

Consumer Protection in the 21st Century

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Executive Summary

How do we know whether an apple we buy is safe to eat; whether the pound of butter on sale is really a pound (or really butter); whether our cell phone will blow up in our hands or send all of our data to the government; or whether a taxi driver will overcharge us (or worse)? Concerns such as these have driven the creation of consumer-protection laws. But with the emergence of new ways of sharing information and rating suppliers, do we still need such laws?

This brief describes the origin, development, and implications of government-mandated consumer-protection laws and contrasts these with emergent, bottom-up solutions of various kinds, especially those made possible by the internet. Section I offers a brief history of consumer-protection legislation and its effects. Section II discusses some traditional alternatives to such top-down controls, including contract law and reputation. Section III explains the growth of the regulatory state. Section IV describes some modern alternatives to regulation that have been made possible by the internet. Section V offers examples of how the regulatory state has reacted to these new alternatives. Section VI addresses some of the major criticisms of online information sharing. Finally, Section VIII concludes.

I. A Brief History of Consumer-Protection Legislation

Consumer-protection legislation is nothing new. The Babylonian code of Hammurabi, written in about 1760 BC, set prices for various goods and services, ranging from a medical operation to a ship's rent.¹ It also set "prices" for various harms, including theft and injuries (for example, rule number 196 states: "If a man puts out the eye of another man, his eye shall be put out."). Roman

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¹ *The Code of Hammurabi Translated by L. W. King*, YALE LAW SCHOOL (no date), <https://avalon.law.yale.edu/ancient/hamframe.asp>.

emperors introduced various regulations to standardize weights and measures,² which were replicated in various guises by medieval monarchs and local governments. Some of these laws established very specific requirements. Henry III's *Assisa panis et cervisia* ("Assize of bread and ale"), promulgated throughout England in 1256, regulated the sale price of bread and ale of varying quantities.³ Meanwhile, in Bavaria, the *Reinheitsgebot* of 1516 specified that only hops, barley, and water may be used to produce beer.

A. Perverse Effects of Early Consumer-Protection Regulation

While notionally justified on the grounds that they protected consumers, these laws often had the opposite effect: protecting incumbents against competition, driving up prices, and impeding innovation.

Under the *Assisa*, the prices of standard loaves of "wastrel" bread were fixed at a farthing (a quarter penny) and half-penny, but local authorities would vary the size of the loaf based on the prevailing cost of inputs, particularly the price of wheat.⁴ Thus, when wheat prices rose, the mandated size would fall, and vice versa. Most towns had only a small number of bakers, however, and they sometimes would conspire with local authorities to set quantities at levels that created supernormal profits, to the detriment of consumers.⁵ But this was not ubiquitous; in some towns, the level was set infrequently, with the result that, when wheat prices peaked, the level would be too high and bakers would have no incentive to bake, leading to artificial shortages of bread.⁶

Until 1987, when the European Court of Justice ruled that it violated the principle of the free movement of goods,⁷ the *Reinheitsgebot* had been amended only once in nearly 500 years.⁸ Follow-

² Philip Smither, *Roman Weights and Measures*, UNIVERSITY OF KENT (Dec. 13, 2017), <https://blogs.kent.ac.uk/lucius-romans/2017/12/13/roman-weights-and-measures>.

³ James Davis, *Baking for the Common Good: A Reassessment of the Assize of Bread in Medieval England*, 3 *ECON. HIST. REV.* 465 (August 2004). While the assize promulgated in 1256 (51 Henry III) is the best-known and longest lasting, it built upon earlier similar laws, including those proclaimed by Henry II (1154–89), Richard I (1189–99), and John (1199–1216) in England, and others imposed across Europe from 794 AD onwards.

⁴ *Id.*

⁵ *Id.* at 472.

⁶ *Id.*

⁷ *Commission of the European Communities v Federal Republic of Germany*, EUROPEAN COURT OF JUSTICE (Mar. 12, 1987), Case 178/84, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0178>.

⁸ The amendment permitted the use of yeast, the presence of which had been unknown in 1516 (though other exceptions were made, including the grant, to one producer, to use wheat). Stephen R. Holle & Manfred Schaumberger, *The Reinheitsgebot - One Country's Interpretation of Quality Beer*, 7 *BREWING TECHNIQUES* 1 (1999), https://www.morebeer.com/articles/Reinheitsgebot_Brewing_Germany_Purity_Law_Bavaria_1516_Malt_Barley_Water_Hops_Yeast.

ing the ECJ decision, imported beers not compliant with the *Reinheitsgebot* could be sold in Germany, but German producers are still largely bound by the law. In 1993, Germany amended the *Reinheitsgebot*, leading to the adoption of modern craft-beer techniques—but with few exceptions, those beers still cannot be called beer.⁹ As a 2016 article notes, “until the arrival of craft beers, the most recent innovation in German brewing was the advent of the very successful Pilsner in the 19th century.”¹⁰

B. Origins of the Regulatory State

During the 19th century, advances in science and industry dramatically improved the accuracy of measurement—leading to better, more reliable standards, as well as better means of detecting potentially harmful additives. At the same time, industrialization and urbanization resulted in a proliferation of mass-produced processed foods. Many of these contained “adulterants” of various kinds, which reduced the quality of the food and some of which were harmful.

Following a series of studies by Arthur Hill Hassall on instances of adulteration, published in *The Lancet* in the early 1850s,¹¹ Parliament launched a select committee on the issue in 1855. Between 1860 and 1875, Parliament passed a series of acts intended to address the problem of food adulteration,¹² culminating in the Sale of Food and Drugs Act of 1875. These acts established strict rules prohibiting the use of “injurious ingredients” in food and drugs, required local governments to appoint analysts to sample food and drugs for sale in their jurisdictions, and empowered those same governments to prosecute merchants for violating the act.¹³

The Safe Food and Drug Act was the first comprehensive legislation of its kind and arguably was a foundational moment in the establishment of the regulatory state. Other legislatures followed suit with similar laws, including the U.S. Pure Food and Drug Act of 1906.¹⁴ And in Britain and elsewhere, the model of establishing strict rules and empowering agencies to enforce them became pervasive.

⁹ Kate Connolly, *Medieval Beer Purity Law Has Germany's Craft Brewers Over a Barrel*, THE GUARDIAN (Apr. 18, 2016), <https://www.theguardian.com/world/2016/apr/18/germany-reinheitsgebot-beer-purity-law-klosterbrauerei-neuzelle>.

¹⁰ Esme Nicholson, *Germany's Beer Purity Law Is 500 Years Old. Is It Past Its Sell-By Date?*, NATIONAL PUBLIC RADIO (Apr. 29, 2016), <https://www.npr.org/sections/thesalt/2016/04/29/475138367/germanys-beer-purity-law-is-500-years-old-is-it-past-its-sell-by-date>.

¹¹ Arthur Hill Hassall, *Food and Its Adulterations*, THE LANCET (1851-1854).

¹² Neil Coley, *The Fight Against Food Adulteration*, EDUCATION IN CHEMISTRY (Feb. 28, 2005), <https://eic.rsc.org/feature/the-fight-against-food-adulteration/2020253.article>.

¹³ Sale of Food and Drugs Act 1875, c. 63, available at <http://www.legislation.gov.uk/ukpga/1875/63/enacted>.

¹⁴ Pub. L. No. 59-384, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg768.pdf>.

C. Regulation Gets a Red Flag

While various consumer-protection laws typically have been enacted on the premise that they would protect consumers, like the *Assisa* and the *Reinheitsgebot*, they have often had the unintended effect of limiting supply and undermining incentives to innovate, harming the very consumers they are intended to benefit. One of the most blatant examples of this was Britain's Locomotives Act 1865—better known as the “Red Flag Act.” The law limited the speed of self-propelled vehicles on public roads to 4 mph in the countryside and 2 mph in towns, and required that a person walk in front of each vehicle carrying a red flag.¹⁵ Far from protecting consumers, the act had the effect of denying consumers access to a desirable technology. In the 1860s, the vehicles on the roads were heavy, steam-powered contraptions. By disincentivizing innovation, the law likely held up the development in the United Kingdom of better, faster, lighter, and less expensive automobiles that used alternative means of propulsion until 1896, when the speed limit was raised to 12 mph and the red-flag requirement rescinded.¹⁶

II. Contract, Reputation, and Brands as Consumer Protection

Fortunately, these public laws were not the only sources of consumer protection. Indeed, actual protection mainly came from two other sources: private law and public reputation.

A key element of consumer protection has been the existence of warranties, enforceable against a manufacturer and/or vendor, that a product will do what it says it will do. Since Babylonian times, consumers have been protected by laws that impose liability on sellers for fraud.¹⁷ These early laws were likely quite narrow in scope, but they were broadened over time.

First, there was a shift toward a more formal concept of contract formation being by agreement between private parties, rather than being primarily subject to rules set in code. Thus, in Roman Law, parties to certain kinds of contracts could include express warranties if the contract was made face-to-face.¹⁸ During the early phases of the Industrial Revolution, English law adopted a somewhat broader notion of *consensus ad idem* (“agreement [by both parties] to the [same] thing”—often abbreviated to “a meeting of minds”) as the basis for private contract,¹⁹ along with the principle of *caveat emptor* (“buyer beware”).²⁰ Meanwhile, courts in England and other common-law jurisdic-

¹⁵ Locomotives Act 1865, UK Public General Acts 1865 c. 83

¹⁶ Locomotives on Highways Act 1896, UK Public General Acts 1896 c. 36.

¹⁷ Arvinder S. Loomba, *A Chronicle of Global Evolution of Product Warranty*, 55 JPN LND MANAGE ASSOC 311 (January 2005).

¹⁸ Alan Watson, *The Evolution of Law: The Roman System of Contracts*, 2 LHR 1 (1984), at 9.

¹⁹ *Paradine v Jane* (1647) Aleyn 26.

²⁰ *Chandelor v Lopus* (1603) 79 ER 3.

tions, including the United States, gradually imputed terms into contracts pertaining to the quality of products sold, such as requirements that the products be “of merchantable quality” and “fit for purpose.”²¹ Companies also developed express warranties that went beyond those imputed by judges.²²

This combination of express and implied warranties created strong incentives on the part of producers to ensure that the goods and services they sell conform with buyers’ expectations. Meanwhile, implied warranties notwithstanding, the general principle of *caveat emptor* creates strong incentives for consumers to ensure that a product is appropriate for the intended use and to obtain express warranties to that effect. As George Winder explains:

In this Australian case some young ex-service men had rented a threshing machine and undertaken contracts to thresh wheat. The machine had not worked satisfactorily and had finally broken down. Whereupon, the young men sued the owner for the loss they had sustained by reason of the defective machine. There was much sympathy for the young men, and most people in the little town thought they were bound to win their case. They told the Magistrate how in good faith they had rented this machine to do a job of threshing for which it had been built, but it had let them down. To their surprise, the Magistrate, although most sympathetic, pronounced the fatal words “Caveat emptor,” of which they had never heard, and gave the case to the defendant.

The good people who had listened to the case were inclined to agree that “the law was an ass” and to hope that they might never be subject to court action.

Eventually, it appeared that the law was right. The thresher had been used with a very powerful engine entirely unsuited for the job and this had caused the breakdown. This fact had not been known to the Magistrate but, by accepting the principle, “Caveat emptor,” he had reached the right verdict. The young men should have known that the thresher would not work with such an engine and should not have hired it. Having done so, they were not entitled to claim damages against the owner when the machine failed them.²³

In addition to the obligations associated with express and implied warranties, companies have strong incentives to avoid harming their consumers to ensure repeat business and avoid reputational damage. A notable instance of this is Crosse and Blackwell, a prominent U.K. food proces-

²¹ These concepts were developed in case law and subsequently adopted as part of the Sale of Goods Act in the United Kingdom (Sale of Goods Act 1979, UK Public General Acts 1979 c. 54 SCHEDULE 1, Section 14) and the Uniform Commercial Code in the United States (Uniform Commercial Code § 2-315. *Implied Warranty: Fitness for Particular Purpose*).

²² Loomba, *supra* note 18.

²³ George Winder, *Caveat Emptor*, FOUNDATION FOR ECONOMIC EDUCATION (Jan, 1, 1968), <https://fee.org/articles/caveat-emptor>.

sor that was identified in one of Hassell's *Lancet* articles as purveying preserved fruits and vegetables adulterated with copper sulphate.²⁴ Thomas Blackwell declared during the parliamentary inquiry that, following the *Lancet* report, the company immediately eliminated adulterants from its foods.²⁵ The company also put in place a system of farm-to-factory quality control, sourcing ingredients directly from farmers.²⁶ By the mid-1860s, Crosse and Blackwell had become one of the largest food companies in the world and continues to be a significant brand today, suggesting that the firm's actions had the desired reputational effect.

This example highlights the importance of brands as signifiers of quality to consumers. When purchasing products and services, consumers now typically face a choice between several different brands, each of which represents different bundles of characteristics. The existence of such competition means producers of goods and services have incentives to identify and meet the felt needs of different consumers, using their brand(s) to signal to specific groups of consumers. It also provides incentives to innovate so that those felt needs can be met more cost-effectively, thereby increasing the firm's market share.

III. Explaining the Growth of the Regulatory State

Despite firms' incentives to ensure their products meet high standards to avoid liability and reputational damage, governments continued to expand the regulatory state throughout the 20th century. In addition to a plethora of product regulations, entire industries—from mining to finance—have been subject to regulation, and systems of occupational licensing were established for professions ranging from medicine and law to hairdressing.

Economists have long recognized the problems inherent in such top-down government controls. In a seminal 1959 study, Ronald Coase noted that the Federal Communications Commission was not the most efficient or effective allocator of radio spectrum.²⁷ Coase argued that it would be better to establish property rights in spectrum and allow market transactions to determine allocations.

²⁴ Hassall *supra* note 12, at 480.

²⁵ Peter Atkins, *Vinegar and Sugar: The Early History of Factory-made Jams, Pickles and Sauces in Britain*, in D.J. ODDY (Ed.) *THE FOOD INDUSTRIES OF EUROPE IN THE NINETEENTH AND TWENTIETH CENTURIES*, Farnham, UK: Ashgate (2013). http://www.academia.edu/3550965/Vinegar_and_sugar_the_early_history_of_factory-made_jams_pickles_and_sauces_in_Britain.

²⁶ *Id.*

²⁷ Ronald H. Coase, *The Federal Communications Commission*, 2 J LAW ECON 1 (1959); see also Thomas W. Hazlett, David Porter, & Vernon Smith, *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, for the University of Chicago School of Law conference *MARKETS, FIRMS, AND PROPERTY RIGHTS: A CELEBRATION OF THE RESEARCH OF RONALD COASE* (Dec. 4-5, 2009), <https://www.chapman.edu/esi/wp/porter-smith-hazlett-radiospectrum.pdf>.

Yet now, more than 60 years later, although the FCC has improved the efficiency of spectrum allocation by auctioning licenses—arguably heeding Coase’s analysis, at least in part—it continues to act as the ultimate controller.²⁸

A key reason for the persistence of such top-down regulations, despite ample evidence of their folly, is the power of interest groups that benefit directly or indirectly from them. In “The Theory of Economic Regulation,” George Stigler argued that, even when regulations are intended to promote the public interest, regulators tend to be captured by those being regulated. Regulation thereby serves as a barrier to entry, benefiting regulated firms and individuals but at great cost to society.²⁹ This insight is, however, hardly new. Back in 1776, Adam Smith noted that guilds were apt to promote their interests through mandates that limited competition.³⁰

Aside from often benefiting the companies and individuals subject to them, regulations may also benefit more ideological interest groups, leading to a form of tacit collusion between regulated firms and those interest groups. Bruce Yandle explained this phenomenon in his essay on “bootleggers and Baptists,” noting that Baptist ministers call for prohibitions on the sale of alcohol on Sundays at least in part because they want people to go to their churches, so they will fill the collection plates; meanwhile, bootleggers benefit from restrictions on the sale of alcohol on Sunday because they get to be the only suppliers of alcohol on those days.³¹

Such tacit collusion is pervasive. For example, during the 1990s, environmental and consumer-advocacy groups in Europe raised concerns over—and called for bans on—genetically modified crops (GMOs), in spite of the many benefits those technologies bring to consumers and the environment (and a lack of evidence of harm).³² Meanwhile, producers of so-called “organic” food benefited from the scare stories by emphasizing that their foods did not contain GMOs.³³

²⁸ See, e.g., *Stepping In: The FCC’s Authority to Preempt State Laws Under the Communications Act*, CONGRESSIONAL RESEARCH SERVICE (Sep. 20, 2021), <https://crsreports.congress.gov/product/pdf/R/R46736>.

²⁹ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI 3 (1971).

³⁰ ADAM SMITH, *THE WEALTH OF NATIONS* (1776), Book I, Chapter X. “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. . . . But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary. . . . A regulation which enables those of the same trade to tax themselves in order to provide for their poor, their sick, their widows, and orphans, by giving them a common interest to manage, renders such assemblies necessary. An incorporation not only renders them necessary, but makes the act of the majority binding upon the whole.”

³¹ Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REGULATION 12 (June 1983), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/1983/5/v7n3-3.pdf>.

³² GMOs can enable increased productivity using fewer agrochemicals, increasing output and lowering the cost of foods and reducing the amount of land required to grow crops. Meanwhile, there is no evidence that consumption of such crops poses

IV. Alternatives to the Regulatory State

While regulatory capture may explain the persistence of many top-down regulations in the face of overwhelming evidence of better alternatives, it also suggests that there may be a way out. Over the past two decades, innovative ways to enable consumers to make better-informed purchases have emerged that are generally superior to existing top-down regulations.

A. Online Information Sharing

Before the advent of the internet, consumers interested in comparing the quality of various goods and services generally relied on information provided by expert reviewers working for specialist magazines, such as Good Housekeeping (which even established its own institute dedicated to evaluating products and offering product warranties) or nonprofit organizations such as Consumer Reports.³⁴

Today, websites and apps offer various means for consumers to access information pertaining to the quality of goods and services on offer. Thumbtack—a marketplace for services ranging from appliance installation to wedding planners—undertakes background checks on all its providers and enables users to rate the quality of services.³⁵ Ebay enables buyers to rate sellers. Amazon enables buyers to rate both products and vendors. To varying degrees, these sites also enable buyers to provide more detailed feedback on the products and services they purchase, allowing consumers to better match their preferences with those whose tastes and views are more relevant to them.

There are many websites that enable either expert or user-shared evaluations of products and services, offer price comparisons, and enable users to purchase those goods, either directly or indirectly. These include TripAdvisor (mainly focused on accommodation and experiences); Yelp (various services); OpenTable (restaurants); Expedia and Booking.com (flights, cars, accommodation); and, of course, Google (practically everything).³⁶

harms of a different kind or scale to those presented by conventionally bred crops. For a review of the evidence, see NATIONAL ACADEMY OF SCIENCES, *GENETICALLY ENGINEERED CROPS: EXPERIENCES AND PROSPECTS*, National Academies Press (2016), available at <https://www.nap.edu/catalog/23395/genetically-engineered-crops-experiences-and-prospects>.

³³ Robert Paarlberg, *A Dubious Success: The NGO Campaign Against GMOs*, 5 *GM CROPS FOOD* 223 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5033189>.

³⁴ See, e.g., GOOD HOUSEKEEPING INSTITUTE, <https://www.goodhousekeeping.com/institute>; CONSUMER REPORTS, <https://www.consumerreports.org>.

³⁵ *Smart Hiring on Thumbtack*, THUMBSTACK, <https://www.thumbtack.com/safety>.

³⁶ This list is very far from exhaustive. For a range of other popular sites, see Nicole Martins Ferreira, *You Should Try These Website and Apps to Compare Prices*, OBERLO (Oct. 5, 2020), <https://www.oberlo.com/blog/25-best-price-comparison-websites>.

These online rating systems have proven so effective that a 2015 survey from the Pew Research Center found that 40% of U.S. adults said they always use them when making a purchase for the first time, while an additional 42% said they sometimes use them.³⁷ Among those aged 18-29, the proportions were higher: 54% said “always” and 43% “sometimes,” while only 3% said they never used such sites.

Social media (Facebook, Twitter, YouTube, Snapchat, Discord, LinkedIn, Instagram, TikTok, Reddit, Pinterest, etc.) also increasingly offers a means for both companies and consumers to share information about products. Social media also facilitates far more effective feedback loops than was previously possible, with consumers evaluating products and sharing ideas about product improvements. Sometimes this information is helpful primarily to other consumers—e.g., at least one site is devoted to “hacking” Ikea products.³⁸ But in other cases, companies use the information to address criticisms and incorporate new ideas into products.

B. Product Enhancement

In some cases, websites and forums have helped shape an entire industry’s product development cycle. A case in point is the crucial role that online forums played in the early days of e-cigarette technology.³⁹ The first e-cigarette—Ruyan, invented by Beijing-based pharmacist Hon Lik—was generally considered to be a poor substitute for combustible cigarettes. In response, users started “hacking” the product by independently developing bigger, rechargeable batteries and better liquids, among other enhancements, and shared information about these potential improvements with other users of online forums. Manufacturers then incorporated the innovations shared on these sites to develop better commercial products.

Some users even collaborated in developing standards, such as the types of thread that connected different parts of the e-cigarette, which were then adopted by manufacturers.⁴⁰ These interoperability standards resulted in a plethora of products and enabled users to choose their preferred combinations of parts.⁴¹

³⁷ Aaron Smith & Monica Anderson, *Online Reviews*, PEW RESEARCH CENTER (Dec. 19, 2016), <http://www.pewinternet.org/2016/12/19/online-reviews>.

³⁸ See, e.g., IKEA HACKERS, <https://ikeahackers.net>.

³⁹ Forums included, e.g., ECF, <https://www.e-cigarette-forum.com>.

⁴⁰ Personal communication with Luc van Daele, one of the vapers who encouraged the use of these thread standards.

⁴¹ See Julian Morris & Amir Ullah Khan, *The Vapour Revolution: How Bottom-Up Innovation Is Saving Lives*, REASON FOUNDATION (August 2016), available at https://reason.org/wp-content/uploads/files/vapour_revolution_working_paper.pdf.

Since e-cigarettes are estimated to be considerably less harmful than combustible cigarettes, these product improvements have generated enormous benefits to those millions of smokers who had been unable or unwilling to quit before switching to e-cigarettes.⁴² Meanwhile, the e-cigarette revolution emboldened cigarette manufacturers to develop less-harmful alternatives to their own products, something that a half-century of regulation had failed to achieve.

C. Sharing Apps

Other internet-based technologies, such as sharing apps, have gone even further in usurping the role of regulation. Ridesharing apps such as Uber and Lyft offer riders and drivers a way to coordinate with one another, provide price transparency, and enable riders and drivers to rate one another. When a driver picks up a rider, both parties know with whom they are dealing: the driver knows where the rider is going (and is guided to the destination by a GPS-based mapping system) and the rider typically knows how much the trip will cost. Payment is taken through the app, providing protection for both driver and rider. If, for example, a driver takes an inappropriate route, there are systems to dispute excessive charges. In addition, drivers whose ratings fall below a specified level are kicked off the system.

But ridesharing-app companies do not rely exclusively on customer ratings. They also vet every new driver, undertaking background checks via services such as Checkr.⁴³ Ridesharing services thus provide consumers with the confidence that they will be taken safely from their pick-up point to their intended drop-off at an agreed price. Moreover, trip wait times and costs are generally lower for rideshare services than for taxis.⁴⁴ In addition, the popularity of ridesharing services has put pressure on taxi companies to improve the quality, and lower the cost, of their own services, thereby demonstrating that competition is a far more effective driver of quality than regulation.⁴⁵

A 2020 Brookings Institution study estimated the value of Uber's benefits to travelers. Despite slightly higher average fares, they found that Uber generates annual net benefits of approximately

⁴² *Nicotine Vaping in England: 2022 Evidence Update Summary*, UK OFFICE FOR HEALTH IMPROVEMENT & DISPARITIES (Sep. 29, 2022), <https://www.gov.uk/government/publications/nicotine-vaping-in-england-2022-evidence-update/nicotine-vaping-in-england-2022-evidence-update-summary>.

⁴³ *Background Checks for the Gig Economy*, CHECKR, <https://checkr.com/use-cases/gig-marketplace>.

⁴⁴ See Lisa Rayle, Danielle Dai, Nelson Chan, Robert Cervero, & Susan Shaheen, *Just a Better Taxi? A Survey-Based Comparison of Taxis, Transit, and Ridesourcing Services in San Francisco*, 45 *TRANSP POLICY* 168 (January 2016), finding that wait times were significantly lower for rideshare services; See Ed Perkins, *How Much an Airport Uber, Taxi, or Rental Car Costs Around the Globe*, SMARTER TRAVEL (Dec. 21, 2017), <https://www.smartertravel.com/airport-uber-versus-taxi>, offering a comparison of the costs of using Uber versus taxis at various airports and finding that Uber was significantly less expensive in most locations.

⁴⁵ Scott Wallsten, *The Competitive Effects of the Sharing Economy: How Is Uber Changing Taxis?*, TECHNOLOGY POLICY INSTITUTE (June 2015), https://techpolicyinstitute.org/wp-content/uploads/2017/06/Wallsten_The-Competitive-Effects-of-Uber.pdf.

\$1 billion in the Bay Area alone—and, by extension, many billions of dollars nationwide—through a combination of higher service quality, more transparent fares, personalized pricing and services, and expanded taxi service into new markets in response to competition from Uber.⁴⁶ Meanwhile, using data from the New York City metropolitan area, Caitlin Gorbach found that, three years after the introduction of ridesharing services in previously less-accessible locations, net restaurant formation increased by between 6% and 11%, while overall additional amenity value to residents increased house prices by about 3%.⁴⁷

Like ridesharing apps, short-term rental apps and websites such as Airbnb, VRBO, and Flipkey allow users to coordinate short-term stays in rooms or whole properties, make payment, and rate one another. A study recently published in the *American Economic Review* found that, in 2014, Airbnb significantly increased the supply of accommodation, especially in areas of high demand during peak periods.⁴⁸ The authors estimated that, in that single year, Airbnb generated more than \$400 million in additional economic benefits to society.⁴⁹

V. The Regulatory State Pushes Back

Despite the superiority of these decentralized information-sharing mechanisms for allowing consumers to make better-informed decisions, the regulatory state has, in many cases, attempted to continue to “protect” consumers. It has often been supported in these both by various activists and academics and by other regulated businesses.

For example, in the United States, the U.S. Food and Drug Administration (FDA) has hit back at e-cigarettes in a massive way. In 2009, it blocked the importation of e-cigarettes, claiming that they were illegal drug-delivery devices.⁵⁰ Two e-cigarette manufacturers sued the FDA and had the ban overturned.⁵¹ Unfortunately, the plaintiffs in the case argued that, while the FDA did not have authority to regulate e-cigarettes as drug-delivery devices under the Food, Drugs, and Cosmetics

⁴⁶ Hyeonjun Hwang, Jia Yan & Clifford Winston, *Measuring the Benefits of Ridesharing Services to Urban Travelers: The Case of The San Francisco Bay Area*, BROOKINGS INSTITUTION (Oct. 19, 2020), <https://www.brookings.edu/research/measuring-the-benefits-of-ridesharing-services-to-urban-travelers>.

⁴⁷ Caitlin Gorbach, *Your Uber has Arrived: Ridesharing and the Redistribution of Economic Activity*, unpublished PhD thesis (April 2022), available at https://www.dropbox.com/s/12j62po4y3lwzj9/Gorbach_draft_apr2021.pdf?dl=0.

⁴⁸ Chiara Farronato & Andrey Fradkin, *The Welfare Effects of Peer Entry in the Accommodation Market: The Case of Airbnb*, 112 AM ECON REV 1782 (June 2022).

⁴⁹ Specifically, they found that it generated \$305 million in consumer surplus and \$112 million in producer surplus.

⁵⁰ *Sottera, Inc. v. Food Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010); *Smoking Everywhere, Inc., et al v. FDA, et al*, No. 10-5032 (D.C. Cir. 2010).

⁵¹ *Id.*

Act, it did have authority to regulate them as tobacco products under the Tobacco Control Act, and the judge agreed. This offered the FDA a justification to introduce regulations in 2016 “deeming” e-cigarettes to be tobacco products.⁵² Since then, the agency has effectively decimated the industry.⁵³ Combustible cigarettes, which are plausibly at least 20 times more harmful than e-cigarettes, nonetheless remain widely available.

The restrictions imposed by the FDA, as well as regulators in many other jurisdictions, were sought by a classic “bootlegger-Baptist” coalition: the “bootleggers” are cigarette and pharmaceutical manufacturers, who benefit from continued sales of their products, while the “Baptists” are so-called public-health groups, who claim that cigarette smokers should “quit or die” and that new products will result in a new generation of nicotine addicts.⁵⁴ The predictable result has been to reduce the availability and increase the cost of e-cigarettes in markets subject to such restrictions, to the detriment of those who would otherwise use these products as an alternative to more harmful smoking.

Ridesharing services have, unsurprisingly, been subject to persistent challenges from the taxi industry, and governments in many jurisdictions have responded by forcing individuals who wish to offer ridesharing services to obtain taxi licenses. In some places, such services have been banned altogether.

Given the total net benefits of app-based systems, these bans are clearly harmful. Licensing requirements are likely unnecessary from a safety perspective, since both parties are arguably better protected by the app-based system, which requires user and supplier to share pertinent information in advance and creates a record of the identity of each party.⁵⁵ Meanwhile, by imposing costs on those who offer ridesharing services, licensing reduces supply and raises prices, generating net costs. These costs make it uneconomic for many potential suppliers to offer such services.

For example, the New York City Taxi and Limousine Commission requires all operators of ridesharing services to obtain a T&LC license and associated insurance, which comes at an annual cost of some \$3,000.⁵⁶ For people who might otherwise engage in ridesharing only a few hours a week

⁵² 21 CFR Parts 1100, 1140, and 1143.

⁵³ Guy Bentley & Julian Morris, *The FDA Has Decimated the E-Cigarette Market*, REASON FOUNDATION (Sep. 22, 2021), <https://reason.org/commentary/the-fda-has-decimated-the-e-cigarette-market>.

⁵⁴ Jonathan H. Adler, Roger E. Meiners, Andrew P. Morriss, & Bruce Yandle, *Baptists, Bootleggers & Electronic Cigarettes*, 33 JREG 313 (2016).

⁵⁵ Matthew Feeney, *Is Ridesharing Safe?*, CATO INSTITUTE POLICY ANALYSIS (Jan. 27, 2015), available at <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa767.pdf>.

⁵⁶ Daniel Prendergast, *700 Uber Drivers Could Be Fired Under New Bill*, NEW YORK POST (Jul. 12, 2015), <https://nypost.com/2015/07/12/700-uber-drivers-to-be-fired-under-new-bill>.

(for example, at peak times or during a commute), it may not be worth the cost and hassle to obtain such a license. Likewise, those who offer ridesharing services in other parts of the metropolitan area (such as in New Jersey or Connecticut, or even in nearby cities in New York State) may pick up passengers who wish to go to New York City, but without a T&LC license, will be unable to offer return rides. Such licenses unarguably reduce competition and harm consumer welfare – and ought to be challenged as violations of antitrust.

A. When Governments Care About Consumer Welfare

Ironically, despite the *de facto* or *de jure* monopoly status they often enjoy, taxi services have sought to use antitrust law against ridesharing services—e.g., claiming that transportation-network companies circumvent employment and other regulations to gain unfair competitive advantage.⁵⁷ Fortunately, the courts have thus far generally found against such hubristic claims. For example, in 2016, taxi companies in Philadelphia sued Uber alleging that, by avoiding costly regulatory compliance, the company had engaged in anticompetitive behavior in violation of the Sherman Act. The trial judge dismissed the complaint and the 3rd U.S. Circuit Court of Appeals affirmed that dismissal, noting that the company’s entry into the market for on-demand rides actually promoted competition and consumer welfare.⁵⁸ The U.S. Supreme Court refused to hear an appeal, although that has not stopped other groups from making similar claims.⁵⁹

When it comes to harm from products containing nicotine, U.K. agencies have generally been more mindful of consumer welfare than the FDA. While the FDA was trying to ban e-cigarettes in the early 2010s, then-Cabinet Secretary Jeremy Heywood supported e-cigarettes as a less harmful alternative to smoking and commissioned studies from the Behavioral Insights Team into ways to encourage smokers to switch.⁶⁰ Meanwhile, Public Health England (the then-research arm of the National Health Service) commissioned a series of reports into the nature, effectiveness, and

⁵⁷ Nick Passaro, *Uber Has an Antitrust Litigation Problem, Not an Antitrust Problem*, CPI ANTITRUST CHRONICLE (May 2018), available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/CPI-Passaro.pdf>.

⁵⁸ *Philadelphia Taxi Association Inc. v. Uber Technologies Inc.*, No. 17-1871 (3d Cir. 2018), <https://law.justia.com/cases/federal/appellate-courts/ca3/17-1871/17-1871-2018-03-27.html>.

⁵⁹ Mike Scarcella, *Uber, Lyft Drivers Claim Price-Fixing in Lawsuit Against Companies*, REUTERS (Jun, 21, 2022), <https://www.reuters.com/business/autos-transportation/uber-lyft-drivers-claim-price-fixing-lawsuit-against-companies-2022-06-21>.

⁶⁰ *How the Nudge Unit Threw Light on Lighting Up*, CIVIL SERVICE BLOG (Aug. 11, 2015), <https://civilservice.blog.gov.uk/2015/08/11/how-the-nudge-unit-threw-light-on-lighting-up>; see also David Hencke, *Lord Heywood of Whitehall Obituary*, THE GUARDIAN (Nov. 4, 2018), <https://www.theguardian.com/politics/2018/nov/04/lord-heywood-of-whitehall-obituary>, (“Heywood had been a heavy smoker and no doubt understood at a personal level the importance of offering safer alternatives. Sadly, in spite of quitting in 2011, he died of lung cancer in 2018 at the age of 56.”).

health risks associated with e-cigarettes, which concluded that e-cigarettes were “at least 95% safer” than combustible cigarettes.⁶¹ The U.K. government has continued to support e-cigarettes as a less-harmful alternative to combustible cigarettes.⁶²

VI. Addressing Criticisms of Online Information Sharing

While the examples above highlight the benefits that can come from sharing information using online platforms, it is important to acknowledge that “the internet” is hardly an inviolable source of impartial, objective information. There is much nonsense and disinformation available online. Indeed, misinformation about technologies such as GMOs,⁶³ vaccines,⁶⁴ e-cigarettes,⁶⁵ and even bread⁶⁶ are spread virally on websites and social media. Meanwhile, many product “reviews” are posted by companies or their agents seeking to promote their own products.⁶⁷

But the existence of biased and inaccurate information no reason to dismiss crowdsourced information.⁶⁸ Rather, it suggests a need for systems that enable consumers to separate the wheat from the chaff. The operators of platforms are aware of these problems and are evolving mechanisms to address them, such as prioritizing reviews by verified purchasers, reviewers of multiple products, and other means.⁶⁹

⁶¹ See, e.g., Anne McNeil et al., *E-cigarettes: An Evidence Update*, PUBLIC HEALTH ENGLAND (August 2015), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733022/E-cigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf.

⁶² *E-Cigarettes and Vaping: Policy, Regulation and Guidance*, UK OFFICE FOR HEALTH IMPROVEMENT AND DISPARITIES (October 2022), <https://www.gov.uk/government/collections/e-cigarettes-and-vaping-policy-regulation-and-guidance>.

⁶³ Shahla Wunderlich & Kelsey A. Gatto, *Consumer Perception of Genetically Modified Organisms and Sources of Information*, 6 ADV NUTR. 842 (Nov. 10, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4642419>.

⁶⁴ Alexander Muacevic et al., *The Anti-Vaccination Movement: A Regression in Modern Medicine*, 10 CUREUS e2919 (Jul. 3, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6122668>.

⁶⁵ Linda Bauld, *The Evidence Keeps Piling Up: E-Cigarettes Are Definitely Safer Than Smoking*, THE GUARDIAN (Dec. 29, 2017), <https://www.theguardian.com/science/sifting-the-evidence/2017/dec/29/e-cigarettes-vaping-safer-than-smoking>.

⁶⁶ Michael Specter, *Against the Grain: Should You Go Gluten-Free?* THE NEW YORKER (Oct. 27, 2014), <https://www.newyorker.com/magazine/2014/11/03/grain>.

⁶⁷ Yuanyuan Wu et al., *Fake Online Review: Literature Review, Synthesis, and Direction for Future Research*, 132 DECIS. SUPPORT SYST. 113280 (May 2020).

⁶⁸ Counterintuitively, the presence of some inaccurate information may actually improve users’ ability to make good decisions, at least with regard to estimates of the size of effects, which is subject to cognitive biases. See Bertrand Jayles et al., *How Social Information Can Improve Estimation Accuracy in Human Groups*, 114 PROC. NAT. ACAD. SCI. 12620 (Nov. 8, 2017), <http://www.pnas.org/content/114/47/12620>.

⁶⁹ Geoff Donaker, Hyunjin Kim, & Michael Luca, *Designing Better Online Review Systems*, HARV. BUS. REV. (December 2019), <https://hbr.org/2019/11/designing-better-online-review-systems>.

In many respects, despite their imperfections, the information and assurances that consumers obtain through these internet-based systems is far superior to the information and quality checks required by government-imposed regulations. A 2016 survey by the Pew Research Center found that 46% of respondents felt that consumer reviews on websites and apps made them feel confident about their purchases, compared with 26% for “government regulation”; meanwhile, 41% said such reviews make companies accountable to their customers, against 30% for government regulation; and 41% said consumer reviews helped ensure the safety of products and services, against 33% for government regulation.⁷⁰ A 2021 survey by YouGov found that 54% of respondents in the United States trusted crowdsourced online reviews, suggesting that trust in such reviews has increased since 2016.⁷¹ Meanwhile, 57% found such reviews “somewhat useful” and a further 21% found them “very useful.”

VII. Conclusions

Returning to the questions asked in the opening paragraph, it is by now perhaps clear that there are no definitive answers. But it is surely instructive that, when it comes to making purchases, a considerably greater proportion of consumers value the information and assurances provided by online services than value government regulation. Indeed, it is not unreasonable to conclude that these services are increasingly usurping the role of government regulations as validators of information.

But companies who have been protected from competition by regulation have, unsurprisingly, sought protection from the purveyors of goods and services that threaten their markets. Most obviously, taxi companies and medallion owners have lobbied fiercely to require ridesharing services to comply with taxi regulations—or ban them altogether. Likewise, hotel operators have sought to impose restrictions on the operation of home-sharing services. And cigarette manufacturers and pharmaceutical companies have likely benefitted from regulations that impose very onerous restrictions on the supply of e-cigarettes, hindering competition and harming consumer welfare.

These efforts by vested interests should be resisted. One way to do so would be for government agencies charged with promoting competition and the free movement of goods to use their powers to counter the actions of other governments to impose anti-competitive regulation—as the European Commission did when French brewers challenged the *Reinheitsgebot*.

⁷⁰ Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce: Online Reviews*, PEW RESEARCH CENTER (Dec. 19, 2016), <http://www.pewinternet.org/2016/12/19/online-reviews>.

⁷¹ Graeme Bruce, *Most Consumers Trust Review Sites. Here’s What They Use Them for Most*, YOUNGOVAMERICA (May 19, 2021), <https://today.yougov.com/topics/technology/articles-reports/2021/05/19/most-consumers-trust-review-sites>.

Competition and consumer-protection authorities should recognize the benefits that new technologies can offer in promoting both competition and consumer welfare. Instead of regulating those products, as some demand, they should be liberated to innovate better ways to enable consumers to access information, goods, and services.

This is not to advocate for the elimination of all government-imposed consumer-protection regulation, but rather to advocate for scaling back such regulation so that it focuses narrowly on well-recognized harms that are not adequately addressed by private alternatives—including those provided through internet-based services—and to ensure that when regulations are imposed, the benefits of such regulation unambiguously outweigh the costs they impose on society.