
COMMENTS

THE UBER INNOVATIONS THAT LYFTED OUR STANDARDS OUT OF THIN AIR[BNB], BECAUSE NOW, “THERE’S AN APP FOR THAT”

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“While the law of competition may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department.”

– Andrew Carnegie¹

I. INTRODUCTION

A. *The Weekend Escape: An Illuminating Example*

Considering escaping the harsh winter by taking a weekend vacation to the heart of Miami Beach? According to its website in October 2015, a standard guest room without any extra bells and whistles at the Fontainebleau, one of Miami Beach’s most popular hotels, is \$444 per night.² In fine print and one click away from submitting payment information, the Fontainebleau casually mentions it charges a \$32

* Alamea Deedee Bitran, Florida International University College of Law, Juris Doctor Candidate, May 2016. As Ronald Reagan once said, “When you can’t make them see the light, make them feel the heat.” John Hawkins, *The 40 Best Quotes from Ronald Reagan*, TOWNHALL.COM (July 3, 2012), http://townhall.com/columnists/johnhawkins/2012/07/03/the_40_best_quotes_from_ronald_reagan/page/full. Many thanks to my grandparents, husband, and parents for their unwavering support. This Article earned Third Place in the Pacific Legal Foundation Law Student Writing Competition 2015.

¹ MARIANNE JENNINGS, *BUSINESS: ITS LEGAL, ETHICAL, & GLOBAL ENVIRONMENT* 527 (10th ed. 2014).

² FONTAINEBLEAU, <https://fontainebleau.com/> (last visited Oct. 1, 2015).

nightly parking fee for each guest vehicle.³ In addition to the steep room rate and fine print parking fees, the Fontainebleau informs its guests during check-in that the Fontainebleau takes the liberty of charging its guests a “resort fee” of \$50 per night, per room.⁴

A TripAdvisor review warned, “If you want a sun bed close to the pool it costs extra. If you want a sun bed on the beach it costs extra. If you want an umbrella on the beach, yes, you guessed it, it costs extra.”⁵

As you crunch numbers, you begin rethinking that Miami sunshine escape as your eyes widen and stomach sinks a bit. Just a *two-night* weekend would rack up a bill of over \$1,000 solely for hotel expenses.⁶ You could starve, not order a single poolside drink, not shop at Miami’s historic Lincoln Road, forgo any tours of the city on corny double decker buses, sit far away from the pool, live without the beach umbrella, and return home with a nasty sunburn to show for your \$1,000 deduction to your checking account. Or you could open another tab on your Internet browser and type in “Airbnb.com.”

A September 2015 search on Airbnb.com revealed that fully furnished, waterfront studios, apartments, private rooms, cottages, or entire luxury homes were available in the heart of Miami Beach at rates ranging from \$10 to over \$1,000 per night. Plenty of Airbnb’s options are “steps to the beach” or within a five-minute walk of the prestigious Fontainebleau.⁷ User-friendly symbols are scattered across the Airbnb screen to denote extra amenities included with every Airbnb home. Some homes include amenities like a washer, dryer, gym, Internet access, guard gate, doorman, private pool, and complimentary parking.⁸

Scrolling on Airbnb.com, you find a luxurious, newly renovated, oceanfront condo in the heart of Miami Beach that includes a plethora of amenities and free parking for \$130 per night. You message the owner of the condo on the Airbnb website asking if that is the best

³ *Guest FAQs*, FONTAINEBLEAU, <https://webcache.googleusercontent.com/search?q=cache:vmH6BjaweiEJ:https://fontainebleau.com/guest-faqs+&cd=1&hl=en&ct=clnk&gl=US> (last visited Oct. 1, 2015).

⁴ *Id.*

⁵ *Review of Fontainebleau Miami Beach*, TRIPADVISOR, http://www.tripadvisor.com/ShowUserReviews-g34439-d85177-r41978763-Fontainebleau_Miami_Beach-Miami_Beach_Florida.html (last visited Oct. 2, 2015).

⁶ See FONTAINEBLEAU, *supra* note 2.

⁷ AIRBNB, <https://www.airbnb.com/rooms/6401522?checkin=03/07/2016> (last visited Oct. 2, 2015).

⁸ See AIRBNB, <https://www.airbnb.com/rooms/11143171?checkin=03/07/201> (last visited Oct. 2, 2015).

possible rate, and within twenty-four hours, the owner messages you back that he can lower the rate to \$110 per night. Your entire week-end cost for a luxury condo would be under \$250, leaving you with the peace of mind and freedom to tour, eat, shop, and indulge during your Miami Beach vacation. Your decision is simple, is it not?

B. *Today's Sharing Economies and the Opposition They Battle to Survive*

With over 20 million users and 800,000 global listings, Airbnb was dubbed 2014's "Company of the Year" and "offer[s] more lodging than Hilton Worldwide or InterContinental Hotels Group or any other hotel chain in the world."⁹ An economic research article noted that Airbnb has a higher valuation than the hotel giant, Hyatt, and Uber's valuation equals that of the car rental company, Hertz®.¹⁰

Companies such as Uber and Airbnb are referred to as "sharing economies," which are defined as "socio-economic ecosystem[s] built around the sharing of human and physical resources. It includes the shared creation, production, distribution, trade and consumption of goods and services by different people."¹¹ Sharing economies are making strides as the wave of the future, inspiring innovation across industries. For example, DogVacay is a sharing economy business in which "dog owners can leave their dog with a host who will take care of the dog [and] [i]t's cheaper than a kennel and gives dogs a more comfortable place to stay."¹² RelayRides and Getaround are sharing economy corporations that allow people to borrow cars from neighbors and rent them by the hour or at a daily rate.¹³ TaskRabbit is a sharing economy corporation that allows people to hire others to complete tasks for them, such as handyman work or office assignments.¹⁴ LendingClub is

⁹ Burt Helm, *Airbnb is Inc.'s 2014 Company of the Year*, INC., <http://www.inc.com/magazine/201412/burt-helm/airbnb-company-of-the-year-2014.html> (last visited Mar. 10, 2016).

¹⁰ Daniel Rauch & David Schleicher, *Like Uber, but for Local Government Policy: The Future of Local Regulation of the "Shared Economy"* 29 (N.Y. Univ. Marron Inst. Urban Mgmt., Working Paper No. 21, 2015), http://marroninstitute.nyu.edu/uploads/content/The_Future_of_Local_Regulation_of_the_Shared_Economy.pdf.

¹¹ Benita Matofska, *What is the Sharing Economy*, THE PEOPLE WHO SHARE, <http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/> (last visited Mar. 10, 2016).

¹² *Airbnb, Snapgoods and 12 More Pioneers of the 'Share Economy'*, FORBES, <http://www.forbes.com/pictures/eji45emgkh/dogvacay/> (last visited Mar. 2, 2016).

¹³ *See id.* (click through slideshow to see slides on RelayRides, Getaround, and Liquid (a bike rental sharing economy corporation)).

¹⁴ *Id.* (click through slideshow to see slide on TaskRabbit).

a peer-to-peer network, a form of a sharing economy that offers loans as an alternative to seeking loans from a bank.¹⁵ Poshmark is a sharing economy that allows its users to buy or sell clothing on a mobile app.¹⁶

Expanding its innovation, Airbnb combined forces with Tesla to provide electronic car charging stations at rental homes.¹⁷ Tesla explained that combining creative efforts with Airbnb was an exciting step in the right direction because “[t]ogether, we’re building a world with no limits to how far you can travel and how you get there. From remote deserts to lush forests, we’re unlocking highways, backroads, adventures and unique homes.”¹⁸

Unfortunately, instead of adjusting its rates to compete or offering additional services to justify the gross disparity in cost, the hotel industry’s goal is to shut down its competition by rallying for overregulation of “sharing economies.”¹⁹ A story all too familiar, the hotel industry’s attempt to crush Airbnb is just one example of large industrial giants attempting to rob smaller businesses of their economic liberty.²⁰ The taxi industry is continuing to run Uber out of cities by using its political clout to overregulate and cripple its competitors.²¹ According to San Francisco’s Municipal Transportation Agency, in the last fifteen months, cab usage has decreased by 65%.²² In 2012, the average San Francisco taxi used to take approximately 1,424 trips a month, but now that statistic is down to 504 trips a month.²³

Setting aside the employment law inquiry that has generated a plethora of litigation on whether sharing economy workers are em-

¹⁵ *Id.* (click through slideshow to see slide on LendingClub).

¹⁶ *Id.* (click through slideshow to see slide on Poshmark).

¹⁷ Philip Wilmot, *Tesla & Airbnb Team Up to Provide Electric Car Charging Stations at Rental Homes*, IMMORTALNEWS (Aug. 23, 2015), <http://www.immortal.org/15371/tesla-airbnb-car-charging-stations/>.

¹⁸ *Id.*

¹⁹ See Rauch & Schleicher, *supra* note 10, at 29.

²⁰ See, e.g., Michael DeMasi, *Uber and Lyft Do Not Pass “GO” This Time Around in New York State Legislature*, ALBANY BUS. REV. (June 25, 2015, 8:11 AM), <http://www.bizjournals.com/albany/news/2015/06/24/uber-lyft-do-not-pass-go-this-time-around-in-ny.html> (noting that Lyft reached a \$300,000 settlement but admitted no wrongdoing).

²¹ *Id.*

²² Maya Kosoff, *This New Report Shows Why Taxi Drivers Are Terrified Of Uber & Lyft*, BUS. INSIDER (Sept. 22, 2014, 10:25 AM), <http://www.businessinsider.com/new-report-shows-why-taxi-drivers-are-terrified-of-uber-and-lyft-2014-9>.

²³ *Id.*

ployees or independent contractors,²⁴ the bigger picture constitutional issue for courts to grapple with is “whether protecting a discrete interest group from economic competition is a legitimate governmental purpose.”²⁵ Already, at least one court has answered that question in the negative and refused to create a per se rule that economic protectionism is a legitimate state interest.²⁶ According to the Goldwater Institute, the “mere presence of widespread occupational licensing can depress the low-income entrepreneurship rate.”²⁷

C. The Judicial and Legislative Solutions

Airbnb and Uber’s fight to protect our freedom will be successful if the judiciary and the legislature are prepared to take the “lobbying” blinders off and defend our constitutional right to economic liberty. Protected by the Fourteenth Amendment’s Due Process Clause, economic liberty is defined as the “right to pursue . . . [a] chosen livelihood free from arbitrary, excessive, and irrational government regulation.”²⁸ Public interest groups like the Pacific Legal Foundation and the Institute for Justice have joined the fight to “challenge[] state laws that create cartels prohibiting free competition.”²⁹

²⁴ Many courts have grappled with whether to classify sharing economy workers as employees or independent contractors. See, e.g., *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141–45 (N.D. Cal. 2015) (holding that drivers are presumptively developer’s employees); *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185 (N.D. Cal. 2015) (assessing background reports implemented for hiring and termination of employees); *Yucesoy v. Uber Techs., Inc.*, 109 F. Supp. 3d 1259, 1270–73 (N.D. Cal. 2015) (assessing the classification of drivers as independent contractors); *Search v. Uber Techs., Inc.*, No. CV 15–257 (JEB), 2015 WL 5297508, at *5–7 (D.C. Sept. 10, 2015) (assessing liability of injury in terms of employee or independent contractor); *Lavitman v. Uber Techs., Inc.*, 32 Mass. L. Rptr. 476 (Super. Ct. Mass. 2015) (assessing distribution of fees accrued from each passenger); *Uber v. Dep’t of Nat. Res.*, No. 211685, 2001 WL 704317 (Mich. Ct. App. 2001) (determining status as an employee or independent contractor).

²⁵ *St. Joseph Abbey v. Castille*, No. 10–2717, 2011 WL 1361425, at *5 (E.D. La. Apr. 8, 2011).

²⁶ *Id.* at *9 (“The Court sees no basis to create a per se rule of law that economic protectionism is a legitimate state interest.”).

²⁷ Stephen Slivinski, *Bootstraps Tangled in Red Tape: How State Occupational Licensing Hinders Low-Income Entrepreneurship*, GOLDWATER INST. (Feb. 23, 2015), <http://goldwater-institute.org/en/work/topics/free-enterprise/entrepreneurship/bootstraps-tangled-in-red-tape/>.

²⁸ *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1213 (D. Utah 2012).

²⁹ *Moving Roadblocks to Competition and Free Enterprise in Nevada*, PAC. LEGAL FOUND., <http://www.pacificlegal.org/cases/Moving-roadblocks-to-competition-and-free-enterprise-in-Nevada> (last visited Mar. 10, 2016) [hereinafter *Moving Roadblocks to Competi-*

Sharing economy industries like Airbnb and Uber “have the innovation part covered [and] [i]f they can . . . evolve . . . from renegade[s] into corporate citizen[s], . . . the future . . . is theirs.”³⁰ To guard economic liberty and encourage such innovations in the marketplace, the government must get “out of the business of picking winners and criminalizing competition” because entrepreneurial success should not depend “on political connection and favoritism.”³¹

II. UBER & AIRBNB’S STORIES: DAVID & GOLIATH³²

A. *AirBnb’s Story*

The founders of AirBnb—Brian, Nathan, and Joe—are three friends in their early thirties who had an entrepreneurial dream and were brave enough to make that dream a reality.³³ As Inc.com described, “Seven years ago, they were guys with a website, three air mattresses, and ambitions that to many people sounded silly, naive, and reckless.”³⁴ The Telegraph explained that the founders of Airbnb were inspired when there was a design conference scheduled in San Francisco and all of the local hotels were at maximum occupancy.³⁵ The founders conjured up the idea of renting airbeds in their living room and cooking breakfast for their “guests” the next morning.³⁶ Their idea roped in three guests, and the Airbnb founders charged their guests \$80 per night.³⁷ As their guests departed, the founders looked at each other and thought “there’s got to be a bigger idea here.”³⁸

tion]; see also *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).

³⁰ Helm, *supra* note 9.

³¹ Jason Snead, *Uber Fights to Win the Regulatory War (And You Should Want It To)*, DAILY SIGNAL (Sept. 25, 2014), <http://dailysignal.com/2014/09/25/uber-fights-win-regulatory-war-want/>.

³² See Josh Krauss, Note, *The Sharing Economy: How State and Local Governments are Failing and Why We Need Congress to get Involved*, 44 SW. L. REV. 365, 365 (2014) (noting that “incumbent companies fight tirelessly to protect themselves from future innovation, deathly afraid of a new product or service that will threaten their market share”).

³³ Helm, *supra* note 9.

³⁴ *Id.*

³⁵ Jessica Salter, *Airbnb: The Story Behind the \$1.3bn Room-Letting Website*, TELEGRAPH (Sept. 7, 2012, 7:00 AM), <http://www.telegraph.co.uk/technology/news/9525267/Airbnb-The-story-behind-the-1.3bn-room-letting-website.html>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Initially, the Airbnb founders were skeptical of their idea and viewed it as something that would “work for one weekend to pay the bills.”³⁹ The three friends came up with the name Airbnb to stand for “Air Bed & Breakfast” because “[i]t was literally supposed to be all about air beds.”⁴⁰ They began targeting conference heavy areas and selling cereal boxes related to presidential campaigns to generate money for their entrepreneurial business idea.⁴¹ Specifically, when investors refused to give them money, the Airbnb founders generated money to start up Airbnb with “Obama O’s” and “Cap’n McCains,” which were decorated Cheerios boxes.⁴² At one point, when business was still low, the Airbnb founders lived off of their cereal.⁴³ When they started out, Airbnb’s revenue was only \$200 per week.⁴⁴ Eventually, according to the *Wall Street Journal Blog*, the collectable cereal boxes generated approximately \$30,000 for the Airbnb founders.⁴⁵

To the Airbnb founders, Airbnb is so much more than just a substitute for a hotel room. Brian explained, “Airbnb is about so much more than just renting space It’s about people and experiences. At the end of the day, what we’re trying to do is bring the world together. You’re not getting a room, you’re getting a sense of belonging.”⁴⁶ Brian told *Telegraph* that “[w]hen you share your space with somebody it is a personal, meaningful experience.”⁴⁷ Joe, another one of Airbnb’s founders, explained the distinction between Airbnb and hotels. He explained, “What we’re doing with Airbnb feels like the nexus of everything that is right We’re helping people be more

³⁹ Derek Thompson, *Airbnb CEO Brian Chesky on Building a Company and Starting a ‘Sharing’ Revolution*, ATLANTIC (Aug. 13, 2013), <http://www.theatlantic.com/business/archive/2013/08/airbnb-ceo-brian-chesky-on-building-a-company-and-starting-a-sharing-revolution/278635/>.

⁴⁰ *Id.*

⁴¹ Salter, *supra* note 35.

⁴² Thompson, *supra* note 39.

⁴³ Scott Austin, *Airbnb: From Y Combinator to \$112M Funding in Three Years*, WALL ST. J. BLOG (June 25, 2011, 12:21 AM), <http://blogs.wsj.com/venturecapital/2011/07/25/airbnb-from-y-combinator-to-112m-funding-in-three-years/>.

⁴⁴ *How Design Thinking Transformed Airbnb from a Failing Startup to a Billion Dollar Business*, FIRST ROUND REV., <http://firstround.com/review/How-design-thinking-transformed-Airbnb-from-failing-startup-to-billion-dollar-business/> (last visited Mar. 10, 2016) [hereinafter *How Design Thinking Transformed Airbnb*].

⁴⁵ Austin, *supra* note 43.

⁴⁶ Helm, *supra* note 9.

⁴⁷ Salter, *supra* note 35.

resourceful with the space they already have and we're connecting people around the world."⁴⁸

To the users of Airbnb, the service assists them in paying rent and making payments on other bills in a timely manner. For example, a thirty-two-year-old, former army sergeant Airbnb renter in New York City explained, "I use Airbnb to supplement my income, and it's allowed me to go back to school."⁴⁹ She rents her second bedroom in her apartment out via Airbnb for \$60–\$70 per night and is thrilled to have "met so many wonderful people from France, Germany, Spain, South Africa, Brazil, the Philippines."⁵⁰ Another Airbnb renter has shared that she used the money from renting out a double room in her home to start a new career as an acupuncturist.⁵¹

Combining the original Airbnb founder's brilliance with the ability to generate substantial income for their renters, Airbnb continues to grow at explosive rates.⁵² The Airbnb founders believe Airbnb is so much more than just a standard business model. Instead, the founders explained, "We're trying to create an environment where people can see a glimmer of something and basically throw dynamite on it and blow it up to become something bigger than anyone could have ever imagined."⁵³

B. Goliath Attacks Airbnb

Despite Airbnb's inspiring, American dream success story, cities have pushed back and attempted to fine Airbnb for various violations.⁵⁴ To go for Airbnb's jugular, hotels encourage the enactment and enforcement of zoning laws that prohibit people running a business in a residential area.⁵⁵ Additionally, Airbnb faces the hurdle of overcoming

⁴⁸ *Id.*

⁴⁹ Verena Dobnik, *Airbnb in New York City a Good Deal for Renters and Tourists, Not for Hotel Industry*, HUFFINGTON POST (Oct. 16, 2013, 8:00 AM), http://www.huffingtonpost.com/2013/10/16/airbnb-new-york-city_n_4107080.html.

⁵⁰ *Id.*

⁵¹ Salter, *supra* note 35.

⁵² Nathan McAlone, *This Chart Shows Exactly How Insane Airbnb's Growth Has Been Over the Past 5 Years*, BUS. INSIDER (Sept. 8, 2015, 1:55 PM), <http://www.businessinsider.com/airbnbs-summer-reach-has-grown-by-353-times-in-5-years-2015-9>.

⁵³ *How Design Thinking Transformed Airbnb*, *supra* note 44.

⁵⁴ Zaw Thiha Tun, *Top Cities Where Airbnb is Legal or Illegal*, INVESTOPEDIA (Oct. 30, 2015), <http://www.investopedia.com/articles/investing/083115/top-cities-where-airbnb-legal-or-illegal.asp>.

⁵⁵ *Id.*

health and safety laws that require hotels to provide clean towels, sprinklers, and emergency exit signage.⁵⁶

Since the New York City mayor's office commenced investigating short-term rentals nine years ago, "it has fielded more than 3,000 complaints and issued almost 6,000 notices of violation, including fire, safety and occupancy infractions, which carry fines."⁵⁷ Referencing *Nollan v. California Coastal Commission*,⁵⁸ some have suggested that over-regulation of Airbnb hosts is a regulatory taking of private property without just compensation, running afoul of the Fifth and Fourteenth Amendments.⁵⁹

New Orleans, San Francisco, and Malibu have investigated Airbnb for zoning violations within residential communities.⁶⁰ New York's attorney general opined that 72% of Airbnb's 25,500 New York listings violate hotel regulations.⁶¹ In response, Airbnb removed 2,000 New York listings.⁶² The Santa Monica city council passed an ordinance prohibiting its residents from being Airbnb "hosts" when they are not in town.⁶³ The Santa Monica law imposes a 14% hotel tax on residents that participate in Airbnb.⁶⁴ In response to the Santa Monica legislation, approximately 200 people participated in a rally against over-regulation of Airbnb.⁶⁵ The Southern California Public Radio reported that many of the protesters did not mind paying the 14% tax, and instead were upset with being robbed of the option to rent out their homes while they traveled.⁶⁶

⁵⁶ Christina Bonnington, *The Tragic Airbnb Problem You've Probably Never Thought About*, REFINERY 29 (Nov. 9, 2015), <http://www.refinery29.com/2015/11/97263/airbnb-safety-regulation-controversy>.

⁵⁷ Dobnik, *supra* note 49.

⁵⁸ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

⁵⁹ Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557, 568 (2015).

⁶⁰ Helm, *supra* note 9.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Kristen Lepore, *Santa Monica Council Unanimously Approves Airbnb Regulations; Hosts to Pay Tax*, S. CAL. PUB. RADIO (May 13, 2015), <http://www.scpr.org/news/2015/05/12/51625/airbnb-says-santa-monica-proposed-legislation-is-u/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Airbnb's opponents claim that the risk Airbnb poses to its customers is much greater than it discloses.⁶⁷ In hopes of shutting Airbnb down, the Hotel Association of New York City funded the "Share Better" coalition, which endeavors to take photos of Airbnb locations that it considers sub-par.⁶⁸

Fighting for survival, in November 2015, Airbnb invested over \$8 million to combat "Proposition F," which seeks to tighten regulations on Airbnb and other short term rentals in San Francisco.⁶⁹ A tax memo estimates that San Francisco will lose approximately \$58 million in tax revenue if Proposition F passes, because the legislation would limit homes to seventy-five rental nights annually.⁷⁰ As Inc.com explained, "Regulators, hoteliers, and neighbors may hate Airbnb, but it has revolutionized an industry and made it hard for anyone who wants to stop them. Twenty million users strong, Airbnb has nestled in to stay."⁷¹

C. Uber's Story

Uber began in 2008 when two friends, Travis and Garrett, attended a European tech conference and were frustrated as they struggled to find a cab in Paris in the snow.⁷² Their frustration inspired them to brainstorm ideas and eventually resulted in Uber's creation.⁷³

Travis told *Vanity Fair* that he had previously gone through eight years of entrepreneurial endeavors and was burnt out.⁷⁴ Before creating Uber, Travis received "hundreds of thousands of 'No's'" in the job market.⁷⁵ Travis was hesitant to pursue the Uber idea that he and Garrett conjured up in the snow because Travis's two prior startups were unsuccessful.⁷⁶ Travis explained that he feared failure and had been

⁶⁷ Helm, *supra* note 9.

⁶⁸ *Id.*

⁶⁹ Leo Markus, *Airbnb Invests Over \$8 Million To Combat Proposition F's Short-Term Rental Regulation*, IMMORTAL NEWS (Nov. 1, 2015), <http://www.immortal.org/19653/airbnb-invests-8-million-combat-proposition-fs-short-term-rental-regulation/>.

⁷⁰ *Id.*

⁷¹ Helm, *supra* note 9.

⁷² Kara Swisher, *Man & Uber Man: It's Going to be a Bumpy Ride*, VANITY FAIR (Dec. 2014), <http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Seth Fiegerman, *Uber CEO: We're Creating 50,000 New Jobs Per Month*, MASHABLE (Sept. 8, 2014), <http://mashable.com/2014/09/08/uber-ceo-techcrunch-disrupt/>.

⁷⁶ Swisher, *supra* note 72.

living at home in his childhood bedroom before he took the conference trip to Paris with Garrett.⁷⁷

Travis explained that the purpose of Uber was “to get to the point that using Uber is cheaper than owning a car Transportation that’s as reliable as running water.”⁷⁸ Within a few years of Travis taking the entrepreneurial jump with Garret, Uber began creating 50,000 jobs per month.⁷⁹ Uber relies on smartphone apps to connect rides and drivers with customers, and Uber’s clientele primarily consists of college students, retirees, and unemployed individuals.⁸⁰

In addition to providing convenient and affordable transportation on a new type of platform, Uber continues to innovate by providing unique services. Uber delivered kittens on demand to offices during National Cat Day to raise awareness about cat adoptions.⁸¹ Previously, Travis stated that “on demand” everything is not too far away from Uber’s future.⁸² Uber has run “on demand” delivery services for ice cream, Valentine’s Day roses, and barbeque.⁸³

D. *Goliath Attacks Uber*

Uber’s massive financial success quickly made enemies. Shortly after Uber started running, the San Francisco Municipal Transportation Agency and the California Public Utilities Commission sent Uber cease-and-desist letters.⁸⁴ Inadvertently, their initial challenges to Uber were, according to *Vanity Fair*, what Travis wanted, “an opportunity for a fight.”⁸⁵

According to the *New York Daily News*, “Uber has more cars registered on our streets than all of New York’s yellow-cab companies com-

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Fiegerman, *supra* note 75; see also Jack Dutton, *Uber is Now Recruiting 50,000 Drivers a Month*, BUS. INSIDER (Sept. 9, 2014, 6:45 AM), <http://www.businessinsider.com/uber-recruiting-50000-drivers-a-month-2014-9>.

⁸⁰ Eric Goldwyn, *Will Uber Destroy the Driving Profession?*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/tech/elements/will-uber-destroy-the-driving-profession>.

⁸¹ Maya Kosoff, *Uber Will Let You Order a Kitten to Your Office—but for One Day Only*, BUS. INSIDER (Oct. 29, 2015, 9:19 AM), <http://www.businessinsider.com/ubers-uberkitten-delivery-on-national-cat-day-2015-10>.

⁸² Donna Tam, *Uber Delivers Adoptable Kittens to your Doorstep*, CNET (Oct. 29, 2013, 5:00 AM) <http://www.cnet.com/news/uber-delivers-adoptable-kittens-to-your-doorstep/>.

⁸³ *Id.*

⁸⁴ Swisher, *supra* note 72.

⁸⁵ *Id.*

bined and adds 500 new drivers a week.”⁸⁶ *Vanity Fair* reported that Uber is valued at \$18.2 billion.⁸⁷ *Fortune* noted that Uber employs more than 3,000 people and operates in 311 cities and 58 countries.⁸⁸

Vanity Fair's Uber article, *It's Going to be a Bumpy Ride*, noted that shortly after Uber started, the San Francisco Municipal Transportation Agency and the California Public Utilities Commission sent Uber cease and desist letters, which objected to Uber's name including the word "cab."⁸⁹ Uber initially was advertised as "UberCab" but changed its name to "Uber" in response to the letters.⁹⁰

The founder of the New York Taxi Workers Alliance complains that Uber is "forcing out full-time professional drivers so it can lower wages across the board for all drivers."⁹¹ *Fortune* covered a story on Uber and explained that the D.C. Taxi Commissioner declared Uber illegal, requested an Uber ride, took an Uber car to the Mayflower Hotel in D.C., and arranged for the press to watch as he impounded the vehicle and gave the driver \$2,000 worth of tickets.⁹² The Executive Director of the New York Taxi Alliance stated, "If the Ubers of the world are successful, we'll be reduced to nothing."⁹³

The "Goliath" pushback on Uber is not limited to the United States. The French government declared Uber illegal, and rioters burned Uber cars in the streets of France.⁹⁴ In response to the Uber ban in France, Uber has accused France's legislation of being unconstitutional.⁹⁵ Some people who are against Uber have gone as far as slashing the tires and smashing the windows on Uber vehicles.⁹⁶ Germany banned Uber from its streets and declared that Uber violated Ger-

⁸⁶ Juan Gonzalez, *Uber Using Any Means Necessary to Crush Attempts to Regulate its Practices*, N.Y. DAILY NEWS (July 23, 2015, 12:45 AM), <http://www.nydailynews.com/news/politics/uber-determined-fight-attempts-regulation-article-1.2299791>.

⁸⁷ Swisher, *supra* note 72.

⁸⁸ Adam Lashinsky, *Uber: An Oral History*, FORTUNE (June 3, 2015, 11:00 AM), <http://fortune.com/2015/06/03/uber-an-oral-history/>.

⁸⁹ Swisher, *supra* note 72.

⁹⁰ *Id.*

⁹¹ Gonzalez, *supra* note 86.

⁹² Lashinsky, *supra* note 88.

⁹³ Goldwyn, *supra* note 80.

⁹⁴ Gonzalez, *supra* note 86.

⁹⁵ Sam Schechner, *Uber Accuses French Government of Trampling on the Sharing Economy*, WALL ST. J. (Sept. 15, 2015), <http://www.wsj.com/articles/uber-accuses-french-government-of-trampling-on-the-sharing-economy-1442318187>.

⁹⁶ Swisher, *supra* note 72.

many's Passenger Transportation Act.⁹⁷ Additionally, London's mayor has accused Uber of systematically breaking the taxicab regulation laws and proposed that Uber drivers should be held to passing a knowledge-based test on the law before being allowed to operate.⁹⁸ In October 2015, Uber urged the high court in London to declare Uber's legality in response to Uber being accused of systematically violating the law.⁹⁹

Beginning to give credence to the taxi giant's concerns, a news article recently noted that Uber "looks more like another scheme by the people at the top to bleed the people at the bottom."¹⁰⁰ Similarly, in a CNN interview, Travis was asked if he knew he was called "a Darth Vader in the startup world."¹⁰¹ Travis explained that his only regret with founding Uber was that he didn't realize the full extent of the politics involved. Travis stated:

What we maybe should've realized sooner was that we are running a political campaign and the candidate is Uber And this political race is happening in every major city in the world. And because this isn't about a democracy, this is about a product, you can't win 51 to 49. You have to win 98 to 2.¹⁰²

Defenders of Uber applaud Uber's innovation and challenge the taxicab industry to "adapt or die."¹⁰³ *Gulf Elite Magazine* explained that Uber is:

getting a ton of heat from old fashioned transportation services who think their cab fares are a holy commandment no one should ever question. See, *the beauty of tech-based startups is that they are disruptive by nature*,

⁹⁷ Ben Knight, *Car Sharing Service Uber Banned in Germany*, THE GUARDIAN (Sept. 2, 2014, 8:13 AM), <http://www.theguardian.com/technology/2014/sep/02/car-sharing-uber-ban-taxi-germany>.

⁹⁸ Sebastian Anthony, *London Mayor Says Uber Is Systematically Breaking the Law*, ARS TECHNICA (Oct. 5, 2015, 11:39 AM), <http://arstechnica.com/cars/2015/10/boris-john-son-says-uber-is-systematically-breaking-the-law-in-london/>.

⁹⁹ James Titcomb, *Uber Tells High Court Its App Does Not Break the Law*, TELEGRAPH (Oct. 5, 2015, 6:33 PM), <http://www.telegraph.co.uk/technology/uber/11913171/Uber-tells-High-Court-its-app-does-not-break-the-law.html>.

¹⁰⁰ Gonzalez, *supra* note 86.

¹⁰¹ Laurie Segall, *Is Uber CEO 'Darth Vader'?*, CNN (Sept. 8, 2014, 6:08 PM), <http://money.cnn.com/2014/09/08/technology/uber-travis-kalanick-techcrunch/>.

¹⁰² Swisher, *supra* note 72.

¹⁰³ Mohamed Amine Belarbi, *Startup from the Bottom: Here Is How Uber Started Out*, GULF ELITE, <http://gulfelitemag.com/startup-bottom-uber-started/> (last visited Mar. 10, 2016).

*they allow us to do things better, faster and cheaper, things which makes a lot of old "givens" obsolete.*¹⁰⁴

When *Vanity Fair* asked Travis if he would consider selling Uber to Google® or another company, Travis “seem[ed] genuinely shocked” and answered, “You’re asking somebody who has a wife and is really happily married, ‘So, what’s your next wife going to be like?’ And I’m like, ‘What?’”¹⁰⁵

III. JUDICIAL HURDLES: POLICE POWER AND DEFERENTIAL RATIONAL REVIEW STANDARD

The famous “Footnote Four” from *United States v. Carolene Products Co.* explained the different tiers of review—strict scrutiny, intermediate scrutiny, and rational basis.¹⁰⁶ The Supreme Court explained that under rational basis review,

the existence of facts supporting the legislative judgment is to be presumed . . . unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.¹⁰⁷

Under rational basis review, courts will uphold a law if “there is any reasonably conceivable state of facts that could provide a rational basis” for the challenged law.¹⁰⁸

Simply put, rational basis review requires “only that the regulation bears a rational relation to some legitimate end.”¹⁰⁹ The police power granted to the states allows the states to create and enforce regulations for the health, welfare, and safety of the general public.¹¹⁰ “It is too well settled . . . that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health.”¹¹¹

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ Swisher, *supra* note 72.

¹⁰⁶ U.S. 144, 152–53 n.4 (1938).

¹⁰⁷ *Id.*

¹⁰⁸ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

¹⁰⁹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

¹¹⁰ *Watson v. Maryland*, 218 U.S. 173, 176–77 (1910).

¹¹¹ *Id.*; *see also* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189–90 (1997) (recognizing that protecting consumers is a legitimate governmental interest).

Emphasizing the deferential nature of the rational basis review standard, the Supreme Court refused to invalidate a regulatory law and explained:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought We emphasize again . . . ‘[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.’¹¹²

Some have correctly criticized rational basis review’s lack of “teeth” because laws are hardly ever invalidated under the rational basis test.¹¹³ Courts have explicitly acknowledged that they will uphold ridiculous laws if they can fathom any rational reason for them under rational basis review.¹¹⁴ The United States Court of Appeals for the Sixth Circuit has explained, “Even foolish and misdirected provisions are generally valid if subject only to rational basis review.”¹¹⁵ Courts evaluating a statute using rational basis review must “negative every conceivable basis which might support it.”¹¹⁶ The Supreme Court has explained that it was not within its purview to “second-guess state officials,” and “[i]t is enough that the State’s action be rationally based and free from invidious discrimination.”¹¹⁷

The courts’ strong deferential standard was created after the “*Lochner* era” ended almost a century ago.¹¹⁸ In *Lochner v. New York*,¹¹⁹ the Court found that a statute that regulated the amount of hours a

¹¹² *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (emphasis added).

¹¹³ *Miranda O. McGowan, Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 382, 385 (2012).

¹¹⁴ See, e.g., *FCC v. Beach Commc’n, Inc.*, 508 U.S. 307, 313 (1993).

¹¹⁵ *Craigmiles v. Giles*, 312 F.3d 220, 223–24 (6th Cir. 2002).

¹¹⁶ *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

¹¹⁷ *Dandridge v. Williams*, 397 U.S. 471, 487 (1970); see also *Ry. Express Agency v. New York*, 336 U.S. 106, 109 (1949) (upholding advertising regulatory laws under rational basis).

¹¹⁸ See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 949–52 (1999); see also *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1962) (“The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and the like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”).

¹¹⁹ 198 U.S. 45 (1905).

baker could work lacked a direct relation to the health of the employee and was therefore irrational.¹²⁰ The *Lochner* court struck down the law because it reasoned that the Fourteenth Amendment did not allow for laws that did not have a legitimate health or safety justification.¹²¹ Justice Harlan dissented in *Lochner* and opined,

If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere.¹²²

Now, post “*Lochner* era,” to successfully bring a substantive due process claim, a plaintiff must prove that the government’s regulation or action was clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare.¹²³ To serve in a profession, “[a] state can require high standards of qualification . . . but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.”¹²⁴

IV. THE CURRENT STATUS OF COURT DECISIONS

A. Emerging Trend: Noting Distinctions- No More Rubber Stamping Licensing Laws

Government over-regulation is not a new societal concept, but thankfully some courts are beginning to put a stop to completely irrational and capricious regulatory regimes. Courts are beginning to take bold steps in the right direction by refusing to force people to follow regulatory regimes when the licensing schemes are “not even rationally related to a legitimate governmental purpose.”¹²⁵ Those courts reasoned that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose” and therefore is unconstitutional even under rational basis review.¹²⁶

¹²⁰ *Id.* at 64.

¹²¹ *Id.*

¹²² *Id.* at 68 (1905) (Harlan, J., dissenting).

¹²³ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

¹²⁴ *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 239 (1957) (citations omitted).

¹²⁵ *Craigsmiles v. Giles*, 312 F. 3d 220, 224 (6th Cir. 2002).

¹²⁶ *Id.*

In *Craigmiles v. Giles*, the Sixth Circuit found that holding casket merchants to the licensing requirements for funeral directors violated the Equal Protection and Due Process Clauses.¹²⁷ The Sixth Circuit reasoned that requiring casket sellers to have the same knowledge as funeral directors did not protect the health and safety of the general public.¹²⁸ The casket sellers did not conduct funerals or handle the corpse cleanings.¹²⁹ The only reason the court could fathom to justify forcing casket sellers to abide by funeral director licensing laws would be that the quality of caskets might threaten public health.¹³⁰ The casket owners argued that their casket business was so distinguishable from the funeral director business that the regulations imposed on funeral directors should not be imposed on them.¹³¹ The Sixth Circuit refused give that weak “reason” credence and found that forcing casket sellers to abide by the licensing law *only served “to prevent economic competition” with the funeral director industry.*¹³² The *Craigmiles* court concluded that funeral directors charged between 250 to 600% more than casket sellers, and forcing casket sellers to conform to the same licensing requirements was a Due Process Clause violation.¹³³

Despite rational basis review not requiring “the best or most finely honed legislation,” the *Craigmiles* court examined the legislative history of the licensing regulation and noted that “rational basis review, while deferential, is not toothless.”¹³⁴ The court found that the licensing law was not drafted to be overly inclusive and was not a product of “mere oversight,” but instead was created to “protect[] licensed funeral directors from retail price competition.”¹³⁵ The court removed the deferential blinders and emphasized that “[n]o sophisticated economic analysis is required to see the pretextual nature of the state’s proffered explanations” for the regulatory regime.¹³⁶ Regulatory regimes that “privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.”¹³⁷

¹²⁷ *Id.* at 229.

¹²⁸ *Id.* at 225–26.

¹²⁹ *Id.* at 225.

¹³⁰ *Id.*

¹³¹ *Id.* at 225–28.

¹³² *Id.* at 225 (emphasis added).

¹³³ *Id.* at 224.

¹³⁴ *Id.* at 227, 229 (citations omitted).

¹³⁵ *Id.* at 227.

¹³⁶ *Id.* at 229.

¹³⁷ *Id.*

Similar to the *Craigsmiles* court's rationale and facts involving regulation of the funeral industry, the Fifth Circuit came to the same conclusion almost a decade later in *St. Joseph Abbey v. Castille*.¹³⁸ In *St. Joseph Abbey*, the government attempted to justify its regulatory regime over the funeral and casket industry by stating that regulations protect consumers and guard the public health and safety.¹³⁹ The United States Court of Appeals for the Fifth Circuit found it "doubtful that the challenged law is rationally related to policing deceptive sales tactics."¹⁴⁰ The court reasoned, "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth."¹⁴¹ Due to the nature of interpreting state law within the case, the Fifth Circuit certified the constitutional question to the Louisiana Supreme Court.¹⁴²

Similar to the Fifth and Sixth Circuits invalidating regulations as applied under the Fourteenth Amendment, the Southern District of California determined that an "African hair braider" should not be forced to comply with California's cosmetology licensing laws in *Cornwell v. Hamilton*.¹⁴³ The court noted that although the African hair braider could be categorized as a cosmetologist, because her activities involving natural hair were so distinguishable from the activities that a cosmetology license pertained to, it was unconstitutional to force her to comply with those licensing laws.¹⁴⁴ Less than 10% of the curriculum for obtaining a cosmetology license pertained to activities that the African hair braider engaged in.¹⁴⁵ The court reasoned that the only conceivable reason for forcing the African hair braider to comply with cosmetology licensing laws would be economic protectionism of the cosmetology industry, which the court opined was an illegitimate reason that could not withstand constitutional challenge.¹⁴⁶ The licensing law violated the African hair braider's Due Process and Equal Protection rights under the Fourteenth Amendment.¹⁴⁷

¹³⁸ 700 F.3d 154 (5th Cir. 2012).

¹³⁹ *Id.* at 158–59.

¹⁴⁰ *Id.* at 163.

¹⁴¹ *Id.* at 165.

¹⁴² *Id.* at 168.

¹⁴³ 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

¹⁴⁴ *Id.* at 1107–08.

¹⁴⁵ *Id.* at 1111.

¹⁴⁶ *Id.* at 1106.

¹⁴⁷ *Id.* at 1105–17.

Importantly, the *Cornwell* court noted that “sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”¹⁴⁸ The African hair braider did not contend that the entire licensing law was invalid.¹⁴⁹ Instead, she claimed (and the Southern District of California agreed) that “[a]s applied, the classification at issue is that the regulatory scheme treats persons performing different skills as if their professions were one and the same, i.e., it attempts to squeeze two professions into a single, identical mold.”¹⁵⁰

Similarly, in 2012, a Utah court invalidated a cosmetology regulatory licensing law under rational basis review.¹⁵¹ In *Clayton v. Steinagel*, the plaintiff performed hair braiding but because Utah categorized the plaintiff as a cosmetologist, she could not legally braid hair unless she spent thousands on cosmetology licensing courses.¹⁵² The court reasoned that it was undisputed that the legislature never contemplated African hair braiding when it enacted its cosmetology regulations nor did it investigate the health risk of such braiding techniques.¹⁵³

Like the *Cornwell* plaintiff, the *Clayton* plaintiff was not seeking deregulation of cosmetology.¹⁵⁴ Instead, the plaintiff challenged the licensing scheme as applied to her African hair braiding profession.¹⁵⁵ The court concluded that Utah’s cosmetology scheme was “so disconnected” from the plaintiff’s African braiding that it showed “an insufficient rational relationship between public health and safety and the actual regulatory scheme” as applied to the plaintiff.¹⁵⁶ Adding some “teeth” to rational basis review, the court explained that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that the Constitution was designed to protect.”¹⁵⁷

Like the *Clayton* and *Cornwell* courts invalidated an arbitrary law under rational review, the United States Court of Appeals for the Ninth Circuit determined that a state’s licensing scheme for pest control violated the plaintiff’s rights under the Equal Protection Clause of

¹⁴⁸ *Id.* at 1103 (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

¹⁴⁹ *Id.* at 1118–19.

¹⁵⁰ *Id.* at 1103 (emphasis added).

¹⁵¹ *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1213–14 (D. Utah 2012).

¹⁵² *Id.* at 1213.

¹⁵³ *Id.* at 1214–15.

¹⁵⁴ *Id.* at 1213.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1215.

¹⁵⁷ *Id.* at 1216 (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

the Fourteenth Amendment.¹⁵⁸ In *Merrifield v. Lockyer*, the Pacific Legal Foundation represented the plaintiff, Merrifield, who owned a non-pesticide animal damage prevention and bird control business.¹⁵⁹ Merrifield argued that he should not be subjected to California's regulatory pest control licensing laws because the regulations are intended to monitor pesticide usage and Merrifield did not use pesticides.¹⁶⁰ Merrifield faced two untenable options: he would risk possible punishment by operating without a license, or he could incur the large expense and effort involved in seeking a license.¹⁶¹

Merrifield challenged the licensing law and argued that as applied to non-pesticide pest controllers like himself, it did not bear any relationship to a legitimate interest like consumer protection, public health, or safety.¹⁶² The Ninth Circuit acknowledged that the police power of the states includes the ability to regulate professions for the health, safety, consumer protection, and general welfare of the people.¹⁶³ However, the court also noted that "if the statute is *unrelated* to these interests, the statute lacks a rational basis."¹⁶⁴ Although the court ultimately rejected the due process claim because it concluded Merrifield understated the license requirement's relationship to his line of work, the court found the licensing scheme as applied violated the Equal Protection Clause.¹⁶⁵

Like the Pacific Legal Foundation, the Institute for Justice joined the fight in challenging irrational regulatory regimes in *Patel v. Texas Department of Licensing and Regulation*¹⁶⁶ in June 2015.¹⁶⁷ A concurring *Patel* judge explained that "[t]his case is *fundamentally about the American Dream and the unalienable human right to pursue happiness without curtsying to government on bended knee.*"¹⁶⁸ In *Patel*, the plaintiffs, eyebrow threaders, argued that the 750 hours of training that Texas required for a cosmetology license was unreasonable and unrelated to health or safety.¹⁶⁹ Like the *Craigsmiles*, *Clayton*, and *Merrifield* cases, the Texas Su-

¹⁵⁸ *Merrifield v. Lockyer*, 547 F.3d 978, 980–86, 992 (9th Cir. 2008).

¹⁵⁹ *Id.* at 980.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 986.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 988, 992.

¹⁶⁶ 469 S.W.3d 69 (Tex. 2015).

¹⁶⁷ *Id.* at 69.

¹⁶⁸ *Id.* at 93 (Willett, J., concurring) (emphasis added).

¹⁶⁹ *Id.* at 90.

preme Court found that the licensing requirements were unconstitutional as applied to the eyebrow threaders.¹⁷⁰ The court reasoned that “the unalienable right to pursue happiness is not merely the right to possess things or to participate in activities we enjoy; it necessarily includes the right to improve our lot in life through industry and ingenuity.”¹⁷¹

As a Florida court opined in an August 2015 decision,

It is a basic truism of the law and reinforced by the United States Supreme Court that “[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose” Occupational freedom, the right to earn a living as one chooses, is a *nontrivial constitutional right entitled to nontrivial judicial protection*.¹⁷²

B. Traditional Trend: Deference to the Legislature

Despite the trend of courts invalidating irrational nonsensical laws under rational review, there are still plenty of courts that uphold such laws, giving great deference to the legislature and avoiding constitutional throttles.

For example, according to Pacific Legal’s website, Nevada has the most anti-competitive licensing laws for movers.¹⁷³ Pacific Legal represented an entrepreneur in Reno who started a moving business and challenged the licensing law in *Underwood v. Mackay*.¹⁷⁴ The plaintiff filed suit under § 1983, stating that the regulatory regime violated the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment.¹⁷⁵ The licensing laws were so stringent that only two moving companies existed in Reno.¹⁷⁶ One of the requirements that applicants for a license must show to obtain a license was that granting him or her a license will not “increase or create competition that may be detrimental to . . . the motor carrier business.”¹⁷⁷

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 117.

¹⁷² *Muratti-Stuart v. Dep’t of Bus. & Prof’l Regulation*, 174 So. 3d 538, 540 (Fla. Dist. Ct. App. 2015) (emphasis added) (internal citations and quotations omitted).

¹⁷³ *Moving Roadblocks to Competition*, *supra* note 29.

¹⁷⁴ *Id.*

¹⁷⁵ *Underwood v. Mackay*, No. 3:12-cv-00533-MMD-VPC, 2013 WL 3270564, at *3 (D. Nev. June 26, 2013).

¹⁷⁶ *Moving Roadblocks to Competition*, *supra* note 29.

¹⁷⁷ *Id.* (citation omitted).

Pacific Legal's attorney coined this provision as the "Competitor's Veto."¹⁷⁸

The *Underwood* court admitted that "[t]he licensing scheme giving rise to Plaintiffs' suit contains both purportedly unconstitutional provisions (most notably, that a potential licensee demonstrate that their business does not unreasonably and adversely impact other carriers in the area) and constitutional provisions."¹⁷⁹ Despite this admission of unconstitutional components in the law, the court disposed of the case on ripeness grounds, stating that because the plaintiff did not go through the motions of applying and being rejected that there was no certainty of injury.¹⁸⁰ Shying away from disposing of the case on the merits, the court stated, "The point here is not to argue the merits of Plaintiffs' position, but rather to make clear the uncertainty that faces the Court in interpreting this regulatory scheme as applied to the facts of Plaintiffs' business."¹⁸¹

V. THE JUDICIAL CHANGE NEEDED

A. *Rational Basis Review Needs Some Teeth*

Rational basis review needs some "teeth." Courts have repeatedly acknowledged that "rational basis review, while deferential, is not toothless."¹⁸² The time is now for courts to quit grappling with and upholding ridiculous, arbitrary, and capricious laws by affording broad deference to the legislature. Economic protectionism and favoritism to specific players in industries is not a legitimate purpose for government regulation.

Courts should remove their deferential blinders like the Sixth Circuit did in *Craigsmiles*, by invalidating a regulatory regime because "[n]o sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations."¹⁸³ Regulatory regimes that "privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review."¹⁸⁴

¹⁷⁸ *Underwood*, 2013 WL 3270564, at *3.

¹⁷⁹ *Id.* at *6.

¹⁸⁰ *Id.* at *7.

¹⁸¹ *Id.* at *6.

¹⁸² *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (quoting *Peoples Rights of Org., Inc. v. City of Columbus* 152 F.3d 522, 532 (6th Cir. 1998) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976))).

¹⁸³ *Craigsmiles*, 312 F.3d at 229.

¹⁸⁴ *Id.*

Critics of the immensely low rational review standard and the suffocating licensing regulatory regimes are calling for “teeth.” As Inc.com hopefully put it, some laws:

make sense in a 21st-century context, some are vestiges of outdated regulatory regimes, and some are simply reflexive protectionism. With a few notable exceptions, prohibitions on economic activity between consenting adults do not long stand. Legislators and regulators may move slowly, but they are unlikely to completely block activities that people want.¹⁸⁵

Moreover, the Fifth Circuit held that “[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth.”¹⁸⁶

Even under rational basis review, certain occupational licensing, like regulations pertaining to sharing economies, are so nonsensical that they should be found unconstitutional. A Cato Institute study noted that the ride sharing industry was as safe as the taxi industry, thus combatting any safety concerns that the government might claim would justify overregulation of sharing economies.¹⁸⁷ The study found “Uber’s and Lyft’s background check requirements are stricter than the screening requirements for many American taxi drivers.”¹⁸⁸ The Goldwater Institute noted the outlandish nature of regulatory regimes by showing how disproportionately out of whack the arbitrary training hour requirements for occupational licensing are:

The difficulty of entering an occupation often does not line up with the public health or safety risk it poses. For example, 66 occupations have greater average licensure burdens than emergency medical technicians. The average cosmetologist spends 372 days in training; the average EMT only 33.¹⁸⁹

¹⁸⁵ Helm, *supra* note 9.

¹⁸⁶ *St. Joseph Abbey v. Castille*, 700 F.3d 154, 165 (5th Cir. 2012).

¹⁸⁷ Joseph Shuford, *Hotel, Motel, Holiday Inn & Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. ON. 301, 335 (2015), http://ncjolt.org/wp-content/uploads/2015/04/Shuford_Final.pdf.

¹⁸⁸ *Id.* at 335–36 (citation omitted).

¹⁸⁹ Slivinski, *supra* note 27 (quoting DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2012), https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf).

B. *Distinguish Airbnb & Uber from its Attackers to Distance their Companies from the Reach of Regulatory Regimes*

In *Cornwell*, the African hair braider did not contend that the entire licensing law was invalid. Instead, she successfully argued that “[a]s applied, the classification at issue is that the regulatory scheme treats persons performing different skills as if their professions were one and the same, i.e., it attempts to squeeze two professions into a single, identical mold.”¹⁹⁰ Following similar logic, the *Clayton* court refused to force an African hair braider to follow Utah’s cosmetology licensing laws because the regulations were “so disconnected” from African braiding and there was “an insufficient rational relationship between public health and safety and the actual regulatory scheme” as applied to the plaintiff.¹⁹¹

The same holds true with the current attack on Airbnb and Uber. Airbnb and Uber are not hotels and taxis. They are a breed of their own and a new creature to the industry. To successfully argue that the regulatory regimes are unconstitutional as applied, Airbnb and Uber would need to effectively distinguish their activities and overall purpose from their attackers to justify why they should not be held to the same state law regulations. They can both argue that technology is changing the entire dynamic and nature of their companies such that it is inherently different from prior established antiquated businesses like taxis and hotels.

Instead of calling Airbnb a “hotel substitute,” at least two courts have defined Airbnb as “a company that provides an internet platform connecting individuals who offer accommodations to individuals who wish to book accommodations and, if the parties agree on the price and terms, they can complete the transaction, including payment, via such platform.”¹⁹² Similar to courts recognizing that Airbnb is not a “hotel substitute,” some courts and legislatures are beginning to recognize Uber is not a “taxi substitute.”¹⁹³ Josh Mohrer, the general manager of Uber’s New York office, explained to *The New Yorker* that

¹⁹⁰ *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999) (emphasis added).

¹⁹¹ *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215 (D. Utah 2012).

¹⁹² *42nd & 10th Assocs. LLC v. Ikezi*, No. 85736, 2015 WL 731616, at *5 n.1 (N.Y. Civ. Ct. Feb. 17, 2015) (citing *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 789 (Sup. Ct. 2014)) (finding that respondent engaged in profiteering by renting out the premises on Airbnb, which was grounds for eviction under the Rent Stabilization Code).

¹⁹³ See, e.g., *Schneiderman*, 989 N.Y.S.2d at 789 (discussing that Airbnb is not a hotel substitute because of the tax provisions and occupancy law); *Greenwich Taxi, Inc. v. Uber Tech., Inc.*, No. 14-cv-733 (AWT), 2015 WL 4774989, at *3 (D. Conn. Aug. 13,

“[t]ech tools have changed the whole environment The upstarts can provide a range of ride options at different price points, improve driver efficiency by matching drivers with rides more quickly, and weed out bad drivers.”¹⁹⁴ In June 2015, the Michigan legislature began to recognize this important distinction between taxis and Uber. Representative Joseph Graves explained that Uber and other tech-based ride-sharing companies “are not taxis and they should be treated separately.”¹⁹⁵

In May 2015, Uber successfully defended its right to operate in Nevada by distinguishing itself from taxis and limos.¹⁹⁶ Specifically, “Uber had contended that it is a technology company, not a transportation provider, and therefore should not be subject to transportation regulations overseen by the Nevada Transportation Authority and the Nevada Taxicab Authority.”¹⁹⁷

Successfully utilizing a similar argument when sued by a taxi company, in *Greenwich*,¹⁹⁸ Uber took the same position by stating that “it is not even clear that Connecticut’s transportation laws apply to a technology company like Uber, which owns no cars, employs no drivers and provides smartphone-based transportation-request service.”¹⁹⁹ The *Greenwich* court dismissed the count that Uber misrepresented to customers its compliance with state regulations and noted that “the Connecticut legislature recently tasked the Connecticut Department of Transportation and other agencies with studying . . . whether the existing regulatory structure [as to taxicabs and livery vehicles] applies to companies like Uber.”²⁰⁰ Further, the *Greenwich* court refused to find

2015) (finding that Uber is not a taxi substitute because of the tax system for third-parties and personal insurance for drivers).

¹⁹⁴ Goldwyn, *supra* note 80.

¹⁹⁵ Kathleen Gray, *House, Senate Debate Very Different Regs for Uber, Lyft*, DETROIT FREE PRESS (June 16, 2015), <http://www.freep.com/story/news/politics/2015/06/16/legislature-looking-regulating-ride-services-like-uber-lyft/28827471/>.

¹⁹⁶ Sean Whaley & Sandra Chereb, *Legislature Approves Bill Authorizing Uber, Lyft in Nevada*, LAS VEGAS REVIEW-JOURNAL (May 23, 2015, 3:31 AM), <http://www.reviewjournal.com/news/nevada-legislature/legislature-approves-bill-authorizing-uber-lyft-nevada>.

¹⁹⁷ *Id.*

¹⁹⁸ *Greenwich Taxi, Inc. v. Uber Tech., Inc.*, No. 14–cv–733 (AWT), 2015 WL 4774989, at *3 (D. Conn. Aug. 13, 2015).

¹⁹⁹ *Id.* (citations omitted). *But see Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13–10769–NMG, 2014 WL 1338148, at *6 (D. Mass. Mar. 27, 2014) (finding the exact opposite of *Greenwich* stating that Uber is unfairly competing and that Uber’s attempt to distinguish its business from taxis was “an unduly narrow conception”).

²⁰⁰ *Greenwich Taxi, Inc.*, 2015 WL 4774989, at *12 n.4.

that the plaintiffs sufficiently pled enough to support a finding that Uber was falsely representing itself, misleading the public, tortiously interfering with contractual relationships with credit card companies, breaking state unfair trade practices law, or falsely associating itself with the taxi industry.²⁰¹ The *Greenwich* court reasoned that Uber was not using similar language or logos that would lead customers to believe Uber was owned or operated by limousines or taxis.²⁰²

Like the *Greenwich* court, other courts have dismissed complaints with conclusory allegations, such as “Uber has engaged in a series of false representations that constitute unfair and deceptive acts in commerce.”²⁰³ One court that dismissed a misrepresentation claim against Uber stated, “Uber has not made such explicit representations and . . . plaintiffs have alleged no facts to support their allegations Conclusory allegations such as these, unsupported by facts, will not survive a motion to dismiss.”²⁰⁴ Another court dismissed a false advertising claim because the Medallion taxi plaintiffs did not allege that Uber’s business caused a direct injury to them.²⁰⁵ That court concluded that Uber’s presence in the market that allegedly decreased the value of taxi medallions was too conclusory of an allegation absent a direct injury flowing from Uber’s presence.²⁰⁶

VI. THE LEGISLATIVE CHANGE NEEDED: REGULATE TO PROMOTE THE LEGITIMACY OF SHARING ECONOMIES & CURB LITIGATION COSTS

When looking at the sharing economy trend objectively, it would be more efficient for the legislature to implement a small tax on Airbnb hosts and Uber drivers instead of running those industries out of business. Additionally, putting an end to the question of sharing economies “legality” would curb litigation costs substantially.²⁰⁷ Forcing Airbnb out of town altogether results in flawed legislation that is “constitutionally questionable and likely to lead to litigation,” said Rob-

²⁰¹ *Id.* at *7.

²⁰² *Id.* at *8.

²⁰³ *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148, at *5 (D. Mass. Mar. 27, 2014).

²⁰⁴ *Id.*

²⁰⁵ *Yellow Grp. LLC v. Uber Techs., Inc.*, No. 12-C-7967, 2014 WL 3396055, at *3 (N.D. Ill. July 10, 2014).

²⁰⁶ *Id.*

²⁰⁷ See Krauss, *supra* note 32 (discussing the benefit of the sharing economy and suggesting proposed regulation focusing on public safety).

ert St. Genis, Director of Operations of the Los Angeles Short Term Rental Alliance.²⁰⁸

As a law review article noted, “If the public seems to want to share rides, the government should be responsive to these preferences while remaining cautious about potential risks.”²⁰⁹ Sharing economies have shaken up laws and regulations as we know them because those antiquated laws and regulations did not anticipate the wave of the future when they were crafted. An article pointed out categories of laws that were not crafted to adapt with the emergence of sharing economies: employer/employee law and landlord/tenant law.²¹⁰ The article noted, “When such regulations do apply, they can be unduly burdensome given that they are designed to protect the powerless against the powerful and such protections are often unnecessary”²¹¹ Since “[t]he sharing economy is not a top-down solution, meaning that it will not be imposed by a set of legislated policies,” legislators should craft new adaptive regulations suited for such innovation.²¹²

A September 2015 Westlaw search of “Uber & regulat!” yielded 140 cases, 93 of which are federal court cases, and 47 of which are state court cases. A September 2015 search of “Airbnb & regulat!” yielded four cases, one federal case and three state court cases. If the legislature deemed such sharing economies “legal” and issued unique regulations to those industries, at least 144 lawsuits could have been prevented as of September 2015. Some common claims that have been repeatedly litigated throughout the United States in both federal and state court against sharing economies like Uber and Airbnb are that they unfairly compete with plaintiffs’ industries and fail to comply with regulations.²¹³ The Legislature should issue more guidance on

²⁰⁸ Tim Logan, *Despite Airbnb Opposition, Santa Monica Poised to Pass Tough Short-Term Rental Law*, L.A. TIMES (May 12, 2015), <http://www.latimes.com/business/la-fi-santa-monica-airbnb-20150511-story.html>.

²⁰⁹ Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 474 (2015).

²¹⁰ Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 13–14 (2012).

²¹¹ *Id.*

²¹² *Id.* at 3.

²¹³ *See, e.g.,* Reardon v. Uber Techs., Inc., 115 F. Supp. 3d 1090, 1091–92 (N.D. Cal. 2015) (alleging violation of the Telephone Consumer Protection Act); Greenwich Taxi, Inc. v. Uber Techs., Inc., 123 F. Supp. 3d 327 (D. Conn. 2015) (alleging deceptive trade practices, unfair competition, and misrepresentation); L.A. Taxi Coop., Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 859 (N.D. Cal. 2015) (alleging violations of the Lanham Act, false advertising, and fraud); Ramos v. Uber Techs., Inc., No.

classifying these sharing economies to conserve judicial resources and maintain consistency.

A sharing economy expert, Rachel Botsman, explained that “[c]ities are realizing this is the new normal When you have millions of people having a positive experience, it’s hard to argue a case against it. Cities now see if they don’t tax this in some way, they’re losing money.”²¹⁴ Sharing economies facilitate efficient allocation of resources. A law review article noted,

a well-functioning shared economy reduces overconsumption of goods and, by recycling unused goods and labor, reduces prices and scarcity of these goods and services in the consumer market [while] [s]olving social problems associated with overconsumption and allowing access to goods and services at a lower cost clearly benefits consumers.²¹⁵

Portland, Oregon, and San Francisco, California, have legalized some Airbnb listings in exchange for a tax.²¹⁶ San Francisco’s “Airbnb Law” has been challenged on constitutionality grounds and requires a public registry of hosts, fees due every two years, hotel-like taxes, and homeowner’s insurance.²¹⁷

SA-14-CA-502-XR, 2015 WL 758087, at *1, *4 (W.D. Tex. Feb. 20, 2015) (alleging disability discrimination and that Uber must comply with the ADA because it is a public accommodation); *Manzo v. Uber Techs., Inc.*, No. 13 C 2407, 2014 WL 3495401, at *1 (N.D. Ill. July 14, 2014) (alleging violations of state unfair trade practice law, violations of local regulatory ordinances, and rate misrepresentation); *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148, at *1 (D. Mass. Mar. 27, 2014) (alleging violations of state unfair trade practices); *Brookford, LLC v. Penraat*, 8 N.Y.S.3d 859, 874-75 (N.Y. Sup. Ct. 2014) (finding that Respondent violated the Rent Control Law); *City of N.Y. v. Smart Apartments LLC*, 959 N.Y.S.2d 890, 892 (N.Y. Sup. Ct. 2013) (alleging using Airbnb constitutes a public nuisance and violates rent codes); *42nd & 10th Assocs. LLC v. Ikezi*, 2015 WL 731616, at *6 (N.Y.C. Civ. Ct. Feb. 17, 2015) (finding that Respondent engaged in profiteering by renting out the premises on Airbnb which was grounds for eviction under the Rent Stabilization Code).

²¹⁴ Helm, *supra* note 9.

²¹⁵ Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH. L.J. 23, 31 (2015).

²¹⁶ Helm, *supra* note 9.

²¹⁷ S.F., CAL., ORDINANCE No. 218-14 (Oct. 27, 2014); *see also* *HomeAway Inc. v. City & Cty. of San Francisco*, No. 14-CV-04859-JCS, 2015 WL 367121, at *1 (N.D. Cal. 2015) (granting a motion to dismiss for HomeAway Inc.’s claim that a city ordinance regulating short-term rentals of residential housing “violates the negative implications of the Commerce Clause”); Shuford, *supra* note 187 (discussing the recent developments in the sharing economy and their potential impact on the North Carolina legislature, which has yet to address the subject).

As of June 2015, Virginia legislated a licensing process for tech-based car services like Uber, which consists of a \$100,000 initial fee and \$60,000 renewal costs.²¹⁸ Los Angeles is in the process of forming an ad hoc tax, “the transit occupancy tax,” which will result in a “spotty system” with uncertain enforcement guidelines.²¹⁹ Airbnb welcomed the tax and explained that the very act of taxing was a step in the right direction.²²⁰ David Owen, Airbnb’s regional head of public policy stated, “We’re hopeful that folks move forward with clear and fair rules that make it simple for people to share their homes.”²²¹

A law review article explained that “[c]ompanies eager to gain official recognition of their legitimacy and to reduce the appearance of [sic] illegality or risk for their individual users appear willing to compromise to demands of tax remittance, record-keeping, and co-enforcement against noncompliant users.”²²² While some courts refer to Airbnb as an Internet platform that connects people in the marketplace, other courts have held that using Airbnb constitutes “operating an illegal hotel and/or bed and breakfast” under rent control laws.²²³ Legislative change is necessary to solidify Airbnb’s definition and maintain consistency in the court system.

In June 2015, Michigan’s legislature took a revolutionary leap in categorizing Uber as distinct from taxicab companies.²²⁴ Previously, Uber would have to reach an agreement with the communities in which it operates, but now, the House Commerce and Trade Committee transferred that negotiating duty to the Michigan Department of Transportation.²²⁵ Representative Joseph Graves, chair of the committee, stated that this legislative decision “puts a structure in place that

²¹⁸ Jenna Portnoy & Josh Hicks, *New Laws in Va., Md. and D.C. Regulate Drones, Uber, Social Media*, WASH. POST (June 30, 2015), http://www.washingtonpost.com/local/virginia-politics/new-laws-in-va-md-and-dc-police-drones-uber-and-social-media/2015/06/30/d14f6cc0-1e93-11e5-bf41-c23f5d3face1_story.html.

²¹⁹ Josie Huang, *L.A. Councilmembers Push to Regulate Airbnb*, S. CAL. PUB. RADIO (June 2, 2015), <http://www.scpr.org/news/2015/06/02/52144/la-officials-push-to-regulate-airbnb/>.

²²⁰ *Id.*

²²¹ *Id.*

²²² Cannon & Chung, *supra* note 215, at 94–95.

²²³ Brookford, LLC v. Penraat, 8 N.Y.S.3d 859, 863 (N.Y. Sup. Ct. 2014) (equating using Airbnb with running an “illegal hotel and/or bed and breakfast”). *But see* 42nd & 10th Assocs. LLC v. Ikezi, 2015 WL 731616, at *6 n.1 (N.Y.C. Civ. Ct. Feb. 17, 2015) (defining Airbnb as an Internet platform).

²²⁴ Gray, *supra* note 195.

²²⁵ *Id.*

says that TNCs (Transportation Network Companies) are not taxis and they should be treated separately.”²²⁶

Despite strong competitor opposition, Uber has rallied some support in the legislature to defend its right to continue operating. In California, state regulators are classifying Uber as a “transportation network company” that can operate as long as Uber conducts driver background checks and holds insurance.²²⁷ Other cities like Washington, D.C., and Houston, Texas, allow Uber to continue running in exchange for a tax and other various regulations.²²⁸ The governors of Virginia and Massachusetts are striving to overturn regulatory bans on Uber.²²⁹ In Florida, Coral Gables’ commissioners support regulation of ride-sharing companies to enable the companies to continue serving their city.²³⁰ Coral Gables Commissioner Patricia Keon stated, “I think it’s a good thing to promote some of these innovative means of doing business, and that’s hoping they are regulated to the point that we can ensure public safety.”²³¹

While some cities are embracing the wave of the future, in March 2014, others like Miami, Little Rock, New Orleans, and Las Vegas banned Uber.²³² Other cities like Minneapolis, St. Paul, Milwaukee, and Detroit require Uber to operate under taxi regulations.²³³ Seattle went as far as to limit the number of alternative transportation methods that companies such as Uber or Lyft can have in operation at once.²³⁴ Specifically, Seattle passed a law limiting Uber to 150 drivers at any given time within its city.²³⁵ San Francisco airport officials arrested sharing economy transportation drivers and Philadelphia officials impounded ride-share vehicles.²³⁶ Until the legislature takes on

²²⁶ *Id.*

²²⁷ Rauch & Schleicher, *supra* note 10, at 26.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Lance Dixon, *Coral Gables Urges County Regulation of Uber, Lyft*, MIAMI HERALD (Oct. 27, 2015) <http://www.miamiherald.com/news/local/community/miami-dade/coral-gables/article41623200.html>.

²³¹ *Id.*

²³² Rauch & Schleicher, *supra* note 10; *see also* Reid Wilson, *Seattle Becomes First City to Cap Uber, Lyft Vehicles*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/03/18/seattle-becomes-first-city-to-cap-uber-lyft-vehicles/>.

²³³ Wilson, *supra* note 232.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Cannon & Chung, *supra* note 215.

this inconsistency, innovation will continue to be stifled and consumers will continue to be deprived.

Although some states have imposed harsh legislative regulations on Uber, just the act of imposing such regulations is a step in the right direction because it legitimizes Uber as a business that is distinct from taxicab drivers. For example, in Boston, two legislators filed a bill that refers to Uber and other tech-based, ride-sharing companies as “Transportation Network Companies” (“TNCs”), “a new category of state supervision.”²³⁷ Boston’s Uber division performs background checks on its drivers through a private company, and the new bills require extensive background checks and licensing that “closely mirror those that govern the taxi . . . industry.”²³⁸ Though such legislation is not exactly a “victory” for Uber, just the act of recognizing that Uber is distinct from taxis is a step towards the liberation of innovation. Uber spokeswoman Susie Health explained that Uber welcomes such regulations. She stated, “We believe that ride-sharing and Uber should be regulated and we have been working together with provincial and municipal governments across the country to make this a reality.”²³⁹

Instead of government regulation, the Goldwater Institute has suggested “[a] regime of voluntary private certification” like the Better Business Bureau to regulate certifications for professions.²⁴⁰ Such a system would “alleviate the biggest problem faced by low-income entrepreneurs: arbitrary education and experience requirements written by representatives in incumbent industries who wish to keep out competitors.”²⁴¹ Certifying agencies will protect their reputation by creating job certification requirements that test competency.²⁴² Similarly, a *University of Chicago Law Review* article suggested that regulatory responsibility over sharing economies should be delegated to non-governmental entities.²⁴³ The article suggested that the non-govern-

²³⁷ Nicole Dungca, *State Bill Would Toughen Rules for Ride-Hailing Firms*, BOSTON GLOBE (July 20, 2015), <https://www.bostonglobe.com/metro/2015/07/20/boston-legislators-push-for-strict-regulations-uber-and-lyft/11jXcp5PAV8ViWbZgTHISI/story.html>.

²³⁸ *Id.*

²³⁹ Sheena Goodyear, *Uber vs. the World: How Cities are Dealing with Ride-Hailing Technology*, CBC NEWS (Oct. 2, 2015), <http://www.cbc.ca/news/business/uber-versus-the-world-1.3252096>.

²⁴⁰ Slivinski, *supra* note 27.

²⁴¹ *Id.*

²⁴² *See id.*

²⁴³ *See* Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 116 (2015), <https://>

mental regulatory entities would need credible enforcement mechanisms, the perception of legitimacy, and a solid reputation to be effective.²⁴⁴ Different proposals have called for government and non-governmental agencies to collaborate and regulate sharing economies as a dual effort.²⁴⁵

On the other hand, another proposal has called for de-regulation across the board. An article in the *Journal of Business, Entrepreneurship and the Law* stated:

[T]he solution is not to punish new innovations by simply rolling old regulatory regimes onto new technologies and sectors. *The better alternative is to level the playing field by “deregulating down” to put everyone on equal footing, not by “regulating up” to achieve parity.* Policymakers should relax old rules on incumbents as new entrants and new technologies challenge the status quo. By extension, new entrants should only face minimal regulatory requirements as more onerous and unnecessary restrictions on incumbents are relaxed.²⁴⁶

Slowly, legislatures are beginning to embrace Uber and other sharing economies with a willingness to modify regulations. Uber estimates that approximately fifty jurisdictions have adopted regulatory schemes to allow Uber to continue operating.²⁴⁷ Some jurisdictions that have regulated Uber include California, Washington, Colorado, Illinois, New York, and Washington, D.C.²⁴⁸ For example, the Hillsborough County Public Transportation Commission’s chairman stated in September 2015 that his board would stop ticketing Uber drivers for existing.²⁴⁹ He explained this form of a white flag compromise will be made in good faith because “[w]e really want to make this work. We want new technology, we want new companies, we want the future here today.”²⁵⁰

lawreview.uchicago.edu/page/self-regulation-and-innovation-peer-peer-sharing-economy.

²⁴⁴ *Id.* at 125–26.

²⁴⁵ See Cannon & Chung, *supra* note 215, at 55–56.

²⁴⁶ Cristopher Koopman et al., *The Sharing Economy & Consumer Protection Regulation*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 544 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535345 (emphasis added).

²⁴⁷ Goodyear, *supra* note 239.

²⁴⁸ See *id.*

²⁴⁹ Jennifer Titus, *Law Could Force New Safety Rules on Uber*, WTSP NEWS (Sept. 9, 2015, 6:48 PM), <http://www.wtsp.com/story/news/local/2015/09/09/ride-sharing-uber-lyft/71958704/>.

²⁵⁰ *Id.*

The Hillsborough white flag proposed legislation, as the chairman explained, strikes a fair balance between “open[ing] the door to innovative free market enterprise without sacrificing reasonable consumer protection and public safety.”²⁵¹ The proposed legislation requires Uber drivers to (1) complete background checks, (2) carry insurance, (3) honor accommodations for people with disabilities under the Americans with Disability Act (“ADA”), and (4) complete annual car inspections with a mechanic of the driver’s choice.²⁵² The proposed legislation did not address citations given to Uber drivers because Florida’s Second District Court of Appeal was scheduled to hear oral arguments on the issuance of citations to Uber drivers on October 14, 2015.²⁵³

Characterized as settling “one of the biggest fights County Hall has ever hosted,” Broward County commissioners decided to lift its ban on Uber after four months of experiencing an overwhelming amount of public outcry in response to its prior ban on Uber.²⁵⁴ In a major Uber victory after being banned from its streets in July 2015, Broward County decided to allow Uber to begin operating again under looser regulations in October 2015.²⁵⁵ Broward County’s vice mayor explained that Uber is an “evolving technology” and such legislation will allow Uber to run as long as Uber complies with insurance, background checks, and other safety regulations.²⁵⁶ The *Sun Sentinel* explained that the commissioners were faced with an overwhelming amount of opposition from the general public after attempting to ban Uber from Broward County: “The Uber-loving public clobbered county commissioners in meetings and filled their email inboxes with hate mail. Business leaders denounced the county for running Uber off.”²⁵⁷

Similar to the United States’ legislators responding to public demand for Uber and crafting balanced legislation to allow Uber’s opera-

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See Brittany Wallman, *Uber is Back in Broward County*, SUN SENTINEL (Oct. 15, 2015, 8:00 AM), <http://www.sun-sentinel.com/local/broward/fl-uber-final-vote-20151013-story.html>.

²⁵⁵ Jaime Guirola, *Broward County Approves Looser Regulations*, NBC 6 S. FLA. (Oct. 13, 2015), <http://www.nbcmiami.com/news/local/Broward-County-to-Vote-on-Uber-Lyft-332426452.html>.

²⁵⁶ *Id.*

²⁵⁷ Wallman, *supra* note 254.

tion, international legislators and judges are also leaning towards a balanced legislation instead of banning Uber. On October 9, 2015, a Brazilian judge issued a restraining order against a ban on Uber in Rio de Janeiro.²⁵⁸ The Brazilian judge reasoned that his country should not ban Uber because it offers “better, safer and speedier [transportation] services at lower prices.”²⁵⁹ Additionally, Toronto decided to regulate Uber instead of ban it because the mayor concluded that an outright ban would not be practical because of Uber’s strong growing presence in the market.²⁶⁰

VII. CONCLUSION

Regulatory regimes are unconstitutional under the Fourteenth Amendment because they arbitrarily safeguard established companies with political clout against legitimate competition and ultimately disadvantage the public. As the concurrence in *Patel* stated, “the unalienable right to pursue happiness is not merely the right to possess things or to participate in activities we enjoy; it necessarily includes the right to improve our lot in life through industry and ingenuity.”²⁶¹

If the taxis and hotels want to compete with the technology-created sharing economy companies like Uber and Airbnb, then they need to improve their services and efficiency, not ban competition. Uber’s barrister has explained that there is an irony in “asking the court to keep up with the times when their stance is to make sure modern technology is not used.”²⁶²

Customers have complained for decades about cab conditions, nasty taxi drivers, and confusing fares.²⁶³ The *New Yorker* featured an article on Uber, *Will Uber Destroy the Driving Profession?*, which began with the author taking an Uber ride.²⁶⁴ The author explained that her driver told her he went to work for Uber after waiting “eight fruitless

²⁵⁸ *Brazil Judge Issues Restraining Order that Allows Uber and Other Ride Apps to Operate in Rio*, FOX NEWS (Oct. 9, 2015), <http://www.foxnews.com/world/2015/10/09/brazil-judge-issues-restraining-order-that-allows-uber-and-other-ride-apps-to.html>.

²⁵⁹ *Id.*

²⁶⁰ Goodyear, *supra* note 239.

²⁶¹ *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 117 (Tex. 2015) (Willett, J., concurring).

²⁶² Titcomb, *supra* note 99.

²⁶³ DeMasi, *supra* note 20.

²⁶⁴ Goldwyn, *supra* note 80.

months pursuing an official taxi license” because Uber accepted his application “within a few days.”²⁶⁵

When a journalist took identical trips, one with Uber and one with a taxicab, she found that Uber was cheaper and quicker.²⁶⁶ Representative Leslie Love shared a similar “comparative experience” and has stated, “I called for Uber and the service was excellent And then I waited [thirty] minutes for a cab that never showed.”²⁶⁷

Indicating that the taxicabs are able to compete if they adjust their methods of conducting business, “[t]here is now talk within the taxi community of developing mobile applications to compete” with Uber and other tech-based ride sharing companies.²⁶⁸ Improvement of services from all industries best serves the general public by inspiring companies to constantly provide the best possible service to its customers to stay afloat. Governor Charlie Baker agrees, and stated, “The consumer gets to make the call with respect to what they think is the best mode of transportation for them, which is exactly as it should be.”²⁶⁹

Similarly advocating for industries to up their standards instead of cutting sharing economies out of the market, when the *Atlantic* asked Airbnb’s founders if they were trying to make hotels obsolete, Airbnb’s co-founder and CEO, Brian Chesky, stated,

I don’t think we’re disrupting hotels unless hotels refuse to change We generally believe that the pie can grow so much, it’s not a fixed pie. Around the world, tourism is as big an industry as oil. Oil is \$4 trillion and tourism is between \$2 trillion and \$6 trillion. With the rise of Brazil, Russian, India, China, you have all of these new travelers, 300 million people from China alone. Think about what that means for the industry.²⁷⁰

Responding to and keeping up with innovation, not crushing innovation, is best for society. The refreshing attitude of Joe Gebbia, one

²⁶⁵ *Id.*

²⁶⁶ Chloe Hamilton, *Road-Testing the Taxis: Uber Was Cheaper and Quicker than a Black Cab*, INDEPENDENT (June 10, 2014), <http://www.independent.co.uk/voices/roadtesting-the-taxis-uber-was-cheaper-and-quicker-than-a-black-cab-9524060.html>.

²⁶⁷ Gray, *supra* note 195.

²⁶⁸ Goldwyn, *supra* note 80.

²⁶⁹ Dan Adams, *New Rules Proposed for Ride Services like Uber, Lyft*, BOSTON GLOBE (Apr. 24, 2015), <https://www.bostonglobe.com/business/2015/04/24/baker-proposes-law-regulate-uber-lyft-other-ride-sharing-services/q1rS2IDNs0WEIrtbNxb60I/story.html>.

²⁷⁰ Thompson, *supra* note 39.

of Airbnb's founders, that he directs towards his company's innovation team is as follows:

Anytime somebody comes to me with something, my first instinct when I look at it is to think bigger. That's my instinctual piece of advice. Think bigger. Whatever it is, blow it out of proportion and see where that takes you. Come back to me when you've thought about that times 100. Show me what that looks like.²⁷¹

Is that not the type of persistence, dedication, passion, and creativity that we want to encourage *every* company owner to portray? A law review article hit the nail on the head and observed that sharing economies "should be viewed as part of the solution, rather than part of the problem."²⁷² Limitations and boundaries on creativity and entrepreneurship are crippling to society because such restrictions deprive consumers of the best possible prices for the top services available. Instead of fighting positive change, archaic industries need to keep up, or get out of the way for superior companies to take over.

²⁷¹ *How Design Thinking Transformed Airbnb*, *supra* note 44.

²⁷² Cohen & Sundararajan, *supra* note 243, at 119.