THE SHARING ECONOMY: HOW STATE AND LOCAL GOVERNMENTS ARE FAILING AND WHY WE NEED CONGRESS TO GET INVOLVED

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I. INTRODUCTION

Although a few people may prefer typewriters to computers or pagers to cell phones, mostly everyone loves new technology. However, incumbent companies fight tirelessly to protect themselves from future innovation, deathly afraid of a new product or service that will threaten their market share. The manufacturer of typewriters certainly abhorred the day it saw sales plummet when the world elected to replace them with computers. Unfortunately, companies dominant in their respective industries, spend a considerable amount of money to lobby local, state and federal legislatures to pass laws to protect the existing marketplace and create insurmountable obstacles to the next innovative wave.

The sharing economy is the next wave of economic growth.[1] Sharing economy companies such as Airbnb[2] and Uber[3] are being compared to industry behemoths eBay and Amazon, as both appear to be on a similar growth line.[4] In this note, I will advocate for Congress to promote the sharing economy by creating regulation for emerging technologies and incentivizing states to adopt those measures. This note is divided into three parts. Part I will outline the benefits of the sharing economy and the legal issues confronting it. Part II will highlight proposed regulation, which encourages innovation and focuses on public safety instead of impeding growth. Finally, Part III will detail the constitutional authority that permits Congress to enact such laws and how the federal government will incentivize the states to adopt the legislation.

II. THE SHARING ECONOMY

The sharing economy is a recent trend where people can monetize their personal belongings by renting (sharing) them out to complete strangers.[5] The relationships are forged through online companies that make the personal connection. RelayRides[6] allows people to rent their car, Uber[7] and Lyft[8] allow people to provide taxi-like services, DogVacay[9] provides dog-kennel services, Boatbound[10] offers boat rentals, and Airbnb lets people rent

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1. Marcus Wohlsen, *The Next Big Thing You Missed: The Sharing Economy Goes Corporate*, WIRED (Dec. 10, 2013, 9:30 AM), http://www.wired.com/business/2013/12/sharing-economy-goes-corporate/; Michael Olson & Andrew D. Connor, *The Disruption of Sharing*, PIPERJAFFRAY (Nov. 2013), https://piper2.bluematrix.com/docs/pdf/35ef1fcc-a07b-48cf-ab80-04d80e5665c4.pdf.

2. AIRBNB, https://www.airbnb.com (last visited Nov. 12, 2014).

3. UBER, https://www.uber.com (last visited Nov. 12, 2014).

4. Olson & Connor, *supra* note 1.

5. Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/.

6. *See* RELAYRIDES, https://relayrides.com/how-it-works (last visited Oct. 16, 2014).

7. *See* UBER, https://www.uber.com/about (last visited Oct. 16, 2014).

8. *See* LYFT, https://www.lyft.com/how (last visited Oct. 16, 2014).

9. *See* DOGVACAY, http://dogvacay.com/how-it-works (last visited Oct. 16, 2014).

10. *See* BOATBOUND, https://boatbound.co/about (last visited Oct. 16, 2014).

out spare rooms.[11] These peer-to-peer services provide people with a cheaper alternative to purchasing these goods. Further, these services give a new revenue stream to people who may typically only use a belonging for a brief period of time.

A. Background and Benefits

The emergence of the sharing economy is intimately tied to technology. Today, people have greater access to information than ever before. Social networks, such as Facebook, allow people to perform a limited background check on people, and online payment systems facilitate transactions.[12] The volume of data about people and things is simply staggering. As of 2011, "90% of the world's data ha[d] been generated in the past two years."[13] These ideal conditions have led to the introduction of the sharing economy.

Brian Chesky, Joe Gebbia and Nathan Blecharczyk founded Airbnb in San Francisco in 2008.[14] In 2007, Chesky was practically broke and left Los Angeles to stay with his friend Gebbia in San Francisco.[15] The two agreed to split the rent but Chesky was unemployed and unable to pay his half.[16] San Francisco was hosting the Industrial Designers Society of America, and because all of the hotels were sold out the two of them decided to inflate air mattresses and offer people a place to stay.[17] Three people stayed with them, each paid $80/night, and Chesky and Gebbia served them breakfast and called themselves "Airbed and Breakfast."[18] This idea eventually became Airbnb, which is now reportedly worth $1 billion.[19] Airbnb now offers rental listings in 34,000 cities and 190

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

12. *The Rise of the Sharing Economy*, ECONOMIST (Mar. 7, 2013), http://www.economist.com/node/21573104.

13. *Where Angels Will Tread*, ECONOMIST (Nov. 9, 2011), http://www.economist.com/node/21537967.

14. AIRBNB, https://www.airbnb.com/about/about-us (last visited Oct. 19, 2014); *see also* AIRBNB, https://www.airbnb.com/about/founders (last visited Oct. 19, 2014).

15. Thomas L. Friedman, *Welcome to the 'Sharing Economy'*, N.Y. TIMES (July 20, 2013), http://www.nytimes.com/2013/07/21/opinion/sunday/friedman-welcome-to-the-sharing-economy.html?_r=1&.

16. *Id.*

17. *Id.*

18. *Id.*

19. Nicole Perlroth, *It's Official: Airbnb Joins the Billion Dollar Valuation Club*, FORBES (July 24, 2011, 10:30 PM), http://www.forbes.com/sites/nicoleperlroth/2011/07/24/its-official-airbnb-joins-the-billion-dollar-valuation-club/.

countries without owning a single bed.[20] People can list anything from a bed, to a room, to the entire house, and set rental rates.[21] In exchange, Airbnb charges hosts a 3% fee for bookings and travelers pay an additional 6 to 12% on top of the rental fee.[22] Blecharczyk said, "We couldn't have existed ten years ago, before Facebook, because people weren't really into sharing."[23]

The sharing economy and Airbnb are good for the economy and consumers. The world economy is still struggling to emerge from the 2008 recession, and Airbnb type companies create a conduit for people to earn more money, which in turn will increase spending and promote growth. The value of items being shared today is close to $26 billion.[24] Airbnb reports that San Francisco hosts make on average $9,300 by renting their homes for roughly fifty-eight nights per year.[25] An Airbnb released case study revealed its services generated $632 million for New York City's economy in 2012.[26] On average, because Airbnb renters spend less on rentals than they would on hotels, they can afford to stay longer and spend more money on food and shopping.[27] In New York City, Airbnb renters stayed 6.4 nights on average and spent $1,300 throughout the stay, $420 on accommodations and $880 on everything else.[28] Contrast that with hotel guests, who stayed on average 3.9 nights and spent $1,230 during their stay, $535 on accommodations and $695 beyond that.[29] Airbnb renters are staying longer and spending more. Further, Airbnb boasts that its service entices renters to stay in less desirable areas such as Harlem, rather than Times Square, which is heavily populated with hotels.[30] This provides valuable economic support to the less popular neighborhoods. For

20. AIRBNB, *supra* note 14; Friedman, *supra* note 15.

21. *All Eyes on the Sharing Economy*, *supra* note 11.

22. A. Pawlowski, *Airbnb Apologizes: 'We Have Really Screwed Things Up'*, CNN (Aug. 1, 2011, 2:37 PM), http://www.cnn.com/2011/TRAVEL/08/01/online.rental.horror.stories/index.html?iref=allsearch.

23. *All Eyes on the Sharing Economy*, *supra* note 11.

24. Dominic Basulto, *The Sharing Economy: How Do You Stop Something You Can't Keep Up With?*, WASH. POST (May 24, 2013, 1:52 PM), http://www.washingtonpost.com/blogs/innovations/wp/2013/05/24/the-sharing-economy-how-do-you-stop-something-you-cant-keep-up-with/.

25. *The Rise of the Sharing Economy*, *supra* note 12.

26. Laura Kusisto, *Airbnb Cites Its Role in City*, WALL ST. J. (Oct. 21, 2013, 9:30 PM), http://online.wsj.com/news/articles/SB10001424052702303448104579149844259343658.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

example, Airbnb reported that renters spent $14.5 million in Bedford-Stuyvesant in 2012.[31]

Airbnb does not just impact the domestic economy but has an impressive effect internationally as well. Airbnb reported that it contributed 185 million Euros to the Paris economy in one year.[32] Notably, 70% of the rental listings are located outside of "the central hotel area," and the Parisian hotel bookings increased by 70% over the same period of time this study was conducted.[33] This statistic illustrates that not only is Airbnb not disrupting the hotel business but that hotels are catering to a different clientele. Hotels provide services absent from Airbnb rentals such as concierge, room and maid services.

B. Legal Issues: David and Goliath

The sharing economy is currently being attacked, facing a plethora of regulatory and legal challenges, which could destroy this fragile emerging marketplace. In New York City, Airbnb is accused of violating the city's "illegal hotel" laws, which prohibit apartment owners from renting out homes for less than twenty-nine days, restricting apartment use to a private residence and not a hotel.[34] The city actually fined resident Nigel Warren $2,400 for violating the law.[35] Warren had rented his condominium through Airbnb to a person for a three-day stay.[36] The purpose of the law is not aimed at Airbnb hosts but was an attempt to prevent people from purchasing residential properties and converting them into hotels.[37] Thankfully, Airbnb got New York City's Environmental Control board to dismiss the fine.[38] The judge reasoned that the city's hotel law is not

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31. *Id.*

32. The study was conducted with assistance from French economic analysis company Asteres. The one-year was from May 2012 to April 2013. Liam Boogar, *Airbnb Contributes €185 Million Euros to the Paris Economy, So Don't Write-Off the Sharing Economy Just Yet*, RUDE BAGUETTE (June 13, 2013), http://www.rudebaguette.com/2013/06/13/airbnb-sharing-economy-paris/; *New Study: Airbnb Community Contributes €185 Million Euros to Parisian Economy*, AIRBNB, http://assets.airbnb.com/press/press-releases/Paris%20Econ%20Impact%20Release.pdf (last visited Mar. 12, 2013).

33. Boogar, *supra* note 32.

34. Donna Tam, *NY Official: Airbnb Stay Illegal; Host Fined $2*,400, CNET (May 20, 2013, 5:00 PM), http://news.cnet.com/8301-1023_3-57585377-93/ny-official-airbnb-stay-illegal-host-fined-$2400/.

35. *Id.*

36. *Id.*

37. *Id.*

38. Patrick Hodge, *Airbnb Willing to Collect Occupancy Tax*, SAN FRANCISCO BUSINESS TIMES (Oct. 4, 2013, 12:43 PM), http://www.bizjournals.com/sanfrancisco/blog/2013/10/airbnb-willing-to-collect-occupancy-tax.html?page=all.

violated as long as the permanent occupant is present during the renter's stay.[39]

Airbnb is facing similar challenges in San Francisco. The San Francisco administrative code makes it illegal for an apartment owner to rent out the unit for less than thirty days.[40] This was a 1981 amendment, which penalizes violators by fining them up to $1,000 per day.[41] These antiquated laws, created for purposes beyond the effects of emerging companies like Airbnb, are hurting the sharing economy.[42]

I agree that cities deserve to protect themselves from violators who abuse the system and convert residential buildings zoned for non-hotel use into Airbnb short-term rentals. Understandably, San Francisco wants to rid itself of people that "skirt the law" by leasing an apartment solely to rent it out.[43] Also, San Francisco housing is already expensive, and the city justifiably worries about a constricting supply of available apartments, which in turn will increase the already high rental market.[44] However, the focus needs to be on those corporate abusers who purchase numerous units or entire buildings, not on the individual who chooses to rent out an apartment for supplemental income reasons. The current solution for these individuals, the option of applying for a permit to convert an apartment into a bed and breakfast, is both financially and procedurally untenable.[45] The bed and breakfast application costs over $1,000 and can take years before being approved.[46] This defeats the reigning purpose of the sharing economy, to provide people with easily accessible additional revenue streams while simultaneously growing the economy.

Despite the regulatory anguish, the sharing economy has its supporters. San Francisco's mayor acknowledges that companies like Airbnb generate new jobs and create income for the city.[47] The mayor went as far as creating a "Sharing Economy Working Group," aimed to create legislation

39. *Id.*

40. Aaron Sankin, *Airbnb, Other Apartment Rental Sites Struggle With Legality in San Francisco*, HUFFINGTON POST (Oct. 3, 2012, 5:32 PM), http://www.huffingtonpost.com/2012/10/03/airbnb_n_1936523.html.

41. *Id.*

42. For example, NYC's illegal hotel laws were originally meant to prevent landlords from usurping the housing supply by purchasing residential buildings with the intent to convert them into hotels. *See* Basulto, *supra* note 24.

43. Sankin, *supra* note 40.

44. *Id.*

45. *Id.*

46. *Id.*

47. *San Francisco Taxes Airbnb: Online Booking Service Now Required to Pay City*, HUFFINGTON POST (April 5, 2012, 2:08 AM), http://www.huffingtonpost.com/2012/04/04/san-francisco-taxes-airbn_n_1404479.html.

to give tax breaks to Airbnb-type companies.[48] The mayor's Director of Economic and Workforce Development supports the idea that Airbnb-type rentals should be viewed differently from hotels.[49] Outside of the mayor's camp, the Board of Supervisors' President, David Chiu, proposed legislation on "illegal short-term corporate apartment rentals."[50] The proposed legislation would prevent corporations from signing long-term leases with the goal of renting out the units for profit.[51] The legislation would allow the Department of Building Inspection to conduct hearings to review offender conduct, which it currently is not permitted to do.[52] Chiu is also targeting legislation that will help with non-corporate renters who use Airbnb to rent out apartments for a temporary basis for brief periods of time as a source of supplemental income.[53] Chiu recognizes that individuals who may need additional income to help pay rent deserve to continue to use Airbnb services.[54]

C. Cities, Incumbents and the Sharing Economy Can Live in Harmony

Cities and incumbent companies should not view Airbnb and sharing economy as the enemy. Although tourism injects additional revenue into the local economy, cities also incur added expenses to provide infrastructure for visitors, such as sanitation and police services.[55] Hotels charge an occupancy tax to help offset these costs.[56] Cities should collaborate with Airbnb to address these added expenses. Incumbent companies have already illustrated their ability to co-exist with the sharing economy through their direct participation in sharing economy-companies.[57]

The sharing economy should not seek shelter from paying taxes. In 2012, the hotel industry collected $493 billion in tax revenue.[58] Cities, such

48. Matt Smith, *As Mayor Cultivates New Business, Treatment of Back Is Questioned*, N.Y. TIMES (Mar. 31, 2012), http://www.nytimes.com/2012/04/01/us/as-mayor-edwin-m-lee-cultivates-business-treatment-of-backer-is-questioned.html?pagewanted=1&_r=0.

49. *Id.*

50. Alex Bevk, *Crack Down on Corporate Rentals*, CURBED SAN FRANCISCO (Oct. 3, 2012), http://sf.curbed.com/archives/2012/10/03/crack_down_on_corporate_apartment_rentals.php.

51. *Id.*

52. Sankin, *supra* note 40.

53. *San Francisco Board of Supervisor David Chiu on SF's Response to Airbnb*, https://soundcloud.com/kqed/san-francisco-board-of (last visited Mar. 18, 2013).

54. *Id.*

55. *See id.*

56. *See id.*

57. *Infra* at Part I.C.

58. Kusisto, *supra* note 26.

as San Francisco, which charge an occupancy tax to hotel guests, should be able to collect from Airbnb hosts. Airbnb is certainly open to the idea as well.[59] Airbnb said, "We believe it makes sense for our community of hosts to pay occupancy tax to the cities in which they live, with exceptions under certain thresholds, and we are eager to discuss how this might be made possible."[60] Unfortunately, instead of working with Airbnb to attempt to draft regulation, New York City's Attorney General subpoenaed Airbnb for information on its 225,000 landlords in the state.[61] Attorney General Eric Schneiderman wants the host information to collect unpaid 14.75% state occupancy taxes.[62] Airbnb said, "We are fighting the subpoena with all we've got, but poorly written laws make for even worse enforcement, and unless you help to stop it once and for all, the laws may never get better and New Yorkers will continue to suffer."[63] The Attorney General wants to eliminate those who are abusing Airbnb – "hotel operators" who are renting out residential units – not the people who occasionally rent out their apartment.[64] However, this is a disturbing method of solving the problem. This subpoena will severely strain Airbnb's resources and jeopardize the privacy of numerous hosts.[65] Instead of aimlessly attacking the problem, laws should be enacted to facilitate the payment of occupancy taxes and the capture of those abusing the system.

Incumbent businesses that complain about unfair competition are participating in the sharing economy as well. Car manufacturers such as GM and Daimler and car rental company Avis have all invested in car sharing companies.[66] In 2011, GM invested in a three million dollar round in RelayRides with the hope that buyers would be motivated to purchase one of its cars after renting it.[67] GM began marketing its cars to the sharing economy by encouraging people to purchase a car, which now comes with a

59. Verne Kopytoff, *Airbnb Woes Show How Far the Sharing Economy Has Come*, TIME (Oct. 7, 2013), http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come/.

60. *Id.*

61. Kaja Whitehouse, *Attorney General's NYC Battle with Airbnb Targets Widowed Grandma*, N.Y. POST (Nov. 13, 2013, 2:06 AM), http://nypost.com/2013/11/13/ny-attorney-general-targets-widow-in-airbnb-battle/.

62. *Id.*

63. Dara Kerr, *Airbnb Host Creates Petition to Confront New York Lawmakers*, CNET (Oct. 14, 2013, 6:51 PM), http://news.cnet.com/8301-1023_3-57607491-93/airbnb-host-creates-petition-to-confront-new-york-lawmakers/.

64. Whitehouse, *supra* note 61.

65. *Id.*

66. *The Rise of the Sharing Economy*, *supra* note 12.

67. Geron, *supra* note 5.

potential "rental income stream attached."[68] Avis, through its acquisition of ZipCar, a pay-by-the-hour car-rental company that had made a $14 million investment in a car peer-rental company Wheelz, acquired a portion of Wheelz.[69]

III. THE PROPOSED LEGISLATION

Congress should and can enact legislation to protect innovation such as the sharing economy. Congress can borrow from the successful templates forged by California's ridesharing program and Los Angeles' early embrace of the food truck industry, while simultaneously avoiding mistakes generated by legislators who wrongly fought innovation.[70] Safety remains the paramount goal of nascent legislation, which sharing economy companies have already began to implement.[71]

A. *Legal Framework*

To help alleviate the legal woes facing the sharing economy and stave off future legal calamities that undiscovered innovation will certainly face, Congress should enact legislation to protect emerging markets. The goal is to provide a minimum standard for states to adopt that can provide an early regulatory foundation in the nascent stages of development. These laws will provide interim protection while giving each state time to pass individualized laws that cater more directly to the specific state and the entity to be regulated. The legislation's focus should be on economic stimulus and the government's role of safety, maintaining the right to regulate and inspect.

The legislation's goal should aim to pass laws that are good for the economy and good for the consumers. Historically, this is a government-supported theme. For example, Amazon initially did not have to collect sales tax from customers unless it had a physical presence in that state.[72] This previously novel marketplace was given a competitive edge to attract customers to help the industry flourish. Now that Amazon is becoming

68. *Id.*

69. *All Eyes on the Sharing Economy*, *supra* note 11; RelayRides has since acquired Wheelz. Tomio Geron, *RelayRides Acquires Wheelz in Car Sharing Consolidation*, FORBES (May 14, 2013, 3:00 AM), http://www.forbes.com/sites/tomiogeron/2013/05/14/relayrides-acquires-wheelz-in-car-sharing-consolidation/.

70. *Infra* at Part III.B.

71. *Id.*

72. Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (holding retailers are exempt from charging sales tax in states where they did not have a physical presence).

required to collect sales tax, regardless of an in-state presence, the company is changing its approach to compete with other merchants, which includes reducing its delivery windows.[73] Although legislators did not intend to stimulate the Internet economy by providing for a no sales tax benefit, the indirect result helped Amazon as well as other online companies grow. Now that these companies have matured, the laws are appropriately adapting to cover any unfair competitive edge, and noticeably companies like Amazon are enhancing other aspects of its business to compensate for the change.

Another example stems from the birth of the videocassette recorder ("VCR"). Sony's Betamax was the first VCR available for purchase, which gave people the unprecedented ability to tape live television, a tremendous innovation at the time.[74] Entertainment studios Disney and Universal sued Sony for copyright infringement.[75] The Supreme Court held for Sony, ruling that the home recording did not constitute copyright infringement.[76] After the decision, Disney and Universal aggressively lobbied Congress to pass legislation to shelter them from the alleged harmful effects of home copying.[77] However, Congress rightfully acknowledged the popularity of home recording, and refused to detrimentally impact the growth of important innovation.[78] Congress also rejected the studios' plea to enact a statutory royalty on the sale of blank videocassette tapes and VCRs.[79] Congress made the right decision, and by 1995, the home video market constituted 57% of the movie industry's domestic revenue.[80] By rejecting the incumbent studios' demand for innovation-stifling legislation, Congress helped pave the way for a huge surge in the home video market, which benefited consumers, the economy, and the very studios that so desperately feared change. Thus, Congress has proven it has the ability to affect

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73. Michael Hiltzik, *Amazon's War on Sales Taxes Whimpers to an End*, LOS ANGELES TIMES (Dec. 02, 2013), http://articles.latimes.com/2013/dec/02/business/la-fi-mh-amazons-20131202.

74. *Videocassette Recorder*, WIKIPEDIA, http://en.wikipedia.org/wiki/Videocassette_recorder#VHS_vs._Betamax (last visited Mar. 12, 2013).

75. Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984).

76. *Id.* at 454-55 (holding that making copies of television shows is fair use).

77. *See Videocassette Recorder*, *supra* note 74.

78. *Sony Corp. of America*, 464 U.S. 417.

79. *Id.* at 455 (reasoning the studios were already making money in the home video department); Robert S. Schwartz, *It's the 30th Anniversary of the Supreme Court's Monumental Decision About Betamax*, SLATE (Jan. 17, 2014 9:03 AM), http://www.slate.com/blogs/future_tense/2014/01/17/betamax_supreme_court_opinion_anniversary_the_decision_has_had_long_reaching.html.

80. Peter M. Nichols, *Where the VCR Rules*, N.Y. TIMES (July. 12, 1996), http://www.nytimes.com/1996/07/12/movies/home-video-078344.html.

innovation, not only through legislation, but also through its refusal to enact innovation-stifling regulation.

B. California as a Role Model

Beyond economic goals, the government's role is to promote safety. California recently provided a positive example of potential sharing economy legislation. In 2013, the California Public Utilities Commission approved regulation in support of ride sharing, a peer-to-peer taxi service made popular by companies such as Uber, Sidecar[81] and Lyft.[82] The Commission distinguished ride sharing from traditional taxi service by creating a new category of business called a Transportation Network Company.[83] The Commission also recognized the importance of innovation and took a strict public safety stance by requiring "drivers to be licensed by the commission, go through criminal background checks, attend driver-training programs, carry one million dollar per-accident insurance coverage, and have a zero-tolerance police on drugs and alcohol."[84] Commissioner Mark J. Ferron said, "Our decision emphasizes safety as a primary objective, while fostering the development of this nascent industry."[85]

Congress should follow California's lead. Just as the California Public Utilities Commission established a new business category for ride sharing and enacted new regulation, Congress should respond similarly with the sharing economy. California recognized that ride sharing, "an online-enabled application that connects passengers with drivers using their personal vehicles," is different from taxis and should not have to succumb to an old model.[86] Similarly, legislators should recognize that the sharing economy companies are different from its traditional counterparts and also

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81. SIDECAR, https://www.side.cr/ (last visited Mar. 18, 2013).

82. Dara Kerr, *Uber, Lyft, and Sidecar Get Tentative Green Light in Calif.*, CNET (July. 30, 2013, 8:17 PM), http://news.cnet.com/8301-1023_3-57596259-93/uber-lyft-and-sidecar-get-tentative-green-light-in-calif/; Tomio Geron, *California Becomes First State to Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sept. 19, 2013, 3:40 PM), http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/.

83. Kerr, *supra* note 82.

84. *Id.*; CALIFORNIA PUBLIC UTILITIES COMMISSION, CPUC Establishes Rules for Transportation Network Companies, http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.PDF (last visited Nov. 12, 2014).

85. Anthony Ha, *California Regulator Passes First Ridesharing Rules, A Big Win for Lyft, Sidecar, and Uber*, TECH CRUNCH (Sept. 19, 2013), http://techcrunch.com/2013/09/19/cpuc-ridesharing-regulations/.

86. *Proposed Decision*, *available at* http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K122/77122741.PDF (last visited Nov. 12, 2014).

should not be subjected to similar labeling. Sites like Airbnb, which are dissimilar from traditional hotels, should be labeled differently and subject to different regulations, especially during their initial growth.[87]

The food truck industry provides another positive legislative example. Although the food truck industry is not part of the sharing economy, the two share a similar dilemma; both are innovative new services that face the wrath of established businesses and local government. The contemporary gourmet food truck industry almost never occurred in Washington D.C.[88] The city hosted one of the more lively food truck friendly spots in the country until Mayor Vincent C. Gray proposed significant regulations on the newly arrived industry.[89] The mayor's goal seemed to be to protect existing restaurants from the competition posed by these mobile eateries.[90] If the mayor succeeded then this innovative form of food service would have vanished because the proposed regulation would have made it impossible for food trucks to succeed.[91] The regulation sought to ban trucks from operating downtown unless they became one of the fortunate few to win a lottery, and even then they would be restricted to park in only one of a selected number of designating parking spots.[92]

Change in Washington D.C. only occurred because the citizens voiced their complaint, rallying against the proposed legislation.[93] The possible fear of upsetting the people or even losing valuable constituencies in the upcoming election was the catalyst for preventing the implementation of legislation that surely would have annihilated an exciting new innovation. Due to public support, food trucks are now permitted to travel about the city.[94] However, the fear only motivated the mayor so much.[95] Although, the food trucks can roam the city, the trucks are not allowed to park within 200 feet of certain designated spaces.[96]

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87. *See supra* Part I.A.

88. Kathleen Rooney, *Los Angeles Is the Model for Food-Truck Freedom, Washington, D.C. Is Protectionist Hell*, FORBES, at 2 (Aug. 2, 2013, 8:00 AM), http://www.forbes.com/sites/realspin/2013/08/02/los-angeles-is-the-model-for-food-truck-freedom-washington-d-c-is-protectionist-hell/.

89. *Id.* at 1.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1-2.

95. *Id.* at 1.

96. *Id.* at 2.

Fortunately, Los Angeles allowed the food truck industry to blossom.[97] The city did not participate in protectionism.[98] Unlike Washington D.C., which supported incumbent restaurants to the detriment of the newcomer, Los Angeles welcomed the food truck revolution.[99] In drafting legislation, Los Angeles favored public health and safety concerns over protectionism, which was echoed in a report generated by the Institute for Justice titled "Food Truck Freedom."[100] The report concentrated on public safety concerns, such as food safety, hours of operation, licensing and maintaining liability insurance.[101]

In general, local and state legislatures should not pass laws that protect incumbent businesses, especially when the new companies provide different services. For example, established restaurants complain that they are at an unfair disadvantage over food trucks because they have to pay property tax and rent and food trucks do not. However, restaurants have numerous advantages over food trucks, such as seating, air conditioning, heating, and storage.[102] Food trucks typically cannot provide their customers with any of these features. Also, hotels and Airbnb both offer visitors a place to stay but both offer customers different amenities.[103] Thus, even though both restaurants and food trucks serve food and hotels and Airbnb provide accommodations, they supply different benefits to consumers and cities should not be able to favor one group over another.

C. Safety and User-Generated Reviews

Even without regulation, Airbnb has made safety its primary concern. After an Airbnb host's apartment had been vandalized and robbed following a stay, the company started providing a $50,000 physical-property guarantee and a 24-hour customer support hotline.[104] In May 2012 that amount was increased to $1 million.[105] Airbnb also provides a customer support team comprised of eighty-eight employees to review

97. Robert Frommer & Bert Gall, *Food Truck Freedom: How to Build Better Food-Truck Laws in Your City*, INSTITUTE FOR JUSTICE, at 7 (Nov. 2012), http://ij.org/images/pdf_folder/economic_liberty/vending/foodtruckfreedom.pdf.

98. *Id.* at 10.

99. *Id.*

100. *Id.* at 14.

101. *Id.* at 5-6.

102. *Id.* at 8.

103. *See supra* at Part I.A.

104. Jessi Hempel, *Airbnb: More Than a Place to Crash*, CNN, at 6 (May 3, 2012, 5:00 AM), http://tech.fortune.cnn.com/2012/05/03/airbnb-apartments-social-media/.

105. The amount is with the backing of insurance marketplace Lloyd's. *All Eyes on the Sharing Economy*, *supra* note 11, at 3-4.

suspicious activity.[106] Airbnb has developed a host of other safety methods such as providing: private messaging between host and renter prior to booking, hosts have the ability to decline guests, a payment system that holds payment for a day, a system that flags suspicious behavior, and professional photographs of listings.[107]

Airbnb should continue to encourage user-generated reviews to complement any existing or future safety regulation. Reviews will help hosts identify potentially harmful renters, as well as allow renters avoid undesirable properties. Airbnb provides a "Safety Tips" section on its website that instructs user how to review hosts' profiles and determine how other renters have viewed their experiences.[108] Additionally, unlike sites such as Yelp.com, Airbnb only allows people who have previously rented or hosts to post reviews.[109] Cities should also encourage user-generated reviews. A city's endorsement of user-generated reviews as a method of obtaining information about sharing economy hosts and consumers will add further credibility to the system. User-generated reviews also provide cities with a low cost supplement or potentially an alternative to publicly funded safety measures.

Although some users will post baseless negative reviews, user generated reviews are extremely impactful and companies or individuals will fight tirelessly to maintain a positive reputation.[110] Eighty-nine percent of consumers trust online reviews and eighty percent have changed their minds about a purchase based on having read a negative review.[111] Ride sharing drivers and Airbnb hosts will only attract passengers and renters respectfully if they are well reviewed. Few passengers would enter a car if previous passengers have written discouraging remarks about the experience. Typically, a ride sharing driver will greet his passengers with a bottle of water and friendly dialogue in exchange for the hope of a positive

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106. A. Pawlowski, *Airbnb Apologizes: We Have Really Screwed Things* Up, CNN, at 1 (Aug. 1, 2011, 2:37 PM), http://www.cnn.com/2011/TRAVEL/08/01/online.rental.horror.stories/index.html?iref=allsearch.

107. Brian Chesky, *On Safety: A Word from Airbnb*, TECH CRUNCH, at 2 (July 27, 2011), http://techcrunch.com/2011/07/27/on-safety-a-word-from-airbnb/.

108. A. Pawlowski, *supra* note 106, at 2.

109. *Common Questions*, AIRBNB, at 2, https://www.airbnb.com/help/question/13 (last visited Oct. 17, 2014).

110. *See* Chris Horton, *Caveat Vendit: User-Generated Reviews Go Mobile*, SYNECORE, at 1-2, (Aug. 14, 2013, 6:01 AM), http://engage.synecoretech.com/marketing-technology-for-growth/bid/185277/Caveat-Vendit-User-Generated-Reviews-Go-Mobile.

111. *Id.*

review.[112] Thus, user generated reviews may reduce the need for burdensome safety regulation beyond a basic level of precautionary care.

IV. CONSTITUTIONAL AUTHORITY

Congress has authority to pass federal legislation through the Commerce Clause.[113] Congress subsequently can incentivize states to adopt the legislation though the Taxing and Spending Clause.[114] Although Congress drafts the regulation, society also plays an important role by encouraging Congress to pass the laws in the first place.

A. Commerce Clause: Interstate Commerce

The sharing economy affects interstate commerce and can be regulated by Congress. The Commerce Clause, one of Congress' enumerated powers listed in the United States Constitution, states that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[115] The section that reads, "[A]mong the several States," is known as the Interstate Commerce Clause.[116] The Supreme Court has held that Congress has the right to regulate a business that serves predominately interstate travelers.[117] This right is so vast that Congress not only has the authority to regulate a small local restaurant if some of the food was purchased from non-local suppliers[118] but also local motels, which attract out of state travelers.[119] Essentially, if interstate commerce is affected, no matter how local the action, Congress has the ability to regulate.[120]

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112. *See id.*

113. U.S. Const. art. 1, § 8, cl. 3.

114. *Id.*

115. *Id.*

116. *Id.*

117. Heart of Atlanta Motel v. United States, 379 U.S. 241, 251-52 (1964) (holding that the Civil Rights Act, which prohibited discrimination in businesses, was constitutional and that a motel could not refuse service to Blacks because seventy-five percent of guests were out-of-staters and the plaintiff solicited business from out-of-state residents through advertisements).

118. Katzenbach v. McClung, 379 U.S. 294, 297, 302 (1964).

119. *Heart of Atlanta Motel*, 379 U.S. at 241.

120. *Katzenbach*, 379 U.S. at 302 (holding Congress acted within its Commerce Clause power in forbidding racial discrimination in restaurants). The decision highlighted the fact that some of the restaurant's food was purchased from non-local suppliers and that restaurants might sell less food due to discrimination, which would affect the non-local suppliers, which would then have an effect on interstate commerce. The Supreme Court was concerned about restaurant aggregation and what would happen if many restaurants discriminated and how that would affect out-of-state suppliers.

Airbnb affects interstate commerce on a much larger scale than a local restaurant or motel. Airbnb renters might elect to forgo travel entirely because of either a lack of interest in staying in a hotel or due to what they may perceive as prohibitively expensive accommodations. Further, considering people typically extend their stay when staying in Airbnb accommodations that could also have a large affect on interstate commerce.[121] If out-of-state guests spend less time visiting a city that will restrict the flow of business and money between the states, which is the very thing that Congress legislates to prevent.

Numerous other sharing economy concepts affect interstate commerce. Ride sharing companies partially rely on out-of-state travelers who hire drivers to transport them around cities.[122] Instead of paying for airport parking, FlightCar is a service that rents out users' cars while they are traveling, gives them a free ride to the airport and returns their vehicle upon their return.[123] RelayRides is a peer-to-peer car-sharing service that allows private car owners to rent out their cars.[124] All of these services cater to a mobile audience.

There is a tremendous amount of business at risk if the states regulate the sharing economy out of existence. The sharing economy is estimated to be a $110 billion market.[125] Further, not only do these services risk losing customers but also the people who are sharing their own belongings risk losing a supplemental income stream. The additional revenue generated by people monetizing their personal belongings will inevitably be funneled back into the economy, which will provide a valuable boost to our post-recession marketplace.

B. *Taxing and Spending*

Congress can incentivize states to adopt legislation by utilizing the Taxing and Spending Clause. The United States Constitution reads, "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . ."[126] "With the power to tax implicitly comes the power to spend the revenues raised thereby in order to meet the objectives and goals

121. *See supra* at Part I.A.

122. *See id.*

123. Salvador Rodriguez, *Top Ten Ways to Take Advantage of the Sharing Economy*, LOS ANGELES TIMES, at 2 (Nov. 22, 2013), http://articles.latimes.com/2013/nov/22/business/la-fi-tn-sharing-economy-top-ten-ways-20131121.

124. *See* RELAYRIDES, *supra* note 6.

125. Danielle Sacks, *The Sharing Economy*, FAST COMPANY, at 3 (Apr. 18, 2011 1:05 AM), *available at* http://www.fastcompany.com/1747551/sharing-economy.

126. 117. U.S. Const. art. 1, § 8, cl. 1.

of the government."[127] The Supreme Court has held that Congress has the power to exercise this clause to encourage the states to adopt certain regulations.[128] However, Congress cannot force the states to adopt federal legislation by coercively withholding funding.[129]

Congress must satisfy four elements for conditions on spending to be acceptable.[130] First, the purpose must be for the general welfare.[131] In interpreting this first element Courts have been very deferential to Congress, typically not inquiring whether the law actually works.[132] Second, the conditions have to be unambiguous, allowing states to exercise its choice knowingly.[133] Basically, this element is met if the restriction on funding is clear in the statute.[134] Third, the spending must be related to the federal interest in a particular program, which means there must be a relationship between the condition and the money.[135] The fourth element is that the condition cannot be too coercive.[136]

The sharing economy caters to the entire wealth spectrum, satisfying the general welfare requirement.[137] Regardless of wealth, everyone can participate in sharing resources. Those unable to pay monthly bills can supplement income by renting out a room through Airbnb or wealthier individuals who are more interested in renting a luxurious high-end house than staying in a hotel can find a wide variety of selections through Airbnb as well. Entire cities have recognized the importance of the sharing economy with fifteen mayors having now signed the Shareable Cities Resolution, a document that recognizes the importance of the sharing

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127. *Taxing and Spending Clause*, WIKIPEDIA, http://en.wikipedia.org/wiki/Taxing_and_Spending_Clause (last visited Nov. 11, 2014).

128. *See generally* South Dakota v. Dole 483 U.S. 203 (1987) (holding a federal Act that withheld highway funds to states that sold beer to people under 21 was constitutional because Congress can impose conditions on spending programs and drinking age was related to the highway because a higher drinking age made the highways safer).

129. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (holding Congress exceeded spending power by putting too coercive a condition on Medicaid funds and violated the 10th Amendment because it became commandeering by telling states to change laws to take care of these people).

130. *South Dakota*, 483 U.S. at 207-08.

131. *Id.* at 207

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

137. *See* Adam Parsons, *The Sharing Economy: A Short Introduction to its Political Evolution*, RESILIENCE (Jan. 24, 2014), http://www.resilience.org/stories/2014-01-24/the-sharing-economy-a-short-introduction-to-its-political-evolution.

economy to both the public and private sectors.[138] The resolution, which counts the mayors of both San Francisco and New York as sponsors, strives to better understand the sharing economy by confronting regulation that may impede sharing growth.[139] The mayors have also started to plan how the cities can involve publicly owned assets in sharing.[140] The public recognizes that the sharing economy strengthens community relations, which provides stability during a difficult economic environment.[141]

General welfare is not limited to economic growth but involves the global environment as well. It is estimated that the world population will reach 9.6 billion people be 2050.[142] With billions of people depleting the worlds' resources, today's ideology of "excessive consumerism" will become unrealistic, paving the way for society to favor sharing over ownership.[143] Psychologist Tim Kasser reinforces this principal, acknowledging that, "When people focus more on materialism they care less about the earth."[144]

Next, to satisfy the element that spending must be related to the federal interest in a particular program, Congress is not required to draw a direct connection between the funding and the program.[145] For example, Congress has the authority to withhold highway funds unless a state increases the drinking age.[146] Although indirectly related, the highway fund restriction is sufficiently related because a higher drinking age makes the highways safer.[147] An even more direct connection between funding and the program would be to incentivize states to adopt sharing economy legislation through The American Recovery and Reinvestment Act of 2009. The Act provided states with an estimated $831 billion to help facilitate recovery from the recession that lasted from December 2007 to June 2009.[148] The Act allocated funds to numerous areas, including infrastructure, alternative energy, health care, education, science and small

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138. *Id.*

139. *Shareable Cities Resolution: Passed*, COLLABORATIVE CONSUMPTION (June 26, 2013), http://www.collaborativeconsumption.com/2013/06/26/shareable-cities-resolution-passed/.

140. *Id.*

141. *Id.*

142. Parsons, *supra* note 137.

143. *Id.*

144. *The High Price of Materialism*, YOUTUBE (Dec. 4, 2011), http://www.youtube.com/watch?v=oGab38pKscw.

145. *See* South Dakota v. Dole 483 U.S. 203 (1987).

146. *Id.* at 211-12.

147. *Id.* 208-09.

148. Congressional Budget Office, *Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from Oct. 2011 Through Dec. 2011* (Feb. 2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/02-22-ARRA.pdf.

businesses.[149] The funding was designed to be spent over a ten-year period, 2009 to 2019, with ninety-one and a half percent of the funding to be spent over the first three years.[150] Congress has the authority to tie the Act's remaining funds to the condition that the states adopt legislation that promotes innovation.[151] This is not too coercive because over ninety percent of the funds have already been distributed.[152] This is just one example of how Congress should use federal grants to incentivize states to adopt legislation.

Beyond The American Recovery and Reinvestment Act of 2009, Congress can borrow from a previously enacted statute and apply its template to the sharing economy.[153] In 1985, Congress authorized states with radioactive waste disposal sites to impose a surcharge on out-of-state received waste.[154] The Secretary of Energy collected a portion of the surcharge and distributed that money to states that developed waste sites.[155] Applying this schematic to the sharing economy, Congress can authorize states that initially foster innovative technologies, potentially through the creation of a more business friendly environment, to charge other states a surcharge that subsequently utilize the technology.[156] The Secretary of Commerce can collect a portion of the surcharge and place those funds in an escrow account.[157] States that achieve a series of goals designed to support innovation will receive a portion of the collected funds.[158] The Supreme Court has also validated this approach.[159] The Supreme Court has held that Congress can authorize states to burden interstate commerce by an expression of unambiguous Congressional intent.[160] The Court reasoned that the Secretary's collection of a surcharge is "no more than a federal tax on interstate commerce."[161] Thus, applying that reasoning to the sharing economy, so long as the states use the portion of collected funds toward the

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149. Kimberly Amadeo, *ARRA Details*, ABOUT.COM (Sept. 7, 2013), http://useconomy.about.com/od/usfederalbudget/a/Economomic_Stimulus_Package_in_Detail.htm.

150. Kimberly Amadeo, *What Was Obama's Stimulus Package?*, ABOUT.COM, http://useconomy.about.com/od/candidatesandtheeconomy/a/Obama_Stimulus.htm (last visited Mar. 12, 2013).

151. *See South Dakota*, 483 U.S. at 203.

152. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

153. *See* New York v. United States 505 U.S. 144 (1992).

154. *Id.*

155. *Id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

goal of incentivizing innovation than the conditions are constitutional.[162] This potential federal framework incentivizes states to be more business friendly, which will in turn create more jobs and economic growth.

C. Congress' and Society's Joint-Role and Sharing Economy As An Example For Future Innovation

Both Congress and society play a vital role in the proliferation of future legislation. Society must encourage Congress to pass legislation and we rely on Congress to draft the laws. Even the courts have historically relied on and deferred to Congress when an innovative new product or industry has created controversy amongst opposing parties.[163]

Most importantly society is incentivized to pressure Congress because emerging technologies and innovation provide economic growth, which greatly impacts society.[164] Empirical evidence shows that the living standard is substantially higher in areas that have experienced strong economic growth.[165]

The potential sharing economy regulation, which focuses on economic stimulus and safety, should be seen as a prototype for future innovation. New products and services will inevitably continue to appear. Each time a new product or service is created, be it the Internet or the sharing economy, it is plagued with legal and regulatory challenges. To prevent innovation spending valuable resources fighting state regulation, it would benefit tremendously through the implementation of a federal minimum regulatory standard.

Josh Krauss

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162. *See id.*

163. *See generally* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (holding that music rolls for pianos did not infringe on the copyright holders right to make a copy). This case prompted Congress to pass the Copyright Act of 1909, which expanded the copyright holder's exclusive rights and made music rolls a violation of the copyright holder's exclusive right of public performance. Separately, the concurring opinion in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) laid out a set of rules known as the Ashwander Rules, which set guidelines for The Supreme Court to avoid constitutional rulings. The seventh rule read, "When the validity of an act of the Congress is drawn in question . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.*

164. *See* David Ahlstrom, *Innovation and Growth: How Business Contributes to Society*, ACAD. OF MGMT. PERSP. (Aug. 2010), http://www.neeley.tcu.edu/uploadedFiles/Academic_Departments/Management/zol003102941p.pdf.

165. *Id.*