Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution

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Within the past several years, a new business model has rapidly expanded into a billion dollar industry, with potential to expand further—the sharing economy. The North Carolina General Assembly has yet to address how it intends to regulate the sharing economy. The General Assembly could choose to create completely new regulations for the sharing economy, decide to shoehorn the sharing economy into existing regulations, or elect to do a bit of both. As the General Assembly makes its decision, it should keep in mind the Constitutional challenges that new regulations will prompt. This Recent Development evaluates how the General Assembly should address regulating the sharing economy.

I. INTRODUCTION

Airbnb. Uber. ThredUP. The first company allows people to rent out extra space in their homes.¹ The second connects people that need rides with individuals that want to drive for a fee.² And the third sells “like-new” clothing online.³ At first glance, these three companies do not have much in common. But all three are

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¹ The Sugarhill Gang, Rapper’s Delight, on Sugarhill Gang (Sugar Hill Records 1979).
² J.D. Candidate, University of North Carolina School of Law, 2016. The author would like to thank Kristen Jarman for introducing him to the sharing economy and for supporting him in this endeavor. The author would also like to thank the NC JOLT staff and editors for their thoughtful feedback, particularly Britton Lewis, Jennifer Nusbaum, and Ben Szany.
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participants of a rapidly growing business model called the “sharing economy.”

The sharing economy business model is based around the principle of using personal resources more efficiently. Personal resources are those resources that ordinary people have regular access to, such as spare bedrooms, large cars, or no-longer-worn clothes. Owners often underutilize their personal resources, either by not using the resources at all or by not using them to their full extent. Sharing economy companies, such as Airbnb, Uber, and thredUP, have discovered that non-owners are interested in accessing these underutilized resources and owners are willing to allow non-owners this access, often for a fee. To help facilitate this access, sharing economy companies act as online forums for people to advertise their available resources.

Over the past several years, many companies have emerged using the sharing economy business model. These companies

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4 Molly Cohen & Corey Zehngebot, Heads Up: What’s Old Becomes New: Regulating the Sharing Economy, 58 B.B.J. 6, 6 (2014). It should be noted that while the word “sharing” usually means to use something with others free of charge, “sharing” in the sharing economy does not necessarily mean that items are free. Samuel Nadler, The Sharing Economy: What Is It and Where Is It Going? (May 9, 2014) (unpublished M.B.A. thesis, on file with MIT Sloan School of Management). Instead, “sharing” refers to providing temporary access of a good or service to many people, often as a result of a monetary exchange. See Kurt Matzler et al., Adapting to the Sharing Economy, 56(2) MIT Sloan Management Rev. 71, 71 (2015).

5 Cohen & Zehngebot, supra note 4, at 6.

6 See Matzler et al., supra note 4, at 72.

7 See id. Even though these personal resources are often underutilized, owners would still like to have access to them. For example, an owner that has a lawnmower still wants to have access to that mower, but may only use that mower once a week during the year.


have received high praise for their innovation and their ability to lucratively break into established industries that have grown “greedy and lazy.” Sharing economy companies have benefited from operating with near zero marginal cost, few regulations, and through social media systems.

However, critics, including state and local governments, have disparaged these companies for operating with questionable legality. In 2014, New York Attorney General Eric T. Schneiderman, subpoenaed Airbnb’s records. Based on the information from these records, Scheniderman drafted a critical report of Airbnb and many Airbnb hosts. This report stated that as many as 7 percent of Airbnb rentals violate state and local laws, and concluded that Airbnb might owe as much as $33.4 million in taxes to New York City.

San Francisco has also started to regulate the sharing economy. The San Francisco ordinance, commonly known as

Zaarly, Lyft, Lending Club, Fon, SideCar, Poshmark, and Neighborgoods as examples of pioneers in the sharing economy).

11 See Cohen & Zehngebot, supra note 4, at 6.
15 Matzler et al., supra note 4, at 72.
16 See Cohen & Zehngebot, supra note 4, at 6; Hamilton, supra note 9.
19 Id. at 9–10.
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the “Airbnb Law,” attempts to regulate a sector of the sharing economy that provides peer-to-peer, short-term property rentals, such as those rentals facilitated by Airbnb. This San Francisco regulation has been controversial; an Airbnb competitor, HomeAway, filed a lawsuit challenging the constitutionality of the new regulation.

Other governments, both state and local, are also determining how to regulate the sharing economy. The North Carolina General Assembly is set to consider the regulation of sharing economy companies in 2015. In light of this potential decision by the state legislature, and the increasing importance of effectively regulating the rapidly growing sharing economy, this Recent Development endeavors to provide some recommendations for the General Assembly. This Recent Development examines some of the regulatory concerns associated with the sharing economy and evaluates some potential Constitutional challenges regulations might face.

Part II will define the sharing economy generally and provide an overview of the business of the sharing economy. Then, Part III will examine attempts to regulate peer-to-peer rental organizations, specifically focusing on San Francisco’s recent attempt, and will highlight potential legal and regulatory hurdles. Part IV will analyze the Constitutional arguments against regulating the sharing

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23 See Cutler, supra note 20.
26 See Valencia, supra note 25; Campbell, supra note 25.
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economy, specifically focusing on Substantive Due Process and Equal Protection arguments. Part V will briefly conclude.

II. THE BUSINESS OF SHARING

Although this Recent Development largely uses examples of two specific sectors of the sharing economy—peer-to-peer accommodation sharing and ride sharing—a broader overview of the sharing economy helps illustrate how this sector is developing and the legal and economic challenges it faces. This section provides a brief overview of the sharing economy, discusses the peer-to-peer accommodation sector, and then analyzes growth and changes in the sharing economy.

A. Access is King—Background of the Sharing Economy

The central idea behind the sharing economy is that there is “untapped potential residing in goods that are not fully exploited” by their owners. The sharing economy suggests that the full potential of these underexploited goods can be unlocked when the goods’ owners allow the community to access them. By allowing community access to these goods, owners allow more people to use a specific good and spread the cost of using that good among the community by charging for the use of the good. Thus, the sharing economy creates a community that uses its goods more efficiently, with lower costs, and with greater access. In the sharing

27 Though ‘exploiting’ is often used as a negative term to describe taking advantage of a weaker entity, in this Recent Development (and in economics more generally) ‘exploiting’ simply means fully utilizing an investment or good to create maximum value for its investor. See, e.g., Matzler et al., supra note 4, at 72.

28 Matzler et al., supra note 4, at 72.

29 See id. In the example of a person with a lawnmower who only uses it once a week, a lot of potential is wasted with the lawnmower just sitting in the shed, day after day—the mower is an under-exploited good. The mower’s potential could be unlocked if the owner allowed others in his neighborhood to rent the mower on the days he was not planning on using it.

30 See id.
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The economy, “[a]ccess to goods and skills [has become] more important than ownership of them.”

Broadly, “anything to which access is enabled through pooling of resources, products or services” can be shared. This broad sharing world includes everything from renting out parking spots, to hiring a temporary friend, to sharing leftover food. In order to better understand this world, Rachel Botsman suggests that the sharing world can be divided into three groups: “first, product-service systems that facilitate the sharing or renting of a product (i.e., car sharing); second, redistribution markets, which enable the re-ownership of a product (i.e., Craigslist); and third, collaborative lifestyles in which assets and skills can be shared (i.e., coworking spaces).” Airbnb and other peer-to-peer accommodation sharing companies fall under the first category.

B. Su Casa es Mi Casa—Peer-to-Peer Accommodation Sharing Overview

Within the product-service systems group of the sharing economy, a specific sector provides a short-term accommodation rental listing service. Companies in this sector allow people with spare rooms, apartments, or unused houses to list these

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31 Sacks, supra note 8.
32 Matzler et al., supra note 4, at 72.
37 Sacks, supra note 8.
38 The traditional adage is ‘mi casa es su casa,’ meaning ‘my house is your house.’ The change to ‘su casa es mi casa,’ meaning ‘your house is my house,’ illustrates how the sharing economy allows many people to have access to one person’s resources and also highlights how the sharing economy is changing traditional industries.
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accommodations online in order to allow others in the community
to rent them.40 These companies facilitate short-term, peer-to-peer
property rentals, essentially creating “forum[s] where people run a
bed and breakfast out of their own home.”41

Airbnb is the most well-known example of this specific sector
of the sharing economy. In order to list a property on Airbnb, the
owner must list their property with a description and photos, write
a short biography, and verify their identity.42 Both the property host
and guests can participate in a “‘double-blind review system’
where guests rate their hosts, and hosts rate their guests.”43 This
process requires that prospective sharers join a network where
reputation and trust are often as valuable as currency.44 Executives
for sharing economy companies contend that by building rating
systems and other self-policing methods into their networks, they
create a reputation-based system that instills trust in their network
users.45 The effectiveness of such systems is discussed below.46

Although Airbnb may be the most prominent of the
peer-to-peer rental companies, it is certainly not the only one.47
Airbnb’s competitors include HomeAway, a company that focuses
on renting second homes,48 Vacation Rental by Owner, which uses

40 Charlotte Davis, Big Changes Ahead for Airbnb and Other Lodging-share
Websites?, N.C. J.L. & TECH. (Sept. 22, 2014) http://ncjolt.org/big-changes-
ahead-for-airbnb-and-other-lodging-share-websites/.
41 Id.
42 Ins and Outs of Airbnb, PORTLAND PRESS HERALD, July 21, 2014.
43 Barry Smith, Airbnb Gets A Pass From NCGA For Now, CAROLINA
display_exclusive.html?id=11706.
44 See Sacks, supra note 8. The rationale behind these networks is to establish
trust between the lender and the borrower of the good. If a person decides to
spend a night in a stranger’s home, both parties involved should have a way to
showcase their trustworthiness to each other.
45 See id.
46 See infra notes 152–61 and accompanying text.
47 Heather Yamada-Hosley, The Best Hotel Alternatives (Besides Airbnb),
LIFEHACKER (Sept. 9, 2014), http://wayfarer.lifehacker.com/the-best-hotel-
alternatives-besides-airbnb-1630874742.
Brustein, An Airbnb Rival Challenges San Francisco's Airbnb Law, BLOOMBERG
BUSINESSWEEK (Nov. 3, 2014), http://www.businessweek.com/articles/2014-11-
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a similar model to Airbnb, travelmob, with a focus on Asia and the Pacific, and onefinestay, which guarantees that the owners of the rentals will not be around when the renters are there.

C. Ride Sharing

Another significant sector of the sharing economy is ride sharing. Sharing economy companies operate transportation services similar to traditional taxi services. However, ride sharing companies do not own any vehicles, do not directly hire drivers as employees, and do not have potential passengers hail rides from the side of the road. Instead, ride sharing companies facilitate an exchange between local, private drivers—using their personal vehicles—and potential passengers via a smartphone application. Passengers hail and pay drivers electronically.

03/san-francisco-faces-a-lawsuit-over-its-airbnb-law [hereinafter Brustein, Airbnb Rival].


52 Ride sharing has other aliases, including ridesharing, ride-matching, and peer-to-peer services. Donald N. Anderson, “Not Just a Taxi”? For-Profit Ridesharing, Driver Strategies, and VMT, 41 TRANSPORTATION 1099, 1100 (2014).

53 Throughout this Recent Development, the word “traditional” is used to describe various types of companies and industries that existed prior to the emergence of the sharing economy and are now being disrupted by its emergence. Sharing economy companies are characterized by their use of digital platforms to facilitate transactions, offering access instead of ownership, and promoting networks that involve deep social interactions. The Sharing Economy: How It Will Disrupt Your Business, PricewaterhouseCoopers, 3 http://pwc.blogs.com/files/sharing-economy-final_0814.pdf (last visited Mar. 17, 2015). In contrast, traditional companies focus on ownership, are well-regulated, and established. Matzler et al., supra note 4, at 72; Dan Preston, How The Internet Of Everything Transforms Traditional Industries, FORBES (July 29, 2014, 8:43 AM), http://www.forbes.com/sites/groupthink/2014/07/29/how-the-internet-of-everything-transforms-traditional-industries/. Two examples of traditional industries are the taxicab industry and the hotel industry.

54 See Anderson, supra note 52, at 1099–1100.

55 See id.

56 Id.

57 Id. at 1100.
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ride sharing company takes a percentage of this fee for its role in facilitating the transaction.\textsuperscript{58} The company also provides an online community that allows drivers and passengers to rate and evaluate each other.\textsuperscript{59} Although the ride sharing drivers are not licensed as taxi drivers,\textsuperscript{60} ride sharing companies often require their drivers to undergo strict background checks before they can use the company’s service.\textsuperscript{61}

Uber and Lyft are the market leaders in the ride sharing sector of the sharing economy. Forbes stated that Uber was worth $18.2 billion,\textsuperscript{62} while the Wall Street Journal reports that Lyft is valued at $2.5 billion.\textsuperscript{63} Other companies in the ride sharing sector include Relay Rides, Sidecar, and Zimride.\textsuperscript{64}

D. Explosion of Sharing—The Growth of Sharing Economy

The sharing economy is not a new concept.\textsuperscript{65} In the past, people have regularly shared with others their unused or underused
personal resources, often for monetary gain. However, the development of technology expanded the pool of potential consumers. The Internet allows companies to highlight underused resources to millions of people around the world, opening up the sharing economy on an unprecedented and enormous scale. For example, Airbnb claims more than 25 million guests shared their hosts’ accommodations using their service in more than 34,000 cities in 190 countries.

The revenue growth of the sharing economy also sets this new iteration of sharing apart from traditional sharing—lending something to someone for nothing. Only four years after its founding, Airbnb recorded annual revenue of $250 million. In 2014, company valuation experts valued Airbnb at $10 billion after it raised between $400 and $500 million in capital from investors. At $10 billion, Airbnb’s value is greater than Hyatt Hotels Corp. ($8.4 billion) and Wyndham Worldwide Corp. ($9.3 billion), two of the world’s highest grossing hotel corporations.

Future revenue growth of the sharing economy promises to be even larger. PricewaterhouseCoopers, a company that does financial consulting among other things, found that the sharing economy generated $15 billion in 2013, and projects that annual revenue will increase to $335 billion in 2025, a staggering 2,200 percent increase in 12 years.

E. Changes in the Sharing Economy

Over the past few years, the sharing economy developed quite rapidly in many different ways, including by evolving from free to commercial,74 amateur to professional,75 and local to global.76 The early members of the Internet-driven sharing economy started by providing free access to goods and services.77 Now, the sharing economy is firmly rooted in commerce.78 As one early investor in Twitter articulated the value shift, “I’d never invest in something that’s purely warm and fuzzy.”79

Originally, sharing resources was done in primarily local networks—early colonists sharing tools on the farm, pioneers forming wagon trains,80 and churches organizing rummage sales for the needy.81 However, the Internet has had an amplifying effect on the sharing economy.82 Now Airbnb reaches over 34,000 cities worldwide,83 and Uber is in more than 54 countries.84 Sharing has gone global.

The sharing economy also shifted from amateur to professional. An increasing number of professional organizations are entering a market that was originally dominated by amateur users. The sharing economy “is supposed to offer a new kind of capitalism, one where regular folks, enabled by efficient online platforms, can turn their fallow assets into cash machines.”85 However, some commercial organizations saw the opportunity to make substantial revenue in the sharing economy. For example, in

74 See Sacks, supra note 8.
76 See Burnett, supra note 65, at 2.
77 Sacks, supra note 8 (highlighting Freecycle and CouchSurfing as early members of the sharing economy that encouraged sharing goods for free).
78 Id.
79 Id. (quoting venture capitalist Ann Miuar-Ko).
80 Burnett, supra note 65, at 2 (“Nineteenth-century pioneers headed West with pooled resources, forming wagon trains to secure the common defense.”).
81 See id.
82 Id.
83 AIRBNB, supra note 1.
84 UBER, supra note 2.
85 Alden, supra note 75.
New York City, commercial Airbnb renters generated thirty-seven percent of the total revenue of Airbnb users, despite representing just six percent of Airbnb hosts. In fact, many Airbnb users in NYC were operating de facto hotels. While the sharing economy may have started out as a way for amateurs to generate extra income from their under-utilized goods, professional users have now since joined in the sharing.

F. Value of Sharing Network

As the sharing economy has gone global, it has also become a very lucrative prospect for investors. In 2014, Uber raised $1.2 billion in funding, while Airbnb raised $450 million. After this funding, these sharing economy companies are valued by experts at $40 billion and $10 billion, respectively. The question then becomes, what value do investors see in these sharing economy companies? The answer is complex, but can be explained in some part by these companies’ abilities to operate with near zero marginal cost, the potential for the sharing economy networks, and the value of the sharing network.

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86 N.Y. STATE OFFICE OF THE ATT’Y GEN., supra note 18, at 2.
87 Id. at 12.
88 Alden, supra note 75.
91 Vaccaro, supra note 89.
92 Konrad, supra note 90.
93 Tech companies are often difficult to value because new companies have not come close to reaching their potential. When valuing these companies, a multiplier will often be used. For more information about how Airbnb and Uber were valued, see generally Barry Libert et al., What Airbnb, Uber, and Alibaba Have in Common, HARV. BUS. REV. (Nov. 20, 2014), https://hbr.org/2014/11/what-airbnb-uber-and-alibaba-have-in-common (analyzing the value of new, online-based companies).
94 Rifkin, supra note 13.
and the ability of the sharing economy Internet platforms to create a monopoly.\textsuperscript{96}

Marginal cost “is the cost of producing an additional unit of a good or service once a business has its fixed costs in place.”\textsuperscript{97} For a traditional hotel chain, marginal cost would be the cost of adding an extra room to its inventory.\textsuperscript{98} For a peer-to-peer accommodation sharing company, marginal cost would be adding another listing to its website.\textsuperscript{99} Peer-to-peer companies shift the cost of physical inventory expansion onto a third party—somebody else builds the accommodation, while the sharing company simply provides the listing. Since the marginal cost is significantly less for the peer-to-peer sharing company than the traditional hotel chain, the sharing company can add to its inventory significantly with little to no additional cost.\textsuperscript{100} Meanwhile, the traditional chain can expand only by creating a new hotel, expanding an old one, or renting a new space.\textsuperscript{101} The low cost of adding additional inventory makes many sharing economy companies attractive options for investors.

In addition to the low cost of inventory expansion, many sharing economy companies are creating vast online networks for their users.\textsuperscript{102} For example, Uber has more than 8 million users,\textsuperscript{103}


\textsuperscript{97} Rifkin, supra note 13.

\textsuperscript{98} Id.

\textsuperscript{99} Id. Additional server and web hosting space is one of the only real increased costs the sharing economy companies might face from adding new inventory.


\textsuperscript{101} Rifkin, supra note 13.

\textsuperscript{102} See id.

\textsuperscript{103} See Sacks, supra note 8.

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and Airbnb has more than 500,000 property listings.\textsuperscript{105} In order to encourage sharing of personal items such as a person’s home or the use of their car, companies must companies must establish trust between users.\textsuperscript{106} Companies require users to share personal information on the companies’ networks. This information may include a user’s photo, pictures of a user’s home, and any materials gained from reviews written by and about the user.\textsuperscript{107} Companies with these networks then harvest users’ information, selling it to other companies,\textsuperscript{108} using it for targeted advertising,\textsuperscript{109} or both. The economic potential of these information networks can be enticing to investors.

As these sharing economy networks continue to attract more users, their ability to reach a monopoly position in their sector increases.\textsuperscript{110} As one journalist writing for Salon pointed out, many large Silicon Valley companies have followed a pattern: “[f]irst lure them in and establish your monopoly, then monetize.”\textsuperscript{111} In order to do this, a sharing economy company identifies a core market.\textsuperscript{112} Then the company offers its services at a low price to capture a share of the market.\textsuperscript{113} The company builds up a critical mass of users within its core market, making it an attractive option for buyers and sellers.\textsuperscript{114} Once the company captures this monopoly share, they can use their powerful algorithms to manipulate the

\textsuperscript{105} Gregory Ferenstein, \textit{Uber and Airbnb’s Incredible Growth in 4 Charts}, VENTURE BEAT, (June 19, 2014, 6:00 AM) http://venturebeat.com/2014/06/19/uber-and-airbnbs-incredible-growth-in-4-charts/.
\textsuperscript{106} See Sacks, supra note 8.
\textsuperscript{107} See \textit{Ins and Outs of Airbnb}, supra note 42.
\textsuperscript{108} Beckett, supra note 95.
\textsuperscript{109} See \textit{How Social Sites Make Money}, supra note 95.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
prices of the services offered.\textsuperscript{115} In order to maintain their monopolies and expand monopolies into other marker areas, more established companies will purchase newer companies as Google did with YouTube.\textsuperscript{116} Companies with the ability to create monopolies in their specific sectors have incredible value to investors.

The rapid increase in the number of users and the huge financial growth of the sharing economy are causing state and local governments, such as those in North Carolina, to begin regulating the sharing economy.\textsuperscript{117}

\section*{III. More Money, More Problems—State and Local Regulation of the Peer-to-Peer Accommodation Sharers}

In the past, small-scale sharing has generally either been ignored by the legal system or unregulated.\textsuperscript{119} However, as the sharing economy has ballooned and become increasingly lucrative,\textsuperscript{120} the companies involved are becoming harder for regulators to ignore.\textsuperscript{121} Lawmakers and other businesses have pushed for increasing regulations on the sharing economy,\textsuperscript{122} though there remain concerns over how best to regulate it.\textsuperscript{123}

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\textsuperscript{115} Olma, supra note 96. A good example of this is Uber’s surge pricing during peak demand, which can spike prices of a ride up to seven times their normal value. The way that this works is that when demand for rides spikes, Uber’s algorithm elevates the price of a ride to many times the price of a normal ride. \textit{Pricing the Surge, Free Exchange, ECONOMIST} (Mar. 29, 2014, 3:58 PM), http://www.economist.com/news/finance-and-economics/21599766-economics-ubers-attempt-revolutionise-taxi-markets-pricing-surge.
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\textsuperscript{116} Eskow, supra note 110.
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\textsuperscript{117} See Valencia, supra note 25.
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\textsuperscript{118} See \textsc{The Notorious B.I.G., Mo Money, Mo Problems, on Life After Death} (Bad Boy Records 1997).
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\textsuperscript{119} Cohen & Zehngbot, supra note 4, at 6 (“though barter exchange is taxable”).
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\textsuperscript{120} Id. (“Forbes estimates the sharing economy generated $3.5 billion in 2013.”); Hamilton, supra note 9. (“[T]he consumer peer-to-peer rental market alone is worth $26 billion.”).
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\textsuperscript{121} Streitfeld, supra note 12.
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\textsuperscript{122} See, e.g. id. (“Mr. Schneiderman and city regulators will also announce Thursday a joint enforcement initiative to shut down illegal hotels. Various
A. Attempts at Regulation

San Francisco, the birthplace of Airbnb, recently attempted to regulate the sharing economy by enacting an ordinance targeting short-term, peer-to-peer rental companies. The San Francisco ordinance, colloquially known as the “Airbnb law,” has been controversial, with a lawsuit filed over the constitutionality of these regulations. However, as one of the most recent and largest cities to enact new regulations for the shared economy, San Francisco’s new regulations are worth examining.

The San Francisco ordinance endeavored to strike a balance between allowing short-term rentals for those people that needed the extra money and trying to eliminate apartment complexes that were turning into de facto hotels. In order to accomplish these goals, the new ordinance enforced requirements on the hosts of the properties, while leaving the peer-to-peer sharing companies largely unaffected.

The new ordinance creates a public registry of hosts. Hosts must pay a one-time $50 fee every two years and register with the regulators will investigate violations of building and safety codes and tax regulations.

See, e.g. Arun Sundararajan et al., Regulating the Sharing Economy, N.Y. Times (May 6, 2014) http://www.nytimes.com/roomfordebate/2014/05/06/regulating-the-sharing-economy (debating how the sharing economy should be regulated).

S.F., Cal, Ordinance No. 218-14 supra note 21; see Cutler, 7-4 Vote, supra note 20.

Cutler, 7-4 Vote, supra note 20; Brustein, Airbnb Rival, supra note 48. The lawsuit centered around language that permitted short term rentals only when a “Permanent Resident occupies the Residential Unit for no less than 275 days out of the calendar year in which the Residential Unit is rented as a Short-Term Residential Rental.” S.F., Cal, Ordinance No. 218-14, supra note 21, at 17; HomeAway Inc. v. City & County of San Francisco, 2015 U.S. Dist. LEXIS 9912 *3 (N.D. Cal. Jan. 27, 2015).


Cutler, 7-4 Vote, supra note 20.
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city planning department.\textsuperscript{129} Hosts are also now required to pay hotel taxes to the sharing economy company, which the sharing economy companies will then remit to the city on behalf of the hosts.\textsuperscript{130} Additionally, hosts must have homeowner’s insurance with liability coverage of at least $500,000 and abide by building codes.\textsuperscript{131} Rental spaces that do not have hosts, non-hosted rentals,\textsuperscript{132} are limited to ninety days of short term renting per year.\textsuperscript{133} Consequences of non-compliance range from paying civil penalties of up to $1,000 per day,\textsuperscript{134} to suspension of registration.\textsuperscript{135}

Despite taking nearly two years to craft,\textsuperscript{136} the Airbnb law has left some dissatisfied.\textsuperscript{137} Many critics of the new ordinance would like to have the ninety-day per year limit apply to all rentals, because they claim it is difficult to distinguish hosted rentals from non-hosted rentals.\textsuperscript{138} In addition, critics argue that many provisions in the law are functionally unenforceable.\textsuperscript{139} Even if the law can be enforced, the $50 fee, paid for a two-year period, may not provide enough funding for the government to support an effective enforcement framework.\textsuperscript{140} Any effort to ensure compliance would face the 5,000 Airbnb rentals and 1,200 HomeAway rentals San Francisco sees each night.\textsuperscript{141} Although San Francisco has taken a big step forward in regulating part of the sharing economy,

\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Non-hosted rentals are rental properties where the owner is not the primary resident. Some examples of non-hosted rentals are apartment complexes and second homes.
\textsuperscript{134} S.F., Cal, Ordinance No. 218-14, supra note 21, at 22.
\textsuperscript{135} Id. at 19.
\textsuperscript{137} Cutler, 7-4 Vote, supra note 20.
\textsuperscript{138} Id.
\textsuperscript{139} Cutler, Decision Day, supra note 133.
\textsuperscript{140} Cutler, 7-4 Vote, supra note 20.
\textsuperscript{141} Id.; Musil, supra note 22.
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questions remain about several practical aspects of the new regulations and whether the attempted goals are worthwhile.

The city of Raleigh, North Carolina, is considering regulating the sharing economy. As part of this process, Travis Crane, the Raleigh City Planning and Zoning Administrator, compiled a report on “best practices related to short term residential rentals.” In this report, Mr. Crane evaluated thirteen different cities that have approved sharing economy short-term rentals. Mr. Crane noted that ten of the cities required the rental hosts to be licensed and pay a fee. Additionally, six of the cities required that the rental properties undergo a safety inspection.

Mr. Crane’s report detailed three recommendations for the Raleigh City Council to consider: (1) maintain existing regulations, (2) “[a]uthorize a text change to amend the [Raleigh] Unified Development Ordinance,” expanding zoning availability for and standards for short-term rentals, and (3) require a special use permit for hosts to operate in certain districts. By maintaining the existing regulations, Mr. Crane wants to allow short-term rentals to continue in the zoning areas that already allow for these rentals. A text change to the Unified Development Ordinance would set standards for short-term rentals and expand the areas in which they are allowed to operate.

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142 Smith, supra note 43.
144 Portland, OR; Seattle, WA; San Francisco, CA; San Diego, CA; Palm Springs, CA; Phoenix, AZ; Las Vegas, NV; Austin, TX; Madison, WI; Chicago, IL; Miami, FL; Charleston, SC; and Washington DC. Id. at Attachment 2.
145 Id.
146 Id.
147 Id.
148 Id. at 5.
149 Id.
150 Standards “could include a definition of the use, appropriate zoning districts for the use, standards related to occupancy, size and parking, and a business process for licensing, permitting, registration and inspection.” Id.
151 Id.
As the General Assembly considers regulating the sharing economy, they would do well to follow Mr. Crane’s example and evaluate the best practices of locations that have already regulated sharing economy companies, both inside and outside of North Carolina.

B. \textit{Consumer Protection}

When companies act as large-scale facilitators in many transactions between numerous individuals, consumer protection becomes a concern.\textsuperscript{152} One solution is for companies to maintain internal methods for consumer protections, such as consumer rating systems.\textsuperscript{153} Many sharing economy companies investing in this method find that rating systems foster a sense of community and are relatively inexpensive to implement.\textsuperscript{154}

However, rating systems are not perfect and do not account for inadvertent racial discrimination. Research conducted by two Harvard Business School professors found such discrimination when analyzing property listings on Airbnb.\textsuperscript{155} These professors attributed the discrimination to the hosts’ profile pictures—generally displaying hosts’ faces—that Airbnb prominently displays for its property listings.\textsuperscript{156} Because of these profile pictures, potential Airbnb renters are less likely to select places hosted by African Americans.\textsuperscript{157} Thus, African American hosts have more trouble initially attracting guests and thus must lower the prices of their rentals in order to be able to compete with other listings.\textsuperscript{158} As a result, African American hosts charged twelve percent less for rentals than non-African American hosts for properties of similar location and property value in order to be

\begin{footnotesize}
\begin{enumerate}
\item[$\textsuperscript{152}$] Cohen & Zehngebot, \textit{supra} note 5, at 7.
\item[$\textsuperscript{153}$] See \textit{id}.
\item[$\textsuperscript{154}$] \textit{Id}.
\item[$\textsuperscript{156}$] \textit{Id}.
\item[$\textsuperscript{157}$] See \textit{id}.
\item[$\textsuperscript{158}$] \textit{Id}.
\end{enumerate}
\end{footnotesize}
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competitive with other hosts. Additionally, these professors found that African American hosts face a “larger price penalty for having a poor location score” than non-African American hosts for having a poor property location.

Inadvertent racial discrimination is a serious problem for this peer-to-peer network that some consumer protection solutions, such as consumer ratings, fail to address. However, the Harvard Professors suggest inadvertent discrimination may be reduced by system design—having sharing economy companies design their websites in ways that downplay discriminatory factors such as race and gender. The North Carolina General Assembly should consider implementing checks and oversight of sharing economy networks to ensure that these networks are designed in ways that work to reduce discriminatory tendencies.

C. Taxation

Taxation may also be an issue for those operating in the sharing economy. Taxation often relies on how the law classifies persons or businesses; for sharing economy participants, those classifications remain unclear. Are drivers for Uber a franchise, small business, or none of the above? Do Airbnb users need to pay occupancy taxes? Additionally, governments cannot reliably enforce existing tax laws on sharing economy participants. Airbnb’s CEO, Brian Chesky, told Airbnb’s hosts, “you are microentrepreneurs, and there are no laws written for microentrepreneurs.” Statements such as these may indicate to members of the sharing economy that there may not be rules for them to follow or taxes to pay. Additionally, while Airbnb instructs its hosts to abide by federal, state, and local laws, these

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159 Id.
160 Id.
161 Nobel, supra note 155.
162 Hamilton, supra note 9.
163 See Cohen & Zehngebot, supra note 4, at 7; see Hamilton, supra note 9.
164 See Cohen & Zehngebot, supra note 4, at 7.
165 See id.
166 See Hamilton, supra note 9.
167 See id.
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governments have not traditionally tasked Airbnb with making sure that hosts comply with any laws, including tax laws.\textsuperscript{168} Hosts have generally been solely responsible for ensuring compliance with these relevant tax laws.\textsuperscript{169} In addition, housing laws and regulations can vary significantly from municipality to municipality, and sometimes even between neighborhoods, which creates a lot of confusion about who is taxed on what and at what rate.\textsuperscript{170}

The North Carolina Revenue Laws Study Committee (\textquotedblleft Committee\textquotedblright) has already begun looking at the taxation issues of the sharing economy in North Carolina.\textsuperscript{171} The Committee expressed concern with the undercompliance of North Carolina short-term rental hosts in remitting taxes to state and local governments.\textsuperscript{172} Under North Carolina state law, owners of private residences who rent their residences for less than fifteen days a year need not pay state taxes on the income from those rentals.\textsuperscript{173} However, once an owner passes that fifteen-day threshold, they must pay state taxes.\textsuperscript{174}

The Committee’s recommendation to fix this undercompliance issue is to require sharing economy companies to remit the tax on behalf of their users.\textsuperscript{175} The Committee also suggests that current North Carolina state law may already require sharing economy companies to do this, as they may qualify as \textquotedblleft facilitators.\textquotedblright\textsuperscript{176} A facilitator is \textquotedblleft [a] person who is not a rental agent and who

\begin{itemize}
\item \textsuperscript{168} See id.
\item \textsuperscript{169} See id.
\item \textsuperscript{170} See Cohen & Zehngebot, supra note 4, at 7.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} N.C. GEN. STAT. § 105-164.4F(e)(1) (2014).
\item \textsuperscript{174} See id.
\item \textsuperscript{175} 2013–2014 REVENUE LAWS STUDY COMMITTEE, supra note 171 at 13. This suggested fix is similar to San Francisco’s requirement for short-term rental tax remittance discussed in Section of Part III of this Recent Development. See discussion supra Part III.
\item \textsuperscript{176} Id.; see § 105-164.4F(a)(2) (2014).
\end{itemize}
contracts with a provider of an accommodation to market the accommodation and to accept payment from the consumer for the accommodation.”  

The Committee makes two recommendations to the General Assembly in order to remedy undercompliance. First, the Committee proposes “amend[ing] the statutes to more specifically require sites like Airbnb to collect sales and occupancy tax.” Second, the Committee recommends that the state government create a statewide central collection point for occupancy tax. In North Carolina, “occupancy tax is collected at the local level by the unit of government that levies it, which means that there are over 150 collectors of the occupancy tax” across the state. This second recommendation would make compliance with tax law easier for the sharing economy companies. However, as the Committee aptly points out, creating a central collection point would “generate new responsibilities and expense for the [State] Department of Revenue.”

Instead of adopting this second recommendation, the General Assembly should require that the sharing economy companies remit local occupancy taxes directly to local governments. In order to function, short-term rental sharing economy companies are directly in local communities—providing access to local resources (ex. spare rooms) in order to generate income. As such, these companies benefit heavily from local amenities—roads, tourist attractions, etc. Requiring these companies to remit taxes directly to local governments would ensure that the taxes go directly to the

177 § 105-164.4F(a)(2) (2014).
178 Id. at § 105-164.4F(c) (2014); 2013–2014 REVENUE LAWS STUDY COMMITTEE, supra note 171 at 13.
180 Id.
181 Id. at 14.
182 Id.
183 Id.
local governments that fund these amenities\(^\text{185}\) and would foster relationships and understanding between the companies and local governments. These relationships could lead to long-term benefits for both parties, including increased revenue for the local governments and favorable zoning regulations for the companies.

Additionally, sharing resources more efficiently is the foundation of the sharing economy. Creating new expensive bureaucracy and additional steps for local governments goes directly against this sharing economy foundation.

D. Liability

Questions of liability are also an issue for many sharing economy companies.\(^\text{186}\) Sharing economy companies often shift the risk of sharing resources onto the people that provide the goods or services.\(^\text{187}\) For example, Uber placed the risk on drivers by asking them “to push damage claims through their personal insurance companies while knowing that those companies did not cover commercial activity.”\(^\text{188}\)

Until January 2015, Airbnb expected its hosts to assume the full liability risk even though most “homeowner’s and renter’s insurance policies do not cover regular commercial activity in the home.”\(^\text{189}\) To help share the liability risk, Airbnb now provides free liability insurance to hosts of up to $1 million per incident.\(^\text{190}\) However, this insurance will act as either primary or secondary coverage depending on if hosts already have insurance.\(^\text{191}\)

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\(^\text{185}\) As opposed to going to the state government as recommended by the Committee.

\(^\text{186}\) Cohen & Zehngebot, supra note 4, at 8.


\(^\text{188}\) Id.

\(^\text{189}\) Id.


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this option could get very expensive, very quickly. Instead of free insurance, HomeAway offers its hosts the option to purchase primary insurance before using their service. The sharing economy is still working through the best ways to share liability.

The North Carolina Revenue Committee does not directly discuss the potential liabilities that sharing economy presents in their report to the General Assembly. However, they do mention concerns with health and safety for guests. The Committee notes that “establishments with four or fewer lodging units and private homes that occasionally offer lodging” are exempt from health and safety regulations that are required for traditional hotels.

E. Zoning Issues

Peer-to-peer rental companies are very concerned with zoning. Zoning codes often draw sharp lines of demarcation for land use. If a municipality has zoned an area for residential use, property owners might violate the code if they rent out a spare room or unused apartment. Even if short-term rentals are allowed, there may still be a question regarding how many days per year a host could rent a room or apartment. Because of the hyper-local nature of zoning, there is no consensus (and often much confusion) on whether zoning codes are flexible.

\[^{192}\] Lieber, supra note 187 (“Scott Wolf, president of the program division for CBIZ Insurance Services, which provides the Assure policy, broke the host’s cost down: For a $1 million, four-bedroom home with contents worth $100,000, the annual cost of coverage would be about $3,000, which includes any damage, liability coverage and replacement of rental income in case the home is temporarily uninhabitable. Most Airbnb properties are worth less than this, its hosts may rent only part of their homes and do so less often, and the company would get a bulk discount if it were to buy coverage for all of them. Still, multiply that times 800,000 listings and it’s easy to see why it’s out of the question for Airbnb to hand out primary coverage to everyone.”).

\[^{193}\] Lieber, supra note 187.


\[^{195}\] Id. at 14.

\[^{196}\] Cohen & Zehngebot, supra note 4, at 8.

\[^{197}\] Id.

\[^{198}\] See, e.g S.F., Cal, Ordinance No. 218-14, supra note 21, at 22 (limiting non-hosted rentals to 90 rented days per year).
In Raleigh, there are four types of short-term lodging allowed: (1) bed and breakfast, (2) hospitality house, (3) hotel, motel, inn, and (4) youth hostel.\textsuperscript{199} According to Mr. Crane’s report to the Raleigh City Manager, short-term sharing economy rentals would likely fall into the bed and breakfast category.\textsuperscript{200} Raleigh defines a bed and breakfast as “a detached house or other structure constructed for a use permitted within the district that has no more than 5 guest rooms. Breakfast is customarily served to guests.”\textsuperscript{201} Currently, city law allows bed and breakfasts only “within a historic district, historic landmark, or on a property listed in the National Register of Historic Places.”\textsuperscript{202} This effectively excludes bed and breakfasts from most residential areas.\textsuperscript{203}

Mr. Crane’s report details several impacts that short-term rentals can have on residential zones, including increased traffic on neighborhood streets, increased numbers of people in neighborhoods, and conflict with unit density regulations.\textsuperscript{204} As Mr. Crane points out, businesses typically must apply for a special use permit in order to operate in residential areas, and this permit allows for only two employees and limited customer activity.\textsuperscript{205} Residentially zoned areas in Raleigh also have unit density maximums that short-term rentals would violate.\textsuperscript{206} For example, since residential zoning in Raleigh allows a dwelling unit to be comprised of four unrelated persons, allowing a short-term renter to stay in this unit would constitute a density violation.\textsuperscript{207}

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\item \textsuperscript{199} Raleigh, N.C., Part 10A: Unified Development Ordinance, Section 6.4.6(A) (2013).
\item \textsuperscript{200} See Crane, supra note 143, at 1–2 (Jan. 9, 2015).
\item \textsuperscript{201} Raleigh, N.C., Part 10A, supra note 199, Section 6.4.6(B).
\item \textsuperscript{202} Crane, supra note 143, at 2.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 3.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id. (“Residential zoning contains density maximums, expressed as units per acre. A dwelling unit may be comprised of a family related by blood, marriage or adoption, or by four unrelated persons. If a dwelling unit that contains four unrelated persons allows a traveler as a short-term rental, a density violation would exist.”).
\end{itemize}
\end{footnotesize}
F. Affordable Housing

Local governments are often concerned with ensuring the availability of affordable housing. With the advent of peer-to-peer accommodation sharing sites, many landlords are listing their rentals with sharing economy sites as short-term rentals instead of having these rentals available for long-term tenants. These short-term rentals often provide property owners with a more lucrative rental opportunity than longer-term rentals. Renting this way can reduce the availability of housing for local residents and drive up rental costs in the area.

Cities like San Francisco and New York City face both increasing housing prices and affordable housing shortages. With many apartment buildings using sharing economy websites to turn into de facto hotels—virtually removing these apartments from the long-term housing marketplace—cities might lose their affordable, long-term housing to lucrative, short-term renting.

In North Carolina, state government officials believe that the sharing economy could hurt the available housing market. In a N.C. General Assembly Revenue Laws Study Committee meeting, participants discussed the potential of “[r]educed housing stock available” to local residents as a primary reason to restrict the...

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209 Id.
210 See id.
211 See id.
212 Id.
214 Id.
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short-term rental sharing economy.\textsuperscript{216} In order to address these concerns, the General Assembly should either put a maximum cap on the number of days allowed for short-term rentals, or mandate that local communities institute their own cap.

IV. CONSTITUTIONAL CHALLENGES TO PEER-TO-PEER ACCOMMODATION SHARING

As state and local governments begin to regulate the sharing economy, constitutional challenges will be—and in some cases, are already being—raised with regards to these regulations.\textsuperscript{217} Part IV analyzes the equal protection and substantive due process arguments for and against regulating the sharing economy.

A. Harder, Better, Faster, Stronger\textsuperscript{218}

Companies in the sharing economy utilize technology in a way that disrupts traditional industries.\textsuperscript{219} Disrupting, in this sense, means that sharing economy companies often find ways to deliver an equal or better product at less cost than traditional methods.\textsuperscript{220} For example, one price comparison of Airbnb and hotels found that renting a room in an apartment on Airbnb cost only half as much as renting a hotel room in the same city.\textsuperscript{221} Renting an entire apartment on Airbnb cost 21.2 percent less than a hotel room.\textsuperscript{222} Another study found that Uber is less expensive than taxi service

\textsuperscript{216} Id.
\textsuperscript{217} See, e.g., HomeAway Inc. v. City & County of San Francisco, 2015 U.S. Dist. LEXIS 9912 (N.D. Cal. Jan. 27, 2015) (analyzing whether the Commerce Clause was violated as a result of a newly enacted San Francisco ordinance regulating short-term rentals).
\textsuperscript{218} DAFT PUNK, Harder, Better, Faster, Stronger, on DISCOVERY (Virgin Records 2001).
\textsuperscript{219} Arun Sundararajan, Services, like Airbnb, Mean We Need to Adapt to a New Economy, N.Y. TIMES (May 6, 2014), http://www.nytimes.com/roomfordebate/2014/05/06/regulating-the-sharing-economy/services-like-airbnb-mean-we-need-to-adapt-to-a-new-economy.
\textsuperscript{220} See Geron, supra note 12.
\textsuperscript{221} Airbnb vs Hotels: A Price Comparison, PRICEONOMICS (June 17, 2013), http://priceonomics.com/hotels/.
\textsuperscript{222} Id.

These sharing economy companies have proven that they can offer equal or better services for less cost outside of the current regulatory framework. Unsurprisingly, traditional companies are not happy about this disruption.\footnote{See e.g. Larry Downes, \textit{Industries Just Want to Protect Their Turf}, N.Y. TIMES (July 9, 2014, 2:22 PM), http://www.nytimes.com/roomfordebate/2014/05/06/regulating-the-sharing-economy/industries-just-want-to-protect-their-turf (“Old-fashioned taxicab, hotel and trade associations are more interested in protecting their turf than in competing with the disruptors.”).} As the sharing economy has grown, calls for sharing economy companies to be regulated in the traditional ways have grown louder.\footnote{See e.g. “Sharing economy” Debate Heats Up in NC, NORTH CAROLINA ASSOCIATION OF REALTORS (Feb. 6, 2015), http://www.ncrealtors.org/overview-government-affairs-public-menu/319-site-category/government-affairs-news-category/659-sharing-economy-debate-heats-up.html (“The North Carolina Association of REALTORS® [“NCAR”] seeks to protect public safety by advocating that all rental vacation businesses are licensed, insured, and inspected. NCAR will support legislation proposed in the General Assembly that regulates the sharing economy in North Carolina through hotel and occupancy taxation.”).} Traditional companies have relied on Constitutional arguments of equal protection and substantive due process to advocate that sharing economy companies should be similarly regulated.\footnote{See e.g. Boston Taxi Owners Ass’n v. City of Boston, 2015 U.S. Dist. LEXIS 14564 (D. Mass. Feb. 5, 2015).} However, these arguments have generally failed for two reasons: (1) courts treat sharing economy companies and traditional industry companies as different types of companies, and (2) it is difficult to find a rational basis for regulating sharing economy companies under the regulatory framework for traditional industries.

\subsection*{B. Constitutional Case Law So Far}

Thus far, traditional companies have used equal protection and substantive due process arguments to challenge new regulations that effectively permit sharing economy companies to operate
under less regulatory scrutiny than traditional companies. These traditional companies have either sought negative injunctions to stop the newly enacted regulations from being enforced, affirmative injunctions to require their municipalities to enforce existing regulations (developed for traditional companies) on sharing economy companies, or both.

For equal protection challenges, traditional companies believed that new laws specifically targeting sharing economy companies provided unequal treatment of new competitors operating in a similar space for a similar customer base. This perceived unequal treatment provided the equal protection rationale for the injunctions. For example, in *Boston Taxi Owners Ass’n v. City of Boston*, the Boston Taxi Owners Association and two taxicab license owners raised a constitutional challenge to regulations that “establish[ed] standards for the registration of motor vehicles providing services for so-called Transportation Network Companies (“TNCs”), such as Uber, Lyft and Sidecar.” The traditional licensed taxicab owners and operators challenged regulations allowing sharing economy companies to provide passenger services to a similar customer in a similar mode of transportation (people seeking vehicular transportation in exchange for money) with fewer regulatory requirements.

The substantive due process right allegedly infringed was an economic one: devaluing the right of the traditional company to operate exclusively within the municipality. In *Boston Taxi*, the plaintiffs challenged the ability of sharing economy companies to operate their taxi services in Boston. In Boston, taxi operators

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230 *Id.* at *2.
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are required to "possess a license known as a 'taxicab medallion."" However, these medallions were not required for Uber drivers. The plaintiffs contend that by allowing sharing economy taxi services to operate without the medallions, the city was depriving them of their right to operate exclusively in Boston.

Despite the alleged unequal treatment to similar competitors and the alleged violation of an economic right, courts have upheld the attacked regulations under rational basis scrutiny, primarily because of the difference in the way that sharing economy companies and traditional economy companies operate. For example, the court in Joe Sanfelippo Cabs Inc. v. City of Milwaukee, facing facts similar to Boston Taxi, highlighted the digital communication between the sharing economy company and the customer as one key difference. In particular, the court noted that the digital communication of the sharing economy company provided verifiable interaction of an agreed upon fare prior to the passenger pickup, digitally connected the passenger to the driver, and digitally provided a way for the passenger to be able to register a complaint with that company.

Additionally, the Joe Sanfelippo court cited Milwaukee’s growing consumer demand for “available and accessible cost-effective transportation” as a rational basis for upholding the regulation under substantive due process analysis. Thus, by demonstrating consumer demand for a service, a state or local government can establish a valid rational basis for creating

234 Id. at *3 (“There are currently 1,825 city-issued medallions.”).
235 See id.
239 Id. at *9.
240 According to the Joe Sanfelippo Cabs Inc. court, this eliminated the need for external visual identification of the transporting vehicle. Id. at *11.
241 Id.
242 Id. at *14.
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regulations responding specifically to sharing economy companies under substantive due process analysis.

These courts’ reasoning under equal protection and substantive due process analysis is important for three reasons. First, under equal protection analysis, these cases show that courts are open to addressing sharing economy companies as distinct from traditional companies that provide similar services. Courts are doing this by focusing on the method in which the service is rendered instead of the ultimate outcome of the service. This means that although an online peer-to-peer ride sharing company and a traditional taxi service provide the same ultimate outcome (a person receives vehicular transportation to a desired location), the courts consider how that person was able to access that transportation for purposes of equal protection analysis.

Therefore, if a state or local government desires to provide different legislation or regulation for sharing economy companies than for traditional companies, the laws or regulations should focus on the method the company uses instead of the ultimate outcome of the service. By doing so, these governments could provide a valid rational basis for treating sharing economy companies and traditional companies differently.

Next, by recognizing that responding to consumer demand constitutes a rational basis, courts allow municipalities the ability to change the traditional regulatory landscape by demonstrating that there is a consumer demand for a new service. Thus, if a state or local government can show that their citizens have a need for a service that a sharing economy sector provides, simply demonstrating this demand will satisfy rational basis scrutiny under substantive due process analysis. Sharing economy companies that wish to be regulated differently from traditional industries, as well as communities that want to regulate the sharing economy differently, can constitutionally support new regulation by demonstrating consumer demand.

Finally, these cases highlight the interests of some municipalities in finding ways to allow sharing economy
companies to operate within a new regulatory framework. These municipalities are open to allowing the sharing economy to operate, albeit with some regulation. Additionally, these municipalities view the sharing economy not as an end result (a customer receives a room for a short-term stay), but as a new method of delivering that end result. Because of this evaluation, these municipalities create new legislation and regulation that sets the sharing economy apart from traditional industries.

C. Constitutional Arguments for Little Regulation

While the above cases hint that local and state governments might develop new regulations tailored for the sharing economy, some advocates, many of whom are members of traditional companies affected by the sharing economy, support regulating the sharing economy under existing laws and regulations. Other advocates argue for little to no regulation for these new companies. These de-regulation advocates worry that shoehorning these new companies into existing regulation could limit innovation and cause regulatory capture.

Although the court decisions based on constitutional analysis discussed above are largely favorable rulings for creating new legislation and regulation for the sharing economy, there may also be equal protection and substantive due process arguments that stand in the way of regulating the sharing economy under already existing regulations.

D. Arguments for Regulation—Finding a Rational Basis

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243 This is instead of: (1) fitting sharing economy companies within an existing framework, (2) fitting them outside of the regulatory framework altogether, or (3) not allowing them to operate at all.

244 Downes, supra note 224.


247 Id.
Traditionally, governments regulate economic activity and, as a result, regulators of economic activity need only to show a rational basis \( ^{248} \) for their regulation to satisfy Constitutional equal protection and substantive due process analysis.\(^ {249} \) The sharing economy largely involves economic activity. Thus, equal protection and substantive due process analysis of sharing economy regulations focuses on determining if those regulations are rationally related to state interests. However, even with this low standard, it may be difficult to determine a rational basis for regulating the sharing economy under existing regulations designed for traditional industries.

Unfortunately for many traditional industries, “[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”\(^ {250} \) In *Craigmiles v. Giles*,\(^ {251} \) the Sixth Circuit held unconstitutional “a provision of the Tennessee Funeral Directors and Embalmers Act (“FDEA”) that forbid[ ] anyone from selling caskets without being licensed by the state as a ‘funeral director.’”\(^ {252} \) In order to become a licensed funeral director, a candidate had to undergo two years of mortuary school and pay thousands of dollars—which the court termed “a significant barrier to entering the Tennessee casket market.”\(^ {253} \) The court held that “[n]one of the justifications offered by the state satisfies the slight review required by rational basis

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\(^{248} \) “Rational basis review is a test used in some contexts to determine a law's constitutionality. To pass rational basis review, the challenged law must be rationally related to a legitimate government interest. Rational basis is the most lenient form of judicial review, as both strict scrutiny and intermediate scrutiny are considered more stringent. Rational basis review is generally used when in cases where no fundamental rights or suspect classifications are at issue.” *Rational Basis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis (last visited Mar. 17, 2015).

\(^{249} \) *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

\(^{250} \) *Id.* at 222, 229.

\(^{251} \) *Id.* at 224–25.
review under the Due Process and Equal Protection clauses of the
Fourteenth Amendment. In particular, the court found that the
licensing requirement did not positively affect the quality of the
casket, make the caskets safer, or enhance consumer protection in
purchasing caskets.

When analyzing the regulation of the sharing economy under
traditional regulations, a court could find that the licensing
requirements may present a significant burden to entering the
traditional market, do not positively affect the quality of the good
or service, make the good or service safer, or enhance consumer
protection. Taking the taxi industry as an example, ride sharing
companies are already providing a similar service at a less
expensive price. Additionally, many cities require that taxis be
licensed before they can be operated as such. These licenses are
often referred to as medallions. Many cities also cap the number
of medallions allowed. In New York City, there are 13,437 taxi
medallions that are worth between $967,000 and $1,150,000 each
in purchase price. While in Boston, there are 1,825 medallions
that are worth $700,000 each. And in Chicago, there are 6,904
taxi medallions that are worth $360,000 each. A court could
likely find that the requirement of these licenses presents a

254 Id. at 228–29.
255 Id.
256 See supra notes 218–23 and accompanying text.
257 Emily Badger, Taxi Medallions Have Been the Best Investment in America for
washingtonpost.com/blogs/wonkblog/wp/2014/06/20/taxi-medallions-have-been-the-
best-investment-in-america-for-years-now-uber-may-be-changing-that/.
258 Id.
259 See, e.g., id. (showing 6,904 medallions in Chicago); 2014 Taxicab Fact
medallions in NYC); Boston Taxi Owners Ass’n v. City of Boston, 2015 U.S.
Dist. LEXIS 14564, at *3 (D. Mass. Feb. 5, 2015) (showing 1,825 medallions in
Boston).
261 Boston Taxi at *3.
262 Badger, supra note 257.
263 Id.
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significant barrier to entering into the taxi market in each of these cities.

Another argument for regulating the sharing economy under the traditional scheme is that existing regulation provides safety for consumers. In 2014, an Uber driver allegedly raped a woman in India. Another Uber driver tragically ran into and killed a six-year-old girl while driving in San Francisco. At that time, the driver was driving for Uber, but did not have insurance through the company as he did not have a passenger. Fox News featured a story titled *10 Incredible Airbnb Horror Stories* that featured provocatively titled incidents including “meth addicts,” “the crime scene,” and “the pop-up brothel.” These stories are indeed terrible and facially present a good argument for consumer safety as a valid state interest for regulating the sharing economy under existing regulations.

However, the sharing economy may be just as safe as traditional industries. For instance, a Cato Institute study found that the largely self-regulated ride sharing industry was as safe as the heavily regulated taxi industry. The Cato study analyzed a variety of transportation concerns, including the safety for drivers, privacy concerns of passengers, and insurance. Importantly, the study also found that “Uber’s and Lyft’s background check requirements are stricter than the screening requirements for many

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266 Id.


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American taxi drivers.” So even though there have been highly publicized instances of unsafe activity in the sharing economy, the sharing economy may be just as safe as traditional industries.

Consumer protection concerns about the ride sharing industry may be mitigated by the digital nature of the companies involved. As the court in Joe Sanfelippo noted, because the nature of the ride sharing transaction is digital, the fee for the ride will be agreed upon in advance. Additionally, the name of ride sharing company and driver information are also known to the passenger before the ride. Also, because of the social network and rating information many of these companies employ, the passenger will be able to evaluate his or her driver ahead of time to screen for problem drivers.

Although this section does not provide a complete answer to whether the sharing economy may be regulated under traditional regulations, it does serve to indicate that it may be a difficult challenge to shoehorn the sharing economy into traditional regulation.

V. CONCLUSION

The growth of the sharing economy has the potential to shape laws, policy, and business for years to come. Understanding how and when to regulate sharing economy companies is essential to keep consumers, operators, and traditional companies satisfied, innovating, and growing.

270 Id. at 6 (finding that Uber and Lyft require their drivers to undergo more rigorous screening than many American taxi drivers. For example, “Uber requires that an applicant driver have none of the following on his or her record over the past seven years: hit and runs, fatal accidents, reckless driving, violent crimes, sexual offenses, gun-related violations, resisting or evading arrest, driving without insurance, or ‘DUI or other drug-related violations or severe infractions[,]’” while, “[t]axi cab driver applicants in Philadelphia cannot have been convicted of a felony in the five years prior to the application.”).


272 See id. at *9–10.

273 See id.; see also supra Part III.B–D.
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As the legislators in Raleigh make their decisions about how to regulate the sharing economy, they would do well to keep in mind three things. First, leaving the sharing economy unregulated leaves more questions than answers. Second, regulating the sharing economy under existing legislation may not be possible due to equal protection and substantive due process challenges. Third, if the General Assembly does decide to create new legislation and regulation for the sharing economy, it will be important to make sure that legislation specific to the sharing economy focuses on the method of the service delivery rather than the outcome of the service in order to provide a rational basis for treating the sharing economy differently than the traditional economy.