on Facilitating the Healthy Development of Internet Finance, which designates the China Securities Regulatory Commission as the regulator for crowd funding activities. See *Notice on Calling for Public Opinions on Measures on the Regulation of Private Equity Crowd Funding Financing Activities (Draft)*, SAC (Dec. 18, 2014), http://www.sac.net.cn/tzgg/201412/t20141218_113326.html; *Guiding Opinion on Facilitating the Healthy Development of Internet Finance*, MINISTRY OF FIN. (July 20, 2015), http://www.mof.gov.cn/zhengwuxinxi/zhengcefabu/201507/t20150720_1332370.htm.

Many large Chinese companies operate online crowd funding platforms. *E.g.*, JD FINANCE, <https://z.jd.com> (last visited Jan. 2, 2019); TAobao ZHONGCHOU, <https://izhongchou.taobao.com/index.htm> (last visited Jan. 2, 2019); ZHONG.COM, <http://www.zhong.com> (last visited Jan. 2, 2019).

³⁹ SHARING ECONOMY REPORT OF CHINA, *supra* note 35, at 2.

⁴⁰ Michele Galeotto, *3 Reasons Why Coworking Is Booming in China and What’s Next*, DESIGNHOTSPOT (Feb. 16, 2017, 9:04), <http://designhotpot.com/5-reasons-why-coworking-is-booming-in-china-and-whats-next/>.

⁴¹ SHARING ECONOMY REPORT OF CHINA, *supra* note 35, at 5–6.

⁴² *Id.* at 6.

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 10.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9.

the positive results of the sharing economy does not tell the entire story. Understanding areas in which the sharing economy creates market failures will provide relevant context about the full impact of the sharing economy, and will also suggest the areas that will be most amenable to productive regulatory interventions.

II. RIDESHARING 101

Cars have always had excess capacity—the average car is parked 95% of the time.⁴⁷ As a result, they were a prime target for incorporation into the sharing economy. Ridesharing platforms connect drivers and passengers. Riders use an app to signal their destination and request a ride. Based on their current location (determined by their GPS coordinates and shared in real-time with the app), the platform will notify them when a nearby driver is coming and will provide such details as what car the driver is using, the license plate, and the driver's name and picture. When the ride ends, the app automatically deducts money from the credit card associated with their account.⁴⁸

Drivers have a different app. They see requests for rides nearby and can accept these requests. The app also indicates areas where requests for drivers are high and provides other services. The app provides directions for the driver as well.⁴⁹ On both the rider and driver side there is an option to review each other after the ride. These ratings are shown to drivers when they select riders and to riders when they are matched with a driver.⁵⁰ The platform generally takes a percentage cut for each transaction.⁵¹

A. U.S. Ridesharing Players

The US has two key ridesharing players: Uber and Lyft. Both companies were founded in San Francisco; Uber was founded in 2009 and Lyft in 2012. The two companies own about 98% the US ridesharing market, and Uber

⁴⁷ Paul Barter, *Cars Are Parked 95% of the Time.* "Let's Check!", REINVENTING PARKING (Feb. 22, 2013), <https://www.reinventingparking.org/2013/02/cars-are-parked-95-of-time-lets-check.html>.

⁴⁸ *How Does Uber Work?*, UBER HELP, <https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e> (last visited Feb. 12, 2019).

⁴⁹ *Introducing the New Driver App, Your Partner on the Road*, UBER, <https://www.uber.com/us/en/drive/driver-app/> (last visited Feb. 12, 2019).

⁵⁰ *How Uber Works*, UBER, <https://www.uber.com/en-AE/about/how-does-uber-work/> (last visited Feb. 12, 2019).

⁵¹ Ridester Staff, *Uber Fees: How Much Does Uber Pay, Actually? (with Case Studies)*, RIDESTER (Jan. 17, 2019), <https://www.ridester.com/uber-fees/>.

holds 69.2% of the market while Lyft holds 28.4%.⁵² Both companies offer traditional peer-to-peer ridesharing services and luxury black-car services. Additionally, both companies have invested heavily in or outright acquired bike sharing and scooter companies.⁵³ Uber also offers meal delivery services under its Uber Eats brand. As of March 2018, Uber operates in over 70 countries globally and Lyft operates in the US and Canada.⁵⁴ Uber is valued at \$76 billion⁵⁵ and Lyft is valued at \$31 billion.⁵⁶ Both Uber and Lyft plan to IPO in early 2019.⁵⁷

B. Didi Chuxing

Founded in 2012 with an estimated valuation of \$56 billion, Didi Chuxing has become a giant of ridesharing in just four years. Didi's success stems from its biggest rival Uber being forced out of the Chinese market. Their services include taxis, private cars, rentals, buses, and chauffeurs. Didi further differentiates by utilizing AI technology to deploy their services. Although it commanded 80% of the Chinese market share, Didi sought to create further competitive pressures on Uber. That is why Didi has partnered with Lyft to share technology and marketing strategies and has been on a global acquisition of smaller companies⁵⁸. Didi is reportedly looking to go public later in 2019.

Ridesharing platforms have revolutionized the ways in which certain common regulatory concerns are addressed. For example, their reputation systems, which collect and organize user feedback, greatly reduce problems associated with asymmetric information and help to ensure consumer

⁵² Kathryn Gessner, *Rideshare: With IPOs Looming, Uber Leads Market Share, but Lyft has Gained Ground*, SECOND MEASURE (Jan. 21, 2019), <https://blog.secondmeasure.com/datapoints/rideshare-industry-overview/>

⁵³ Morgan Rose Dickey, *Lyft Outlines Bike and Scooter Plans*, TECHCRUNCH (Jul. 16, 2018), <https://techcrunch.com/2018/07/16/lyft-outlines-bike-and-scooter-plans/>

⁵⁴ Kirsten Korosec, *Lyft Just Made Its Biggest One-Dady Expansion Into U.S. Cities*, FORTUNE (Feb. 23, 2017), <http://fortune.com/2017/02/23/lyft-54-cities/> ; Nathan Rieff, *Key Differences Between Lyft and Uber*, INVESTOPEDIA (Dec. 30, 2018), <https://www.investopedia.com/articles/personal-finance/010715/key-differences-between-uber-and-lyft.asp>

⁵⁵ Somerville, *supra* note 21.

⁵⁶ Carson, *supra* note 22.

⁵⁷ Rani Molla, *Lyft Has Eaten Into Uber's US Market Share, New Data Suggests*, RECODE (Dec. 12, 2018), <https://www.recode.net/2018/12/12/18134882/lyft-uber-ride-car-market-share>

⁵⁸ Chris Ciaccia, *Didi Chuxing- The Chinese Ride Sharing Giant*, INVESTOPEDIA (Oct. 5, 2018), <https://www.investopedia.com/articles/small-business/012517/didi-chuxing.asp>.

safety.⁵⁹ However, there are numerous market failures that these platforms have no natural incentive to address—issues, for example, relating to tax collection,⁶⁰ pollution,⁶¹ insurance gaps,⁶² worker protections,⁶³ discrimination,⁶⁴ and privacy lapses.⁶⁵ This section will examine the market failures created by the sharing economy and the substantive policy differences between the U.S. and China’s ridesharing rules.

C. Market Failures Created by Ridesharing

The burgeoning market growth of ridesharing in both the U.S. and China (as discussed in Part I, *supra*) has been well-documented. So too have the market failures and concomitant negative externalities created by the platforms. Platforms create market failures in numerous ways.

⁵⁹ See, e.g., *Disrupter Series: How the Sharing Economy Creates Jobs, Benefits Consumers, and Raises Policy Questions: Hearing Before the Subcomm. on Commerce, Mfg., & Trade of the Comm. on Energy & Commerce*, 114th Cong. 2 (2015) (statement of Hon. Michael C. Burgess, Chairman, Subcomm. On Commerce, Mfg., & Trade of the Comm. on Energy & Commerce) (“Sharing platforms are inherently good [at] providing reputation feedback loops.”). The previous subsection provides several examples of performance standards (i.e. do not advertise or booking services for unauthorized listings).

⁶⁰ See Zach Schiller & Carl Davis, *Taxes and the On-Demand Economy*, INST. ON TAX & ECON. POL’Y 2–3 (2017), <https://itep.org/wp-content/uploads/ondemandeconomytaxes0317.pdf>.

⁶¹ Emily Badger, *Is Uber Helping or Hurting Mass Transit?*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/upshot/is-uber-helping-or-hurting-mass-transit.html> (citing a survey from U.C. Davis that found that ridesharing platforms draw people away from public transportation); Laura Bliss, *Uber and Lyft Could Do a Lot More for the Planet*, CITYLAB (Apr. 30, 2018), <https://www.citylab.com/transportation/2018/04/how-uber-and-lyft-could-do-better-by-the-planet/558866/>.

⁶² Ron Lieber, *Death in Airbnb Rental Raises Liability Questions*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/your-money/death-in-airbnb-rental-raises-liability-questions.html?_r=0 (detailing how homesharing platforms such as HomeAway may not necessarily offer free liability coverage and instead encourages homeowners to purchase more comprehensive homeowner’s insurance policies. Airbnb now offers free, automatic primary liability coverage up to \$1 million per incident; before October 2015, Airbnb only offered automatic secondary liability coverage in the case that a homeowner’s claim for an incident was denied).

⁶³ TREBOR SCHOLZ, *UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY* 129–30 (2017); GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* 24 (2011); Valerio De Stefano, *The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdswork, and Labor Protection in the Gig-Economy*, 37 COMP. LAB. L. & POL’Y J. 471, 504 (2016).

⁶⁴ Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 3 (2017).

⁶⁵ See Gregory Day & Abbey Stemler, *Supracompetitive Privacy* (2019) (paper on file with the authors) (describing how platforms fail to internalize privacy harms).

- **Asymmetric Information:** Asymmetric information involves situations in which one transacting party has more information about the transaction's quality than another party.⁶⁶ Sharing economy platforms implemented reputation systems as a primary means for reducing information asymmetry, but these systems do not alleviate all related issues such as fraud.⁶⁷ For example, in the United States an Uber driver named Jason Brian Dalton killed six people and seriously injured two others while picking up riders on the app.⁶⁸ One rider even called Uber and reported his erratic behavior, but the alert was ignored.⁶⁹ While such horrific crimes are rare, they do test the limits of self-regulatory mechanisms, such as background checks and reputation systems, that ridesharing companies espouse.

Didi has also experienced consumer protection issues.⁷⁰ In May 2018, for example, a flight attendant was found dead after using Hitch, Didi's carpooling service. In August 2018 another woman was found murdered after using Hitch. After an analysis it was clear that the services were being misused. This resulted in two executives being fired, a suspension on the carpooling service, and a boycott on Didi's services.⁷¹

- **Discrimination:** Sharing economy platforms are not immune to discriminatory behavior. For example, a study of ridesharing in Los Angeles showed that African American riders had noticeably longer wait times for their rides than did white riders.⁷²

⁶⁶LALIT WANKHADE & BALAJI DABADE, QUALITY UNCERTAINTY AND PERCEPTION 14 (2010).

⁶⁷ Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy*, 18 MINN J.L. SCI. TECH. 673, 687–88 (2017).

⁶⁸ RACHEL BOTSMAN, WHO CAN YOU TRUST?, 81 (2017).

⁶⁹ *Id.* at 82.

⁷⁰ Trefis Team, *Google's Strategy Behind the \$3.2 Billion Acquisition of Nest Labs*, FORBES (Jan 17, 2014, 2:57 PM), <https://www.forbes.com/sites/greatspeculations/2014/01/17/googles-strategy-behind-the-3-2-billion-acquisition-of-nest-labs/#42e378e21d45>.

⁷¹ Sui-Lee Wee, *Didi Suspends Carpooling Service in China after 2nd Passenger Is Killed*, N.Y. TIMES (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/business/didi-chuxing-murder-rape-women.html>.

⁷² Anne Elizabeth Brown, *Ridehail Revolution: Ridehail Travel and Equity in Los Angeles* (2018), <https://cloudfront.escholarship.org/dist/prd/content/qt4r22m57k/qt4r22m57k.pdf?t=p9pju4>.

- **Tax Evasion:** Some platforms avoid reporting and paying significant tax revenues to all levels of government.⁷³ For example, Uber eschews any responsibility for collecting employment taxes because it deems its drivers to be independent contractors, rather than employees.⁷⁴
- **Environmental Harms:** The sharing economy's impact on the environment is not necessarily positive, as was once assumed. There is no empirical evidence to support claims that sharing economy platforms other than car-sharing platforms reduce the demand for new goods.⁷⁵ And the entry of ridesharing companies in a city is generally associated with a reduction of both heavy rail and bus riderships.⁷⁶
- **Anticompetitive behavior:** Successful sharing economy platforms have relied on network and data network effects to gain scale and market share; as such, competition in each sub-sector or modality of the sharing economy is limited.⁷⁷ Dominant market players such as Uber have exerted this market power in examples of unilateral price setting like its surge pricing scheme.⁷⁸
- **Worker Protections:** Some sharing economy platforms have worked hard to classify their workers as independent contractors and not

⁷³ See Daniel Boffey, *Airbnb Faces EU Clampdown for Not Paying 'Fair Share' of Tax*, THE GUARDIAN (Aug. 10, 2017), <https://www.theguardian.com/business/2017/aug/10/airbnb-faces-eu-clampdown-fair-share-tax>.

⁷⁴ Robert W. Wood, *Uber's Growing Tax Problems*, FORBES (Dec. 19, 2014, 8:48 AM), <https://www.forbes.com/sites/robertwood/2014/12/19/ubers-growing-tax-problems/#402d32fe21bd>.

⁷⁵ See Hans Nijland et al., *Impact of Car Sharing on Mobility and CO₂ Emissions*, PLANBUREAU VOOR DE LEEFOMGEVING 1, 10–11 (July 2015), http://www.pbl.nl/sites/default/files/cms/publicaties/PBL_2015_Note%20Impact%20of%20car%20sharing_1842.pdf.

⁷⁶ Michael Graehler, Jr., Richard A. Mucci, & Gregory D. Erhardt, *Understanding the Recent Transit Ridership Decline in Major U.S. Cities: Service Cuts or Emerging Modes?*, 98TH ANNUAL MEETING OF THE TRANSPORTATION RESEARCH BOARD (Aug. 1, 2018), <http://usa.streetsblog.org/wp-content/uploads/sites/5/2019/01/19-04931-Transit-Trends.pdf>.

⁷⁷ FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 83 (2015).

⁷⁸ See generally Arvind Malhotra and Marshall Van Alstyne, *The Dark Side of the Sharing Economy ... and How to Lighten It*, 57 COMM. OF THE ACM 24, 27 (Nov. 2014) (discussing how self-regulation mechanisms and network effects may encourage firms to engage in anticompetitive behavior).

employees, thereby reducing the platforms' liabilities and employee benefits costs while imposing uncertainty upon their workers.⁷⁹

- **Privacy Violations:** Sharing economy platforms collect and store individuals' data spanning countless places, thereby increasing the magnitude of harms related to privacy violations when they occur. Most platforms utilize contract law to establish privacy protections, although these measures may not be wholly sufficient.⁸⁰
- **Harms to Incumbent Firms:** Sharing economy platforms may acquire market share from incumbent firms by providing similar services at lower costs by avoiding costly regulation. For example, as Airbnb rentals increased in Texas, revenues of Texas hotels fell significantly.⁸¹ Additionally, Uber's rise from 300,000 to 3.5 million rides in New York City occurred while taxicab rides simultaneously fell by 2.1 million rides.⁸²

Considering the varied and complex ways that sharing economy platforms can create market failures, regulators face a pressing challenge in effectively constraining these platforms without dampening the benefits that they create. Accordingly, regulators in the U.S. should examine how other jurisdictions approach the regulation of the sharing economy to seek out approaches that may ameliorate platforms' market failures more effectively than has U.S. law to date.

III. PRELIMINARY AND CONTEXTUAL MATTERS

The discussion above illustrates many of the market failures and other social challenges raised by ridesharing platforms, and the resulting dilemmas that regulators in the U.S. are now being forced to reckon with as they strive to

⁷⁹ See Juliet B. Schor & William Attwood-Charles, *The "Sharing" Economy: Labor, Inequality, and Social Connection on For-Profit Platforms*, 11 SOC. COMPASS 1, 11 (2017); Nathan Heller, *Is the Gig Economy Working?*, N. YORKER (May 15, 2017), <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working>.

⁸⁰ Sabreena Khalid, *Privacy Concerns in the Sharing Economy: The Case of Uber*, HARV. J.L. & TECH: JOLT DIGEST (Dec. 16, 2014), <http://jolt.law.harvard.edu/digest/privacy-concerns-in-the-sharing-economy-the-case-of-uber>.

⁸¹ Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (B.U. Sch. of Mgmt., Res. Paper No. 2013-16, 2016), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2366898.

⁸² Casey Leins, *Who's a Sharing Economy Worker?*, U.S. NEWS & WORLD REP.: DATA MINE (Aug. 21, 2015, 1:49 PM), <https://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers>.

minimize the platforms' negative externalities without smothering the social benefits that the platforms create. Yet the challenges and tradeoffs confronting U.S. authorities are not unique. Although the legal and social questions raised by ridesharing platforms play out across widely varying contexts from country to country, the basic economic and legal questions involved with ridesharing platforms are fundamentally similar from place to place. All jurisdictions, for instance, strive to ensure the safety of passengers, and all want to collect tax revenues from companies and employees.

These basic commonalities suggest that a comparative legal approach to the regulation of ridesharing platforms might yield fruitful insights for American policymakers.⁸³ As noted in the Introduction, *supra*, this Article looks to the regulatory framework of the People's Republic of China (PRC or China) as it considers the tradeoffs between the national and regional regulation of ridesharing. Before commencing that analysis, however, we first turn to consider the basic principles of the comparative legal methods that will guide the analysis.

A. Methods of Comparative Law

Comparative legal studies run the risk of producing repetitive, technical refinements—thereby contributing little new knowledge to the literature—when they are divorced altogether from theory.⁸⁴ Yet scholars widely acknowledge that theory is greatly underdeveloped in the comparative field.⁸⁵

⁸³ Others have considered how foreign law might inspire innovations in the national laws of another jurisdiction. *See, e.g.,* BASIL MARKESINIS, *COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM* 157–82 (2003) (discussing an example of how judges, practitioners, and academics can cooperate in the study and comparison of legal systems).

⁸⁴ GEOFFREY SAMUEL, *AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD* 16 (2014). For a synopsis of the perils and virtues of comparative law generally, *see* ALAN WATSON, *LEGAL TRANSPLANTS* 10–20 (2nd ed. 1993).

⁸⁵ For instance, while the functional method is the most widely used approach in comparative legal studies, “[a]s theory, it hardly exists[.]” Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339, 340 (Mathias Reimann & Reinhard Zimmerman eds., 2006). *See also* Maurice Adams & Jacco Bomhoff, *Comparing Law: Practice and Theory*, in *PRACTICE AND THEORY IN COMPARATIVE LAW* 1 (2012) (discussing constructive methodological choices within comparative legal studies in light of the apparent gap between purely theoretical treatments of method and substantive works entirely detached from theory); William Twining, *Comparative Law and Legal Theory: The Country and Western Tradition*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 21, 54 (Ian Edge ed., 2000) (noting that comparative legal studies have tended to be “atheoretical” and discussing the shortcomings of macro-comparative and micro-comparative approaches to comparative legal studies).

Nevertheless, a number of well-established methods for comparative legal studies have arisen, and these methods are in turn guided by the parameters of one's comparison.⁸⁶

In this section, we briefly survey these methodologies and their connections to extant theory in order to guide the analysis that follows. These considerations are especially important in the comparative context since “there is no single key to comparative legal studies.”⁸⁷ The goal of this section, then, is to make explicit the assumptions and focus of the comparison that follows, in order to emphasize its conceptual strengths and to acknowledge its limitations.

In short, an initial question for comparative methodologies is, “what should the exercise of comparison be doing?”⁸⁸ In other words, what are the central functions of legal comparison? There are several major responses to this question, which might be summarized as the *approaches* to comparative legal studies. These approaches, which are detailed below, establish the dimensions of a given comparison—namely, whether a comparison is seeking (or presuming) similarities between legal systems or differences; whether the comparison involves legal systems that have descended from a common ancestor or from traditions far removed from one another; and whether the comparison gives priority to the views of actors within a legal system, or to those from outside of it. The contrasting approaches that are available for each of these dimensions help make explicit the assumptions that a given comparison entails—i.e., does the comparison serve to find similarities or differences? Does the comparison attribute similarities to the two legal systems' common ancestors, or to some other set of conditions? And, does the comparison prioritize the perspectives of an insider or an outsider with respect to one or both of the legal systems under review?

In addition to these approaches, several major *methods* of comparative legal studies are available. The methods of comparison concern the general foci along which the analysis proceeds. Geoffrey Samuel identifies three principal methods of comparative legal studies—the functionalist, structural, and hermeneutical—and these, too, are briefly considered below. Each of these

⁸⁶ The preliminary question for any comparative analysis is the scope of the comparison. This scope might exist at the macro level (comparing whole legal systems), the micro level (comparing individual cases, facts, or legal rules), or at an intermediary level (comparing discrete bodies of law, such as contract). SAMUEL, *supra* note 84, at 53.

⁸⁷ Roderick Munday, *Accounting for an Encounter*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 3, 12 (Pierre Legrand & Roderick Munday eds., 2003).

⁸⁸ SAMUEL, *supra* note 84, at 53.

methods gives priority to a different basis for comparison (that is, the functional equivalents across the legal systems under study, the ways of thinking in each legal system reflected in how the systems categorize their basic legal constructs, and the meanings that each legal system attaches to its legal concepts, respectively). The identification of the method or methods to which a comparative legal study adheres is important, since that choice will direct the principal focus of the analysis to either the legal systems' functionalities, their structures, or their culturally-derived meanings.

Turning, then, to the approaches of comparative legal studies, the most basic dimension of analysis concerns the similarities and differences between the legal systems under study.⁸⁹ A *universalist approach* seeks out similarities between legal systems in order to discern general rules. This approach is motivated by the assumption that jurisdictions at similar levels of development answer their core legal needs similarly to one another, and therefore can be expected to afford similar results to legal questions.⁹⁰ In contrast, the *differential approach* posits that similarities between jurisdictions are bound to be superficial.⁹¹ An emphasis on differences forces "one away from making conventional assumptions that destroy the richness of different legal traditions," and thus, comparative studies are most useful

⁸⁹ A number of scholars have argued persuasively that a robust comparative analysis will account for both similarities and differences between the jurisdictions of interest, even if the analysis emphasizes one or the other more heavily. See Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 383, 384–85 (Mathias Reimann & Reinhard Zimmerman eds., 2006). Studies that find similarities more compelling will be focused on explaining similarity, while those studies that find differences more significant will focus primarily on explaining differences. *Id.* at 416. A presumption of similarity is valuable insofar as it can lead scholarly inquiries into directions it may otherwise have neglected, whereas an emphasis upon differences can help to unearth unarticulated assumptions that differ from place to place. *Id.* at 393–96. See also H. Patrick Glenn, *Aims of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 57, 63 (Jan M. Smits ed., 2006) (observing that our ordinary understanding of comparison involves bringing together two equal objects, and that "[e]quality would here not imply similarity or close correspondence ... but simply equal treatment or standing in the process of bringing together"). "The process of comparison would thus in no way imply resulting uniformity" and "if anything it implies the reverse, that differences remain which must be somehow brought together, such that coexistence of difference is possible." Glenn, *supra*, at *id.* For Glenn, *id.*, this conception of comparative law is at odds with Western legal thought since it emphasizes the conciliation, rather than the conflict, of laws.

⁹⁰ SAMUEL, *supra* note 84, at 54–55.

⁹¹ *Id.* Moreover, presumptions of similarity can lead to deductions of false universalizations.

amongst greatly divergent systems.⁹² At its core, a differential approach compares the jurisdictions' legal cultures and legal mentalities.⁹³

Comparative law could be pursued with the single goal of stating the similarity or differences of the legal systems under study; and there is no inherent basis to reflexively reject such a purpose since, "[i]f unknown to the researcher or [their] reader, the description of similarities and differences produces knowledge."⁹⁴ Still, for most observers, comparative law should not be limited to description and is instead obliged to go the additional step of *explaining* similarities and differences "and, in applied research, to their critical evaluation and to proposals for changes[.]"⁹⁵

Another dimension of comparison involves the genealogical and analogical approaches. A *genealogical approach* attributes relationships among legal systems to a common ancestry, while the *analogical approach* views similarities as attributable to factors other than ancestry. The analogical approach allows comparison between two legal systems "that have been in no direct contact in terms of space, time or textual influence" and is thus well-suited to the comparison of legal systems of fundamentally different origins.⁹⁶

A final set of approaches involves the *internal* and *external perspectives*, or the extent to which comparative work must seek to reflect an insider's perspective of both legal systems under study.⁹⁷ Tradeoffs inhere in each approach: insiders achieve a depth of understanding of a legal system that outsiders by definition cannot, and yet outsiders are inherently better-suited to the critical comparative task of uncovering the unarticulated assumptions of another legal system that insiders are likely blind to.⁹⁸ While extreme skeptics of comparative work roundly deny the possibility that a lawyer from one jurisdiction can effectively study another, comparatists point to examples of lawyers and law professors who have come to understand foreign systems

⁹² See *id.* at 54–55.

⁹³ *Id.* at 57.

⁹⁴ Sebastian McEvoy, *Descriptive and Purposive Categories of Comparative Law*, in *METHODS OF COMPARATIVE LAW* 144, 151 (Pier Giuseppe Monateri ed., 2012).

⁹⁵ *Id.*

⁹⁶ SAMUEL, *supra* note 84, at 57–58.

⁹⁷ *Id.* at 60–61.

⁹⁸ *Id.* at 61–62.

through study—despite being outsiders.⁹⁹ These approaches are summarized below in Figure 1.

Dimension of comparison	First approach	Second approach
Similarities vs. Differences	Universalist approach (seeks out similarities between legal systems to discover generalizable rules)	Differential approach (critically seeks out differences between legal systems to challenge assumptions and to better discern legal cultures and legal mentalities)
Common ancestry vs. No common ancestors	Geneological approach (attributes similarities between legal systems to common ancestors)	Analogical approach (attributes similarities between legal systems to factors other than ancestry)
Internal vs. external perspectives	Internal approach (contends that comparative legal studies must try to reflect the perspectives of an insider within each legal system under comparison)	External approach (contends that those who are not native to a legal system are better positioned to uncover the unspoken assumptions within the foreign legal system)

Figure 1: The major dimensions of comparative legal studies and their competing approaches.

Along these three dimensions of comparison, this Article embraces the “second approach” denoted in Figure 1. This Article highlights both similarities and differences between the ridesharing regulatory regimes of China and the United States. While the similarities in the countries’ federalist divisions of state authority enable us to envision how the United States might successfully adapt the Chinese approach to America, it will also argue that the differences in legal substance and mindset are instructive for American policymakers (the differential approach). Additionally, this Article recognizes that while modern Chinese law has often incorporated language from Western legal sources into its national-level statutes, the PRC legal system is nevertheless derived from a fundamentally different set of cultural and political expectations, historical experiences, and systemic policy goals than that of the United States (the analogical approach). Finally, the authors are Americans, and therefore take an outsider’s view of the PRC’s approach to the regulation of ridesharing platforms (the external approach); as a result, this Article aims to deduce the unspoken assumptions underlying the PRC’s approach. This combination of the approaches from Figure 1 suggests that China is a particularly useful baseline against which to compare America’s experiences. It also suggests that, with an emphasis on differences between China and the United States, this Article might productively identify the

⁹⁹ See, e.g., Mitchel de S.-O.-L’E. Lasser, *The Question of Understanding*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 197, 199–202 (Pierre Legrand & Roderick Munday eds., 2003).

cultural and mental frames of mind in each legal culture with respect to each jurisdiction's legal treatment of ridesharing platforms.

From these approaches emerge three major methods for comparative legal studies. The most well-established and widely-used of these is the *functionalist method*, under which two very different objects can be brought together by reference to their practical uses and purposes. Institutions are comparable if they are functionally equivalent—that is, if they fulfill similar functions in different legal systems.¹⁰⁰ The functionalist method focuses less on the substance of legal rules and more on their effects; the chief question is therefore which institution in the first legal system performs an equivalent function in the second.¹⁰¹ Since functionalism assesses the *purpose* of a rule, it can help to determine which of several rules having the same purpose is the better solution for the underlying problem to which they are addressed.¹⁰²

Like any method or theory, functionalism has its limits and cannot claim to account for every conceivable dimension that one may wish to compare between legal systems; hence, alternative methods in comparative legal studies have arisen.¹⁰³ The *structural method* attempts to articulate how a legal system is assembled in terms of its structure or classification.¹⁰⁴ Legal systems often influence one another, and in such cases, more important than the transfer of substantive legal rules is the “institutional system,” or way of thinking, that is transferred.¹⁰⁵

A third major approach within comparative legal studies is the *hermeneutical method*, which, by emphasizing the “situated characters” of the interpreter and the legal text, rejects the possibility of a truly objective interpretation.¹⁰⁶ In this method, the interpreter searches not for cause but instead for meaning; this requires the scholar to go beyond the text of legal rules to determine how

¹⁰⁰ SAMUEL, *supra* note 84, at 67. Hence, a functionalist “must ... interpret rules and define the concepts which inform them in terms of the purposes that they serve.” *Id.* at 68 (internal citation and quotation marks omitted). In this way, diverging legal patterns in the jurisdictions of interests reveal their varying priorities and ideologies. *Id.* at 18.

¹⁰¹ *Id.* at 65–67. Accordingly, “one ... starts with a social problem or need in one society, discovers the institution that deals with it and then looks to other societies for institutions, legal or otherwise, which deal with the same problem or need, i.e., functional equivalents.” *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 79.

¹⁰⁴ *Id.* at 96.

¹⁰⁵ SAMUEL, *supra* note 84, at 96.

¹⁰⁶ *Id.* at 108–09.

the rules function within the foreign jurisdiction's culture.¹⁰⁷ The interpreter can thus be critical but is not at liberty to say that one legal system is universally better than another.¹⁰⁸ The comparatist under this method judges foreign law from the position of their own legal system, and is thus "a ferryman carrying people from one mentality to another and back again."¹⁰⁹

The three methods of comparative legal analysis are summarized in Figure 2 below.

Method	Description	Applications
Functionalist Method	Allows comparison between legal institutions as long as they are functionally equivalent - that is, as long as they fulfill similar functions	Can be used to identify and assess the potential application of a legal solution from one jurisdiction in another; can help determine which of several rules having the same purpose is likely the best in the context of a dissimilar jurisdiction
Structural Method	Enables comparison between legal systems based upon their respective structures - that is, based upon how the legal systems categorize their fundamental constructs and norms	Can be used to identify and assess the similarities and differences amongst legal systems in terms of their ways of thinking, even more so than their substantive legal rules
Hermeneutical Method	Pursues comparisons between legal systems in view of the situated character of the scholar and the legal text, contending that a truly objective interpretation is precluded	Can be used to search not for the causes of legal rules, but rather for their meanings; identifies the legal mentality of a jurisdiction based upon the relationship between the culture and the legal rules it has created

Figure 2: The three major methods within comparative legal studies.

This Article embraces the functionalist method. The purpose of this Article is to assess the similarities and differences between the legal frameworks governing ridesharing platforms in the United States and China. In doing so, this Article will assess the formal legal rules governing ridesharing and is concerned with the purposes of the legal rules in each place, in order to assess the advantages from the PRC approach that may be useful in the U.S. environment. In so doing, however, this Article attempts to account for the important differences across the two countries' contexts—cultural and

¹⁰⁷ *Id.* at 110. Since law is one manifestation of culture, comparative legal studies under the hermeneutical method are often interdisciplinary in orientation.

¹⁰⁸ *Id.* at 110.

¹⁰⁹ *Id.* at 110–11. Culture yields normative propositions (rules), which in turn constitute the jurisdiction's legal mentality.

otherwise—that may impact the applicability of China’s approach in the U.S. environment, as emphasized by the hermeneutical method.

These approaches and methods to comparative legal studies are bounded by additional guidance from the literature. It is noteworthy that comparative law has assumed its heightened importance due to the pace of societal change and the complexity of legal issues with which states must grapple: these forces make one’s knowledge of how other jurisdictions have addressed legal challenges all the more valuable.¹¹⁰ For courts, comparative law provides persuasive, non-binding arguments, particularly on novel issues¹¹¹—and the same can be said for legislators, too.¹¹² For Andenas and Fairgrieve, comparative law can be used to generate normative models where national law is undetermined, to review assumptions about the universal applicability of a particular rule, and to develop principles of domestic law.¹¹³ For others, the similarities and differences observed in comparative studies allow the scholar to link rules to effects, undertake more complex analyses, solve particular problems, and to better understand foreign legal systems as well as one’s own.¹¹⁴ Hence, critically for our purposes, comparative law can be used to identify and modify legal rules for applications in other jurisdictions.¹¹⁵

Although it is “impossible to draw a clean line between the descriptive and the analytic,” a comparative legal study must incorporate elements of each.¹¹⁶ To that end, a sensitivity to the differing contexts of the legal systems under

¹¹⁰ Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, in *METHODS OF COMPARATIVE LAW* 25, 26 (Pier Giuseppe Monateri ed., 2012).

¹¹¹ *Id.* at 29.

¹¹² See, e.g., THE INDIAN LAW INSTITUTE, AN INTRODUCTION TO THE STUDY OF COMPARATIVE LAW 9 (1971) (discussing the benefits of comparative legal studies for legislators and noting that “[a]s regards its practical utility to the legislator [comparative law] can hardly be exaggerated”).

¹¹³ *Id.* at 50–51.

¹¹⁴ Dannemann, *supra* note 89, at 396–406.

¹¹⁵ If the purpose of a comparative study is to learn from another jurisdiction and to assess how the legal solutions of one place might work in another, then the differences between the legal systems become paramount. “Learning requires a legal system to take something on board which it does not have, but which another system has. Thus, those interested in legal systems learning from each other will primarily look for difference, and [will evaluate] this difference by forming an opinion as to which rule, institution, theory, or result is to be preferred,” and whether the rule or institution is likely to work as well in the adopting jurisdiction. *Id.* at 417–18.

¹¹⁶ Lasser, *supra* note 99, at 224.

study remains important in comparative projects.¹¹⁷ Western scholars may be tempted to view the world as progressing homogenously in one particular direction or another, but this assumption must be resisted: the complex web of institutions operating at a given time and place may produce trends or institutional outcomes that are inconsistent with the scholar's presumed state of affairs.¹¹⁸ We acknowledge in this paper the limitations inherent in any comparative effort. Although "differences across legal cultures can only ever be overcome imperfectly," affording due weight to the differences between jurisdictions can effectively help scholars to identify and appreciate the true state of affairs in each place.¹¹⁹ Hence, this Article points out the relevant contextual differences between China and the United States where significant divergence between them prevails.

While there exists relatively little comparative literature in the context of the sharing economy, a few recent works provide examples of effective comparative approaches. Cherry and Aloisi, for example, utilized a comparative analysis to examine the classification of workers in the gig economy as employees, independent contractors, and as "dependent contractors."¹²⁰ Noting that "we should seek to understand and evaluate the experiences of other nations in their implementation of the [dependent contractor] category" before adopting such a category in the U.S.,¹²¹ the authors stated that their "goal is to learn from context and experience, capitalizing on those elements of the [dependent contractor] category that

¹¹⁷ "The interpretation of legal 'facts' is simply incomplete without proper consideration of the culture out of which they grow." Roderick Munday, *Accounting for an Encounter*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 3, 12 (Pierre Legrand & Roderick Munday eds., 2003). See also Lawrence Rosen, *Beyond Compare*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 493, 502 (Pierre Legrand & Roderick Munday eds., 2003) ("[s]imilarity or difference is not the question that can be usefully addressed so much as how the processes of differentiation and interconnection play out with distinctive implications for the people who orient their lives with reference to these very concepts and relationships").

¹¹⁸ Or as Rosen put it, "[n]otwithstanding the McDonaldization of the world people will always create differentiating categories and just when you think you have it all moving toward the same thing, you are likely to get bitten in the backside by some local surprise." *Id.* at 502.

¹¹⁹ Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240, 278–79, 288 (Pierre Legrand & Roderick Munday eds., 2003).

¹²⁰ See generally Miriam A. Cherry & Antonio Aloisi, "Dependent Contractors" in the Gig Economy: A Comparative Approach, 66 AM. U. L. REV. 635 (2017). See also Michele Finck & Sofia Ranchordas, *Sharing and the City*, 49 VAND. J. TRANSNAT'L L. 1299 (2016) (comparing sharing practices among U.S., European and Asian cities).

¹²¹ *Id.* at 638.

were successful and avoiding the aspects of those systems that worked poorly.”¹²² This exemplifies the underlying goal that runs throughout the varying approaches and methods of comparative law discussed above: to better understand other legal systems and their solutions to societal challenges, in the hope that one’s own jurisdiction might benefit from the knowledge of the positive successes—and the ominous warnings—of legal experiments elsewhere.

B. Challenges of Comparing United States to China

The sociopolitical and legal environments of China and the United States are vastly different. However, they share a similar practical approach to federalist divisions of responsibility between national and subnational governments that would enable federal regulators in the U.S. to look to their Chinese counterparts for potential solutions to ridesharing market failures.¹²³ As the functionalist perspective suggests, the functional similarities exhibited by the two countries’ federalist systems allow us to assess how the benefits of China’s experiences can be adapted to similar effect in the U.S.¹²⁴ The use of federalist divisions of state authority and responsibility—which, in the abstract, are quite familiar to U.S. law—may also aid American policymakers in feeling comfortable with the PRC’s approach to ridesharing regulation.¹²⁵ Indeed, the similarities between China and the U.S. with respect to federalism

¹²² *Id.* at 650.

¹²³ Several legal scholars across time have opined as to the purposes and value of comparative legal approaches. Among these purposes are that foreign models may be used to improve one’s domestic legal models, and the study of foreign law can help one to better understand one’s own legal system. Kirk W. Junker, *A Focus on Comparison in Comparative Law*, 52 DUQUESNE L. REV. 69, 75 (2014).

¹²⁴ See *supra* Part II (discussing functionalist approach to comparative legal studies). Or as Junker puts it, “[w]hile functionalism may have problems and faults, the fact remains that if we want to compare legal traditions, there must be something we are comparing, and for the comparison to be worthwhile, the things compared should in some way be justifiably comparable.” *Id.*, at 78.

¹²⁵ “Weak comparisons ... begin with the assumption that what one already does is natural or normal, and if another person or culture does things differently, then that other person or culture is therefore unnatural or abnormal.” *Id.* at 77. While accounting for meaningful contextual differences that may impact precisely how China’s approach to ridesharing may have to be adapted to the U.S. environment, this Article endeavors to avoid the assumption that Junker identifies. Indeed, this Article suggests that, despite the obvious (and sometimes very substantial) differences between the legal systems of the two countries, China’s approach to the regulation of ridesharing may behoove the United States’ approach in certain important respects. That China has approached ridesharing differently is not presumed to be “unnatural or abnormal,” but is instead viewed as an opportunity to perhaps realize some of the benefits of that system in the U.S.

reveal that, despite the substantive policy differences that exist between the two countries, the functionalist method can nevertheless bridge these two divergent legal systems.

China's introduction of a national regulatory framework for its ridesharing industry represents a major shift from the country's past approach to ridesharing regulation. Regulators in the U.S. may be able to learn or draw inspiration from China's regulatory approach. However, they first must understand the general differences between the U.S. and Chinese sociopolitical and legal contexts in order to make credible comparisons.

C. Sociopolitical and Legal Context in China

China's legal system operates within a sociopolitical and historical context profoundly different than that of the U.S..¹²⁶ Perhaps the most striking difference is the close relationship between China's legal institutions and the administrative systems of its national government.¹²⁷ In both theory and practice, there is an affirmative presumption against judicial independence or separation of powers between law enforcement and the courts.¹²⁸ This is because the underlying assumption—indeed, the underlying purpose—of the Chinese state is to strengthen the position of the Chinese Communist Party and its monopoly on political power.¹²⁹ The Chinese government was decimated in the Cultural Revolution (circa 1966 – 1976), during which the Party ruled by fiat and eventually through the direct application of military control in an environment of near anarchy.¹³⁰ The reformers who succeeded Mao Zedong made the establishment of a new and credible government a top

¹²⁶ For recent works that situate China's legal system in this cultural-historical context, *see generally*, e.g., Justin W. Evans, *Explaining China's Legal Flexibility: History and the Institutional Imperative*, 31 PACE INT'L L. REV. (forthcoming 2019) (applying a historical event sequencing methodology to examine the historical factors that explain flexibilities or uncertainties in PRC law today); JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 41–60 (4th ed. 2014) (discussing the principal modes of thought throughout Chinese history and more recent historical events that have shaped and distinguished the PRC legal system).

¹²⁷ William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 7, 8 (C. Stephen Hsu ed., 2003).

¹²⁸ *Id.* at 37.

¹²⁹ *See generally* Evans, *supra* note 126. We are mindful of Junker's admonition that the study of a foreign legal system "is vastly improved if one is conscious of the differences of cultural approach within the foreign legal system before one carries out the comparison." Junker, *supra* note 123, at 81.

¹³⁰ *See, e.g.,* HAROLD M. TANNER, CHINA: A HISTORY 535–36 (2009).

priority.¹³¹ These reformers nevertheless remained committed to the Party's political supremacy, however, and the PRC state exists today to serve the Party's priorities and policy goals.¹³² The interconnections between the Communist Party and the Chinese government remain so strong that many scholars speak of a "Party-state" apparatus in which the Party and state, though functionally distinguishable institutions in certain respects, are sufficiently interwoven that they cannot be meaningfully separated as a practical matter.

In the wake of Mao Zedong's death in 1976, Deng Xiaopeng ascended to the top of the Chinese Communist Party and led the push for two primary changes to the country's legal institutions.¹³³ The first was the "Opening to the Outside," an encouragement of foreign investment through a legal framework to reassure foreigners of their investments' safety.¹³⁴ The second was an emphasis on the rule of law, which resulted in changes to China's legal institutions that made them more closely resemble Western legal systems if viewed outside the country's sociopolitical context.¹³⁵ However, a direct comparison of Chinese and American legal system outcomes based solely on the apparent similarity of each system's institutions presents an incomplete picture given China's deep traditional roots.¹³⁶ For example, assuming that Chinese and U.S. courts are congruent in function because they share the name "court" may fail to capture important nuances created by differences in the sociopolitical contexts of the two countries.¹³⁷ Like any legal comparisons, the *degree* to which the institutions in question are similar or different must be accounted for.¹³⁸

Likewise, in the specific context of studying China's regulatory shift for the purpose of informing ridesharing regulation in the U.S., any direct comparisons between the countries' legal institutions must account—as this Article does—for the contextual differences between the two countries. This is because, absent a sensitivity to the contextual differences, the comparison of the rules' substance may be misleading. Context enables a comparative analysis to move beyond superficial assumptions of congruency in theory and

¹³¹ Roderick MacFarquhar, *The Succession to Mao and the End of Maoism*, in 15 CAMBRIDGE HISTORY OF CHINA 305, 393–401 (Roderick MacFarquhar & John K. Fairbank eds., 1991).

¹³² JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM 83 (6th ed., 2008).

¹³³ *Id.* at 39.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 8. Hence, this Article accounts for the broader context in which China's ridesharing rules have been implemented. *See generally* Part II.

¹³⁷ *See supra* note 35, at 95.

¹³⁸ Junker, *supra* note 123, at 91–92.

a frustrating lack of congruency in practice between the two countries' institutions. Still, the question of how one country's rules might be "transplanted" or otherwise "borrowed" by another requires some baseline similarity between the countries. This Article submits that the core issues of federalism at the heart of ridesharing regulation will allow regulators to draw more credible comparisons between the two country's legal approaches to the ridesharing industry, despite the differences in their contexts and despite the divergent factors that have shaped the two nations' policy choices to date.

IV. COMPARING U.S. AND CHINA'S RIDESHARING REGULATIONS

This Part compares the existing approaches to, and major features of, ridesharing regulation in the U.S. and in China. It shows that while the regulation of ridesharing in the U.S. has been left almost entirely to local governments (and has thereby resulted in a fragmented regulatory landscape in which market failures persist), China has utilized its own version of federalist divisions of responsibility between national and local governments to legislate. China thereby addresses certain market failures more effectively than has U.S. law to date.

A. Regulation of Ridesharing Economy in the U.S.

Regulators in the U.S. have attempted to regulate platforms through a variety of command-and-control regulations and private agreements at the local and state levels. This hodgepodge of exogenous regulatory approaches has been insufficient in addressing market failures across the U.S. sharing economy broadly and the U.S. ridesharing industry specifically. As a result, sharing economy platforms have grown unrestrained and have distinct advantages over incumbent firms. Furthermore, the regulatory approach in the U.S. ridesharing industry demonstrates the market distortions that can arise from the inappropriate imposition of a fragmented state-by-state regulatory scheme.

1. Self-Regulation

To what extent can sharing economy platforms, and ridesharing companies specifically, self-regulate? And, what operating standards are appropriate when regulators determine that they cannot self-regulate? Libertarian-leaning opponents to regulation argue that regulating ridesharing companies is likely

to cause costly regulatory failures¹³⁹ as opposed to alleviating the market failures presented by ridesharing.¹⁴⁰ Additionally, these opponents suggest that ridesharing companies are able to reduce information asymmetry and can effectively self-regulate by relying on endogenous reputational feedback systems where both drivers (suppliers) and riders (end consumers) rate their experience at the end of their interaction.¹⁴¹ However, early evidence suggests that these reputational feedback systems may not be nearly effective enough to serve as a primary regulatory mechanism for ridesharing companies.¹⁴²

Specifically, reputational feedback mechanisms rely on accurate representation of both transacting parties' past transactions but are frequently susceptible to reporting bias, fear of retaliation, reciprocity bias, the herding effect, and bias with respect to race and gender.¹⁴³ Thus, ridesharing companies may require exogenous regulation to address potential market failures that would occur by leaving the industry lightly regulated or unregulated. Regulators could potentially ameliorate such market failures or concerns as consumer safety, driver qualifications and liability, equity and accessibility, data privacy, and competition with the local taxi industry.¹⁴⁴

2. Design Standards

In the face of adverse outcomes not prevented by endogenous regulation, especially failures of particular public salience such as consumer safety, regulators may intervene with exogenous regulatory approaches. Often exogenous policies adopted to address market failures in the U.S. are simple

¹³⁹ Regulatory failures occur when government intervention aiming to remedy a market failure creates externalities costlier than the externalities created by the market failure. See Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979).

¹⁴⁰ Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 532–536 (2015).

¹⁴¹ 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, 830 (2016).

¹⁴² Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy*, 18 MINN. J.L. SCI. & TECH. 673, 688–697 (2017).

¹⁴³ *Id.*

¹⁴⁴ MAARIT MORAN ET AL., TEXAS A&M TRANSPORTATION INSTITUTE, POLICY IMPLICATIONS OF TRANSPORTATION NETWORK COMPANIES 10–13 (2017).

design standards.¹⁴⁵ They vary greatly from place to place, thereby creating a tapestry of regulations, which are as difficult to summarize as they are to enforce.¹⁴⁶ Among these are disclosure requirements.

Many jurisdictions require ridesharing platforms to display certain information within their website or app. For example, the State of New York requires ridesharing companies (collectively referred to as Transportation Network Companies (TNCs)) to display complaint procedures (including timeframe for the resolution of complaints) on the main page of the TNC's website. And Massachusetts requires TNCs to display fare estimates to riders.¹⁴⁷ Others include insurance requirements,¹⁴⁸ background checks,¹⁴⁹ and rules addressing tax collection.

3. Deputizing Platforms

Tax collection is difficult on many levels when it comes to transportation. This is because in the U.S., individual users operate outside the typical employer/employee relationship, and they therefore often fail to pay individual income taxes.¹⁵⁰ As a result ridesharing services are able to offer lower prices because they are able to avoid the taxes and fees that traditional

¹⁴⁵ Design standards are regulations that specify exactly what a platform must do in order to comply with the law. STEPHEN BREYER, *REGULATION AND ITS REFORM*, 105 (1982).

¹⁴⁶ Michael Geist, *The Sharing Economy and Trade Agreements: The Challenge to Domestic Regulation*, in LAW AND THE "SHARING ECONOMY," <https://www.jstor.org/stable/pdf/j.ctv5vdczv.11.pdf?refreqid=excelsior%3Abf60cd393eef30f17b1e91cd710f87d4>.

¹⁴⁷ An Act Regulating Transportation Network Companies, st. 2016, ch. 187 (Aug. 5, 2016), <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter187>.

¹⁴⁸ See National Association of Insurance Commissioners, Center for Insurance Policy and Research Topic Page: Commercial Ride-Sharing, https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm (last visited Jan. 4, 2019).

¹⁴⁹ See e.g., Press Release, Cal. Pub. Utils. Comm'n, CPUC Strengthens TNC Driver Background Checks, Press Release Docket #: R.12-12-011 (Nov. 9, 2017); *Uber and Lyft Will Soon Face Strict New Background Check Rules in This State*, FORTUNE (Nov. 29, 2016), <http://fortune.com/2016/11/29/uber-lyft-driver-background-checks-massachusetts/>.

¹⁵⁰ See Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH U. L. REV. 989 (2016) (arguing that tax enforcement and compliance present challenges for businesses in the sharing economy); Lisa Rayle, et. al, *App- Based, On- Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco*, U.C. TRANSP. CTR. (Nov. 2014), https://www.its.dot.gov/itspac/dec2014/ridesourcingwhitepaper_nov2014.pdf.

taxis pay to support infrastructure and the repair of wear and tear on roads.¹⁵¹ In addition, the lower prices offered by ridesharing services encourage passengers to choose private over public transportation.¹⁵²

In response, many jurisdictions have attempted, though not always successfully, to deputize platforms—placing on them the responsibility to collect taxes, and to find and punish bad actors.¹⁵³ For example, in many jurisdictions TNCs must suspend a driver until further investigation, if they are reported for drunk-driving.¹⁵⁴ If a TNC does not comply, it will face fines. Such was the case in April 2017, when the Public Utilities Commission in California recommended assessing Uber \$1.3 million for more than 150 violations of the zero-tolerance rules.¹⁵⁵ This makes sense because platforms not only have the capability to monitor and detect illegal behavior and they are also the ones profiting from such behavior. However, with their vast userbases and resulting political power, platforms have fiercely opposed such forms of regulation. This resistance puts pressure on regulators to avoid banning platforms outright¹⁵⁶ and take a light-touch approach to regulation.¹⁵⁷

¹⁵¹ See Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2017) (arguing that regulators have not been responsive to taxi apps and new regulations need to encompass both traditional taxis and app-dispatched taxis).

¹⁵² Emily Badger, *Is Uber Helping or Hurting Mass Transit?*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/upshot/is-uber-helping-or-hurting-mass-transit.html> (“But when you aggregate the behavior of many people, transportation becomes less efficient when transit riders switch to cars, when new car services entice people onto trips they wouldn’t otherwise have taken, or when people who give up their cars wind up traveling even more in someone else’s.”).

¹⁵³ Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 55 Harv. J. on Legis. XX (2018).

¹⁵⁴ *Id.* See also FLA. ZERO TOLERANCE POL’Y CH. 2017-12 <http://laws.flrules.org/2017/12>; IND. ZERO TOLERANCE POL’Y, COMM. DIR. 55 (July 2015), <http://www.in.gov/legislative/iac/20150826-IR-045150275NRA.xml.pdf>; ALA. ZERO TOLERANCE POL’Y., DOCKET 32744 <http://psc.state.al.us/32744%20Order%20Promulgating%20Final%20TNC%20Rules.pdf>; N.J. ZERO TOLERANCE POL’Y <https://www.state.nj.us/mvc/pdf/business/TNC-1.pdf>.

¹⁵⁵ Order Instituting Investigation and Order to Show Cause Why the Commission Should Not Impose Appropriate Fines and Sanctions on Rasier-CA, LLC., San Francisco Public Utilities Comm’n, (Apr. 11, 2017) <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M182/K872/182872304.PDF>.

¹⁵⁶ Domenic J. Martini, *International Regulatory Entrepreneurship: Uber’s Battle with Regulators in France*, 19 SAN DIEGO INT’L L.J. 127 (2017).

¹⁵⁷ Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 101 (2017).

4. Fragmented and Hodgepodge Regulatory Approaches

Moreover, regulators across the U.S. approach the sharing economy in various and inconsistent ways. Similarly, in most jurisdictions, market failures are addressed on a local level instead of at the national level, the latter of which could potentially create broad and uniform regulations.¹⁵⁸ A key example of this fragmented approach involves the U.S. ridesharing industry.

The current regulatory environment TNCs face in the United States is most accurately described as a patchwork of mismatching regulation between cities and states across the country. Proponents of the incumbent taxi industry claim that TNCs are operating as *de facto* taxi companies and should be regulated accordingly. By contrast, TNCs argue that they are simply technology companies that facilitate communication between drivers and riders. The large difference in desired approaches between the taxi industry and the ridesharing companies has driven the two groups into courts across the U.S. As of August 2017, 48 states and Washington, D.C. have passed at least one piece of legislation governing ridesharing companies.¹⁵⁹

As a new business model enabled by modern technology, ridesharing networks create challenges for regulators at several junctures in the regulatory process. Regulators must decide whether ridesharing is sufficiently different from the transportation services provided by taxis. If it is different, presumably, it requires distinct legal classifications and regulatory requirements.

Historically in the U.S., taxis were heavily regulated for a variety of reasons, from risks to consumer safety from poorly maintained cars and bad drivers to price gouging.¹⁶⁰ Regulators also typically strove to reduce the negative externalities created by search costs, which prevent deregulated actors from reaching competitive equilibrium.¹⁶¹ Regulators who choose to treat ridesharing services the same as taxis invariably limit ridesharing's

¹⁵⁸ Michael Geist, *The Sharing Economy and Trade Agreements: The Challenge to Domestic Regulation*, in LAW AND THE "SHARING ECONOMY" 223–52 (Derek McKee, Finn Makela, Teresa Scassa, eds.) (2018).

¹⁵⁹ MORAN ET AL., *supra* note 144, at 10–13.

¹⁶⁰ Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 76–77 (1996).

¹⁶¹ Robert D. Cairns & Catherine Liston-Heyes, *Competition and Regulation in the Taxi Industry*, 59 J. PUB. ECON. 1, 1–2 (1996). Perhaps the most substantial efficiency gained through platforms is the dramatic reduction of these search costs.

innovative benefits,¹⁶² especially as ridesharing companies try to adapt to retrofitted requirements.¹⁶³

The rise of the current U.S. TNC industry, comprised of large companies such as Uber and Lyft that operate in many cities and states simultaneously across the U.S., results from the technological disruption of regional taxi industries and is regulated on a state-by-state basis. As a result, signs of four market distortions driven by the state-by-state regulatory scheme can be found: regulatory uncertainty, disparate regulatory schemes for comparable services, negative externalities generated by locally regulating national networks, and local barriers favoring incumbent industries.¹⁶⁴

Currently, TNCs do not fit neatly within the rigid requirements to classify a TNCs as taxi services, which creates regulatory uncertainty.¹⁶⁵ This means that, if left unregulated, the TNC industry is able to provide a similar service to taxi services without costly regulatory compliance.¹⁶⁶ For example, a taxi-cab driver in New York City must own a “medallion” to legally operate a taxi in the city but TNCs are not subjected to the same licensing requirement. The major disparity in licensing requirements between taxi-cabs and TNCs

¹⁶² These benefits include lower prices, increased convenience, and reduced rates of drunk driving. Justin Fox, *Horrors! Uber and Lyft Are Convenient*, BLOOMBERG (Oct. 16, 2017), <https://www.bloomberg.com/view/articles/2017-10-16/horrors-uber-and-lyft-are-convenient>.

¹⁶³ Mehreen Khan and Aliya Ram, *ECJ Rules Uber Can Be Regulated as Taxi Company*, FIN. TIMES (Dec. 20, 2017), <https://www.ft.com/content/7f280664-e565-11e7-97e2-916d4fbac0da>.

¹⁶⁴ Distortions in the TNC industry closely resemble the market distortions in the U.S. telecommunications industry in the early 2010s. The Telecommunications Act of 1996 created a regulatory framework that gave the federal government primary authority to regulate interstate telephone service, wireless communications, and internet service and states the authority to regulate local landline telephone and cable television service. By the early 2010s, technology diffusion and convergence in the U.S. telecommunications industry rendered the state-by-state regulatory approach promulgated by the Telecommunications Act ineffective because large, national companies began to offer services regulated at the state level. See, Daniel Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulations*, 43 U. MICH. J.L. REFORM 383, 384 (2010).

¹⁶⁵ Consider the case of Uber entering the Nevada market. See, A.B. 176. 2015 Leg., 78th Sess. (Nev. 2015); Tracey Lien, *Uber Gets Big Win in Nevada as Legislature Oks Bill Authorizing Service*, L.A. TIMES (May 27, 2015), <http://www.latimes.com/business/la-fi-uber-nevada-20150528-story.html> (detailing how Uber’s unregulated entry into Nevada ultimately led to a months-long battle between Uber and state regulators over the viability of the TNC operating model).

¹⁶⁶ Elena Holodny, *Uber and Lyft Are Demolishing New York City Taxi Drivers*, BUS. INSIDER (Oct. 12, 2016), <http://www.businessinsider.com/nyc-yellow-cab-medallion-prices-falling-further-2016-10>.

created a de-facto subsidy for TNCs and provided a significant advantage for TNCs trying to disrupt the incumbent taxi industry in the New York City market.¹⁶⁷ Moreover, if TNCs are regulated within a local jurisdiction, TNCs internalize negative externalities caused by a collective overregulation across numerous local jurisdictions. Additionally, TNC regulation may also serve as protection for the incumbent taxi industry by creating a barrier to entry for TNCs.¹⁶⁸ As such, the current fragmented approach to U.S. ridesharing regulation creates problems for TNCs, the incumbent taxi industry, and consumers.

B. Regulation of Ridesharing Economy in China

In many fundamental respects, the Chinese legal system is dramatically different from that of the United States.¹⁶⁹ China's contemporary legal system was constructed essentially from scratch and only very recently, beginning in the late 1970s after the reform factions of the Chinese Communist Party (CCP) gained power in the wake of Mao Zedong's death.¹⁷⁰ For most scholars, the Chinese legal system exists as an instrumental tool to aid the CCP as it seeks to manage society while retaining its monopoly on political power.¹⁷¹ The CCP controls public policy, although many organs within the formal Chinese state have substantial power to interpret and implement the laws.¹⁷² As one might expect, there is substantial overlap between Party officials and government officials, especially at the senior-most levels of the Party-state.¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ Consider the popular regulatory tactic of banning TNCs from accepting customers at airports. Of the largest 40 airports in the U.S., 10 prevent TNCs from offering rides at terminals. Scott McCartney, *You Can't Take an Uber Home from These Airports*, WALL ST. J. (July 6, 2016), <https://www.wsj.com/articles/you-cant-take-an-uber-home-from-these-airports-1467829592> (detailing how the effect of TNC airport bans could be seen when the Seattle-Tacoma International airport lifted its TNC ban in April 2016).

¹⁶⁹ See, e.g., Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 20, 27-37 (discussing the inconsistencies and tensions between China's legal system and Western conceptions of the rule of law).

¹⁷⁰ See generally, e.g., Chen Su, *The Establishment and Development of the Chinese Economic Legal System in the Past Sixty Years*, 23 COLUM. J. ASIAN L. 109 (2009); JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK* 41-60 (4th ed., 2014).

¹⁷¹ Su, *supra* note 172, at 37-38 (labeling China an "instrumental rule by law" jurisdiction).

¹⁷² See generally, e.g., PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA* (1997).

¹⁷³ DREYER, *supra* note 132, at 83 (6th ed., 2008). To Western observers, the existence of a state may appear redundant or unnecessary. The government was established because a formal state lends credibility to the Party, and to delineate the separate functions of each

In contrast to some Western assumptions, a great variety exists in the laws across localities in China.¹⁷⁴ Although lower level officials are obliged to act within the boundaries and policies defined by higher levels, lower level officials are given wide discretion and latitude to interpret and implement law.¹⁷⁵ The intended result of this arrangement is that local officials adapt the policy preferences of higher authorities to local realities, to best serve the CCP's interests in each place throughout the country.

The administrative lawmaking process in China is termed *administrative specification*.¹⁷⁶ Formal lawmaking typically begins with a statute from the highest legislative body, the National People's Congress (or from its Standing Committee, which exercises national legislative authority during the large majority of the year in which the full Congress is not meeting).¹⁷⁷ A sophisticated five phase process now surrounds the passage of statutes; these are agenda-setting, inter-agency review, top leadership approval, debate and passage in the Congress, and the implementation of law as policy.¹⁷⁸ A period of public disclosure and comment is required for all bills being considered in the Congress.¹⁷⁹ The language of national-level statutes is often written in broad and ambiguous language to indicate general policy directions and to define the scope of lower officials' discretion.¹⁸⁰ The deliberate drafting of statutes in vague and uncertain terms also lends them to interpretation and reinterpretation by administrative bodies and the lower levels of the state.¹⁸¹

In response to a statute, administrative authorities at the national level implement rules and regulations to build upon the statute in question.¹⁸² Most of China's national-level administrative authorities are governed by a body called the State Council.¹⁸³ The process of administrative rulemaking is

organization. The Party provides ideological leadership and policy guidance, while the government is supposed to execute those policies. *Id.*

¹⁷⁴ CORNE, *supra* note 172, at 126, 147.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 104-05.

¹⁷⁷ *Id.* at 59-62.

¹⁷⁸ Murray Scot Tanner, *How a Bill Becomes a Law in China: Stages and Processes in Lawmaking*, 141 CHINA QUARTERLY 39, 40 (1995).

¹⁷⁹ Xiao Zhu & Kaijie Wu, *Public Participation in China's Environmental Lawmaking: In Pursuit of Better Environmental Democracy*, 29 J. ENVIRONMENTAL L. 389, 389-90 (2017).

¹⁸⁰ CORNE, *supra* note 172, at 93-105.

¹⁸¹ *Id.* at 94.

¹⁸² *Id.* at 56-59, 62-65.

¹⁸³ At the national level, two additional legal organs exist—the Supreme People's Court and the Supreme People's Procuracy. Courts exist primarily to adjudicate or otherwise resolve

prompted when an agency determines that rules are needed. This may be on the agency's own accord, or in response to the passage of a new statute or planning document, or on the basis of instructions from the CCP or another state authority.¹⁸⁴ The agency will then draft rules;¹⁸⁵ increasingly, this process also includes the opportunity for public comment from individuals and interest groups.¹⁸⁶ Once the draft is completed, it must be discussed with other agencies that may have an interest in the rules or their subject matter, and must then be examined and approved by the State Council.¹⁸⁷ The rules must then be published and made public to take legal effect.¹⁸⁸ Akin to Western countries, a large majority of all laws consist of administrative rules rather than statutes (and most are local rather than national).¹⁸⁹

At each level of the state below the national level (i.e., at the provincial, county, and basic levels of the government), the national level organs are replicated. Thus, a provincial people's congress has the authority to pass statutes for the province, and the provincial people's government, consisting of provincial offices of the national-level agencies, can create administrative rules and regulations for the province.¹⁹⁰ This process flows downwards as lower levels of the state "specify" the laws made above it.¹⁹¹ Administrative agencies then have the duty to enforce the laws. The process of law enforcement in China "tends to be ad hoc, haphazard and lacking in consistency."¹⁹² Nevertheless, administrative bodies have a variety of tools at their disposal in the process of enforcing the laws; these include conducting inspections, issuing (and perhaps revoking) business licenses, ordering a regulated party to do or refrain from doing something, and issuing varying

disputes between private parties and to formally sanction criminals. The procuracies exist to oversee the administration of the criminal justice system and also supervise the courts. See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 192-217 (2003). We devote less attention to these bodies here because statutes and administrative actions constitute the bulk of the legal process in China with respect to issues of economic regulation.

¹⁸⁴ See, e.g., CORNE, *supra* note 172, at 65-66.

¹⁸⁵ *Id.* at 66-67.

¹⁸⁶ See, e.g., The U.S.-China Business Council, *The PRC Legislative Process: Rule Making in China*, at 3 (2009), https://www.uschina.org/sites/default/files/prc_legislative_process.pdf.

¹⁸⁷ *Id.*; accord CORNE, *supra* note 172, at 66-67.

¹⁸⁸ *Id.* at 67-68.

¹⁸⁹ Zhu Jingwen, *Lawmaking in China: Development, Issues and Rethinking*, 9 FRONTIERS OF LAW IN CHINA 506, 520-21 (2014).

¹⁹⁰ See, e.g., WEI LUO, CHINESE LAW AND LEGAL RESEARCH 160-61 (2005).

¹⁹¹ See generally CORNE, *supra* note 172.

¹⁹² *Id.* at 189.

sanctions on regulated parties found to have broken the law.¹⁹³

The Chinese ridesharing industry is relatively young but has experienced rapid consolidation. In effect, the Chinese ridesharing industry now has only one substantial player: Didi Chuxing (“Didi”).¹⁹⁴ As of June 2017, Didi was estimated to control as much as 94% of the Chinese ride-hailing market.¹⁹⁵ Didi’s current form is the result of two high-profile mergers in the domestic Chinese market. The first of these combined Didi Dache and Kuaidi Dache.¹⁹⁶ After receiving venture capital investments from prominent Chinese firms Tencent and Alibaba respectively, Didi and Kuaidi merged in 2015 to form China’s ride-hailing market share leader and rebranded as Didi Chuxing.¹⁹⁷

The competitive landscape for ridesharing companies in China shifted further in July 2016 with Didi’s acquisition of Uber China.¹⁹⁸ This merger was driven by a price war with Uber’s Chinese subsidiary.¹⁹⁹ Didi acquired Uber China in a \$35 billion deal under which Didi chairman Cheng Wei joined the Uber board and former Uber CEO Travis Kalanick joined the Didi board.²⁰⁰

¹⁹³ See, e.g., *id.* at 190-222.

¹⁹⁴ iiMedia Research, *2017-2018 China Online Ridesharing Industry Report*, iiMEDIA (Apr. 3, 2018), <http://www.iimedia.cn/61053.html> (reporting that in 2017, DiDi Chuxing had a market penetration rate of 58.6%, leaving other ridesharing companies far behind. Other major ridesharing services include Shouqi Yueche (2.6%), Shenzhou Zhuanche (2.2%), Yidao (1.6%), Caocao Zhuanche (1.3%) (<http://www.iimedia.cn/61053.html>)); see also Press Release, Wu Zhenguo, Head of Anti-Trust Bureau of the State Adm. for Market Regulation of China (Nov. 16, 2018) (<http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/37601/39282/index.htm>) (According to Wu Zhenguo, the State Administration for Market Regulation of China has initiated an anti-trust investigation into the Didi-Uber merger deal according to Anti-Trust Law of China.).

¹⁹⁵ Jeffrey Towson, *Business Insight: Why is Chinese Ride Service Didi Sitting on So Much Cash?*, NIKKEI ASIAN REV. (June 15, 2017), <https://asia.nikkei.com/Business/Business-Insight-Why-is-Chinese-ride-service-Didi-sitting-on-so-much-cash>.

¹⁹⁶ Didi Chuxing, *Milestones*, <http://www.didichuxing.com/en/aboutus/milestones> (last visited Apr. 11, 2018).

¹⁹⁷ *Id.*

¹⁹⁸ Alyssa Abkowitz & Rick Carew, *Uber Sells China Operations to Didi Chuxing*, WALL STREET JOURNAL (Aug. 1, 2016), <https://www.wsj.com/articles/china-s-didi-chuxing-to-acquire-rival-uber-s-chinese-operations-147002440f3>

¹⁹⁹ Anthony Kuhn & Aarti Shahani, *In China, As in the U.S., the Fight Over Ride Hailing is Local*, NPR (Mar. 27, 2017), <http://www.npr.org/sections/alltechconsidered/2017/03/27/521650068/in-china-like-in-the-u-s-the-fight-over-ride-hailing-is-local>.

²⁰⁰ Arjun Kharpal, *Taxi App Rival Didi Chuxing to Buy Uber’s China Business in \$35 Billion Deal*, CNBC (Aug. 1, 2016), <https://www.cnbc.com/2016/08/01/chinas-didi-chuxing-to-acquire-ubers-chinese-operations-wsj.html>.

Kalanick cited an unclear regulatory environment and difficulties competing with Didi as Uber's chief motives for conceding the China market.²⁰¹ During the Didi-Uber price war, drivers would receive large bonuses to begin driving for a company, and customers would receive major discounts on rides as each company attempted to undercut the other.²⁰² Now, because Didi does not have to compete with Uber, many of the attractive rewards such as bonuses to drivers and discounts to customers are no longer present. Without bonuses, drivers who may have been on the margin as to whether they would drive for Didi now have fewer incentives to do so.²⁰³

The burgeoning success of Didi (and of the ridesharing industry more broadly) has roiled the Chinese taxi industry. High-profile taxi driver protests and strikes over the ridesharing industry's growing threat brought salience to the mounting tensions between the two industries.²⁰⁴ The ridesharing industry had previously operated under the radar due to the hesitance of Chinese regulators to regulate ridesharing companies as traditional taxi services and the lack of policies explicitly regulating the ridesharing operating model.²⁰⁵ This unstable relationship between the ridesharing industry, incumbent taxi industry, and government regulators culminated in a new paradigm when officials moved to regulate the ridesharing industry at the national level in 2016.

²⁰¹ Lulu Yilun Chen, *China's Didi Said Near Deal to Become Most Valuable Asia Startup*, BLOOMBERG (Apr. 27, 2017), <https://www.bloomberg.com/news/articles/2017-04-26/didi-said-near-deal-to-raise-at-least-5-billion-in-new-funding>.

²⁰² See *supra* note 21.

²⁰³ *Id.*

²⁰⁴ David Fickling, *Uber Protests Gauge China Strife*, BLOOMBERG (Mar. 17, 2016), <https://www.bloomberg.com/gadfly/articles/2016-03-18/uber-protests-are-the-real-measure-of-china-labor-unrest>; *Taxis Drivers Strike in Multiple Cities, Industrial Monopoly Will End*, 163 NEWS (Jan. 14, 2015, 7:51 AM), <http://news.163.com/15/0114/09/AFTK1FMM00014JB6.html>; *Breaking News: Taxis Drivers Gathering at Didi Beijing Headquarters*, SOHU (Dec. 8, 2015, 4:10 PM), http://www.sohu.com/a/47079350_227965; *Behind the Strikes: Who Touched Taxis Drivers' Cheese*, FENG, <http://js.ifeng.co> m/special/taxi/ (last visited June 25, 2018); Julie Makinen, *In a Boost for Uber, China Legalizes Ride-Hailing Services*, L.A. TIMES (July 28, 2016), <http://www.latimes.com/business/technology/la-fi-china-uber-ridesharing-20160728-snap-story.html>.

²⁰⁵ Guanli Zanzheng banfa (网络预约出租汽车经营服务管理暂行办法) [Interim Measures for the Administration of Online Taxi Booking Business Operations and Services] (promulgated by the Ministry of Transport et al., July 27, 2016, effective Nov. 1, 2016) Ministry of Information Technology, Aug. 25, 2016, <http://www.miit.gov.cn/n1146295/n1146557/n1146624/c5218603/content.html> (which sets out regulatory measures for online ridesharing services for the first time in China).

C. China's Shift Towards a National Regulatory Scheme for Ridesharing

This subpart describes China's shift toward a national regulatory scheme for ridesharing in more depth and is broken into three subsections. The first subsection examines the Chinese ridesharing industry before the introduction of the national framework. The second subsection describes the content of the national framework put forth by Chinese regulators in July 2016. Finally, the third subsection explores the actions taken by municipal regulators after the introduction of the national framework.

1. Before the National Policy

In October 2015, the Chinese Ministry of Transport issued a draft rule that barred drivers of unlicensed vehicles from offering rides for payment through ridesharing platforms.²⁰⁶ The draft rule also included requirements for ridesharing companies operating in China to register their private cars as commercial vehicles and for drivers to possess at least three years of driving experience.²⁰⁷ The introduction of draft rules establishing a countrywide regulatory framework indicated a paradigm shift in the Chinese Ministry of Transport's willingness to regulate the ridesharing industry at a national level.²⁰⁸

In addition to the national draft rules, in October 2015, the Shanghai Municipal Transportation Commission became the first municipality to issue an operating license to a ridesharing company—Didi.²⁰⁹ This came after Didi engaged Shanghai officials and received funding from China Investment Corp, the state's sovereign wealth fund focused on investing in companies deemed important for the future development of China.²¹⁰

The timing of these commissions is not coincidental. The municipality, along

²⁰⁶ Ma Si & Lu Haoting, *Draft Rule Takes Aim at Online Car-Booking Services*, CHINA DAILY (Oct. 12, 2015 7:21 AM), http://english.gov.cn/policies/policy_watch/2015/10/12/content_281475209817550.htm.

²⁰⁷ *Id.*

²⁰⁸ *See supra* note 27.

²⁰⁹ Charles Clover, *Didi Kuaidi Secures Shanghai Licence and Takes Lead in Legal Race*, FIN. TIMES (Oct. 8, 2015), <https://www.ft.com/content/3cd0ff60-6d93-11e5-aca9-d87542bf8673>.

²¹⁰ Charles Clover, *Didi Kuaidi Set to Become China's First Legal Ride-Hailing App*, FIN. TIMES (Aug. 3, 2015), <https://www.ft.com/content/7e31f716-39cc-11e5-bbd1-b37bc06f590c>.

with other high-growth regions, has been used to test new economic policies at a local level before a national rollout.²¹¹ Numerous examples similar to China's experimentation with rideshare licensing in Shanghai can be found in the reform era. One such example occurred in 1986 when national officials praised local farmers for leasing land to outsiders in Shenzhen, even though leasing land was prohibited in the *xianfa* (China's Constitution).²¹² An amendment to the *xianfa* formally authorized these leases in 1988 after the policy's demonstrable success in Shenzhen.²¹³ A second example occurred in 1992 with the introduction of regional securities and commercial regulation in Shanghai and Shenzhen.²¹⁴ The regional regulations were passed in early 1992, immediately before the May 1992 passage of the "Measures on Enterprises' Shareholding System Experiment" by five agencies under the State Council.²¹⁵ Viewed in this historical context, the Shanghai Municipal Transportation Commission's October 2015 issuance of a ridesharing operating license furthered the national Ministry of Transport's experiment to legitimize the ridesharing business model ahead of the draft rule's passage and implementation in 2016.

2. Introduction of the National Policy

The Chinese Ministry of Transport introduced its national framework for regulating the Chinese ridesharing industry at the end of July 2016.²¹⁶ The policy outlined responsibilities of companies, eligibility requirements for drivers, and operating standards for vehicles.²¹⁷ Ridesharing companies must store user information data in China and for at least two years.²¹⁸ Additionally, ridesharing companies operating in China must review the qualifications of the drivers and check whether the drivers' vehicles are insured and in good condition.²¹⁹ In order to be eligible to drive for a

²¹¹ See *supra* note 31.

²¹² Donald C. Clarke, *Puzzling Observations in Chinese Law*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 93, 119 (C. Stephen Hsu ed., 2003).

²¹³ *Id.*

²¹⁴ Natalie G. Lichtenstein, *Law in China's Economic Development*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 274, 283 (C. Stephen Hsu ed., 2003).

²¹⁵ *Id.*

²¹⁶ Meng Jing & Luo Wangshu, *New Rules Clear Way for Ride-Hailing Services*, CHINA DAILY (July 29, 2016 9:46 AM), http://english.gov.cn/policies/policy_watch/2016/07/29/content_281475404181510.htm.

²¹⁷ *Id.*

²¹⁸ Jon Russell, *China Issues Guidelines to Legalize Ride-Hailing Apps like Uber and Didi Chuxing*, TECHCRUNCH (July 28, 2016), <https://techcrunch.com/2016/07/28/china-issues-guidelines-to-legalize-ride-hailing-apps-like-uber-and-didi-chuxing/>

²¹⁹ See *supra* note 172.

ridesharing company, the driver must have three or more years of driving experience and a clean driving record; for purposes of the policy, a clean driving record means that the driver does not have any previous charges of dangerous driving, drug abuse, or drinking and driving.²²⁰ In addition, vehicles must be registered, seat no more than seven passengers, be equipped with a GPS system, and reflect no more than 372,000 miles on the odometer or be less than eight years old.²²¹ The results of the companies' review must be reported to the local transportation bureau where the driver operates.²²²

China achieved two things by introducing this national regulatory framework. First, by passing regulations that make a clear distinction between ridesharing companies and taxi services, China became the first country to formally legalize a discrete ridesharing business model at a national level.²²³ Second, the ridesharing regulations set a minimum operating standard to which ridesharing companies must adhere at the national level, a novel innovation in the previously unregulated Chinese ridesharing industry.²²⁴ Notably, this minimum operating standard functioned more as a regulatory floor than an all-inclusive set of requirements, at it allows regional and local jurisdictions to add additional operating requirements as they see fit.²²⁵ As the national regulatory framework took effect in November 2016, China's ridesharing industry was primed for changes driven both at the national and regional levels.²²⁶

3. After the National Policy

Changes to the ridesharing industry did not stop with the Ministry of Transport's national regulatory framework. Soon after the national policies governing ridesharing took effect in November 2016, local regulators began to experiment with their own rules and administrative practices. In March 2017, Tianjin was the first city to offer a local operating license to Didi and

²²⁰ *Id.*

²²¹ *See supra* note 27.

²²² *Id.*

²²³ Paul Mozur, *Didi Chuxing and Uber, Popular in China, Are Now Legal, Too*, N.Y. TIMES (July 28, 2016), https://www.nytimes.com/2016/07/29/business/international/china-uber-didi-chuxing.html?_r=0.

²²⁴ *Id.*

²²⁵ Brian Solomon, *China Legalizes Ridesharing, Opening the Door for Uber, Didi*, FORBES (July 28, 2016), <https://www.forbes.com/sites/briansolomon/2016/07/28/china-legalizes-ridesharing-opening-the-door-for-uber-didi/#176a31413b59>

²²⁶ *Id.*

its ridesharing competitors after the national standards came into effect.²²⁷ By May 2017, twenty cities had issued local ridesharing operating licenses, including Beijing, Shanghai, Guangzhou, and Shenzhen.²²⁸ Some local regulators, however, created standards for obtaining a local operating license that were much stricter and contentious than the national standards.

The most controversial of these local rules ban or significantly limit economic migrants from driving for ridesharing companies. This is achieved most expeditiously by requiring ridesharing drivers to possess *hukou*, a jurisdiction-specific household residency document.²²⁹ Beijing and Shanghai, China's political and financial hubs, both require ridesharing drivers to possess *hukou* and a local license plate.²³⁰ Guangzhou requires ridesharing drivers to possess either *hukou* or a special permit allowing migrants to work in the city.²³¹ Limiting the pool of eligible drivers to the holders of *hukou* or a local license plate poses major issues for ridesharing companies because a disproportionate percentage of their drivers are migrants. For example, less than 2.4% of Didi's drivers in Shanghai were registered with the city.²³²

Even though *hukou* requirements are standard in the Chinese taxi industry, Didi initially resisted the stricter local standards.²³³ In October 2017, the company attempted to demonstrate the negative impact of these local regulations by releasing data on ride request response rates in four of Didi's most important locations: Beijing, Shanghai, Guangzhou, and Shenzhen.²³⁴

²²⁷ Xinhua News Agency, *DiDi Gets First Official Online Car-Hailing Operating License*, CHINA DAILY.COM.CN (Mar. 3, 2017), http://www.chinadaily.com.cn/china/2017-03/03/content_28429320.htm.

²²⁸ China Plus, *New Rules on Car-Hailing Services Come Into Effect in Beijing*, CHINA PLUS (May 20, 2017), <http://chinaplus.cri.cn/news/china/9/20170520/4971.html>.

²²⁹ Cao Li, *China's New Ride-Hailing Rules Focus on Where Drivers Call Home*, N.Y TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/business/china-didi-driver-rules-uber.html>.

²³⁰ Zheping Huang, *The Reasons Why It's Gotten So Tough – and Expensive – To Hail a Ride in China*, QUARTZ (Jan. 24, 2017), <https://qz.com/893166/its-more-expensive-to-hail-a-didi-in-china-because-of-chinese-new-year-and-anti-migrant-rules/>.

²³¹ Eva Dou, *China Ride-Hailing Rules Threaten Didi's Migrant Drivers*, WALL ST. J. (Dec. 22, 2016), <https://www.wsj.com/articles/china-ride-hailing-rules-threaten-didis-migrant-drivers-1482391152>.

²³² *Id.*

²³³ *Id.*

²³⁴ Josh Horwitz, *One Year After the Uber-Didi Merger, It's Only Getting Harder to Hail a Ride in China*, QUARTZ (Aug. 3, 2017), <https://qz.com/1045268/one-year-after-the-uber-didi-merger-its-only-getting-harder-to-hail-a-ride-in-china/>.

The study found that response rates at common pickup areas decreased by as much as 15.6% at airports and 18.3% at schools.²³⁵ In addition, Sina, the parent company of Chinese microblogging site Weibo, conducted a survey of users about the perceived availability of ridesharing companies a year after the national regulations took effect.²³⁶ In the survey, 81.7% of respondents believed that hailing a ride in China was more difficult in October 2017 than the year before and 86% of respondents believed it was more expensive to hail a ride than ever before.²³⁷ Both Didi and Sina's data suggest that the Chinese ridesharing industry may face headwinds emanating from the national regulations and stricter local requirements.

V. FUNCTIONAL ANALYSIS

This Part argues that one key institutional attribute between the U.S. and China—namely, federalism—is analogous in a number of key respects, and this analogous functionality could enable U.S. regulators to selectively borrow from China's experiment with the regulation of ridesharing platforms. We argue as well that China's experiment, while largely successful, entails certain attributes that U.S. regulators would do well to avoid as they borrow from China.

A. Drawing Comparisons Between U.S. and Chinese Federalism Approaches

Attempting to draw direct comparisons between the U.S. and Chinese legal rules can be a useful exercise for those looking to gain insight into ridesharing industry regulation, to the extent that, as this Article has done above, the analysis is sensitive to differences in context between the countries under comparison. Yet those very differences raise the specter that the lessons or virtues of one legal system's ridesharing rules may not take root in another place, despite the merits that such rules may exhibit in their home jurisdiction. In order to adapt China's ridesharing rules to the United States, the crux of comparing ridesharing regulatory outcomes in the two countries must be approached from the vantage of each country's treatment of federalism.²³⁸ Finding that the U.S. and China approach federalism-at-large enables us to

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ We understand federalism to mean “[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government ...” BLACK’S LAW DICTIONARY 729 (10th ed. 2014).

consider whether and how U.S. regulators can actually implement the lessons from China's experiment in national ridesharing regulation.²³⁹

U.S. federalism, and Western federalism more generally, has the characteristics of protecting individual rights and maintaining political freedom through explicit constitutional foundations.²⁴⁰ China does not share these particular characteristics in its own approach to federalism.²⁴¹ However, there are striking similarities between U.S. and Chinese federalism when studying the political relationships between their respective national and local governments.²⁴² At the core of both is the question of how to allocate power (and responsibility) amongst the differing levels of government.²⁴³

Federalism can assume a variety of forms. Some federalist legal systems are highly centralized while others are only slightly integrated; some result from

²³⁹ Otherwise stated, the similarities between the countries' macro-institutions of interest (i.e., their approaches to federalism) provide a basis for legal transplantation, despite the other differences between the legal systems.

²⁴⁰ Gabriella Montinola, Yingyi Qian & Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 60 (Oct. 1995).

²⁴¹ *Id.*

²⁴² *Id.* at 52. One of the fundamental challenges of comparative work is ensuring that the objects under comparison fulfill the same function. See Part II, *supra*; see also Peter Leyland, *Oppositions and Fragmentations: In Search of a Formula for Comparative Analysis?*, in COMPARATIVE LAW IN THE 21ST CENTURY 211, 215 (Andrew Harding & Esin Örüçü eds., 2002). If one is willing to assume that "every legal system is faced with the same problems and has to solve them in their own particular way," *id.* at 215–16, then, at a sufficiently broad level of generality, functional equivalents can be identified even between disparate systems, *id.* at 216. Leyland, for example, was concerned with administrative law comparisons between European countries, and his concern was thus "the attempt to approach the distribution, exercise, and containment of state power"—an obviously generalized legal subject. *Id.* Analogously, our concern here is the comparison of the functional mechanisms and benefits of federalism between China and the United States—that is, how each legal system distributes authority amongst its national and local governments, and the benefits flowing from these divisions. This is tenable since the "structure and substance [of laws] can be transposed with less difficulty than legal culture ..." Esin Örüçü, *Unde Venit, Quo Tendit Comparative Law?*, in COMPARATIVE LAW IN THE 21ST CENTURY 1, 13, *supra*. As H. Patrick Glenn notes, although popular wisdom in the West holds that one cannot compare apples and oranges on account of the differences between them, even they can be compared through general criteria such as roundness, acidity, color, sweetness, and so on. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 45–46 (4th ed. 2010) (asking, *inter alia*, "how do we know there is such difference if comparison has not somehow, already, taken place?").

²⁴³ For a discussion of this idea in the American context, see LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 326–27 (7th ed. 2011) (framing the issue of federalism in the U.S. legal system as a question of "how to divide power," and observing that the delegates to the Constitutional Convention "wrote into the document a rather elaborate 'pattern of allocation'").

the joining of previously independent polities while others result from the breakup of a previously unified entity; some are vertical models, in which executive, legislative and judicial powers are integrated vertically (e.g., Germany), while others are horizontal models, wherein each level of government makes and adjudicates its own laws separately (e.g., the U.S.).²⁴⁴ Moreover, some federalist states afford all component units equal status, while others are asymmetric in which some units have greater powers than others; and some federalist states formally acknowledge their federalist arrangements, whereas others do not.²⁴⁵

In the United States, of course, federalism has been a construct in flux over time, as subsequent generations and decision makers—particularly the United States Supreme Court—have struggled to delineate the boundaries between federal and state governmental authority.²⁴⁶ Many modern scholars do not view federalism in the United States as a zero-sum game;²⁴⁷ rather, “the boundary between state and federal authority is actually the project of ongoing negotiation, in which federalism values are jointly balanced by local and national actors.”²⁴⁸ This flows from compromises made during the Constitution’s drafting and the resulting amenability of the relevant constitutional language to differing interpretations concerning the distribution of power amongst national and local governments.²⁴⁹

²⁴⁴ Daniel Halberstam & Mathias Reimann, *Federalism and Legal Unification: Comparing Methods, Results, and Explanations Across 20 Systems*, in *FEDERALISM AND LEGAL UNIFICATION* 3, 4 (Daniel Halberstam & Mathias Reimann eds., 2014).

²⁴⁵ *Id.* at 4.

²⁴⁶ See, e.g., ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 1–7 (likening the state of the Supreme Court’s federalism jurisprudence over the decades of the twentieth century to waves of national power crashing on a beach even while the undertow of state power was pulling authority back to state governments); accord ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011) (discussing, *inter alia*, the notion that the boundaries of federalism are negotiated both within the courts and among the political branches of government).

²⁴⁷ Though in some respects there is a zero-sum element since states’ police power consists of any residual power not granted to the national government nor prohibited to the states by the Constitution, nor taken by legitimate federal action. See WILLIAM J. RICH, 3 *MODERN CONSTITUTION LAW* 9 (3d. ed., 2011).

²⁴⁸ RYAN, *supra* note 246, at 271.

²⁴⁹ See, e.g., Michael S. Greve, *Federalism*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 431, 431 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (observing that “[f]ederalism is nowhere in the Constitution. But it is also everywhere in the document ... Federalism, then, is a foundational principle inferred from the document’s conjunction of silence and specificity.”); accord David Brian Robertson, *The Constitution from 1620 to the Early Republic*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION*, *supra*, at 19, 30–32 (discussing the compromises reached between those favoring strong national authority and those favoring local governments).

Federalism can be employed as a means to reconcile conflicting ethnic or tribal tensions, although in the United States it has been associated more with the competing interests of the Constitution's designers and, later, with the values of state experimentation, competition, and choice.²⁵⁰ As we will see below, it is arguably in this pragmatic (and even opportunistic) sense that Chinese federalism is deployed toward the ends of empowering local governments to tailor regulations to best serve the Party's interests (at the most abstract level) and to best promote social stability (at the most practical).

When the U.S. Constitution substantially “upgraded” the standing of America's national government (as compared to the Articles of Confederation) by giving it access to its own tax base and other unambiguous powers, some were left to ask what role the states would play. The Federalists' answer was specialization.²⁵¹ Over time, and particularly during the New Deal, the “dual federalism” of older ages was replaced by “cooperative federalism” in which emphasis is on the concurrent—rather than exclusive—exercise of powers by the national and local governments.²⁵² Nevertheless, the most basic question of federalism in the U.S. today is the same as it has been across time: namely, how to diffuse the powers of government at different levels and also simultaneously ensure that the vaying levels of government effectively deliver on the tasks expected of them.²⁵³

Notwithstanding its benefits, federalism carries certain drawbacks.²⁵⁴ In particular, scholars point to three circumstances in which independent state power can be problematic: these are when one state's action (or inaction)

²⁵⁰ Greve, *supra* note 249, at 434.

²⁵¹ Greve, *supra* note 249, at 437. Or as Martin Redish put it, the federal government can take on problems that extend beyond the borders of the states by virtue of its size, resources and national perspective, while state governments “can focus on the unique impact that a problem may have in a particular geographical or economic area” and can run experiments without the risks of running untested ideas at the national level. JEROME A. BARRON ET AL., CONSTITUTIONAL: PRINCIPLES AND POLICY 61(2012) (quoting MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 25 (1995)). The Chinese government frequently experiments with new policies locally, before deploying them nationally. *See supra* Part III.

²⁵² Greve, *supra* note 249, at 446. Hence, cooperative federalism is characterized by “regulatory regimes administered jointly by federal and state agencies, and federal-to-state transfer payments and funding programs.” *Id.*

²⁵³ BARRON ET AL., *supra* note 249, at 61–62.

²⁵⁴ Chief among these are the inevitable and rather dramatic complexities that federal arrangements introduce to the legal environment. *See, e.g.,* SUSAN LOW BLOCH & VICKI C. JACKSON, FEDERALISM xi (2013) (noting that “[t]he idea of the federal system [in the U.S.] has been fraught with complexities from its inception”).

gives rise to more intense problems in another state, when states deregulate to attract industry, and when states choose to depart from a broader national moral consensus.²⁵⁵ A strong national government capable of addressing these problems is then desirable.

In stark contrast to the U.S.—where questions of federalism are constrained by constitutional principles²⁵⁶—no such legal dynamics are at work in China. Yet Chinese federalism has formed around many of the same practical concerns and desire for effective governance. Deng Xiaoping’s ascent to leadership in the Chinese Communist Party in the late 1970s drove significant and far-reaching decentralization of authority between the national and local Chinese governments.²⁵⁷ Some scholars now characterize China’s policymaking process in terms of “fragmented authoritarianism,” in which policies result from bargaining between top Party leaders (represented by the central bureaucracy) and local governments (especially the provincial authorities).²⁵⁸ As a result, nearly forty years later, local governments in China have increased control over their local economies and the central government’s exercise of control over local economic policy has decreased.²⁵⁹ Even if China does not consider itself a federal state, its economic and political relationships create a market-preserving federalism between the national and local governments, which bear similarities to the relationship between the national and local governments in the U.S..²⁶⁰ Given these similarities, China’s creation of a national regulatory floor for ridesharing regulation while allowing local jurisdictions to impose additional regulation could theoretically be mimicked in the United States. Given this, the next logical step is evaluating what U.S. regulators should take away from China’s recent regulatory shift. These takeaways should play an influential role when regulators evaluate whether the U.S. should introduce a similar regulatory model based on the current state of the American ridesharing industry.

Federal systems may establish legal unification—or alternatively, the harmonization of legal norms throughout the jurisdiction—in several ways. Some of these appear relevant to China, especially in its use of central

²⁵⁵ BARRON ET AL., *supra* note 249, at 61–62.

²⁵⁶ *See, e.g.,* Greve, *supra* note 249, at 448 (noting that “critical questions [concerning federalism in the U.S.] must be worked out one program at a time” and that “[t]he search for suitable bargaining rules . . . has become a principal theme of federalism law”).

²⁵⁷ Montinola et al., *supra* note 240, at 61.

²⁵⁸ DREYER, *supra* note 132, at 20.

²⁵⁹ *Id.* at 72.

²⁶⁰ *Id.* at 57.

legislation. Central legislation is perhaps the most common means of achieving the diffusion of legal norms or rules throughout a jurisdiction, notwithstanding the presence of other sovereign units of government.²⁶¹ Significantly, where “federal systems allow the center to enact legislation mandating that the member units pass conforming (implementing) rules,” the strategy “aims at legal harmonization rather than unification.”²⁶² This is the approach used when national authorities desire certain consistencies in local rules in reference to some guiding, general principle—but do not wish to implement identical rules across all localities. The European Union has been cited as one such example of this approach, since the EU has enacted hundreds of Directives “prescribing basic policies, principles, and rules which the member states must then, with some choice regarding the details, implement in their national legislation.”²⁶³ This is very similar in principle to China’s process of administrative specification, described in Part III, *supra*; and it is clear that, where Chinese authorities enact general legislation, and thereby invite local officials to apply the general principles to their local circumstances, this, likewise, aims at harmonization rather than the unification of the law. Such is the approach that Chinese officials have taken with respect to ridesharing regulation.

B. Benefits

China’s national approach comes with many benefits. First, the national approach explicitly delineates the difference between ridesharing and taxi services, legalizing (and thereby implicitly legitimizing) the ridesharing business model. Second, the national approach sets forth concrete operating standards for drivers and their vehicles designed to promote consumer safety. These safety rules set minimum expectations and thus function as a regulatory floor. Third, the national approach does not pre-empt local municipalities from passing additional regulatory standards tailored to address jurisdiction-specific problems.

China’s introduction of a national regulatory framework for its ridesharing industry represents a major shift in how the country addresses the industry’s potential shortcomings. Regulators in the U.S. may be able to learn or draw inspiration from China’s regulatory approach. However, they first must understand the general differences between the U.S. and Chinese sociopolitical and legal contexts in order to make credible comparisons.

²⁶¹ See, e.g., Halberstam & Reimann, *supra* note 244, at 10–11 (discussing the use of central legislation to achieve legal unification across numerous federal countries).

²⁶² *Id.*

²⁶³ *Id.*

C. Evaluating the Initial Effectiveness of the National Regulatory Scheme

Although China's national regulatory framework is relatively new, and its full impact has not necessarily become apparent, it may still be useful to evaluate the initial effectiveness of the new regulatory framework. China's national framework certainly possesses favorable features. These features include affirming the legality of the ridesharing business model, establishing concrete quality standards for both drivers and their cars to protect rider safety, and maintaining flexibility for local regulators to add supplementary regulations based on the unique needs of their jurisdictions. However, the national framework also fails to address several key market failures in the Chinese ridesharing industry.

The national regulatory framework falls short on two aspects of the rider experience. First, market leader Didi still faces significant challenges ensuring consumer safety during rides. Over the past four years, at least fifty sexual assaults and two murders have been committed by Didi drivers.²⁶⁴ It is common for women to face sexual harassment both in-person during rides and online on its intra-driver comment platform, although Didi now only allows drivers to indicate whether a rider was a 'satisfaction' or a 'dissatisfaction.'²⁶⁵ Second, the national regulatory framework does not address Didi's ability to engage in first degree price discrimination enabled by big data, which means the ridesharing company can set personalized prices for each consumer based on his or her unique characteristics to maximize the consumer surplus the firm extracts as profit.²⁶⁶ Local regulators have tried to address this by banning the price-hiking function, a feature similar to Uber's surge pricing function.²⁶⁷ For example, the Shanghai Municipal Transportation Commission ordered that Didi remove its price-hiking function in January 2017 and the Deputy Director at the Internet Plus consulting center at the Internet Society of China advocated for other local

²⁶⁴ Alice Zhang, *Over 50 Sexual Assaults and 2 Murders in 4 Years, How Can Didi Better Protect Its Passengers?*, PANDAILY (May 29, 2018), <https://pandaily.com/over-50-sexual-assaults-and-2-murders-in-4-years-how-can-didi-better-protect-its-passengers/>.

²⁶⁵ *Id.*

²⁶⁶ CGTN, *Does Big Data Increase Prices in China?* CGTN (Mar. 25, 2018), https://news.cgtn.com/news/7a4d444e306b7a6333566d54/share_p.html.

²⁶⁷ Manny Salvacion, *Price-Hike Function in Didi Chuxing Platform Ordered Removed by Shanghai Gov't*, YIBADA (Jan. 27, 2017), <http://en.yibada.com/articles/189729/20170127/price-hike-function-didi-chuxing-platform-ordered-removed-shanghai-government.htm>.

transportation commissions to take similar actions.²⁶⁸ Both of these consumer-level market failures may be addressed by swift and uniform responses at the national level.

Similarly, regulators at the national level can scrutinize potential antitrust market failures within the ridesharing market. Didi's acquisition of Uber China has been investigated by China's anti-monopoly authorities because the new firm would control over 80% of China's ridesharing market.²⁶⁹ Monopolistic behavior may become a problem in China's ridesharing market if Didi continues to control an outsized proportion of the industry. Multiple competitors such as Meituan, Alibaba, and Ctrip have recently entered China's ridesharing market²⁷⁰; however, these nascent attempts have faced challenges and have yet to seriously erode Didi's market share.²⁷¹ For example, technology firm Meituan attempted to launch its low-cost ride-hailing service in Shanghai but was quickly rebuffed by Shanghai authorities for setting prices below Didi's.²⁷² Accordingly, China's national-level transportation regulators may need to address anti-competitive forces when considering further changes or additions to China's emerging ridesharing regulatory framework.

D. Drawback of China's Policies with Regards to Privacy

Western companies are loath to share user data, typically citing concerns about user privacy protected under the Fourth Amendment.²⁷³ The widely-reported dispute between Airbnb and New York Attorney General Eric Schneiderman, is a case in point. In 2013, Schneiderman subpoenaed Airbnb

²⁶⁸ *Id.*

²⁶⁹ April Ma, *One Year On, Didi-Uber Union Still Under Antitrust Scrutiny*, CAIXIN (July 28, 2017), <https://www.caixinglobal.com/2017-07-28/101123585.html>.

²⁷⁰ Meng Jing, *Ctrip the Latest to Challenge Didi Chuxing in China's Ride-Hailing Market*, S. CHINA MORNING POST (Apr. 3, 2018), <https://www.scmp.com/tech/enterprises/article/2140063/ctrip-latest-challenge-didi-chuxing-chinas-ride-hailing-market>.

²⁷¹ Rita Liao, *Meituan, China's 'Everything App,' Walks Away from Bike Sharing and Ride Hailing*, TECHCRUNCH (Nov. 23, 2018), <https://techcrunch.com/2018/11/23/meituan-scale-back-ride-hailing-and-bike-sharing/>.

²⁷² Maggie Zhang, *Meituan Warned About Rule Violations as Ride-Hailing App Launches in Shanghai*, S. CHINA MORNING POST (Mar. 22, 2018), <http://www.scmp.com/business/companies/article/2138292/meituan-warned-about-rule-violations-ride-hailing-app-launches>.

²⁷³ *Cooperation or Resistance? The Role of Tech Companies in Government Surveillance*, 131 HARV. L. REV. 1722 (Apr. 10, 2018), <https://harvardlawreview.org/2018/04/cooperation-or-resistance-the-role-of-tech-companies-in-government-surveillance/>.

seeking data on Airbnb hosts.²⁷⁴ Airbnb protested and moved to squash the subpoena by claiming that hosts information was private.²⁷⁵ The court rejected this argument, and ultimately, Airbnb and Schneiderman reached an agreement, whereby Airbnb would share some of its user information.²⁷⁶

Under the guise of creating a ‘smart transportation’ system, however, Didi and the Chinese government struck a deal to exchange Didi’s users’ data for light-touch regulation.²⁷⁷ This data can possibly be used by the Chinese government in their ambitious plan to create a large-scale social credit system (SCS).²⁷⁸

First mentioned in the 2014 the State Council of China Published a document entitled “Planning Outline for the Construction of a Social Credit System,”²⁷⁹

²⁷⁴ David Streitfeld, *Airbnb Will Hand Over Host Data to New York*, N.Y. TIMES (May 21, 2014), <https://www.nytimes.com/2014/05/22/technology/airbnb-will-hand-over-host-data-to-new-york.html>.

²⁷⁵ Complaint at 2, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239 (S.D.N.Y. Oct. 21, 2016).

²⁷⁶ Letter Confirming Agreement Regarding Compliance with Subpoena from Clark Russell, Deputy Bureau Chief of the Internet Bureau, Office of the Att’y Gen. of the State of N.Y., to Belinda Johnson, Gen. Counsel, Airbnb, Inc. (May 20, 2014), https://ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf.

²⁷⁷ Eva Xiao, *Didi’s Master Plan to Win Over Local Chinese Governments- With Data*, TECHINASIA (Apr. 28, 2017), [https://www.techinasia.com/didi-big-data-traffic-platform](https://www.techinasia.com/didi-big-data-traffic-platform;); Darrell Etherington, *Didi’s CTO Explains Why China’s Ride-Sharing Giant Has a Data Advantage*, TECHCRUNCH (2017), <https://techcrunch.com/2016/12/02/didis-cto-explains-why-chinas-ride-sharing-giant-has-a-data-advantage/>; Paul Sawers, *How China’s Meshing Ride-Sharing Data with Smart Traffic Lights to Ease Road Congestion*, VENTUREBEAT (May 5, 2017, 6:25 AM), <https://venturebeat.com/2017/05/05/how-chinas-meshing-ride-sharing-data-with-smart-traffic-signals-to-ease-road-congestion/>. Currently, Didi is working with local traffic police in 11 Chinese cities, including Shenzhen and Jinan, the capital of China’s northeastern Shandong province. In Shenzhen, the company is helping local police catch drunk drivers by creating heat maps of *daijia* – Didi’s designated driver service for users who are too drunk to drive their cars home.” Eva Xiao, *Didi’s Master Plan to Win Over Local Chinese Governments- With Data*, TechinAsia (Apr. 28, 2017), <https://www.techinasia.com/didi-big-data-traffic-platform>.

²⁷⁷ Creemers, Rogier, *China’s Social Credit System: An Evolving Practice of Control* (May 9, 2018), <http://dx.doi.org/10.2139/ssrn.3175792>.

²⁷⁸ “Currently, Didi is working with local traffic police in 11 Chinese cities, including Shenzhen and Jinan, the capital of China’s northeastern Shandong province. In Shenzhen, the company is helping local police catch drunk drivers by creating heat maps of *daijia* – Didi’s designated driver service for users who are too drunk to drive their cars home.” Eva Xiao, *Didi’s Master Plan to Win Over Local Chinese Governments- With Data*, TechinAsia (Apr. 28, 2017), <https://www.techinasia.com/didi-big-data-traffic-platform>.

²⁷⁹ Creemers, Rogier, *China’s Social Credit System: An Evolving Practice of Control* (May 9, 2018), <http://dx.doi.org/10.2139/ssrn.3175792>.

by 2020 China plans to collect data about its citizens and give them a reputation score based on their credit history, personal characteristics, and behavior and preferences.²⁸⁰ This sharing of data among ridesharing platforms and the Chinese government could potentially enhance the government's ability to control its citizens—a prospect that is obviously fundamentally at odds with American notions of individual freedom and limits to government incursions into citizens' private affairs.

[Justin, think we should add anything else?]

IV. KEY TAKE-AWAYS

Given U.S. regulators' ability to draw credible comparisons between the U.S. and China's ridesharing regulatory environments, China's shift towards a national regulatory framework for its ridesharing industry should serve as an important benchmark when evaluating the feasibility of a national regulatory standards for the U.S. ridesharing industry. A few general trends are apparent. First, China's national approach ensures a uniform minimum standard of norms throughout the ridesharing industry (including the most foundational matter of legalizing and legitimizing ridesharing as an industry related to, but nevertheless distinct from, the taxi industry). Second, China's evolving rules appear to boost consumer confidence in the competence and reliability of ridesharing companies by requiring drivers and vehicles to meet certain baseline measures. Third, there are some obvious holes in China's ridesharing rules that time may prove to require national-level legal attention. Chief among these gaps are the lack of rules to ensure consumers' safety vis-à-vis deviant drivers who may do harm to passengers, the real possibility of companies' abuse of big data to engage in price discrimination against passengers, and the artificial restriction on the supply of potential ridesharing drivers resulting from *hukou* requirements. And finally, local governments in China have the flexibility to impose further requirements beyond those found in the national-level rules.

As noted above, the differential approach to comparative law aims to assess the "legal mentalities" of the jurisdictions involved.²⁸¹ From this discussion,

²⁸⁰ SCS's origins are similar to the U.S.'s credit scores. China too had a problem with people not paying their debts, but these needs developed much later than the credit scores in Western countries, as a result china has been able to harness big data to monitor citizen behavior and predict their trustworthiness. Fan Liang, Vishnupriya Das, Nadiya Kostyuk & Muzammil M. Hussain, *Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure*, (Aug. 2, 2018), <https://onlinelibrary.wiley.com/doi/abs/10.1002/poi3.183>.

²⁸¹ See *supra* Part II.

it would seem that China's legal mentality about ridesharing is multifaceted, but similar in many respects to America's legal mentality. The PRC clearly wants to facilitate and legitimize the growth of ridesharing. China is a large nation with a tremendous number of people, most of whom need access to affordable and reliable means of transportation. Given the infrastructural constraints (e.g., the miles of roadway, the numbers of cars competing to use those roadways, the public funding available for the construction of new roads, etc.), Chinese authorities seem to appreciate the potential benefits that technologies such as ridesharing platforms can contribute to the public welfare. To date, it seems that Chinese authorities are less concerned about the potential for anti-competitive behavior from Didi and may be content to let local authorities grapple with addressing questions of passenger safety.

While the legal and market conditions between the two countries are certainly distinguishable in many respects, it is nevertheless evident that policymakers in both China and the U.S. employ "divisions of responsibility" between their national and local governments. The functionalist method (discussed in Part II, *supra*) suggests that, where institutions may be identified as fulfilling similar functions in different countries, they may be amenable to analogy or comparison, notwithstanding their differences. For purposes of this analysis, the fact that both the United States and China have different levels of government available to address concerns arising from ridesharing platforms, American policymakers may realize similar benefits through the creation of national standards that set minimum expectations for ridesharing companies in the U.S..

More specifically, U.S. regulators can draw three particular lessons from China's recent actions: first, that the U.S. ridesharing industry will likely benefit by clarifying the legal status of the ridesharing business model; second, that the combination of regional flexibility and a national minimum operating standard may optimize ridesharing consumers' welfare; and third, that a national standard can minimize the market distortions that result from an entirely uncoordinated and divergent patchwork of state and local regulations. If U.S. regulators draw on these three lessons from China's experiment, the U.S. ridesharing industry will be appropriately supported by a comprehensive and predictable regulatory environment.

Clarifying the legality of the ridesharing business model at the national level should encourage the maturation of the ridesharing industry and regulators' ability to legislate it in an informed and sensible manner. Regulating a new business model like ridesharing within regulatory frameworks designed for the taxi industry leads to regulatory uncertainty and inappropriate distortion

between various types of transportation services.²⁸² China's new national framework explicitly legalizes the ridesharing business model.²⁸³ Accordingly, establishing clarity with respect to the ridesharing model appears to be a common-sense first step for regulators interested in fostering the development of the ridesharing industry in the U.S.. This, of course, assumes that U.S. regulators are interested in creating an environment in which ridesharing companies can thrive, but this appears to be a reasonable assumption given the unchecked expansion of U.S. ridesharing companies thus far.²⁸⁴

Balancing national uniformity and regional flexibility may be the optimal approach to ridesharing regulation in the United States. Including remedies to market failures that must be addressed at the national level, such as measures will promote a competitive balance among major U.S. ridesharing companies and common-sense operational requirements to ensure rider safety. However, U.S. state and local jurisdictions face unique challenges that may require regulatory solutions beyond a national minimum operating standard. These challenges are similar in nature to the challenges motivating certain Chinese municipalities to introduce *hukou* and other requirements beyond China's national standard.²⁸⁵ A limited national scope, combined with a lack of strict federal pre-emption, could empower states and cities to introduce supplementary regulations addressing specific issues relevant to their individual jurisdictions.²⁸⁶

Evaluating whether a national standard can minimize market distortions created in a state-by-state regulatory scheme may be a final necessary consideration for U.S. regulators to pull from China's regulatory experiment. One market distortion works in favor of ridesharing companies when a state-by-state regulatory framework enables disparate regulatory schemes that distort competition by indirectly subsidizing less regulated market players.²⁸⁷ In the U.S., ridesharing companies benefit from indirect subsidies in jurisdictions where they incur limited entry and operational costs that other competitors such as taxis may incur. Of course, this can also function as a double-edged sword: to the extent that ridesharing companies may be subject

²⁸² Daniel Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulations*, 43 U. MICH. J.L. REFORM 383, 384 (2010).

²⁸³ See *supra* note 45.

²⁸⁴ See *supra* note 2.

²⁸⁵ See *supra* notes 51–54.

²⁸⁶ See *supra* note 84 at 405.

²⁸⁷ *Id.* at 384.

to regulations that are not identical to those of the taxi industry, and to the extent that mature competitors (that is, taxi companies) may use their political clout to encourage a more onerous legal environment for ridesharing firms than for taxi firms, ridesharing companies may find themselves at a competitive disadvantage in the race for riders. A second market distortion works against the ridesharing companies when a state-by-state regulatory scheme creates negative externalities in the form of administrative and legal compliance costs of collective overregulation.²⁸⁸ These two market distortions currently affect ridesharing companies oppositely in the U.S.. The Chinese national framework will likely minimize the effects of both market distortions, and federal regulators in the U.S. must decide whether a national framework could play a similar role in the U.S..

CONCLUSION

As the scale and influence of ridesharing companies grows around the world, the regulatory schemes shaping each country's national industry will adapt in tandem. China's treatment of its ridesharing industry proves to be no exception. Although the Chinese model of regulating the ridesharing industry underpins its own unique national economic development strategy and is defined by the dominance and ubiquity of Didi Chuxing, the Chinese approach has nevertheless begun to address market failures found in ridesharing industries worldwide. Chinese regulators looked to address some of these concerns with the 2016 rollout of national operating standards for ridesharing companies, drivers, and their vehicles. This national approach served as a regulatory floor upon which local regulators could address jurisdiction-specific problems. So far, local regulators have leveraged this opportunity by restricting economic migrants from driving within major metropolitan hubs. Still, concerns about consumer privacy, consumer safety, and monopolistic behaviors persist after the implementation of the national approach.

U.S. regulators may consider the creation of a common regulatory floor through federal legislation or rulemaking. Such a nation-wide floor could help to minimize the inefficiencies and market distortions that result from the current patchwork of wholly unrelated state and local laws. As regulators outside of China continue to evaluate the initial impact of China's new national approach, strong public-private relationships at the expense of eroded individual privacy may become the key trade-off to explore when considering the implementation of a national regulatory approach, especially

²⁸⁸ *Id.* at 406.

if other large ridesharing companies achieve scale and influence in other countries' ridesharing industry comparable to Didi's in China.

* * *