WHERE TECHS RUSH IN, COURTS SHOULD FEAR TO TREAD†: HOW COURTS SHOULD RESPOND TO THE CHANGING ECONOMICS OF TODAY

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† *See* ALEXANDER POPE, AN ESSAY ON CRITICISM (1711) ("For fools rush in where angels fear to tread.").

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INTRODUCTION

A long unfolding federal circuit court split, setting competing theories of economic due process squarely against each other,[1] suddenly seems more pressing in today's era of emerging "disruptive" technology companies versus fading traditional businesses that are often unable to effectively compete. In the face of unprecedented and rapidly evolving business models, certain circuits' rejection of state regulatory measures amounts to a perhaps short-sighted view, potentially returning American jurisprudence to a defense of laissez-faire capitalism without regard to the limitations of the judicial process. While deference to the legislature is not the perfect answer to solving the economic due process issues that today's courts will face, it is the solution that will lead to outcomes that are most compatible with good-sense regulation based upon the determinations made in the political and regulatory battlegrounds of our states and localities.

In the twenty-first century, technology has broken down long-established barriers and subsequently changed the way citizens interact with businesses and with each other.[2] While the proliferation of digital platforms such as Airbnb,[3] Uber,[4] and TaskRabbit[5] have prompted

1 The current circuit court split exists between the Tenth and Second Circuit Courts, which find economic protectionism to be a legitimate government interest under rational-basis review; and the Fifth, Sixth, and Ninth Circuit Courts, which have come to the opposite result. *See* Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 283, 286 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016); St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) ("As we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose . . . ."); Merrifield v. Lockyer, 547 F.3d 978, 991 & n.15 (9th Cir. 2008) (finding that under rational-basis review, "mere economic protectionism for the sake of economic protectionism is irrational"); Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

2 *See generally* RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION (2010).

3 *See About Us*, AIRBNB, https://www.airbnb.com/about/about-us (last visited Oct. 17, 2015) ("Airbnb is a trusted community marketplace for people to list, discover, and book

some to describe the current climate as the "Sharing Economy," "On-Demand Economy," or "Peer-to-Peer Economy,"[6] one thing for certain is that properly characterizing this "New Economy" is stumping the general public[7] and experts alike.[8] If business leaders and learned scholars cannot come to a consensus, why then would judges be equipped to properly navigate this new environment?

New Economy companies often suddenly appear and encroach upon existing industries where the traditional players are subject to licensing requirements, regulations, and rules.[9] Although proponents laud the New Economy for its inventiveness, efficient use, and preservation of resources,[10] it typically does so by sidestepping regulations. Its participants often intentionally disrupt the traditional economy by upending the existing regulatory scheme and workforce,

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unique accommodations around the world. . . . Whether an apartment for a night, a castle for a week, or a villa for a month, Airbnb connects people to unique travel experiences, at any price point, in more than 34,000 cities and 191 countries.").

4 *See* UBER, https://www.uber.com/?exp=home_signup_form (last visited Sept. 19, 2016) ("Tap the app, get a ride. Uber is the smartest way to get around. One tap and a car comes directly to you. . . . What makes the Uber experience truly great are the people behind the wheel. They are mothers and fathers. Students and teachers. Veterans. Neighbors. Friends. Our partners drive their own cars—on their own schedule—in cities big and small.").

5 *See About Us*, TASKRABBIT, https://taskrabbit.com/about (last visited Oct. 17, 2015) ("Our same-day service platform instantly connects you with skilled Taskers to do your chores so you can be more productive, every day.").

6 PWC, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY 14 (2015), https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf [hereinafter CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY].

7 A 2016 Pew Research Center survey uncovered that just twenty-seven percent of Americans have ever heard of the term "sharing economy." Kenneth Olmstead & Aaron Smith, *How Americans Define the Sharing Economy*, PEW RES. CTR. (May 20, 2016), http://www.pewresearch.org/fact-tank/2016/05/20/how-americans-define-the-sharing-economy. The survey also asked respondents to describe the term. *Id.* The most frequently reported description emphasized "sharing" while ignoring the "economy" portion of the phrase. *Id.*

8 Two professors of marketing, Professor Giana M. Eckhardt and Professor Fleura Bardhi, explain that the sharing economy is not about sharing, it is about access. Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, HARV. BUS. REV. (Jan. 28, 2015), https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all. Once a company becomes an intermediary between consumers who do not know each other, it is no longer considered sharing; it is instead consumers "paying to access someone else's goods or services for a particular period of time." *Id.*

9 *See* Susie Cagle, *The Case Against Sharing*, NIB (May 27, 2014), https://medium.com/the-nib/the-case-against-sharing-9ea5ba3d216d#.evff5ago9 ("But sharing businesses aren't just creating new income streams from nothing. In 'disrupting' even troubled markets . . . the glory of the peer economy comes at the expense of other workers' livelihoods."); Mike Lux, *A Libertarian Dream: The 'Sharing Economy'*, HUFFINGTON POST (May 19, 2015, 1:49 PM), http://www.huffingtonpost.com/mike-lux/a-libertarian-dream-the-sharing-economy_b_7313014.html ("Uber and Airbnb want to compete in markets where their competitors have to get licenses and adhere to certain basic rules of health, safety and reliability. They figure if they don't have to adhere to the same rules, they can gain a competitive edge.").

10 *See The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013, 12:00 AM), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy.

thereby posing dangers to the public.[11] Whether recognized or not, the circuit courts have split over economic due process in a manner that impacts this New Economy.

While offering teeth-whitening in a shopping mall kiosk does not involve an "app" that allows immediate connection to services,[12] or an internet link to allow the marketing of an apartment as a short-stay hotel,[13] it is an equivalent attempt to disregard traditional regulation and licensing and go directly to the public with a new service that challenges "business as usual."[14] In the summer of 2015, the U.S. Court of Appeals for the Second Circuit in *Sensational Smiles, L.L.C. v. Mullen* upheld a Connecticut state regulation that allowed only licensed dentists to perform certain teeth-whitening services on consumers.[15] The plaintiff in *Sensational Smiles* alleged that as opposed to an interest in the public's oral health, the true motive behind the law was to protect the monopoly on dental services that licensed dentists in Connecticut enjoy,[16] a concept known as "naked economic protectionism," or economic favoritism, which is defined as a law having the sole purpose of shielding a particular group from intrastate economic competition.[17]

The Second Circuit upheld Connecticut's limitation of Sensational Smiles's business practices to licensed dentists,[18] explaining that even if the court did not find any rational justification to support its ultimate holding, and the only conceivable reason for the restriction was to

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11 *See, e.g.*, Erik Engquist, *A New Powerful Ally Emerges in Yellow Taxis' Corner*, CRAIN'S N.Y. BUS. (Oct. 30, 2015, 12:01 AM), http://www.crainsnewyork.com/article/20151030/BLOGS04/151029797 (discussing that as a result of ride-sharing companies, such as Uber, owners of taxicab medallions are not earning enough money from renting their medallions to pay off the loans they took out to buy them, ranging from $800,000 to $1.3 million); Andrew Harris, *Chicago Cabbies Sue over Unregulated Uber, Lyft Services*, BLOOMBERG (Feb. 6, 2014, 8:56 PM), http://www.bloomberg.com/news/articles/2014-02-06/chicago-cabbies-sue-over-unregulated-uber-lyft-services (explaining that in *Illinois Transportation Trade Association v. City of Chicago*, plaintiff taxicab owners and taxi trade association alleged in their complaint that by not subjecting ride-share services in Chicago to the standard taxi and limousine regulations, the city government would devalue over 6800 city-issued operating permits, which total in market value to $2.3 billion).

12 Elisabeth Leamy & Vanessa Weber, *Teeth Whitening Kiosks at the Mall*, ABC NEWS (May 21, 2008), http://abcnews.go.com/GMA/story?id=4900804&nfo=/desktop_newsfeed_ab_refer_homepage.

13 *See* AIRBNB, *supra* note 3.

14 *See, e.g.*, Leamy & Weber, *supra* note 12 (describing an investigation of mall bleaching kiosks run by non-dentists which found employees at the kiosk performing acts which "[m]any states consider [to be] practicing dentistry without a license").

15 Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 283 (2d. Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016).

16 *Id.* at 285.

17 *Id.* at 285–86 (defining "naked economic protectionism" as "laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition [that] cannot survive rational basis review").

18 *See* CONN. GEN. STAT. ANN. § 20-103a(a) (West 2008).

protect dentists from competition, it would be compelled by a long line of precedent to uphold the regulation as constitutional.[19]

By explicitly stating that such economic protectionism was constitutionally viable, the Second Circuit amplified an existing disagreement amongst the federal circuit courts.[20] The Tenth Circuit,[21] like the Second Circuit, finds "protectionism" to be a legitimate state interest and rational for purposes of review of state action under the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[22] while the Fifth,[23] Sixth,[24] and Ninth[25] Circuits hold that such protectionist legislation is irrational and does not serve a legitimate governmental purpose.

The Fifth, Sixth, and Ninth Circuits' invalidation of state regulation affecting economic liberties is troubling in today's rapidly changing society and evolving economic environment. This Note argues that these courts are essentially using an early twentieth-century application of due process to resolve economic questions unique to the twenty-first century, an endeavor best left to the political process.

The U.S. Supreme Court's position on economic liberties evolved during the nineteenth and twentieth centuries in accordance with shifting social and economic conditions.[26] Changes in our nation's economic system, such as rapid industrial expansion in the nineteenth-century and the Great Depression of the 1930s, necessitated that state legislatures enact legislation to protect the public and maintain health and safety standards.[27] The emerging clash between the traditional pre-twenty-first century economy and the New Economy is similarly putting pressure on legislatures. They must decide to either enact laws or to stand on the sidelines to allow new concepts to develop without oversight. Legislative bodies must vote to allow or to prohibit today's emerging companies from participating equitably and cooperatively with existing businesses.

This Note proceeds in four parts. Part I provides background on the social and legal environment that we find ourselves in today. Section I.A discusses economic substantive due process and gives an overview of

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19 *Sensational Smiles*, 793 F.3d at 286 ("But even if the only conceivable reason for the LED restriction was to shield licensed dentists from competition, we would still be compelled by an unbroken line of precedent to approve the Commission's action.").

20 *See supra* note 1 and accompanying text.

21 *See* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).

22 U.S. CONST. amend, XIV, § 1.

23 St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

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

25 Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).

26 *See* discussion *infra* Part I.

27 *See* discussion *infra* Part I.

the Supreme Court's varying enforcement of the protection of economic liberties from the 1870s through 1937 and the post-Great Depression era. It describes how the Court shifted its use of the Due Process Clause of the Fourteenth Amendment during these periods, reflecting changing societal and economic times. Section I.B provides background on the New Economy and how it has altered the way Americans interact socially and economically. These changes amount to a perhaps unacknowledged but dramatic departure from the economic models of the twentieth-century. Part II examines the current circuit split on economic protectionism amongst the Fifth, Sixth, Ninth, Tenth, and Second Circuit Courts. Part III analyzes the current circuit split in light of Supreme Court precedent and the unique challenges that the New Economy poses. Part IV proposes that the New Economy requires a new standard of review to evaluate economic legislation in the courts. This Note advocates a highly deferential standard for the courts and argues that the viewpoint of the Fifth, Sixth, and Ninth Circuits is essentially obsolete in the New Economy. Today, perhaps more than ever, the legislative and executive branches of government must be the fortified front line of regulation, with democracy functioning as the ultimate economic authority equipped with the tools to gauge popular sentiments and economic impacts. Courts are ill-equipped to negotiate the twists and turns of technological advances that intend to upend tradition in unpredictable ways.

I. BACKGROUND

A. *Evolving Treatment by the Supreme Court of Economic Legislation*

The Supreme Court's interpretation of due process and treatment of economic legislation has changed in response to economic and societal transitions experienced by the United States.[28] Before the adoption of the Fourteenth Amendment, courts interpreted due process guarantees under the Fifth Amendment and state constitutions to be procedural in both intent and nature.[29] The Fourteenth Amendment

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28 LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE 333 (6th ed. 2015) ("[T]he [Court's] adoption of substantive due process came about gradually and resulted from the push and pull of the legal and political environment of the day.").

29 *Id.* at 334 ("'Before the Civil War [due process] had essentially one meaning,' that people were 'entitled' to fair and orderly proceedings, particularly criminal proceedings." (quoting KERMIT L. HALL, THE MAGIC MIRROR 232 (1989) (alteration in original))).

essentially applied the Fifth Amendment's prohibition of depriving any person "of life, liberty, or property, without due process of law"[30] to state governments. Its enactment gradually spawned a second interpretation of due process known as substantive due process, which not only required fair procedures, but also called for the substance of the laws to be just and reasonable.[31] This Note takes the position that the Supreme Court's evolving interpretation of due process and treatment of economic legislation has paralleled American economic and societal change.[32]

1. The Industrial Revolution

Beginning in the 1870s, industrialization greatly impacted America's economy and, as a result, the manner in which the government regulated the economy.[33] America's agriculture-based society quickly became one heavily influenced by manufacturing and large-scale industry.[34] Regulations were adopted as factory workers spoke out about abusive work practices; farmers complained of monopolistic rates by railroads, grain elevators, and banks; and small businessmen griped about not being able to compete with the large corporations.[35]

Economic power now largely rested in the hands of large corporations.[36] Business interests feared that increased regulation would lead to decreased corporate profits.[37]

At the same time, scholars and judges increasingly embraced laissez-faire economic theories and a hands-off approach by the government.[38] This was partly due to the rise of Social Darwinism, a

30 U.S. CONST. amend. XIV, § 1.

31 EPSTEIN & WALKER, *supra* note 28, at 333.

32 *Id.*

33 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 639 (5th ed. 2015); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 5 (1960) ("Under the pressure of social discontent, legislators had begun to act in the 1870s and 1880s in regard to railroad and grain elevator rates, labor relations, and other matters affecting large business concerns.").

34 TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 44 (2010).

35 *See* CHEMERINSKY, *supra* note 33, at 639; PAUL, *supra* note 33, at 1–2.

36 EPSTEIN & WALKER, *supra* note 28, at 334–35 ("The social ills that flowed from the nation's transition from an agrarian to an industrial economy after the Civil War prompted state legislatures to consider new regulations on commerce, but business interests feared that increased regulation would inevitably lead to a reduction in corporate profits."); PAUL, *supra* note 33, at 1.

37 EPSTEIN & WALKER, *supra* note 28, at 335.

38 CHEMERINSKY, *supra* note 33, at 639.

philosophy that adapted Darwin's theories on biological evolution to social evolution. The theory was that society would thrive with the least government regulation so as not to interfere with the survival and prosperity of the "best" in society.[39] Another factor was the view that governmental regulation infringed on citizens' natural rights and *liberty* to own and use their property, as protected by the Due Process Clause.[40] Great conflict arose between those advocating for state regulation and those who contended that such state intervention unreasonably infringed on a laissez-faire economy.[41]

These divisions over government regulation soon came before the Court.[42] Lawyers representing corporations urged protection for rights of property against regulation.[43] They invoked substantive due process under the Fourteenth Amendment to assert that the legislature did not have the power to intervene in these matters. If such a right to intervene was given to the legislature, they argued, such interference had to be reasonable, and the judiciary, not the legislature, was the final arbiter of reasonableness.[44] Although the Supreme Court was hesitant to explicitly embrace this laissez-faire view,[45] in a series of cases, the Court rejected due process challenges to government economic regulations but noted in dicta that it would invalidate laws that contravened natural rights.[46]

The fundamental shift occurred in *Allgeyer v. Louisiana*, where the Court recognized substantive economic due process.[47] Although the Court chiefly dealt with state power over foreign corporations, Justice

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39 *Id.*; EPSTEIN & WALKER, *supra* note 28, at 336.

40 CHEMERINSKY, *supra* note 33, at 639 (explaining that one of the lead proponents of this view was Thomas M. Cooley in *Constitutional Limitations* (1868)).

41 *Id.*

42 Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 660–63 (1874) ("[T]here are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . ."); CHEMERINSKY, *supra* note 33, at 640 (discussing that *Loan Association v. Topeka*, decided one year after the *Slaughter-House Cases*, was one of the first times the Supreme Court used natural law principles to limit government regulatory power).

43 PAUL, *supra* note 33, at 3, 5.

44 *Id.* at 6.

45 *Id.* at 6–7 ("But 'due process of law' historically had connoted procedural and not substantive restrictions upon the powers of government, and to adopt the interpretations of the corporation lawyers would mean a drastic extension of judicial review beyond its traditional limitations." (footnote omitted)).

46 *E.g.*, Mugler v. Kansas, 123 U.S. 623 (1887); Munn v. Illinois, 94 U.S. 113 (1876) (rejecting an attack on a state law regulating the rates of grain elevators); CHEMERINSKY, *supra* note 33, at 640.

47 Allgeyer v. Louisiana, 165 U.S. 578 (1897) (holding that a state law prohibiting its citizens and corporations from doing business with out-of-state insurance companies that did not fulfill certain requirements imposed by the state violated the Due Process Clause of the Fourteenth Amendment).

Peckham, writing for the majority, explained "liberty of contract" in such broad terms that it inevitably resulted in the advancement of corporate substantive due process.[48]

2. The *Lochner* Era

This sweeping interpretation of "liberty" soon arose in more controversial contexts.[49] The Supreme Court's decision in 1905 in *Lochner v. New York*, sparked a period lasting roughly thirty years in the Court's jurisprudence where corporate substantive due process was widely applied.[50] *Lochner* involved a challenge to a New York maximum hours law, which prohibited bakers from working more than sixty hours in one week.[51] The Court carefully scrutinized the economic regulation at hand and struck it down for interfering with freedom of contract,[52] declaring freedom of contract to be a fundamental right protected under the Due Process Clause.[53]

After *Lochner*, regulations regarding prices, wages, and hours were particularly vulnerable to being challenged and struck down for violating freedom of contract.[54] Citing economic substantive due process, the Court nullified over two hundred regulations from 1905 to

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48 *Id.* at 589 ("The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to br [sic] free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper . . . ."); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 471 (18th ed. 2013) (explaining that Justice Peckham's articulation of "liberty of contract" advanced substantive due process).

49 *See* SULLIVAN & FELDMAN, *supra* note 48, at 471.

50 *Id.* at 478.

51 Lochner v. New York, 198 U.S. 45, 46 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

52 *Id.* at 57–58 ("The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.").

53 *Id.* at 74 (Holmes, J., dissenting) ("We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution." (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903))).

54 SULLIVAN & FELDMAN, *supra* note 48, at 478.

the mid-1930s.[55] In many cases, rulings were accompanied by a heated dissent.[56]

The *Lochner* era is regarded in the Court's jurisprudence as a time of judicial activism and overreach.[57] Commentators have argued that the Supreme Court Justices of this period may have been preoccupied with maintaining constitutional ideology and failed to realize or acknowledge the profound social and economic changes that the country was undergoing, while such shifts were undermining the theoretical foundations of their police power jurisprudence.[58]

3. The Great Depression

The onset of the Great Depression in the mid-1930s placed immense pressure on the Courts to uphold economic regulations and abandon the laissez-faire philosophy of the *Lochner* era.[59] The Depression presented economic realities that demonstrated that freedom of contract might simply be an impractical illusion and positive government intervention was crucial to recovery.[60]

The Court abandoned its hands-off approach and the principles set forth in *Lochner*.[61] In *West Coast Hotel v. Parrish*, the Court rejected the argument that a state law requiring a minimum wage for female employees interfered with freedom of contract.[62] *West Coast Hotel* established the principle that freedom of contract would no longer be

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55 *Id.*

56 *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525, 567 (1923) (Holmes, J., dissenting); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting); SULLIVAN & FELDMAN, *supra* note 48, at 478.

57 C. Ian Anderson, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence*, 92 MICH. L. REV. 1438, 1438 (1994) (reviewing HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993)) ("The Lochner era has come to represent a period in our constitutional history from roughly 1880 to 1937 when conservative Justices aggressively exceeded the proper boundaries of their authority to interfere with the political process.").

58 HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 15–17 (1993); Anderson, *supra* note 57, at 1439–40.

59 CHEMERINSKY, *supra* note 33, at 649 ("The Depression created a widespread perception that government economic regulations were essential.").

60 *Id.* (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 578 (2d ed. 1988)).

61 *Id.* at 651.

62 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

considered a fundamental right and judicial deference would be given to the decisions of the legislature as long as they are reasonable.[63]

4. Economic Substantive Due Process from 1937 to Present

Since 1937,[64] as long as an economic regulation is rationally related to a legitimate state interest, it will be upheld when challenged under the Due Process Clause of the Fourteenth Amendment.[65] This "rational-basis" test is a deferential standard that places the burden on challengers to prove that there is no conceivable rational relationship between the statute and a legitimate governmental interest.

B. *The New "Sharing" Economy*

As recounted in Section I.A, changes in legal, political, and social environments of certain periods in history influenced the Supreme Court's treatment of economic liberties and use of substantive due process. The technologies and innovations of the New Economy present challenges that will inevitably require the Court to respond accordingly.

The "sharing economy," also known as the "Trust Economy," "Collaborative Consumption," the "On-Demand," or "Peer-to-Peer Economy,"[66] is based on the notion that people do not use their personal property and abilities to their full potential. Whether it be an empty bedroom, a car, a boat, or spare time, by sharing, trusting, and collaborating, individuals and groups can fully exploit these underused

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63 *See* CHEMERINSKY, *supra* note 33, at 652; Brianne J. Gorod, Note, *Does* Lochner *Live?: The Disturbing Implications of* Craigmiles v. Giles, 21 YALE L. & POL'Y REV. 537, 539 (2003) (stating that the Court's 1937 decision in *West Coast Hotel v. Parrish* "brought the era of economic substantive due process to an abrupt end").

64 David M. Gold, *The Tradition of Substantive Judicial Review: A Case Study of Continuity in Constitutional Jurisprudence*, 52 ME. L. REV. 355, 377 (2000) ("However, 1937 is often regarded as a turning point, the year in which Justice Roberts' supposed 'switch in time that saved nine' signalled [sic] the end of laissez-faire constitutionalism and substantive due process (at least with regard to economic legislation).").

65 *See* Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) ("Judicial invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era.").

66 Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 531 (2015) ("Despite its rapid growth and enormous popularity with consumers, there is no universally accepted definition of the 'sharing economy,' which is also known as the 'collaborative economy,' the 'peer-production economy,' or the 'peer-to-peer economy.'" (footnote omitted)); CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, supra note 6, at 5; *see, e.g.*, Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013, 7:30 AM), http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition [hereinafter *The Sharing Economy Lacks a Shared Definition*].

personal resources.[67] For purposes of this Note, the New Economy will be understood as the economic model that encompasses all of the aforementioned terms that describe systems in which otherwise underutilized assets are exchanged and shared for monetary or non-monetary benefit.[68]

While a system of sharing or bartering is not new,[69] the advent of the Internet and social media have made it easier for sharing economy enterprises to develop and thrive.[70] Rachel Botsman, an author who is known for conceiving the theory of "collaborative consumption,"[71] explains that the Internet has removed the middleman, enabling anyone to provide a good or service directly to a consumer.[72] Botsman opines that the sharing economy is developing so quickly because of mobile collaboration; through cellular devices, people can locate anyone at any time, in real-time.[73] She describes the proliferation of peer-to-peer social networks and real-time technologies as a "torrent" that has changed the way consumers behave.[74]

Technology has made barriers to entry low[75] and transaction costs less expensive. This enables companies to facilitate the sharing of assets easily and cheaply, and thus, to perform these tasks on a potentially much larger scale.[76] In addition, through the Internet, more data about people and goods is widely available, allowing assets to be separated and distributed, and consumed as services.[77]

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67 *See* Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J. 6, 6 (2014) (describing the sharing economy as "an old concept made new through the internet-based sharing of underutilized space, skills, and stuff for monetary and non-monetary benefits"); CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 5; *see also* Joseph Shuford, Comment, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C J.L. & TECH. ON. 301, 302 (2015); *The Rise of the Sharing Economy*, *supra* note 10.

68 *The Sharing Economy Lacks a Shared Definition*, *supra* note 66.

69 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 15 ("People have always bartered and traded services . . . .").

70 *The Rise of the Sharing Economy*, *supra* note 10 (describing how technology has made the sharing economy different from "running a bed-and-breakfast, owning a timeshare or participating in a carpool").

71 *About Rachel*, RACHEL BOTSMAN, http://rachelbotsman.com/about-rachel-botsman (last visited Dec. 26, 2015).

72 Rachel Botsman, *The Case for Collaborative Consumption*, TED (May 2010), https://www.ted.com/talks/rachel_botsman_the_case_for_collaborative_consumption?language=en.

73 *Id.*

74 *Id.*

75 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 8.

76 *The Rise of the Sharing Economy*, *supra* note 10.

77 Kurt Matzler et al., *Adapting to the Sharing Economy*, 56 MIT SLOAN MGMT. REV. 71, 72 (2015) (explaining how the Internet has fueled the growth of sharing systems because it facilitates connections between peers who are "eager to share their possessions"); *The Rise of the Sharing Economy*, *supra* note 10.

Shifting consumer attitudes have also contributed to the sharing economy's swift rise.[78] As many peer-to-peer rental platforms were founded between 2008 and 2010—during and after the financial crisis[79]—it appears that in the post-crisis world, consumers view the sharing economy as a solution to materialism and wastefulness while presenting an easy path to financial gain.[80] Environmental concerns may also be a driving factor.[81] If people share more and own less, resources are used more efficiently and less waste is produced.[82]

Well-known, reputable tech companies such as Amazon, eBay, Google, and PayPal have "laid the foundation" for consumers to be more trusting of peer-to-peer, online transactions.[83] Trust between borrowers and owners is being developed through social networks and recommendation and review systems.[84]

1. Benefits of the New Economy

Many consumers today see the value in renting goods instead of buying them.[85] A system of sharing is convenient for borrowers and provides extra income for owners through underused goods or even extra spare time.[86] For instance, Airbnb has said that hosts in San

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78 Matzler et al., *supra* note 77, at 71 ("While individuals have traditionally often seen ownership as the most desirable way to have access to products, increasing numbers of consumers are paying to temporarily access or share products and services rather than buy or own them."); CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14 (discussing how the economic downturn caused many consumers to rethink the necessity of owning possessions).

79 *All Eyes on the Sharing Economy*, ECONOMIST (Mar. 9, 2013, 4:08 PM), http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items.

80 *See id.*; *see also* Danielle Sacks, *The Sharing Economy*, FAST COMPANY (Apr. 18, 2011, 1:05 AM), http://www.fastcompany.com/1747551/sharing-economy; CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14 ("A 2011 survey by BAV Consulting showed that 66% of consumers (and 77% of millennials) preferred a pared down lifestyle with fewer possessions. And while the economy has rebounded, many recession-fueled values have stuck.").

81 Sacks, *supra* note 80 ("The benefits are hard to argue—lower costs, less waste, and the creation of global communities with neighborly values."); *see also All Eyes on the Sharing Economy*, *supra* note 79.

82 *All Eyes on the Sharing Economy*, *supra* note 79.

83 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14.

84 *All Eyes on the Sharing Economy*, *supra* note 79.

85 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14 (according to PwC's sharing economy research, "[f]our in five consumers agree that there are sometimes real advantages to renting over owning").

86 *All Eyes on the Sharing Economy*, *supra* note 79 ("People are looking to buy services discretely when they need them, instead of owning an asset." (quoting Jeff Miller, the head of Wheelz, a peer-to-peer car rental service)); Rachel Botsman & Roo Rogers, *Beyond Zipcar: Collaborative Consumption*, HARV. BUS. REV. (Oct. 2010), https://hbr.org/2010/10/beyond-

Francisco rent out their homes, on average, fifty-eight nights per year, making $9300.[87] Car owners who rent out their cars using the peer-to-peer automobile rental marketplace RelayRides make on average $250 per month.[88]

Supporters of New Economy enterprises applaud the freelance flexibility that comes with working for these companies.[89] Independent workers typically set their own hours and are not confined to working in an office.[90] While full-time employees enjoy job-related economic benefits, New Economy advocates argue that the freedom of freelancing trumps these full-time employee benefits because they are accompanied by the restrictions placed upon traditional employees.[91]

The New Economy brings together multiple buyers and sellers, making the supply and demand for certain markets more efficient, and aiding in the development of more specialization.[92] People also enjoy the social aspect of the sharing economy,[93] and the building of trust that it fosters.[94]

2. Disruption by the New Economy

Now that sharing with strangers has become a lucrative industry,[95] critics are evaluating the intentions of the company participants and whether this form of business is as positive as its champions hold it out to be.[96] Some naysayers wonder why the New Economy is considered

zipcar-collaborative-consumption ("Collaborative consumption gives people the benefits of ownership with reduced personal burden and cost and also lower environmental impact—and it's proving to be a compelling alternative to traditional forms of buying and ownership."); *see also* Doug Henwood, *What the Sharing Economy Takes*, NATION (Jan. 27, 2015), http://www.thenation.com/article/what-sharing-economy-takes.

87 *The Rise of the Sharing Economy*, *supra* note 10.

88 *Id.*

89 *See* S. Kumar, *3 Reasons to Cheer Uber and the Sharing Economy*, FORTUNE (July 20, 2015, 11:30 AM), http://fortune.com/2015/07/20/uber-and-the-sharing-economy.

90 *Id.*

91 *See id.* (discussing that millennials in particular value workplace flexibility highly, as they do not like being "tied down," but citing a PwC study that demonstrates this demand for flexibility is becoming a feature of the wider workforce).

92 Koopman, Mitchell & Thierer, *supra* note 66, at 531.

93 *The Rise of the Sharing Economy*, *supra* note 10 ("For sociable souls, meeting new people by staying in their homes is part of the charm.").

94 *See id.*

95 Cohen & Zehngebot, *supra* note 67, at 6.

96 Federico Guerrini, *Are Uber, Airbnb, TaskRabbit Adulterating the Sharing Economy?*, FORBES (Mar. 18, 2015, 1:35 PM), http://www.forbes.com/sites/federicoguerrini/2015/03/18/sharing-economy-or-just-vulture-neoliberalism-the-debate-is-on (discussing that while consumers are still drawn to platforms like Uber and Airbnb, "more and more people are starting to question the real benefits and the underlying motivations of the companies involved"); Henwood, *supra* note 86 ("Sharing is a good thing, we learned in kindergarten, but

sharing at all, when many of the start-ups involved are not mutualizing resources, but rather simply selling and renting.[97] They contend that the true motives behind New Economy enterprises are attempts to avoid regulations and taxes.[98] Although New Economy companies defend their policies and claim positive impact, much of the value they generate goes right back into Silicon Valley, the birthplace of many of these companies.[99]

The already vast-size and scope of the sharing economy makes it difficult to fully comprehend how far-reaching its impact could be on existing companies, workers, and consumers.[100] Despite this lack of certainty, a 2014 study conducted by PricewaterhouseCoopers (PwC) calculated that the sharing economy sector had fifteen billion dollars in annual revenues in 2013, with the potential to grow to $335 billion by 2025.[101] Uber, which has been in existence for over five years, conducts business in sixty countries and in the summer of 2015 was valued at fifty billion dollars, making it the most valuable private start-up in the world.[102] In December 2015, reports emerged that Uber had fundraising plans to raise about $2.1 billion. If all goes accordingly, the financing

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that wisdom was soon called into question by the grown-up world of getting and spending. Now, New Age capitalism has spun out a wonderful invention: the 'sharing economy,' which holds out the promise of using technology to connect disparate individuals in mutually profitable enterprise, or at least in warm feelings.").

97 Michel Bauwens, the founder of the P2P Foundation, recently wondered at a panel about the new forms of economies of the future, "[w]hy they call it 'sharing economy' at all" and that it should aptly be called a "'selling economy' instead," since what Airbnb and Uber do "has nothing to do with mutualizing resoruces [sic], but only with selling and renting." Guerrini, *supra* note 96; *see also* Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Releases Report Documenting Widespread Illegality Across Airbnb's NYC Listings; Site Dominated By Commercial Users (Oct. 16, 2014), http://www.ag.ny.gov/press-release/ag-schneiderman-releases-report-documenting-widespread-illegality-across-airbnbs-nyc (disclosing data that Airbnb earned almost $40 million from transactions made in New York City dwellings).

98 David Streitfeld, *Airbnb Listings Mostly Illegal, New York State Contends*, N.Y. TIMES (Oct. 15, 2014), http://www.nytimes.com/2014/10/16/business/airbnb-listings-mostly-illegal-state-contends.html?_r=0 ("Critics say that the start-ups are unsavory efforts to avoid regulation and taxes, and that the very term 'sharing economy' is ridiculous.").

99 Guerrini, *supra* note 96 ("If you use Uber in your city, a significant percentage of the revenues go to Silicon Valley." (quoting Michel Bauwens, founder of the P2P Foundation)).

100 *See* Ben Eisen, *Zipcar Shows Growth of Sharing Economy Today Means M&A Tomorrow*, BLOOMBERG (June 15, 2015, 10:00 AM), http://www.bloomberg.com/news/articles/2015-06-15/zipcar-shows-growth-of-sharing-economy-today-means-m-a-tomorrow.

101 *See id.*; *The Sharing Economy—Sizing the Revenue Opportunity*, PWC, http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html (last visited Oct. 26, 2016).

102 Julia Kollewe & Gwyn Topham, *Uber Fundraising Drive Values Firm Higher than General Motors*, GUARDIAN (Dec. 4, 2015, 12:24 PM), http://www.theguardian.com/technology/2015/dec/04/uber-app-valued-62-billion-general-motors.

round would result in the technology company being valued at $62.5 billion,[103] exceeding the worth of General Motors, the U.S. carmaker.[104]

While many New Economy companies tout their business models as superior to traditional ones because they decentralize control, power, and wealth,[105] these systems may ultimately harm workers in the long run by promoting work that is precarious[106] and pushing out existing employees. Individuals who decide to forgo a traditional job and turn to New Economy work instead, subject themselves to income instability and fewer workplace protections and rights.[107] These "casual" forms of employment may not provide enough income to maintain a household, nor fuel overall economic growth.[108] Ride-sharing services in particular, such as Uber and Lyft, demonstrate how the New Economy is disturbing traditional business by forcing professional taxi drivers out of work.[109] For example, San Francisco's largest cab company, Yellow Cab Cooperative, Inc., recently filed for bankruptcy.[110] Furthermore, by permitting virtually anyone who has a vehicle to become a ride-share

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103 Eric Newcomer, *Uber Raises Funding at $62.5 Billion Valuation*, BLOOMBERG (Dec. 3, 2015, 2:54 PM), http://www.bloomberg.com/news/articles/2015-12-03/uber-raises-funding-at-62-5-valuation (reporting that people familiar with the matter said that Uber filed paperwork in Delaware explaining the fundraising plans).

104 Kollewe & Topham, *supra* note 102; Richard Read, *Uber Is Now Worth More than General Motors. Yes, Really*, CHRISTIAN SCI. MONITOR (Dec. 7, 2015), http://www.csmonitor.com/Business/In-Gear/2015/1207/Uber-is-now-worth-more-than-General-Motors.-Yes-really.

105 *See* Cagle, *supra* note 9 (quoting Douglas Atkin, Airbnb community manager, Peers co-founder, and author of THE CULTING OF BRANDS: TURN YOUR CUSTOMERS INTO TRUE BELIEVERS (2005)).

106 *Id.* ("Since the 1970s, forces have aligned to create work that is more precarious. 'Rideshare' companies contribute to that culture of precarious work, putting workers back in early 20th century conditions. They've made it really easy to get a ride—at the cost of workers' lives." (quoting Veena Dubal, labor researcher and attorney)).

107 Catherine Rampell, Opinion, *The Dark Side of 'Sharing Economy' Jobs*, WASH. POST (Jan. 26, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-the-dark-side-of-sharing-economy-jobs/2015/01/26/4e05daec-a59f-11e4-a7c2-03d37af98440_story.html ("Celebration of these riskier arrangements can seem especially strange when you consider that society's ability to better manage risk, and spread it over larger pools of people, is considered by many historians to be one of the great advances of 20th-century finance."). Labor protections under the Fair Labor Standards Act generally do not apply when working for a New Economy company. *See* Michelle Chen, *This Is How Bad the Sharing Economy Is for Workers*, NATION (Sept. 14, 2015), http://www.thenation.com/article/this-is-how-bad-the-sharing-economy-is-for-workers.

108 Veena Dubal, Opinion, *'Bandit' Cabs Are Bad for Drivers and Passengers*, S.F. GATE (Aug. 20, 2013, 5:24 PM), http://www.sfgate.com/opinion/openforum/article/Bandit-cabs-are-bad-for-drivers-and-passengers-4747566.php.

109 *Id.*

110 Tom Corrigan, *San Francisco's Yellow Cab Cooperative Files for Chapter 11*, WALL STREET J. (Jan. 22, 2016, 6:53 PM), http://www.wsj.com/articles/san-franciscos-yellow-cab-cooperative-files-for-chapter-11-1453502356.

driver, critics contend such services go against urban safety and transportation regulations that have taken years to effectuate.[111]

Evidence of traditional business disruption can also be seen in the comparison of average nightly stays at an Airbnb to Hilton Hotels.[112] According to PwC's study, Airbnb averages 425,000 guests per night, amounting to over 155 million guest visits per year.[113] This number is almost twenty-two percent more than Hilton Worldwide, which hosted 127 million customers in 2014.[114]

Not only is Airbnb upsetting the businesses of existing hotels, it appears to be doing so in a largely illegal manner—if current regulations are applied[115]—posing a risk to the health and safety of consumers.[116] According to a 2014 report by N.Y. Attorney General Eric Schneiderman, over the past several years, as many as seventy-two percent of Airbnb reservations were made in violation of New York law.[117] At least "a handful" of landlords are managing what amount to "illegal hostels."[118] This is especially problematic for a city like New York, where there is already a rental housing shortage.[119] These short-term rental regimes restrict supply further, making housing less affordable.[120]

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111 *See* Dubal, *supra* note 108.

112 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14; OFFICE OF THE N.Y. ATTORNEY GEN., AIRBNB IN THE CITY 2 (Oct. 2014), http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf ("The rapid rise of short-term rental platforms like Airbnb have dramatically expanded the use of traditional apartments as transient hotel rooms . . . .").

113 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14; *see also* Henwood, *supra* note 86 (discussing how Airbnb, as of January 2015, is valued at $13 billion, slightly less than the stock price of Starwood, a company that operates 1200 properties in one hundred countries).

114 CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY, *supra* note 6, at 14.

115 *See* Press Release, N.Y. State Office of the Attorney Gen., *supra* note 97; *see also* Streitfeld, *supra* note 98 ("Airbnb, the pioneering home rental service, presents itself as useful and virtuous, but the reality is far less benign, according to a report that Eric T. Schneiderman, the New York attorney general, released on Thursday.").

116 Press Release, N.Y. State Office of the Attorney Gen., *supra* note 97 ("We must ensure that, as online marketplaces revolutionize the way we live, laws designed to promote safety and quality-of-life are not forsaken under the pretext of innovation." (quoting Attorney General Eric T. Schneiderman)).

117 *See id.* ("Of the 35,354 private, short-term listings, data suggest that 25,532 of them violated either New York State's Multiple Dwelling Law and/or New York City's Administrative Code (zoning laws).").

118 Streitfeld, *supra* note 98.

119 Henwood, *supra* note 86; Ariel Stulberg, *How Much Does Airbnb Impact Rents in NYC?*, THE REAL DEAL: N.Y. REAL ESTATE NEWS (Oct. 14, 2015, 9:36 AM), http://therealdeal.com/blog/2015/10/14/how-much-does-airbnb-impact-nyc-rents/?utm_source=rss&utm_medium=rss&utm_campaign=how-much-does-airbnb-impact-nyc-rents.

120 Editorial, *The Dark Side of the Sharing Economy*, N.Y. TIMES (Apr. 30, 2014), http://www.nytimes.com/2014/05/01/opinion/the-dark-side-of-the-sharing-economy.html? _r=0.

Along with threatening established businesses, it is not clear that these collaborative companies take consumer protection into account when creating a business model.[121] Molly Cohen and Corey Zehngebot in their Article, *What's Old Becomes New: Regulating the Sharing Economy*, cite several companies offering unique services that may ultimately provide questionable results.[122] When using DogVacay,[123] can one ever be sure that a beloved pet is actually being well taken care of? Or without time to cook dinner, one turns to LeftoverSwap[124]—can it be certain that these meals are being prepared under sanitary conditions? It appears that sharing economy businesses may greatly benefit from not having to consider health or safety regulations, or even take them into account when formulating a business model.[125]

Home-sharing services like Airbnb and HomeAway[126] are especially risky because users can arrange to stay in a home that falsely advertises its amenities and surrounding neighborhood, and upon arrival, guests are greeted with surprises and unsafe living quarters.[127]

Although many such companies provide peer review systems, Cohen and Zehngebot explain that researchers have found that many sharing economy participants "may exhibit discriminatory tendencies."[128] In the past, most online marketplaces facilitated arm's length transactions between buyers and sellers, before either party learns

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121 Cohen & Zehngebot, *supra* note 67, at 7.

122 *Id.* at 6.

123 *See How It Works*, DOGVACAY, https://dogvacay.com/how-it-works (last visited Dec. 30, 2015).

124 *See* Colleen Kane, *Could These Apps Solve America's Huge Food Waste Problem?*, FORTUNE (Apr. 16, 2015, 7:00 AM), http://fortune.com/2015/04/16/could-these-apps-solve-americas-huge-food-waste-problem.

125 Chris Glorioso, Ann Givens & Evan Stulberger, *I-Team: Restaurants Use False Identities on Food Delivery Websites*, NBC N.Y. (Nov. 11, 2015, 10:36 PM), http://www.nbcnewyork.com/news/local/Seamless-Restaurant-Grubhub-Fake-Eatery-Unregulated-Kitchen-Investigation-I-Team-New-York-City-344708652.html ("Seamless and GrubHub have no legal responsibility to verify names and addresses of restaurants, but the sites' [sic] may risk losing customers' trust."); Lux, *supra* note 9.

126 *See* HOMEAWAY, https://www.homeaway.com/info/about-us (last visited Nov. 29, 2015).

127 *See* Ron Lieber, *Airbnb Horror Story Points to Need for Precautions*, N.Y. TIMES (Aug. 14, 2015), http://www.nytimes.com/2015/08/15/your-money/airbnb-horror-story-points-to-need-for-precautions.html (recounting the story of a young man who was allegedly sexually assaulted by his Airbnb host); David Roberts, *Our Year of Living Airbnb*, N.Y. TIMES (Nov. 25, 2015), http://www.nytimes.com/2015/11/29/realestate/our-year-of-living-airbnb.html?hpw&rref=realestate&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well ("But as soon as we entered our one-bedroom rear-facing walk-up, we were struck by the smell of gas. Worried, we alerted our host, who came over and called the fire department. Within minutes, sirens drew near. Helmeted men burst into the apartment. 'Smells like garbage,' said one. 'Spearmint,' declared another. And they were gone. A shrug of the shoulders, and our host was gone, too.").

128 Cohen & Zehngebot, *supra* note 67.

the other's identity.[129] In the New Economy, online platforms are moving towards systems in which users have more revealing profiles, enabling sellers to handpick who they want to transact with.[130] A recent experiment conducted by researchers at Harvard Business School showed that certain users of Airbnb, a platform that provides detailed information about users, are being discriminated against for extraneous factors, such as race.[131]

II. THE CURRENT CIRCUIT COURT SPLIT

In *Sensational Smiles*, the Second Circuit joined a dispute amongst the federal circuit courts when it took a similar position to the Tenth Circuit in stating that a law with the sole purpose of protecting one group from intrastate economic competition is constitutional under rational-basis review.[132] The circuit split forged itself in the 2000s when the Fifth, Sixth, and Ninth Circuits held that economic protectionism is irrational and not a legitimate state interest.[133]

While the plaintiffs in each of these cases similarly alleged that the statute in question violated their due process and equal protection rights under the Fourteenth Amendment,[134] the unlicensed service provider plaintiff of *Sensational Smiles* appears most relevant to the challenges posed by the competitive marketplace of the New Economy. The Second Circuit's analysis in *Sensational Smiles* demonstrates, along with the Tenth Circuit, a starting point for an approach to a jurisprudence for the New Economy. The Fifth, Sixth, and Ninth Circuits' reasoning offers an intrusive approach ill-suited for handling economic issues of today.

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129 Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment* 2 (Harvard Bus. Sch., Working Paper No. 16-069), http://www.hbs.edu/faculty/Publication%20Files/16-069_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf.

130 *Id.* at 3.

131 *See id.* at 3–4; Alex Fitzpatrick, *This One Stat Reveals the Sharing Economy's Racism Problem*, TIME (Dec. 14, 2015), http://time.com/4147597/airbnb-sharing-economy-racism; Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html?_r=0; Christina Pazzanese, *When the 'Sharing Economy' Doesn't*, HARV. GAZETTE (Dec. 21, 2015), http://news.harvard.edu/gazette/story/2015/12/when-the-sharing-economy-doesnt.

132 Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016).

133 *Id.*

134 In all but one of the cases, the plaintiff was represented by the same public interest group, Institute for Justice. *Sensational Smiles*, 793 F.3d at 283; St. Joseph Abbey v. Castille, 712 F.3d 215, 217 (5th Cir. 2013); Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004); Craigmiles v. Giles, 312 F.3d 220, 221 (6th Cir. 2002).

A. *The Fifth, Sixth, and Ninth Circuit Courts: Invalidating Economic Regulations*

In 2002, the Sixth Circuit in *Craigmiles v. Giles* held that a Tennessee law that prohibited the sale of caskets by anyone not licensed by the State as a funeral director to be unconstitutional on equal protection and due process grounds, and expressly rejected a state's "naked attempt to raise a fortress" protecting one industry over another.[135] Sister circuits similarly invalidated such "fortresses" thereafter: six years later in *Merrifield v. Lockyer*, the Ninth Circuit relied on the Sixth Circuit's analysis in *Craigmiles* when it struck down a California law that required those involved in the business of structural pest control to obtain a license;[136] and in 2013, a nearly identical funeral director licensing law to that seen in *Craigmiles* found its way into the Fifth Circuit in *St. Joseph Abbey v. Castille*, where the court found no rational relationship between protecting public health and safety and requiring sellers of intrastate caskets to be licensed funeral directors.[137]

All three courts began their analysis by scrutinizing the regulation at hand under rational-basis review.[138] In each case, the states defended their particular license requirement by arguing that it promoted both public health and safety and consumer protection, legitimate state interests.[139]

The Sixth Circuit found no rational relationship between Tennessee's license requirement and its legitimate interest in protecting the health and welfare of the public and consumer protection,[140] and stated that it was "left with the more obvious illegitimate purpose to which licensure provision is very well tailored."[141] The *Craigmiles* court concluded that Tennessee's law imposed a significant barrier to competition in the casket market and ultimately harmed consumers "in their pocketbooks."[142] Although the court stated its decision was not an

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135 *See Craigmiles*, 312 F.3d at 223, 229; CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 144 (2013) ("[The court went on to consider] the possibility that economic protectionism might be the *only plausible* explanation for Tennessee's casket-sale restrictions; and protectionism . . . is not a legitimate governmental purpose.").

136 Merrifield v. Lockyer, 547 F.3d 978, 987 (9th Cir. 2008).

137 *Castille*, 712 F.3d at 217, 221.

138 *St. Joseph Abbey*, 712 F.3d at 221; *Merrifield*, 547 F.3d at 984; *Craigmiles*, 312 F.3d at 223–24 ("Even foolish and misdirected provisions are generally valid . . . .").

139 *St. Joseph Abbey*, 712 F.3d at 223; *Merrifield*, 547 F.3d at 981; *Craigmiles*, 312 F.3d at 225.

140 *Craigmiles*, 312 F.3d at 228.

141 *Id.*

142 *Id.*

attempt to return to *Lochner*,[143] it explained that it was only invalidating a law that purposely sought to benefit one businessman over another, at the expense of consumers. Such a law does not constitute a legitimate governmental purpose, the court averred; nor is it capable of surviving rational-basis review.

In finding the pest control licensing scheme at issue violative of equal protection, the Ninth Circuit in *Merrifield* relied on the Sixth Circuit's analysis in *Craigmiles*.[144] The court stated that this case was similarly an instance of an economic group being singled out for no rational reason, evidencing a statute with "economic animus" and no real public general welfare purpose.[145] In similar fashion to the Sixth Circuit, the *Merrifield* court assured that it did not base its decision on the judges' "personal approach to economics."[146]

The Fifth Circuit in 2013's *St. Joseph Abbey v. Castille* was presented with a due process and equal protection challenge to a statute almost identical to what the Sixth Circuit faced eleven years earlier.[147] While the Fifth Circuit relied on the Sixth Circuit's analysis in *Craigmiles*, the court also had to address the holding in *Powers v. Harris*, where the Tenth Circuit upheld a similar funeral director licensing scheme coming out of Oklahoma two years after *Craigmiles*.

The State in *St. Joseph Abbey* cited *Powers* in defense of its protectionist legislation.[148] The court rejected the State's argument, explaining that in upholding economic protectionism, the *Powers* court relied on Supreme Court precedent that did not in fact support the proposition that protecting a particular intrastate industry, without advancing the public interest or general welfare, is a legitimate governmental interest.[149] The Fifth Circuit proclaimed that economic protectionism may only be supported by a "post hoc perceived rationale as in *Williamson*,"[150] without which, it is appropriately described as a "naked transfer of wealth."[151]

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143 *Id.* at 229 ("Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies.").

144 *Merrifield*, 547 F.3d 978.

145 *Id.* at 989, 991.

146 *Id.* at 992.

147 NEILY, *supra* note 135, at 145.

148 St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013).

149 *Id.* ("However, none of the Supreme Court cases *Powers* cites stands for that proposition. Rather, the cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare.").

150 In *Lee Optical*, the Supreme Court hypothesized various reasons the legislature may have had for enacting the challenged protectionist measure and concluded, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 478–88 (1955) ("The day is gone when this Court uses the Due Process Clause of the

As seen in the Sixth and Ninth Circuits, the Fifth Circuit also concluded its opinion by stating that "the ghost of *Lochner*" is not "lurking about."[152]

B. *The Tenth and Second Circuit Courts: Upholding Economic Regulations*

The Tenth Circuit's holding in *Powers* created the initial circuit court split. As previously mentioned in the Introduction, the Second Circuit in *Sensational Smiles, L.L.C. v. Mullen* followed the Tenth Circuit's interpretation of economic regulations.[153] After conducting a rational-basis review, each court held that a rational basis existed for the statute in question, and economic protectionism is a legitimate state interest.[154]

The provision at issue in *Powers*, similar to the licensing scheme in *Craigmiles*, required any person engaged in the selling of funeral-service merchandise to be a licensed funeral director.[155]

Plaintiffs claimed that as a matter of substantive due process, the law violated their right to "follow any lawful calling, business, or profession he may choose,"[156] and regarding equal protection, it was unconstitutional because it arbitrarily treated similarly-situated people differently, and differently-situated people the same.[157]

The State argued, and plaintiffs agreed, that protecting casket purchasers, a vulnerable group, is a legitimate state interest and the licensing requirements were put in place for this very purpose.[158] The State admitted that its licensing scheme does not "perfectly match" its

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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.").

151 *St. Joseph Abbey*, 712 F.3d at 222–23 (citing Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984)).

152 *Id.* at 227.

153 *See* Introduction.

154 Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016); Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004).

155 *Powers*, 379 F.3d at 1211. The law does not apply to people selling other funeral-related merchandise (i.e., urns, gravemarkers, monuments, and flowers). *Id.* at 1212. Additionally, the state licensing authority distinguishes between time-of-need and pre-need sales. *Id.* Meaning, a person must be fully licensed to make a time-of-need sale, but no license is required to sell caskets pre-paid, as long as the person making the sale is acting as an agent of a licensed funeral director. *Id.* Enforcement is limited to sales of intrastate caskets only. *Id.*

156 *Id.* at 1214 (quoting Dent v. West Virginia, 129 U.S. 114, 121 (1889)).

157 *Id.* at 1215.

158 *Id.*

claimed consumer-protection goal,[159] but argued that its classification scheme met rational-basis review because it was not "wholly irrelevant" to achieving its stated objective,[160] since every witness who testified agreed that due to the grief and sadness that comes with death, purchasers of time-of-need caskets are especially vulnerable to unfair sales tactics.[161]

The court did not confine its analysis to determining whether a rational relationship existed between the funeral director licensing scheme and Oklahoma's purported interest in protecting casket purchasers.[162] The court declared that it was obligated to consider "every plausible legitimate state interest" that might support the challenged law.[163] Thus, the question before the court became whether protecting the intrastate funeral home industry (i.e., economic protectionism) could be considered a legitimate state interest.[164]

The Tenth Circuit maintained that the Supreme Court has "consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest."[165] It focused on *Fitzgerald v. Racing Association of Central Iowa*,[166] *City of New Orleans v. Dukes*,[167] and *Williamson v. Lee Optical of Oklahoma, Inc.*[168] as support. The court ultimately held that absent any violation of a specific constitutional provision or federal law, "intrastate economic protectionism constitutes

159 *Id.* at 1216.

160 *Id.*

161 *Id.*

162 *Id.* at 1217 ("[T]his Court is *obligated* to seek out other conceivable reasons for validating [a state statute]." (quoting Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001))). The court directly addressed the Supreme Court precedent relied on by the Sixth Circuit in *Craigmiles* and stated that it is not pertinent because it involves *interstate*, rather than intrastate economic activity. *Id.* at 1218–19. The cases utilized by the *Craigmiles* court involve the "dormant" Commerce Clause, which performs a different function than the Equal Protection and the Due Process Clauses "in the analysis of the permissible scope of a state's power." *Id.* at 1220.

163 *Id.* at 1218.

164 *Id.*

165 *Id.* at 1220.

166 *Id.* at 1220 (*Fitzgerald* held that "the hypothetical goal of fostering intrastate riverboat gambling provided a rational basis to support legislation taxing riverboat slot machine revenues at a more favorable rate than those from racetrack slot machines" (citing Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003)).

167 *Id.* at 1221 ("In *Dukes*, the Court rejected an Equal Protection Clause challenge to a New Orleans ordinance that prohibited selling foodstuffs from pushcarts in the French Quarter, even though it exempted area vendors who had continuously operated that business for eight or more years." (citing City of New Orleans v. Dukes, 427 U.S. 297, 298 (1976)).

168 *Id.* (In *Lee Optical*, "the Court held that a state may set as a legitimate goal 'free[ing a] profession, to as great an extent as possible, from all taints of commercialism'" (alteration in original) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955))).

a legitimate state interest."[169] With this conclusion, the Tenth Circuit had "little difficulty" finding that Oklahoma's funeral director licensing regime satisfied rational-basis review.[170]

Eleven years after *Powers*, a similar licensing scheme brought this issue to the Second Circuit in *Sensational Smiles*. *Sensational Smiles* involved a challenge to a Connecticut law that permits only licensed dentists to administer certain teeth-whitening services involving LED lights.[171] Concluding that it found any number of rational reasons in support of the rule, the Second Circuit upheld the statute.[172]

Plaintiff Sensational Smiles, a non-dentist teeth-whitening business, argued that the Connecticut rule violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment[173] because no rational relationship existed between the rule and a legitimate governmental interest.[174]

The plaintiff argued that LED lights do not pose harm to consumers' oral health, and that even if they did, it was not rational to restrict the administration of LED lights to licensed dentists. The court countered that the Dental Commission (Commission) had various rational grounds for concluding that administering these procedures should be limited to trained dentists; including that it may be best if consumers first receive an individualized assessment of their oral health by a dentist before undergoing such teeth-whitening procedures and that dentists may be better equipped to treat any problems that may arise during the procedure.[175] The plaintiff additionally argued that the law was irrational because it permitted consumers to shine the LED lights into their own mouths.[176] The court responded that individuals are often prohibited from doing to (or for) others what they are allowed to do (or for) themselves.[177]

Concluding that there was evidence that LED lights may cause harm to consumers, and that there existed some relationship between

169 *Id.* at 1221.

170 *Id.* at 1222.

171 Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 283 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016).

172 *Id.*

173 U.S. CONST. amend. XIV, § 1.

174 *Sensational Smiles*, 793 F.3d at 283. Although Sensational Smiles challenged several aspects of the law, the parties before the district court agreed that the portion of the law stating that only a licensed dentist could shine a light emitting diode (LED) lamp at the mouth of consumers during a teeth-whitening procedure was the main part that constrained the services offered by Sensational Smiles. *Id.*

175 *Id.* at 285.

176 *Id.*

177 *Id.*

the Commission's rule and the danger it sought to prevent, the court held that the statute did not violate due process or equal protection.[178]

The court went on to address plaintiff's argument that the true purpose behind the Commission's prohibition was to protect the monopoly on dental services enjoyed by licensed dentists in the state.[179] The Second Circuit declared that it joined the Tenth Circuit in concluding that "economic favoritism is rational for purposes of . . . review of state action under the Fourteenth Amendment."[180] The court stated that this decision was "guided by precedent, principle, and practicalities."[181] The Second Circuit, similarly to the *Powers* court, cited to *Fitzgerald*, *Dukes*, and *Williamson*, and explained that for some time, the Supreme Court has permitted economic favoritism, as long as the favoritism did not violate the Constitution.[182] States frequently favor certain groups over others on economic grounds, and whether the results are successful or terrible, is not for the court to decide.[183]

Furthermore, the court stated that it is difficult to distinguish between a protectionist purpose and a more "legitimate" public purpose because often the two will coexist "with no consistent way to determine acceptable levels of protectionism."[184] As such, a court purporting to tease out an "improper" economic protectionist measure will not have difficulty doing so.[185]

III. THE NEW ECONOMY DEMANDS A NEW STANDARD FOR EVALUATION OF ECONOMIC LEGISLATION

In declining to uphold economic protectionism as constitutional, the Fifth, Sixth, and Ninth Circuit Courts deviated from Supreme Court precedent, which, since the demise of *Lochner*, has established that the judiciary is not to lay down economic policies, no matter how wise the approach.[186] This departure is of significance at a time when most controversies entering the courts are not going to stem from straightforward licensing schemes and restrictions that our courts have deliberated for decades. They are going to have their roots in self-

178 *Id.*
179 *Id.* at 285–86.
180 *Id.* at 286.
181 *Id.*
182 *Id.*
183 *Id.* at 287.
184 *Id.*
185 *Id.*
186 Gorod, *supra* note 63, at 543 ("[T]he post-*Lochner* line of cases clearly repudiate judicial efforts to enshrine economic policies, even if ultimately wise, as constitutional rights.").

driving cars,[187] drones,[188] and cellphone location data;[189] concepts that neither our founding fathers, nor our nation's judges could have ever imagined.

A. *The Legislature Decides on the "Wisdom and Utility" of the Laws*

Currently, the federal government is grappling with what role it should play in regulating businesses of the New Economy,[190] and city officials around the country are deliberating over how to react to them.[191] The Fifth, Sixth, and Ninth Circuits, by expanding the role of the judiciary in purported economic rights cases, may have inadvertently set forth a doctrine, with implications for the New Economy, that fails to fully grasp its complexities and the competing interests which come before the legislative and regulatory bodies. These courts' standard of review for economic regulation seems to be more relevant to the *Lochner* era than to the twenty-first century economy.[192]

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187 *See* David Z. Morris, *What Tesla's Fatal Crash Means for the Path to Driverless Cars*, FORTUNE (July 3, 2016, 2:28 PM), http://fortune.com/2016/07/03/teslas-fatal-crash-implications. In fact, in September 2016, federal auto safety regulators for the first time announced driverless car guidelines, signaling the federal government's support of the new technology. Cecilia Kang, *Self-Driving Cars Gain Powerful Ally: The Government*, N.Y. TIMES (Sept. 19, 2016), http://www.nytimes.com/2016/09/20/technology/self-driving-cars-guidelines.html?_ r=0.

188 *See* Editorial, *Drone Regulations Should Focus on Safety and Privacy*, N.Y. TIMES (Jan. 9, 2016), http://www.nytimes.com/2016/01/10/opinion/sunday/drone-regulations-should-focus-on-safety-and-privacy.html?ref=opinion&_r=0.

189 *See* United States v. Davis, 785 F.3d 498 (11th Cir. 2015) (holding that compelling the production of third-party telephone company's business records containing historical cell tower location information did not constitute a search and, thus, it did not violate defendant's Fourth Amendment rights).

190 *See* Rebecca R. Ruiz, *Washington Scrutinizes the Sharing Economy*, N.Y. TIMES: BITS BLOG (June 9, 2015, 6:06 PM), http://bits.blogs.nytimes.com/2015/06/09/washington-scrutinizes-the-sharing-economy (discussing a workshop held by the Federal Trade Commission in which regulators, industry representatives, and academics came together to "consider the government's place in overseeing [sharing economy] businesses").

191 *See* Josh Dawsey, *New York City Council Bypasses Mayor Bill de Blasio on Uber Policy*, WALL STREET J. (Jan. 7, 2016, 8:49 PM), http://www.wsj.com/articles/new-york-city-council-bypasses-mayor-bill-de-blasio-on-uber-policy-1452217772; Erik Engquist & Aaron Elstein, *Mayor Finally Unveils Plan to Protect Industrial Businesses, Which Calls for Freezing Out Hotels and Self-Storage*, CRAIN'S N.Y. BUS. (Nov. 5, 2015), http://www.crainsnewyork.com/article/20151103/REAL_ESTATE/151109966 ("Rising rents and property values aren't just squeezing out mom-and-pop stores and longtime New Yorkers. Manufacturers are also feeling the pinch, and on Tuesday Mayor Bill de Blasio unveiled a long-awaited plan to come to their aid.").

192 The Fifth, Sixth, and Ninth Circuits' invalidation of legislation appears aligned with the *Lochner*-era Court's allegiance to laissez-faire economics, where the Court tended to side with employers and corporations, as opposed to workers and consumers. *See* CHEMERINSKY, *supra*

As expressed by Justices Harlan and Holmes in their *Lochner* dissents, views that were validated by post-1937 Court decisions,[193] it is situations in which reasonable minds could differ that call for deference to state legislatures.[194] The current social and political debates surrounding the New Economy are precisely the type of environment that should compel courts to defer to regulators. The factual and sociological pillars that have given rise to the New Economy are not permanent and are continually changing. Consequently, courts are not in a position to lay down immutable principles to determine which governmental acts benefit the public when economic and societal trends are so transient: "As a creature of politics, the definition of the public good changes with the political winds"[195] and with the arrival of new technologies which quickly can forever alter the public good. This rush of innovation of undetermined lasting value complicates the political sphere where the normal model of problems that state governments are faced with are "practical ones"[196] that do not require solutions that are scientific or have a perfect fit between the means and ends.[197] By undertaking a "probing review" of each action taken by state legislators, courts would cripple governments[198] and hinder their ability to experiment with new forms of regulation.

Legislators are elected officials who represent the people; appointed judges are not.[199] Our nation's Constitution was created to protect and promote the pursuit of happiness for people of differing views, not to

note 33, at 648. These circuits' "invalidat[ion] [of] laws adopted through the democratic process" also bears similarity to the *Lochner*-era Court's often criticized judicial activism. *See id.*

193 *See* Gorod, *supra* note 63, at 539.

194 *See* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *abrogated by* W. Coast Hotel Co. v. Parrish 300 U.S. 379 (1937) ("A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work."); *id.* at 68 (Harlan, J., dissenting); Gorod, *supra* note 63, at 543.

195 Powers v. Harris, 379 F.3d 1208, 1218 (10th Cir. 2004).

196 Heller v. Doe, 509 U.S. 312, 321 (1993) (citing Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69–70 (1913)).

197 *See id.*

198 *See Powers*, 379 F.3d at 1218.

199 *See Lochner*, 198 U.S. at 69 (Harlan, J., dissenting) (discussing that decisions such as these should be made by state legislatures because courts lack the democratic reliability); Katharine M. Rudish, Note, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1502 (2012) ("The Court, in its famous footnote four in *United States v. Carolene Products Co.*, established that legislative classifications that regulate social and economic relationships will be viewed by courts with deference, with courts only applying searching judicial review when regulations infringe on a fundamental right or discriminate against 'discrete and insular minorities.' The logic behind this formulation is that it allows the more democratically elected branches of government to make decisions without fear of the unelected judiciary second-guessing it, unless judicial scrutiny is warranted for some reason." (footnotes omitted)).

guarantee acceptance of a particular economic theory.[200] Elected legislative bodies are given broad discretion to experiment with economic issues,[201] and cities and states need to be able to assess different forms of regulation, or lack thereof, in order for traditional businesses and New Economy participants to coexist.[202] The Constitution created a system of government in which it is left to the legislature, and not the courts, "to decide on the wisdom and utility" of laws.[203] The standard promoted by the Fifth, Sixth, and Ninth Circuits, perhaps inadvertently, runs contrary to this mainstay of our law-making regime.

Businesses capitalizing on the New Economy economic model have blurred the regulatory boundaries that the law typically adheres to, such as divisions between public and private, business and personal, property and shared property,[204] customer and producer.[205] In many instances, New Economy companies are providing the same goods and services as traditional ones, but seek to be treated as though they are not.[206] A legal

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200 As stated by Justice Holmes in his dissenting opinion in *Lochner*:

> Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

198 U.S. at 75–76 (1905) (Holmes, J., dissenting).

201 *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'" (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932))).

202 *See* Cohen & Zehngebot, *supra* note 67, at 8 (discussing how to address the legal issues raised by the sharing economy in Boston, the authors state that "[t]hese are not easy issues to 'solve': the start-ups' rapid emergence defy long regulatory timelines, and regulation may not be necessary in all cases. However, cities that are willing to experiment and embrace regulatory innovation may thrive, along with the entrepreneurs who leverage new forms of collaborative consumption. Though issues of compliance and enforcement are also present, the moment is ripe for Boston to be proactive rather than reactive.").

203 *Skrupa*, 372 U.S. at 729.

204 Cohen & Zehngebot, *supra* note 67, at 6.

205 *See* Laura French, *Sharing Economy Shakes Up Traditional Business Models*, NEW ECON. (Apr. 13, 2015), http://www.theneweconomy.com/business/the-sharing-economy-shakes-up-traditional-business-models (explaining that one of the biggest shifts from the traditional economy to the sharing economy is the breakdown of the distinction between consumers and producers; consumers can become part-time workers, at their convenience, through peer-to-peer models).

206 *See* Anand Giridharadas, *The Pros and Cons of Sharing*, N.Y. TIMES (June 23, 2014), http://www.nytimes.com/2014/06/24/technology/start-ups-like-lyft-and-airbnb-raise-questions-about-markets-and-regulation.html (discussing how sharing economy companies like Lyft, Uber, TaskRabbit, and Airbnb tend to hold themselves out as a "community" or a

gray area has resulted[207] that is forcing legislatures to make hard choices as to the appropriate laws to maintain a safe and competitive marketplace.[208]

This tension is exemplified by the numerous lawsuits brought by cab companies against the municipalities in which they operate. Taxicab owners in Boston,[209] Chicago,[210] and Philadelphia[211] have alleged due process and equal protection violations against their cities for subjecting them to burdensome taxi and limo regulations, while permitting drivers of ride-share services run by Uber and Lyft to operate without having to abide by any statutory requirements. As new developments emerge each day, only time will tell whether these courts will intervene or let the legislatures treat these competing companies as they see fit.[212]

B. *"Naked Preferences"*

The Fifth and Sixth Circuits maintain that protectionist measures employed by legislatures and approved by the Second and Tenth Circuits are "naked transfer[s] of wealth,"[213] a concept coined by Professor Cass Sunstein, and thus unconstitutional because they are not in furtherance of any public good.[214] Sunstein argues that the role of the

"platform," as opposed to an actual company, enabling them to avoid standard laws and regulations).

207 Cohen & Zehngebot, *supra* note 67, at 6.

208 *See* Brad Tuttle, *7 Cities Where the Sharing Economy Is Freshly Under Attack*, TIME: EVERYDAY MONEY (June 9, 2014), http://time.com/money/2800742/uber-lyft-airbnb-sharing-economy-city-regulation (discussing the various efforts being made by local officials to regulate sharing economy companies, such as rideshare services and short-term rental operations, in tandem with enterprises of the traditional economy).

209 Bos. Taxi Owners Ass'n v. City of Boston, No. 15-10100-NMG, 2016 WL 1274531 (D. Mass. Mar. 31, 2016), *appeal filed,* No. 16-1412 (1st Cir. Apr. 21, 2016).

210 Ill. Transp. Trade Ass'n v. City of Chicago, 134 F. Supp. 3d 1108, 1110 (N.D. Ill. 2015) ("Plaintiffs . . . filed a seven Count [sic] Second Amended Complaint alleging constitutional violations under the Takings Clause, Equal Protection Clause, and Substantive Due Process in addition to state law claims of breach of contract, promissory and equitable estoppel.").

211 Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 14, Checker Cab Phila., Inc. v. Phila. Parking Auth., No. 2:16-cv-04669-MMB (E.D. Pa. Sept. 1, 2016).

212 In *Illinois Transportation Trade Association v. City of Chicago*, the district court held that plaintiffs adequately stated an equal protection claim. In October 2016, the Seventh Circuit reversed the district court's determination, reasoning that there are enough differences between traditional taxi companies and Uber and Lyft to warrant disparate treatment. *Ill. Transp. Trade Ass'n*, No. 16-2009, 2016 WL 5859703, at *3–4 (7th Cir. Oct. 7, 2016).

213 *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013); Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) ("[W]e invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers.").

214 The courts here are referencing Professor Sunstein's theory of "naked preferences." *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689–90 (1984); *see also* SULLIVAN & FELDMAN, *supra* note 48, at 615.

legislator is not to act based on private pressure, "naked preferences" for one group over another, but instead is to select public values through debate and deliberations.[215]

One counter to this viewpoint is that naked preferences do not exist; they are simply social constructs, defined partially by the court.[216] When the court is determining whether a legislative action was based on a naked preference or a public value, it is not a neutral or objective exercise.[217] In its evaluation, the court is constantly defining and redefining the meanings of naked and public preferences, just as any ordinary member of society does.[218]

In the New Economy, technology and innovation have the capacity to overwhelm the ability of the court, from its limited perspective isolated from the democratic debate, to interject morality or public values into the system. Under current and evolving conditions, and this counter to the "naked preference" theory, it appears to be consistent with the public good to rely on legislators' best attempts to regulate the technologies at hand.

C. *Protectionist Measures Will No Longer Exclusively Benefit the Politically Powerful*

As we have seen, regulators may have no choice but to enact blatantly protectionist measures to safeguard the economic well-being of their communities and not necessarily to protect the politically influential, which is a key element of the notion of naked economic protectionism.[219] Those taking a *Lochner*-like position in the twenty-first century argue that legislative protectionist measures are the result of the politically connected being granted favors at the expense of politically disfavored groups[220] and deny that such favoritism can ever be viewed as a legitimate state interest.[221]

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215 *Id.* at 1691.

216 Stephen M. Feldman, *Exposing Sunstein's Naked Preferences*, 1989 DUKE L.J. 1335, 1340–45 (1989).

217 *Id.* at 1343.

218 *Id.*

219 *See* David Bernstein, Opinion, *Do Laws that Embody 'Naked Economic Protectionism' Violate the Equal Protection Clause?*, WASH. POST.: THE VOLOKH CONSPIRACY (Sept. 14, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/14/do-laws-that-embody-naked-economic-protectionism-violate-the-equal-protection-clause (discussing economic protectionism and concluding, "unless and until the Supreme Court ever expressly *changes* equal protection doctrine, laws that exist solely to restrict competition to favor a politically powerful incumbent group violate the equal protection clause").

220 *See* Petition for Writ of Certiorari at i, Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281 (2d Cir. 2015) (No. 15-507) ("In its decision below, the Second Circuit—joining the Tenth Circuit and expressly rejecting contrary holdings from the Fifth, Sixth, and Ninth Circuits—

This debate is becoming increasingly irrelevant as the intrusive businesses that are resisting state regulation and battling existing businesses[222] have huge funding and political influence. Despite much publicity to the contrary, the actual regulatory results continue to show that it is not the business establishments of the twentieth century that are controlling the political debate.[223] These companies are put in the position of actually advocating for government intervention, while the politically influential technology start-ups wield the power and are attempting to operate in regulatory-free zones,[224] often claiming that disruption and deregulation benefit the consumer at the expense of special interests. The reality, however, is that the results benefit the economic bottom line of the new technology company while the public benefits remain undetermined.

Just as in past times of rapid economic change, contrary to the argument of the New Economy companies, it is powerful business interests that want to operate outside of government regulation and deal with the public and workers as they wish. Unlike past eras, technology is often considered a panacea that gives the public direct access to goods and services and obliterates the need for government oversight and existing business structures. Now, though, unlike the Industrial

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held that 'laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition' survive rational-basis review under the Fourteenth Amendment because they are a rational means of enriching politically favored groups at the expense of politically disfavored groups.").

221 *Id.* at 13–14.

222 Conor Dougherty & Mike Isaac, *Airbnb and Uber Mobilize Vast User Base to Sway Policy*, N.Y. TIMES (Nov. 4, 2015), http://www.nytimes.com/2015/11/05/technology/airbnb-and-uber-mobilize-vast-user-base-to-sway-policy.html?ref=business&_r=1 ("Over the last few years, so-called sharing companies like Airbnb and Uber—online platforms that allow strangers to pay one another for a room or a ride—have established footholds in thousands of communities well before local regulators have figured out how to deal with them. Now, as cities grapple with the growth of these services and try to pass rules for how they should operate . . . .").

223 New Economy platforms are typically backed by significant funding from venture capital and private equity firms and, in particular, Airbnb and Uber put some of these resources toward hiring political operatives to combat threats of regulation. *See id.*; *see, e.g.*, Rosalind S. Helderman, *Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network*, WASH. POST (Dec. 14, 2014), https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7_story.html (discussing Uber's use of lobbyists to influence legislators).

224 Established players, such as New York taxicab owners, have rallied against Uber and emphasized that they are not "wealthy operators who want to stifle innovation," but, to the contrary, the "single-medallion owner is the lifeblood of the yellow-taxi business." *See* Matthew Flamm, *Uber's Enemies Unite for Counteroffensive*, CRAIN'S N.Y. BUS. (May 9, 2016), http://www.crainsnewyork.com/article/20160509/BLOGS04/160509896. While "[c]ompanies like Airbnb and Uber have become multibillion-dollar companies by employing a kind of guerrilla growth strategy in which they set up a modest team of workers in a city and immediately start providing their services to the public, whether local laws allow them to or not." Dougherty & Isaac, *supra* note 222.

Revolution and early twentieth-century innovations, there are competing businesses in opposition, not just consumers and workers.

The political muscle of sharing economy companies was flexed in November 2015, when Airbnb demonstrated that at any sign of threat to their business, it has the power to turn "their users into a vast political operation," as it mobilized loyal supporters to defeat Proposition F (Prop. F) in San Francisco, California.[225] Prop. F, also known as the "Airbnb Initiative,"[226] included provisions that restricted private, short-term rentals to seventy-five nights per year; required hosts to submit a quarterly report detailing how frequently they rented to users and how often they occupied their home; and mandated that the city promptly notify those living within one hundred feet of each Airbnb host once they register their home.[227] Those supporting Prop. F, including such groups as tenants-rights organizations, landlord representatives, a hotel workers' union, and hotel associations,[228] considered theirs to be a grassroots movement.[229] In sharp contrast to the view of the existing political establishment as being politically connected, Chris Lehane, current head of Airbnb's global policy, went so far as to say that Airbnb's users represent "a bigger political base than anything else in the city."[230]

It appears that the groups that will challenge attempts by the legislature to regulate in this area are in a prime position to manage their issues through the democratic process. As proclaimed by the Supreme Court time and again, "people must resort to the polls, not to the courts" for protection against abuses by the legislature.[231]

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225 *Id.* (stating that according to the San Francisco Ethics Committee, Airbnb supporters and opponents to Prop. F raised eight times as much money as those backing Prop. F); Carolyn Said, *Prop. F Splits Neighbors on Whether Airbnb Hurts or Helps Housing*, S.F. CHRON. (Oct. 21, 2015, 4:47 PM), http://www.sfchronicle.com/business/article/Prop-F-splits-neighbors-on-whether-Airbnb-hurts-6575919.php?t=9276d4a4614832b814&cmpid=twitter-premium (discussing that Airbnb spent more than eight million dollars in a campaign to defeat Prop. F in San Francisco).

226 Alejandro Lazo & Douglas Macmillan, *San Francisco Voters Reject 'Airbnb Initiative'*, WALL STREET J. (Nov. 4, 2015, 2:40 AM), http://www.wsj.com/articles/san-francisco-voters-reject-airbnb-initiative-1446622854.

227 Said, *supra* note 225.

228 Lazo & Macmillan, *supra* note 226.

229 Said, *supra* note 225.

230 *Id.*

231 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488–89 (1955); Munn v. Illinois, 94 U.S. 113, 134 (1876). The pluralist conception of democracy holds that "a key function of government is to distribute resources to competing interest groups based on their political strength, so that an open preference by the legislature for one group over another is ordinarily unproblematic." SULLIVAN & FELDMAN, *supra* note 48, at 615.

And when these powerful tech start-ups do not get their way, they immediately go on the offensive to hinder any attempt at regulation.[232] In the summer of 2016, Airbnb sued San Francisco in response to a law passed by the City that would fine the company $1000 per day for each host on its site that is not registered with the City.[233] Airbnb's defiance further illustrates its view that it should be entitled to operate on its own, subject to no rules or guidelines.[234]

IV. PROPOSAL: THE STANDARD OF REVIEW FOR ECONOMIC LEGISLATION IN THE NEW ECONOMY ON DUE PROCESS AND EQUAL PROTECTION GROUNDS SHOULD BE NEAR DEFERENCE TO THE LEGISLATURE

As outlined in Part III, different historical periods have resulted in varying approaches to the concepts of protecting economic liberties.[235] Today, the New Economy requires courts to take the principles of rational-basis review entrenched in the Supreme Court's economic regulation jurisprudence to the logical conclusion of near absolute deference to the regulatory process.[236] Decisions regarding economic legislation coming out of the Second and Tenth Circuits adhere to the rational-basis framework, but, as discussed above,[237] the unpredictability of the New Economy requires courts today to go a step further in refraining from substituting judicial points of view for legislative prerogatives. It appears that the competing interests of the New Economy necessitate a standard of review that keeps the court above the fray. If a state legislature finds that protectionist measures are appropriate, the judiciary should not interfere unless the actions can be shown, by a court record containing clear and convincing evidence, that both are morally offensive and contrary to the interests of justice. Competitive fairness and logic dictate that the same standard of deference should also be applied when regulators decide not to act to protect existing businesses that are claiming due process and equal

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232 Katie Benner, *Airbnb in Disputes with New York and San Francisco*, N.Y. TIMES (June 28, 2016), http://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html?_r=0.

233 *Id.*

234 *Id.* David Campos, a member of the San Francisco Board of Supervisors, stated that "Airbnb is proving that it wants to play by its own rules, that it believes that it is entitled to something no business has, absolute freedom to operate free of responsibility and oversight . . . . It's their way or the highway." *Id.*

235 *See* CHEMERINSKY, *supra* note 33, at 634 ("The Supreme Court's protection of economic liberties has varied enormously over time.").

236 *See infra* notes 238–44.

237 *See* discussion *supra* Section I.B.

protection violations. The clash of these competing interests appears to be inevitable and bound to increase in the coming years.

This proposed standard is rooted in Supreme Court precedent of the late twentieth century, up until the sprouting of the New Economy. It is well-established that a statute seeking to regulate economic liberties is subject to rational-basis review when being challenged on Due Process or Equal Protection Clause grounds.[238] Laws that are not alleged to abridge fundamental rights, or classify parties on the basis of suspect distinctions, do not authorize the courts to "sit as a superlegislature" and assess the wisdom, fairness, or desirability of legislative policy decisions.[239] Such statutes have been "accorded a strong presumption of validity."[240] As long as an economic regulation bears a rational relationship to a legitimate government purpose, it should be upheld under rational-basis review.[241] It is not necessary for a legislature to set forth the reasoning or purpose behind a challenged statute[242] and a state is not obligated to produce evidence to support the rationality of that statute's classification scheme.[243] The onus is on the challenging party to negate any conceivable rational reason for the legislature's actions.[244]

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238 The Due Process and Equal Protection Clauses protect two different interests. The Equal Protection Clause calls for all similarly situated people to be treated similarly, while the Due Process Clause protects against interference with individuals' certain fundamental rights. This Note groups the analyses of these two clauses together because under rational-basis review, "a substantive due process analysis proceeds along the same lines as an equal protection analysis." Powers v. Harris, 379 F.3d 1208, 1215 (10th Cir. 2004); Sunstein, *supra* note 214, at 1717.

239 *See* Heller v. Doe, 509 U.S. 312, 319 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) ("In more recent years, however, the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn."); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("[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.").

240 *Heller*, 509 U.S. at 319; *see, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1988); Hodel v. Indiana, 452 U.S. 314, 331–32 (1981).

241 *See Heller*, 509 U.S. at 319; *Fritz*, 449 U.S. at 175; *Dukes*, 427 U.S. at 303; *Dandridge*, 397 U.S. at 485; *Skrupa*, 372 U.S. at 731.

242 *See Heller*, 509 U.S. at 319; Nordlinger v. Hahn, 505 U.S. 1, 15 (1992); *Fritz*, 449 U.S. at 175; United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

243 *Heller*, 509 U.S. at 319–20; *Beach Commc'ns, Inc.*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). *But see* Petition for Writ of Certiorari, *supra* note 220, at 28–29 (discussing that although the Supreme Court has expressed in dicta that courts must not look to the record to determine if a rational relationship between the government's ends and

In terms of the evidentiary support that might be set forth by plaintiffs in an attempt to demonstrate the invalidity of a statute or legislative inaction,[245] courts should extend the parameters of the current constitutionally valid theory of economic protectionism as enunciated by the Second and Tenth Circuits and only set aside statutes or regulations when there is unimpeachable data on the record. Questions the court may ask include: Is an entire industry being wiped out? Is there a significant amount of consumers who are no longer able to be served? This same standard should be applied where traditional economic interests seek relief under the Fourteenth Amendment when governments fail to regulate the New Economy, such as in San Francisco where the public voted against legislative interference.[246]

A critique to this highly deferential standard may be that it eliminates the rational-basis test altogether, taking away the federal court's power to determine the rationality of economic legislation.[247] Although critics may feel that debatable regulations may "slip through the cracks" under this standard, decisions made by any branch of the government will have positive and negative repercussions. All choices require balancing the good and bad outcomes that may arise. In this instance, it seems that the benefits outweigh the potential negative effects.

Another argument against this Note's proposed standard is that by finding economic protectionism to be a legitimate state interest in the New Economy, and permitting legislators to potentially enact laws that protect existing industry at the expense of start-up technology companies, it will stifle innovation and economic growth. Many New Economy supporters believe that peer-to-peer platforms of the New Economy are the future, and that the rules developed for the "older,

means exists, the Court has at times supported the notion that plaintiffs can introduce evidence "*refuting* the existence of an asserted rational relationship").

244 *Beach Commc'ns, Inc.*, 508 U.S. at 313, 315; Vance v. Bradley, 440 U.S. 93, 111 (1979) ("In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.").

245 There currently exists a federal court circuit split as to whether or not a plaintiff challenging an economic regulation under the Fourteenth Amendment may introduce evidence seeking to show that there is no plausible relationship between a challenged regulation and the government's asserted interest. Petition for Writ of Certiorari, *supra* note 220, at i.

246 Davey Alba, *Prop F Has Failed. But the Battle for SF's Soul Will Go On*, WIRED (Nov. 4, 2015, 1:32 PM), http://www.wired.com/2015/11/prop-f-has-failed-but-the-battle-for-sfs-soul-will-go-on.

247 Brief of Amici Curiae Southeastern Legal Foundation and St. Joseph Abbey in Support of Petitioner, Sensational Smiles at 1, L.L.C. v. Mullen, 793 F.3d 281 (2d Cir. 2015) (No. 15-507).

industrial-age," do not fit with a shared consumption business model.[248] This may be so, but while New Economy business models continue to thrive off of deregulation, an existing workforce and consumers are potentially at risk. Times are indeed changing, and, in turn, so too must the courts' handling of economic legislation. Although old legislation may not be applicable to the New Economy, city and state officials are best equipped to determine when protection and regulations are necessary. Following the Fifth, Sixth, and Ninth Circuit's invasive approach may lead to chaos and deprive the American public of the great benefits that may ultimately result from a properly regulated New Economy, with economic justice for all.

CONCLUSION

The New Economy of the twenty-first century may mark the birth of independent contractors undertaking a variety of different jobs to earn a living, entrepreneurs administering teeth-whitening procedures, and bed and breakfasts readily available in residential homes, but it has truly not accounted for the people who have made a living performing these tasks up until now.

While New Economy enterprises may pride themselves on promoting workplace freedom and supplemental income, they are simultaneously supporting unpredictable work arrangements and dismantling established businesses that abide by consumer safety and employee protection regulations that took years to implement.[249] In order to protect the employees and businesses that have "played by the rules" for decades while accommodating companies and technologies of the New Economy, it is necessary for courts to permit legislatures to enact economic laws deemed necessary to strike an equitable balance. Following the Fifth, Sixth, and Ninth Circuit's interpretation of the Due Process and Equal Protection Clauses in the realm of economic liberties will potentially close the door on a vital form of relief for the economic hardships and challenges, which are an inevitable part of the American future.

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248 *See* Arun Sundararajan, *Trusting the 'Sharing Economy' to Regulate Itself*, N.Y. TIMES: ECONOMIX (Mar. 3, 2014, 12:01 AM), http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?_r=0.

249 *See* discussion *supra* Section I.B.