
JUDICIAL REVIEW AND THE SHARING ECONOMY:
APPROACHES TO REACHING COMPROMISE

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Public choice theory explains why reasonable regulatory compromises that are supported by the majority are often not implemented to regulate specific business activities. The power of special interests is more influential than the majority of constituents, who have different policy positions but are often less focused on the isolated issues that are a priority for big corporations and lobbying firms. For this reason, the judiciary will play a significant role in the evolution of the new gig economy. A review of judicial systems in different countries highlights the aspects of legislative and regulatory review that will promote compromise and adapt to the pace of technological change that requires nimble legal and regulatory frameworks. This paper uses intricate case studies from Airbnb and Uber to demonstrate the availability of reasonable policy compromise and the role that the judiciary can play in increasing the likelihood that the public can maximize the benefits of new products and services while minimizing the costs.

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INTRODUCTION

Shortly after Jane Doe’s Uber driver dropped her off at her destination in downtown Minneapolis in August 2017, she realized

that she had left her phone in the car's auxiliary power outlet.¹ Upon returning to the car to retrieve it, the driver forcibly kissed and groped her.² While Doe was able to separate herself from the assailant,³ the incident should not have happened. According to Doe's lawsuit, the driver had a criminal record of a prior sexual assault against another woman,⁴ which Doe's complaint posited would have been revealed by a detailed, fingerprint-based background check.⁵ While the taxi industry may use this investigatory tool, the extensiveness of Uber driver background checks depends on the jurisdiction's local regulations.⁶ Due to the differing background check requirements for ridesharing companies in most states, Uber's driver due diligence process varies by jurisdiction.⁷

¹ Cyrus Farivar, *Woman: After I Rebuffed My Uber Driver's Advances, He Tried to Rape Me*, ARS TECHNICA (Feb. 25, 2017, at 11:30 ET), <https://arstechnica.com/tech-policy/2017/02/woman-sues-uber-claims-driver-with-prior-record-attempted-to-rape-her/> (on file with the Columbia Business Law Review).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Salvador Rodriguez, *Uber Versus Women: A Timeline*, INC. (Mar. 28, 2017) (citing Complaint at 16, Doe v. Uber Tech., Inc., No. 17-CV-00950 (N.D. Cal. Feb. 23, 2017)), <https://www.inc.com/salvador-rodriguez/uber-women-timeline.html> [<https://perma.cc/UEY7-2AEV>].

⁶ See *Driver Screening*, UBER, <https://www.uber.com/us/en/ride/safety/driver-screening/> [<https://perma.cc/Q7Y4-R5AH>] (last visited Nov. 30, 2025).

⁷ See Mark Wiggins, *Study: No States Require Uber/Lyft Fingerprints*, KVUE ABC (Aug. 31, 2016, at 18:46 CT), <https://www.kvue.com/article/news/politics/study-no-states-require-uberlyft-fingerprints/312017055> [<https://perma.cc/AF99-DQDV>]; Nick Statt, *Uber Will Pay \$10 Million to Settle Lawsuit over Driver Background Checks*, THE VERGE (Apr. 7, 2016, at 19:21 ET), <https://www.theverge.com/2016/4/7/11389822/uber-lawsuit-background-checks-10-million-settlement/> [<https://perma.cc/FCF2-Y5EM>]. Prior to September 2016, California did not have laws that would reprimand Uber for failure to identify criminal records of drivers. See Dara Kerr, *California Tightens Background Checks on Uber, Lyft Drivers*, CNET (Sept. 29, 2016, at 15:24 PT), <https://www.cnet.com/tech/tech-industry/california-law-tightens-background-checks-on-uber-lyft-drivers/> [<https://perma.cc/7ZLF-KYEQ>]. While New York requires Uber to perform the same background checks as taxi companies do for its drivers, many other states do not have these requirements.

Over 1,500 miles away, new regulations governing short-term rental (STR) markets in 2016 affected homeowners in New Orleans.⁸ Prior to the regulatory action, rentals less than thirty days were mostly illegal in New Orleans, but the city did not strictly enforce the prohibition, allowing homeowners using platforms like Airbnb to rent their property without a license.⁹ In the subsequent years, city officials constantly revisited the STR regulatory regime requiring all STR hosts to obtain and periodically renew a municipal permit as a condition to continue to operate.¹⁰ Under this regime, permit renewal applications became subject to additional substantive and procedural requirements,¹¹ likely resulting in denials for certain existing hosts. The introduction of the permitting framework—and the compliance costs and uncertainty associated with it—likely dissuaded some potential STR hosts from entering the market and imposed additional financial burdens on affected homeowners.¹²

Whereas overbroad and extensive regulations can result in infringement of stakeholders' rights in the sharing economy, unregulated products and services in other industries exemplify the undesirable result of exposing users and third parties to unnecessary

Editorial, *Strong Safety Rules for Taxis and Uber*, N.Y. TIMES (Dec. 24, 2014), <https://www.nytimes.com/2014/12/25/opinion/strong-safety-rules-for-taxis-and-uber.html> [<https://perma.cc/K7BT-FFXG>].

⁸ See New Orleans, La., Ordinance 27,204 (Dec. 1, 2016) (initiating comprehensive regulation of short-term rentals within the city).

⁹ See PAUL CRAMER ET AL., NEW ORLEANS, LA. - CITY PLANNING COMM'N, SHORT TERM RENTAL STUDY, 2019 ED. 10–11 (2019).

¹⁰ See *id.* at 10; *Overview of Short Term Rentals in New Orleans*, CITY OF NEW ORLEANS (Mar. 18, 2024, at 10:59 CT), <https://nola.gov/next/short-term-rental-administration/topics/overview-of-short-term-rentals-in-new-orleans/> [<https://perma.cc/N5UE-HMGF>].

¹¹ See, e.g., NEW ORLEANS, LA., CODE OF ORDINANCES ch. 26 art. XI, §§ 26-613, -617, -620 (2025) (conditioning permit eligibility and renewal on zoning status, residency requirements, density caps, and ongoing compliance).

¹² ROBERT D. RIVERS ET AL., NEW ORLEANS, LA. - CITY PLANNING COMM'N, TRANSIENT LODGING STUDY: INCLUDING SHORT-TERM RENTALS 26–27 (2025) (noting a decrease in new permitting activity and spike in code violations after new regulations were adopted).

safety risks.¹³ In the context of STRs, some regulations could infringe on homeowners' rights to privacy and property.¹⁴ Conversely, unregulated markets that fail to prevent rent inflation often drive residents from their homes.¹⁵ In spite of the regulatory challenges in the sharing economy, recent innovations have made several positive contributions to many cities throughout the U.S.¹⁶ How can regulators strike a balance that protects people from under-regulation and also from over-regulation? To maximize the benefits of innovation in the sharing economy while minimizing the costs, regulators and legislators need to identify reasonable compromises.¹⁷

Reasonable laws aim to mitigate problems by the least restrictive means, while unreasonable regulations propose overbroad solutions that ban or unduly restrict sharing economy platforms.¹⁸ For example, rather than banning STRs to reduce rent inflation and the scarcity of available housing, some cities have limited hosts to posting one STR on Airbnb's platform.¹⁹ While

¹³ See, e.g., Diane S. Aschenbrenner, *FDA Warns Against Unregulated Products*, 118 AM. J. NURSING 22 (Mar. 2018) (highlighting increased consumer risk exposure to unregulated pharmaceuticals).

¹⁴ See generally Sevion DaCosta, *Privacy-as-Property: A New Fundamental Approach to the Right to Privacy and the Impact This Will Have on the Law and Corporations* (May 3, 2021) (B.A. thesis, Claremont McKenna College) (on file with Claremont College's Library) (arguing technology platform users do not "tacitly consent to forego" rights to privacy when they consent to use the platform).

¹⁵ See Ron Bekkerman et al., *Research: Restricting Airbnb Rentals Reduces Development*, HARV. BUS. REV. (Nov. 17, 2021), <https://hbr.org/2021/11/research-restricting-airbnb-rentals-reduces-development> [<https://perma.cc/59YL-B9PD>].

¹⁶ See generally Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 296–305 (2016) (arguing sharing economy platforms provide reduced transaction costs, improved allocation of resources, and information and pricing efficiencies).

¹⁷ *Id.* at 296.

¹⁸ For an example of a guide to effective STR regulation, see VIEWPOINT CLOUD, *A VERY COMPREHENSIVE GUIDE TO SMART AIRBNB REGULATION FOR LOCAL GOVERNMENTS* (2016).

¹⁹ See, e.g., *San Francisco, CA Home Host Rules*, AIRBNB: HELP CENTER, <https://www.airbnb.com/help/article/871/san-francisco-ca> [<https://perma.cc/KH2D-NM9F>] (last visited Sept. 3, 2024).

both approaches have the same objective, the latter alternative is more reasonable because it does not completely eliminate homeowners' ability to generate income through short-term property rentals.²⁰ Conversely, regulations that aim to reduce rent inflation by imposing broad requirements that discourage homeowners from using STR websites in the first place are unreasonable.²¹ For example, STR regulations may require homeowners to make structural adjustments to their homes to meet quality of life policy objectives.²² In these cases, it is reasonable to assume that the time and cost of making physical changes to property to comply with regulations likely outweighs any financial benefit for hosts using a STR service (e.g., Airbnb). Special interests on both sides of the STR issue lobby their representatives to implement legislation that supports their polarized policy positions.²³ Whereas hotel owners and their representatives support hotel-like regulations for all STRs,²⁴ Airbnb often rejects reasonable regulations tailored to specific problems.²⁵ Meanwhile, communities

²⁰ See Madeleine Pauker, *Airbnb to Remove Illegal Listings Under Settlement Agreement with Santa Monica*, SANTA MONICA DAILY PRESS (Dec. 10, 2019), <https://smdp.com/2019/12/10/airbnb-to-remove-illegal-listings-under-settlement-agreement-with-santa-monica/> [https://perma.cc/4XK2-EZ2L].

²¹ See Hans R.A. Koster, Jos van Ommeren & Nicolas Volkhausen, *Short-term Rentals and the Housing Market: Quasi-experimental Evidence from Airbnb in Los Angeles*, J. URB. ECON., July 2021, at 1, 18 (suggesting a decrease in short-term rentals could result in less home ownership and increased long-term rental demand).

²² See VIEWPOINT CLOUD, *supra* note 18, at 10.

²³ See, e.g., Ajay Gupta, *Airbnb and Short-term Rentals in San Diego: The Ban That Never Was*, GUPTA & AYRES: ALL BLOG POSTS (Nov. 1, 2018), <https://social.law/airbnb-and-short-term-rentals-in-san-diego-the-ban-that-never-was/> [https://perma.cc/SU4S-N8UD].

²⁴ See Katie Benner, *Inside the Hotel Industry's Plan to Combat Airbnb*, N.Y. TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html> [https://perma.cc/Y277-MQPD].

²⁵ See, e.g., Julian Crowley, *Unnecessary and Unfair: Why Airbnb Rejects NSW Short Stay Plan*, ACCOM NEWS (Sept. 1, 2019), <https://www.accomnews.com.au/2019/09/unnecessary-and-unfair-why-airbnb-rejects-nsw-short-stay-plan/> [https://perma.cc/H4PV-ZA7K].

favor regulations that serve as effective compromises between the conflicted parties.²⁶

Another challenge facing regulators is the time lag between innovation and the rules that regulate it.²⁷ While all technological advancements present regulatory problems, the type and pace of change in the digital economy is unprecedented.²⁸ As technology and the sharing economy evolve, local governments must create effective, adaptable regulations to match the sharing economy's expansion.²⁹ One example of an adaptive regulation is the implementation of density studies that identify areas where a concentration of STRs develops.³⁰ When the number of STRs in an isolated area reaches a predetermined threshold, the STR regulation triggers restrictions to prevent rent inflation and noise pollution from crystallizing in the community.³¹ This is an example of an adaptive regulation that accounts for and recognizes that risk environments and the need for government intervention changes over time.³² The existing legal and regulatory frameworks for the digital economy in most cities are insufficient and must be replaced by more agile and diverse frameworks that can manage rapid change.³³ If there are legal and regulatory frameworks that address concerns on both sides while also providing a mechanism that accounts for rapid change, why are the frameworks not implemented more frequently and with less resistance?

²⁶ See, e.g., VIEWPOINT CLOUD, *supra* note 18.

²⁷ William D. Eggers & Mike Turley, *The Future of Regulation: Principles for Regulating Emerging Technologies*, DELOITTE INSIGHTS: GOV'T & PUB. SERVICES 3–4 (June 19, 2018), <https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/future-of-regulation/regulating-emerging-technology.html> [<https://perma.cc/7VDJ-H5HT>].

²⁸ See Kristofer Erickson & Inge Sørensen, *Regulating the Sharing Economy*, INTERNET POL'Y REV., June 30, 2016, at 1, 9–10.

²⁹ See Eggers & Turley, *supra* note 27, at 2.

³⁰ See, e.g., VIEWPOINT CLOUD, *supra* note 18, at 12.

³¹ See *id.* at 10, 12.

³² See *id.* at 3–5.

³³ See Lindsay M. Tedds et al., *Why Existing Regulatory Frameworks Fail in the Short-term Rental Market: Exploring the Role of Regulatory Fractures*, U. CALGARY SCH. OF PUB. POL'Y PUBL'NS, Oct. 2021.

As a representative democracy, the U.S. process of developing legislation is vulnerable to the influence of special interests.³⁴ In many scenarios, there is not sufficient reward for politicians to fight powerful interest groups in order to confer benefits on constituents for whom the STR or other gig economy related issues are not a priority.³⁵ Although the number of objective constituents who favor compromise is greater than the number of stakeholders that comprise special interests, politicians are not incentivized to honor the former group's policy choices because the issue is not a priority for the majority.³⁶ Rather, politicians are inclined to honor the desires of interest groups who are in the minority because they prioritize specific issues and are likely to contribute money and vote for those who politically support their positions.³⁷ For these reasons, judicial institutions will play a critical role in checking the power of special interests, promoting compromise, and encouraging an investment environment in which the digital economy's risks are minimized and its rewards are maximized.³⁸ There are several institutional factors that impact the

³⁴ Special interest groups in the context of Airbnb comprise hotels, hosts who rent out their property, Airbnb, and neighbors living near apartments and houses that are listed on the website. For a discussion of special interest groups in the context of the gig economy, see John G. Matsusaka, *Is Direct Democracy Good or Bad for Corporations and Unions?*, 66 J. L. & ECON. 83, 108–09 (2023).

³⁵ See Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy"*, GEO. MASON U. L. & ECON. RSCH. PAPER SERIES, no. 15-01, Jan. 14, 2015, at 1, 24–25.

³⁶ See Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 354 (2017).

³⁷ See *id.*

³⁸ See Martin Shapiro, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (describing courts as institutional checks on concentrated political and economic power); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 22–27 (2003) (explaining how judicial review constrains interest-group capture); Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 214–18 (2008) (linking judicial institutions to investment security and risk reduction); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 447–50 (2004) (showing how courts shape incentives and economic outcomes by limiting arbitrary state action).

likelihood of compromise and the ability to manage risks associated with rapid change.³⁹ Methods, models, and types of judicial review will have a direct impact on outcomes of disputes and an indirect impact on the regulatory framework's ability to achieve compromise and adapt to ongoing changes in the digital age.⁴⁰

With the surging popularity of Airbnb and Uber and the significant number of governments without a solid framework for regulating them, the time is ripe for considering how legal institutions will impact the future of the sharing economy. This article provides a rubric for reviewing the impact of legal institutions in the outcome of disputes and evolution of U.S. regulatory frameworks for the sharing economy. Part I explains the characteristics that define the sharing economy and the related challenges facing regulators and legislators. It then introduces Airbnb and Uber as case studies and identifies the type of regulations that are reasonable and unreasonable. Part II further illustrates the elusiveness of compromise and introduces the concept of public choice theory to explain why compromise is difficult to achieve. Lastly, Part III explains the ways in which legal institutions can maximize the likelihood of compromise and facilitate an adaptive regulatory framework.

³⁹ See Charles F. Sabel & Jonathan Zeitlin, *Learning From Difference: the New Architecture of Experimentalist Governance in the EU*, in EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION 1, 1–6 (Charles F. Sabel & Jonathan Zeitlin eds., 2010) (arguing that institutional design affects compromise, learning, and adaptation under conditions of uncertainty); J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21, 21–34 (2008) (explaining how institutions manage risk under rapid technological and economic change); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371–78 (2004) (discussing institutional mechanisms that enable negotiated compromise and regulatory flexibility).

⁴⁰ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191–98 (2006) (explaining how standards of judicial review shape regulatory authority and outcomes); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 92–95 (1985) (showing how judicial review doctrines influence regulatory behavior ex ante); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082–86 (1986) (demonstrating indirect effects of judicial scrutiny on regulatory design and incentives).

I. EXPLAINING THE SHARING ECONOMY AND THE UNPRECEDENTED TYPE AND PACE OF CHANGE

The world is experiencing “an epic reinvention of our economic system.”⁴¹ The sharing economy “facilitates community ownership, localized production, sharing, cooperation, small scale enterprise, and the regeneration of economic and natural abundance.”⁴² The realization that resources are not unlimited along with a global focus on innovation has driven significant changes to the global economy.⁴³ Simply put, the internet triggered significant changes in human behavior, requiring policy makers to rethink antiquated regulations.⁴⁴

While all technological innovations disrupt economies and standard business practices, the sharing economy triggered change at an unprecedented pace.⁴⁵ According to a study performed by Deloitte, “the pacing problem has acquired new urgency due to the speed with which modern innovations are scaling.”⁴⁶ With vast digital infrastructure, “digital products, services, and industries can become very large, very fast.”⁴⁷ Meanwhile, the time it takes to develop legislation and regulations to manage these industries is far longer, as the policy cycle can often take five to twenty years.⁴⁸

The Deloitte report aptly states:

⁴¹ JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 1 (2012).

⁴² *Id.* at 2.

⁴³ *See id.* at 3–4.

⁴⁴ *See* Eggers & Turley, *supra* note 27, at 2; Hannah A. Posen, *Ridesharing in the Sharing Economy: Should Regulators Impose Über Regulations on Uber?*, 101 IOWA L. REV. 405, 426 (2015).

⁴⁵ Lee Shapiro, *The Unprecedented Pace of Change*, FORBES (Feb. 25, 2021, at 07:40 ET), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/02/25/the-unprecedented-pace-of-change/> [<https://perma.cc/N8B2-36HZ>].

⁴⁶ Eggers & Turley, *supra* note 27, at 4.

⁴⁷ *Id.*

⁴⁸ *Id.* (“[W]hereas a unicorn startup can develop into a company with global reach in a matter of months.”).

Disruptive forms of technological innovation often change traditional industry boundaries. As products and services evolve, they often shift from one regulatory jurisdiction to another. For example, if a ride-hailing company begins delivering food, it can fall under the jurisdiction of health regulators. If the delivery service expands into helicopter service, it will fall under the purview of aviation regulators. If it uses autonomous vehicles for passengers, it may come under the jurisdiction of telecommunications regulators.⁴⁹

As technology enhances products and services, the ease and speed with which innovations penetrate the regulatory space of new industries create serious challenges for legislators and regulators.⁵⁰ The challenge for regulators is to harness the positive aspects of each technology, refrain from implementing measures that serve to protect industry incumbents and exclude competitors, and safeguard against the innovation's threat to public interests.⁵¹ This requires an understanding of the positive and negative externalities of such products, the drivers of regulatory conflict, and the distinction between unfair, protectionist and bona fide, merit-based regulations.⁵²

A. *Positive Aspects of the Sharing Economy*

While there is significant debate about the net impact of the digital economy, there is a consensus that it does provide some positive contributions to the global economy.⁵³ These benefits focus on resource efficiency, enhanced access to information for buyers

⁴⁹ *Id.* at 5.

⁵⁰ Rick Schmitt, *The Sharing Economy: Can the Law Keep Pace with Innovation?*, STAN. LAW. MAG., Spring 2017, <https://law.stanford.edu/stanford-lawyer/articles/the-sharing-economy-can-the-law-keep-pace-with-innovation/> [<https://perma.cc/2SRS-6YKA>].

⁵¹ See Edelman & Geradin, *supra* note 16, at 295.

⁵² See VIEWPOINT CLOUD, *supra* note 18, at 8.

⁵³ See, e.g., Edelman & Geradin, *supra* note 16, at 296–304; Eggers & Turley, *supra* note 27, at 15.

and sellers, and increased accountability for service providers and consumers.⁵⁴

1. *Reducing Transaction Costs*

Modern software platforms reduce the costs and improve the processes associated with finding a suitable transaction counterpart.⁵⁵ For example, rather than having to look for a taxi driver who is available and willing to take a fare, Uber's platform provides the public with access to available drivers who are in close proximity to passengers.⁵⁶ More specifically, the application enables Uber passengers to "hail a car from any location and have it arrive in minutes."⁵⁷

2. *Reputation and Safety*

In the modern global economy, customer feedback is at a premium.⁵⁸ While consumers are often reluctant to provide such feedback, digital platforms foster the exchange of opinions.⁵⁹ Rather than having to fill out a survey or answer a questionnaire over the phone, customers simply check one or two boxes to review the product or service.⁶⁰ For example, if an Uber driver is offensive or an Airbnb tenant damages a home, feedback platforms issue

⁵⁴ See Chia-Ying Li & Yu-Hui Fang, *The More We Get Together, the More We Can Save? A Transaction Cost Perspective*, 62 INT'L J. INFO. MGMT. 1, 2 (Feb. 2022).

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ Mohamed S. Jalloh, *Uber: Advantages and Disadvantages*, INVESTOPEDIA (May 20, 2024) <https://www.investopedia.com/articles/investing/110614/taxi-industry-pros-cons-uber-and-other-ehail-apps.asp> [https://perma.cc/HF56-DZAV].

⁵⁸ *A Better Customer Experience in the Feedback Economy*, FORBES (Feb. 11, 2020, at 14:09 ET), <https://www.forbes.com/sites/businessreporter/2020/01/22/a-better-customer-experience-in-the-feedback-economy/> [https://perma.cc/SFJ5-ZQ3J].

⁵⁹ *Id.*; see also Douglas Wegner et al., *A Systematic Review of Collaborative Digital Platforms: Structuring the Domain and Research Agenda*, 18 REV. MANAGERIAL SCI. 2663 (2024).

⁶⁰ See Edelman & Geradin, *supra* note 16, at 317.

advisories to notify future consumers and service providers of potential problems.⁶¹ With a built-in mechanism to hold consumers and service providers accountable, digital platforms encourage stakeholders to behave appropriately and expose those who do not.⁶² While some users are unwilling to provide negative feedback and others may discriminate against hosts or drivers, the ease and availability of such rating systems ensure that service providers consistently get feedback to improve their offerings.⁶³ Ultimately, access to such information is a net gain.⁶⁴

3. Pricing Efficiencies

By providing current information that is frequently updated to reflect market conditions and by facilitating open communication among all parties, software platforms help companies set prices that reflect volatile levels of supply and demand.⁶⁵ As a result, these platforms maximize pricing efficiencies and enable service providers to meet higher demands.⁶⁶ For example, in times of significant demand, higher rates ensure sufficient supply of Uber drivers by encouraging them to work during times when the demand is high.⁶⁷

While the benefits of technology transfer have been chronicled for years,⁶⁸ digital platforms and related innovations

⁶¹ See *id.* at 316–17. For an example of digital feedback in the context of Airbnb, see Mingming Cheng & Xin Jin, *What Do Airbnb Users Care About? An Analysis of Online Review Comments*, 76 INT’L J. HOSP. MGMT. 58, 66 (2019).

⁶² See Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem,”* 70 U. MIAMI L. REV. 830, 842 (2016).

⁶³ See *id.* at 873.

⁶⁴ *Id.* at 877.

⁶⁵ See Edelman & Geradin, *supra* note 16, at 301.

⁶⁶ See Yanli Guo et al., *Sharing Economy Platforms’ Pricing Strategies and Decision Preferences: The Example of DiDi*, 8 OPEN J. BUS. & MGMT. 1641, 1653–54 (2020).

⁶⁷ *How Uber’s Dynamic Pricing Model Works*, UBER, <https://www.uber.com/en-GB/blog/uber-dynamic-pricing/> [<https://perma.cc/5UMJ-TY3Z>] (last visited Sept. 7, 2024).

⁶⁸ See, e.g., Valerie Landrio McDevitt et al., *More than Money: The Exponential Impact of Academic Technology Transfer*, 16 TECH. & INNOVATION 75 (2014).

provide new advantages to economies.⁶⁹ The three benefits explained above are merely a sample of these new enhancements. For these reasons, legislators and judicial branches of governments are encouraged to develop and enforce regulations that manage related risks without decimating the companies that provide effective and necessary services.⁷⁰

B. *Negative Aspects of the Sharing Economy*

While the benefits of the sharing economy are undeniable, it also presents increased risks.⁷¹ Without pre-existing regulations for managing risks associated with innovative product services, the well-being of consumers and providers can be threatened.⁷² Tailored regulations that address these risks without completely restricting the drivers' or homeowners' rights would be effective for both sides.⁷³

⁶⁹ See Steve Smith, *What Are the Benefits of a Digital Platform?*, EQUAL EXPERTS (Nov. 23, 2020), <https://www.equalexperts.com/blog/our-thinking/what-are-the-benefits-of-a-digital-platform/> [https://perma.cc/AV6N-RL6J].

⁷⁰ See *Sharing Economy 2.0: Can Innovation and Regulation Work Together?*, KNOWLEDGE AT WHARTON (Nov. 5, 2014), <https://knowledge.wharton.upenn.edu/article/the-next-phase-for-the-sharing-economy/> [https://perma.cc/39LK-U7VG].

⁷¹ Zirui Li, *Understanding the Sharing Economy*, ARIZ. STATE U. THUNDERBIRD SCH. GLOB. MGMT. INSIGHTS BLOG (Mar. 9, 2023), <https://thunderbird.asu.edu/thought-leadership/insights/understanding-sharing-economy> [https://perma.cc/NQ4Z-ZJMY].

⁷² See Simon Torkington, *These Are the 3 Biggest Emerging Risks the World Is Facing*, WORLD. ECON. F. (Jan. 13, 2024), <https://www.weforum.org/agenda/2024/01/ai-disinformation-global-risks/> [https://perma.cc/VKW7-KGES] (explaining lawmakers struggle to regulate artificial intelligence quickly); Nestor M. Davidson & John J. Infranca, *Regulatory Challenges in the Sharing Economy*, A.B.A. (Dec. 16, 2019), https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/regulatory-challenges-in-the-sharing-economy/ [https://perma.cc/CFM5-PADZ].

⁷³ See Davidson & Infranca, *supra* note 72.

C. *Constitutional Claims*

Although most innovations in the sharing economy will require different regulations or ordinances to manage related risks,⁷⁴ debate surrounding the STR industry has become a symbolic example of regulatory challenges in the sharing economy.⁷⁵ For this reason, the following section uses Airbnb case study examples to demonstrate some of the ways in which government regulations threaten the constitutional rights of individual and juridical people. Many different states and local policies regulate the different stakeholders of Airbnb.⁷⁶ Examples of the regulations that have drawn the most attention from the media and key stakeholders are restrictions on the ways in which apartments and homes can be rented out and compulsory disclosure of classified information related to listings.⁷⁷

1. *New York City*

In addition to limiting the number of available nights and the number of listings that could be listed at a given time, New York officials required Airbnb to disclose classified, sensitive information about its business operations.⁷⁸ In 2018, the New York City Council enacted a law that required online home-sharing services, such as Airbnb, to disclose information about tens of thousands of its listings to the city's Special Enforcement Division on a monthly

⁷⁴ See *Sharing Economy 2.0*, *supra* note 70.

⁷⁵ See Knowledge at Wharton Podcast, *Why Regulation Is a Tricky Business in the Sharing Economy*, KNOWLEDGE AT WHARTON (Mar. 16, 2018), <https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/regulating-sharing-economy/> [https://perma.cc/69ZN-ME3Z].

⁷⁶ AIRBNB, AIRBNB CODE OF ETHICS 5 (2024).

⁷⁷ See, e.g., Josh Bivens, *The Economic Costs and Benefits of Airbnb*, ECON. POL'Y INST. (Jan. 30, 2019), <https://www.epi.org/publication/the-economic-costs-and-benefits-of-airbnb-no-reason-for-local-policymakers-to-let-airbnb-bypass-tax-or-regulatory-obligations/> [https://perma.cc/5DFG-XMWY].

⁷⁸ See Zoe Greenberg, *New York City Looks to Crack Down on Airbnb Amid Housing Crisis*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/nyregion/new-york-city-airbnb-crackdown.html> [https://perma.cc/SCQ3-26AQ].

basis.⁷⁹ The detailed information comprised of identities and addresses of the platform's hosts.⁸⁰

In response to this law, Airbnb filed a request for an injunction.⁸¹ One month before the law was set to take effect, Judge Paul A. Engelmayer of the Southern District of New York granted a request for a preliminary injunction that temporarily freed Airbnb and HomeAway from disclosing this information.⁸² In his decision, Judge Engelmayer wrote that the home sharing companies were likely to prevail on their claim that the ordinance violated the guarantee against illegal searches and seizures in the Fourth Amendment.⁸³

Other arguments from Airbnb and people who use its site claim that limitations on the number and days of rentals are tantamount to a regulatory taking.⁸⁴ More specifically, they argue that the ability of government officials to place significant restrictions on the ways in which people use their property has a significant impact on property rights while failing to provide just compensation to the homeowners.⁸⁵

2. *Santa Monica*

While the court in New York upheld a legal challenge to an ordinance regulating Airbnb, California courts denied a challenge to STR regulations in Santa Monica.⁸⁶ Arlene Rosenblatt, a retired Santa Monica teacher, had been renting her home on Airbnb for \$350 a night before the city passed an ordinance restricting rentals

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Airbnb, Inc. v. City of N.Y.*, 373 F. Supp. 3d 467, 476 (S.D.N.Y. 2019).

⁸² *Id.* at 501.

⁸³ *Id.* at 499.

⁸⁴ *See, e.g.*, Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557 (2015).

⁸⁵ *Id.* at 569.

⁸⁶ *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 453 (9th Cir. 2019); *see also* Martin Macias Jr., *Ninth Circuit Upholds Santa Monica Ban on Airbnb-Type Rentals*, COURTHOUSE NEWS SERV. (Oct. 3, 2019), <https://www.courthousenews.com/ninth-circuit-uphold-santa-monica-ban-on-airbnb-type-rentals/> [https://perma.cc/QGA2-RUAS].

of less than thirty days in homes where the owner is not present at the time of a guest's stay.⁸⁷

Rosenblatt argued that this ordinance was discriminatory against non-California residents.⁸⁸ She sued the city, claiming the ordinance violated the U.S. Constitution's Dormant Commerce Clause by directly regulating booking and payment transactions that may occur entirely out-of-state.⁸⁹ In rejecting the plaintiff's argument, the panel held that the ordinance applies evenhandedly and does not directly restrain interstate commerce although it may regulate transactions with an interstate component.⁹⁰ "Santa Monica's ordinance does not prohibit out-of-state property owners from home sharing in their out-of-state homes, nor does it prohibit them from allowing home sharing in their Santa Monica properties," Judge Jacqueline Nguyen wrote.⁹¹

3. *New Orleans*

In New Orleans, homeowners have repeatedly challenged the city's evolving short-term rental STR regulatory regime in court.⁹² After the city adopted comprehensive STR regulations in late 2016 and implemented a new permitting framework beginning in 2017, many property owners who had previously operated under earlier licenses sought to renew or convert their authorizations but were denied permits under revised eligibility criteria.⁹³ These regulatory changes prompted litigation in which homeowners and platforms challenged the city's STR framework on constitutional

⁸⁷ Jorge Casuso, *Federal Appeals Court Upholds Santa Monica's Home Sharing Law*, SANTA MONICA LOOKOUT (Oct. 3, 2019), http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2019/October-2019/10_03_2019_Federal_Appeals_Court_Upholds_Santa_Monicas_Home_Sharing_Law.html [https://perma.cc/SH5V-MXFM].

⁸⁸ See *Rosenblatt*, 940 F.3d at 444–53.

⁸⁹ See *id.* at 446.

⁹⁰ See *id.* at 445–47.

⁹¹ *Id.* at 451.

⁹² See, e.g., *Hignell-Stark v. City of New Orleans*, 154 F.4th 345, 350 (5th Cir. 2025).

⁹³ See *id.* at 351. See also *Bodin v. City of New Orleans*, No. 25-CV-00329, 2025 WL 2589590, at *1 (E.D.La. Sept. 8, 2025).

grounds, arguing that the permitting rules and permit denials unlawfully restricted the use of residential property and violated constitutional protections.⁹⁴ Federal courts have since addressed these challenges in multiple decisions recounting the regulatory history and the constitutional claims asserted by STR hosts.⁹⁵

D. *Protectionist, Antiquated Regulations vs. Adaptive, Nuanced Regulations*

The digital economy triggered widespread conflict between governments and digital businesses.⁹⁶ In the context of the sharing economy, these conflicts place those who advocate for individual property rights against those who support a host government's right to regulate. Whereas digital innovators argue that most regulations are overbroad and unnecessary, legacy incumbents argue that most regulations are insufficient.⁹⁷ Meanwhile, more objective observers have identified reasonable regulations that are tailored and attempt to maximize the benefits and minimize the costs.⁹⁸ Below is an explanation of reasonable and unreasonable regulations.

1. *Protectionist and Antiquated Regulations*

While many regulations help protect consumers and the public from the potential negative impacts of business activity, others are often implemented to protect industry incumbents from the competition of new entrants to the market.⁹⁹ These regulations

⁹⁴ See Jack Brook, *Airbnb Sues New Orleans After it Adopts Sweeping Regulations Governing Short-Term Rentals*, ASSOCIATED PRESS (Feb. 18, 2025, at 21:07 ET) <https://apnews.com/article/airbnb-lawsuit-new-orleans> [<https://perma.cc/6XWZ-MLTZ>]; *Hignell-Stark*, 154 F. 4th at 352; *Bodin*, 2025 WL 2589590, at *1.

⁹⁵ *Hignell-Stark*, 154 F. 4th at 352; *Bodin*, 2025 WL 2589590, at *1.

⁹⁶ See *Digital Economy and Platform Markets*, BERKELEY RSCH. GR., <https://www.thinkbrg.com/services/digital-economy/> [<https://perma.cc/LD2F-PNAT>] (last visited Sept. 7, 2024).

⁹⁷ See Trevir I. Nath, *Airbnb vs. Hotels: What's the Difference*, INVESTOPEDIA (Jan. 29, 2022), <https://www.investopedia.com/articles/investing/112414/airbnb-brings-sharing-economy-hotels.asp> [<https://perma.cc/SA6F-4PZK>].

⁹⁸ See VIEWPOINT CLOUD, *supra* note 18, at 10.

⁹⁹ Edelman & Geradin, *supra* note 16, at 306.

often benefit the regulated firms more than the consumers for whom the restrictions are supposed to help.¹⁰⁰ Regulators often become closely linked to the firms they regulate, “through extended discussions, career trajectories, or a desire to maintain the status quo.”¹⁰¹ In some cases, the influence of companies in a regulated sector is powerful enough to provide a situation in which the regulator is the entity that is being regulated.¹⁰² In such cases, regulations are more likely to be overbroad and/or implemented in favor of local investors over competitors from other states and countries.¹⁰³

a. Uber in France

Uber’s rollout in France illustrates how host governments sometimes adopt restrictive rules that appear motivated less by consumer protection than by efforts to shield incumbents from competition.¹⁰⁴ Soon after Uber started operating in French cities and the platform gained rapid traction, the French Parliament enacted a package of measures known as *Loi Thévenoud*.¹⁰⁵ This series of regulations imposed constraints that were not consistent with recognized safety or consumer-welfare objectives.¹⁰⁶

The statute, for example, prohibited “transport vehicles with drivers” (a category crafted to encompass ride-hailing platforms) from being visible to potential riders on a map prior to booking.¹⁰⁷ Consequently, users could not view nearby drivers through the app before committing to a specific reservation.¹⁰⁸ The legislation also took steps to prevent drivers from maximizing the value of their time by disallowing drivers from accepting a subsequent passenger without first returning to their base when the follow-on rider had

¹⁰⁰ Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 204 (2006).

¹⁰¹ Edelman & Geradin, *supra* note 16, at 306.

¹⁰² See Dal Bó, *supra* note 100, at 212–14.

¹⁰³ Edelman & Geradin, *supra* note 16, at 307.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *id.*

not booked in advance.¹⁰⁹ These requirements increased travel time, raised operating costs, and caused drivers to lose passengers while idling between rides.

Without an ostensible purpose, this type of regulation is protectionist.¹¹⁰ The rules hinder drivers' ability to position themselves near clusters of demand, even though that proximity improves service quality and reduces wait times for riders. Where regulations complicate a platform's ability to meet local demand without delivering corresponding benefits to consumers or the broader market, they often function to protect incumbent providers rather than advance genuine regulatory interests.¹¹¹ In some municipalities, officials have even acknowledged that similar measures were enacted expressly to insulate local transportation sectors from competition.¹¹²

b. Airbnb in Arizona, New York, and Seattle

While France's Uber regulations are prime examples of protectionist policies, the regulatory framework for STRs in Arizona is a prime example of an environment that favors Airbnb and its competitors.¹¹³ In Arizona, there are no restrictions on how many rental properties investors can own or a limitation on the number of days that a home can be rented out.¹¹⁴ The implementation of state laws that preclude local governments from restricting investments ensures a favorable legal framework for STRs in Arizona. The

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.* at 305–06.

¹¹³ *See* Jerod MacDonald-Evoy, *First 2020 Legislation Aimed at Allowing Regulation of Airbnb*, AZ MIRROR (Nov. 15, 2019, 1:52 PM), <https://www.azmirror.com/blog/first-2020-legislation-aimed-at-allowing-regulation-of-airbnb/> [<https://perma.cc/WLM5-SQH2>]. “Arizona is one of six states that have enacted local bans on short-term rental regulations. The other states are Florida, Idaho, Indiana, Tennessee, and Wisconsin.” *Id.*

¹¹⁴ *Phoenix, Arizona Short-Term Rental Regulation: A Guide for Airbnb Hosts*, BNBCALC, <https://www.bnbcac.com/blog/short-term-rental-regulation/phoenix-arizona-guide> [<https://perma.cc/D6VD-ZLNP>] (last visited Oct. 23, 2025).

absence of certain STR regulations could expose cities in Arizona to rent inflation and myriads of safety and security concerns.

Several cities in the U.S. have minimized Airbnb-related problems by providing stringent regulations for homeowners who want to post their homes on the website. Through these stringent measures, host cities mitigate the problems by significantly reducing the number of hosts who use home-sharing platforms. For example, in New York City, homeowners must be present in the unit that is being rented out at the time of a guest's visit.¹¹⁵ More specifically, it is illegal in most buildings for an apartment to be rented out for less than thirty days unless the permanent tenant is residing in the apartment at the same time.¹¹⁶ Precluding postings of multiple homes by one person could consequently minimize or eradicate the rent inflation problem.

In Seattle, hosts who rent out dwelling units for fewer than thirty consecutive days must obtain a specific short-term rental operator's license (in addition to a business license tax certificate).¹¹⁷ Moreover, if the accommodation functions more like a traditional bed-and-breakfast (i.e., multiple guest rooms, breakfast service, etc.) then the host must apply for the city's "bed and breakfast operator's license" rather than the standard short-term rental license.¹¹⁸

2. *Adaptive and Nuanced Measures*

In the context of Airbnb, regulators' ostensible objectives include managing traffic in and out of rented units, reducing inflated residential and commercial rental rates due to increased housing demand, and managing housing shortages for residents who cannot

¹¹⁵ Miguel Alexander Centeno, *How to Navigate the NYC Airbnb Law*, SHARED ECON. TAX (Dec. 24, 2019), <https://sharedeconomycpa.com/blog/nyc-airbnb-law/> [https://perma.cc/BLE2-RBCX].

¹¹⁶ *Id.*

¹¹⁷ *Seattle, WA Home Host Rules*, AIRBNB: HELP CENTER, <https://www.airbnb.com/help/article/869> [https://perma.cc/3UFW-KFGS] (last visited Dec. 17, 2025).

¹¹⁸ *See id.*

compete with the prices speculators are willing to pay.¹¹⁹ While some states and cities regulate Airbnb hosts and guests with blunt tools that often result from protectionist objectives,¹²⁰ others use research and data to identify the types of problems plaguing their specific markets and tailor options for managing them.¹²¹ These regulations rely on policy papers, qualitative and quantitative information, and local data points about the context in which Airbnb is doing business.¹²² For example, when considering what type of measures to include for managing rent inflation, nuanced processes for making policies will review availability and affordability of housing in different counties, socioeconomic data, and preexisting lodging options.¹²³

Host governments often play a critical role in devising regulations that maximize the public goods associated with different aspects of technology. In the context of Uber, government officials are ostensibly interested in regulating safety concerns related to the condition of the automobile and the skills of the driver.¹²⁴ In order to minimize problems associated with these issues, many governments require drivers to undergo extensive background checks and require that every vehicle undergo inspections to ensure

¹¹⁹ See Gaby Hinsliff, *Airbnb and the So-called Sharing Economy Is Hollowing Out Our Cities*, THE GUARDIAN (Aug. 31, 2018, at 03:06 ET), <https://www.theguardian.com/commentisfree/2018/aug/31/airbnb-sharing-economy-cities-barcelona-inequality-locals> [https://perma.cc/T9L3-C9HK]; Shirley Nieuwland & Rianne van Melik, *Regulating Airbnb: How Cities Deal with Perceived Negative Externalities of Short-term Rentals*, 23 CURRENT ISSUES IN TOURISM 811, 813–14 (2020).

¹²⁰ See Melih Cevik, *The Surprising Solution to Housing Affordability: Regulating Airbnb*, HARV. POL. REV. (Nov. 29, 2023), <https://harvardpolitics.com/regulating-airbnb/> [https://perma.cc/UY79-ZX45].

¹²¹ See, e.g., Dorine von Briel & Sara Dolnicar, *The Evolution of Airbnb Regulations*, in AIRBNB BEFORE, DURING AND AFTER COVID-19 99, 103 (Sara Dolnicar ed., 2021).

¹²² See VIEWPOINT CLOUD, *supra* note 18, at 3–5.

¹²³ *Id.* at 3–4.

¹²⁴ See, e.g., *California Regulatory Rules and Requirements Training*, UBER (Dec. 16, 2020), <https://tb-static.uber.com/prod/reddog/country/UnitedStates/p2p/3008b53d-8942-43d6-9acc-6379ef031f75.pdf>. [https://perma.cc/B4XN-AHC3].

that it is structurally sound.¹²⁵ These regulations, which also apply to taxi drivers, are reasonable because they are tailored to meet a specific policy interest. For these reasons, they are not protectionist.

a. Airbnb in San Antonio

San Antonio's regulators favor forward-looking compromises rather than endorsing extreme policies that either ban Airbnb or allow it to operate without restrictions.¹²⁶ The ordinance limits, but does not eliminate, the number of "type 2" STRs that can exist within a specific area.¹²⁷ "Type 2" properties are those that are rented for short periods of time in the absence of an owner.¹²⁸ These are the most controversial types of rentals because they allow homeowners to own and rent out multiple homes in a given area.¹²⁹ Rather than require homeowners to be present in the home during rental in most parts of the city,¹³⁰ the drafted measures likely aimed to manage rent inflation in the areas that are most susceptible to it. In highly residential areas, the city implemented different regulations that do not prevent, but limit, homes for rent in the absence of an owner.¹³¹ More specifically, the regulation states that:

Only one type 2 rental is allowed in a multifamily development with fewer than eight units. In larger multifamily buildings and on residential blocks, type

¹²⁵ See U.S. Gov't Accountability Off., GAO-24-107093, Ridesharing and Taxi Safety, 8 (2024), <https://www.gao.gov/assets/gao-24-107093.pdf> [<https://perma.cc/RDE7-DWB7>].

¹²⁶ See Jennifer Sokolowsky, *San Antonio Passes New Short-term Rental Law*, AVALARA (Nov. 6, 2018), <https://www.avalara.com/mylodgetax/en/blog/2018/11/san-antonio-passes-new-short-term-rental-law.html> [<https://perma.cc/4D7Q-B5RY>].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See Iris Dimmick, *Zoning Commission Amends, Approves Short-Term Rental Rules*, SAN ANTONIO REP. (Feb. 7, 2018), <https://sanantonioreport.org/zoning-commission-amends-approves-short-term-rental-rules/>. [<https://perma.cc/2RT9-78CM>].

¹³⁰ *San Antonio, TX Home Host Rules*, AIRBNB: HELP CENTER, <https://www.airbnb.com/help/article/2517> [<https://perma.cc/EWH6-T2CK>] (last visited Dec. 17, 2025).

¹³¹ Sokolowsky, *supra* note 126.

2 rentals are limited to 12.5 percent of housing. Once the density limits are reached, prospective short-term rental operators can ask for an exception from the Board of Adjustments.¹³²

This law ensures that even in areas that are more susceptible to rent inflation, there is not a blanket rule against such rentals. If there are not any Airbnb properties in a given block of town, then there is arguably no risk of rent inflation, and consequently, there can be isolated instances of Airbnb postings. In the event that a number of postings surface in a given area, the rules will preclude any additional postings of ownerless homes.¹³³ This is an adaptive regulation because it recognizes that the need for anti-rent inflation measures often changes over time.¹³⁴ This built-in measure ensures that anti-rent inflation measures are implemented only when the threat of artificially increased rents is real. More clearly, it ensures that measures that infringe property and privacy rights are implemented only when they are necessary.

In the areas of the city that are not likely to experience rent inflation, there are no restrictions on ownerless homes.¹³⁵ In summary, this regulatory approach aims to implement regulations that manage the rent inflation threat and minimize the burden and infringement on the rights and interests of property owners.

Although these new regulations are the first attempt to regulate STRs in San Antonio,¹³⁶ they are tailored to rent inflation and specific geographical areas that experience scarcity in available homes.¹³⁷ More specifically, additional requirements are placed on lessors who aim to list properties that are located in residential areas that are more susceptible to diminishing supply of homes and artificial inflation of rents.¹³⁸ By reserving this measure for areas that

¹³² *Id.*

¹³³ See *San Antonio, TX Home Host Rules*, *supra* note 130.

¹³⁴ See Kyle Barron, Edward Kung & Davide Proserpio, *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, 40 *MKTG. SCI.* 23, 44–45 (2021).

¹³⁵ See, e.g., *San Antonio, TX Home Host Rules*, *supra* note 130.

¹³⁶ Sokolowsky, *supra* note 126.

¹³⁷ *Id.*

¹³⁸ Dimmick, *supra* note 129.

have the most serious problems,¹³⁹ the Council refrained from endorsing blanket policies that ignore geographic differences.¹⁴⁰ This helps regulators manage the problem without unnecessarily restricting hosts in areas where the problems are less pronounced.

II. PUBLIC CHOICE THEORY AND THE ELUSIVENESS OF COMPROMISE

Airbnb argues that some regulations, including tailored and nuanced measures, that apply to hotels should not apply to them at all.¹⁴¹ Claiming that they are merely internet brokers connecting tourists with accommodations, Airbnb argues that it should not be taxed or regulated in other ways.¹⁴² Whereas Uber is currently in disputes with regulators over whether its cars meet the safety and insurance requirements standard for the taxi industry,¹⁴³ Airbnb is embroiled in disputes over whether they should be taxed like hotels.¹⁴⁴

Taxi service incumbents adamantly reject the claim that digital economy innovators are merely technology services that connect service providers with consumers.¹⁴⁵ More specifically, taxi services argue that new entrants into the market should be regulated in the same way as taxi services.¹⁴⁶ For example, taxi drivers argue

¹³⁹ See *San Antonio Airbnb/Short Term Rental Regulations*, BUILDYOURBNB, <https://www.buildyourbnb.com/us-airbnb-and-short-term-rental-regulations/san-antonio> [https://perma.cc/PJ6C-6W48] (last visited Sept. 8, 2024).

¹⁴⁰ See Dimmick, *supra* note 129.

¹⁴¹ Paris Martineau, *Inside Airbnb's 'Guerrilla War' Against Local Governments*, WIRED (Mar. 20, 2019, at 07:00 ET), <https://www.wired.com/story/inside-airbnbs-guerrilla-war-against-local-governments/> [https://perma.cc/Q35S-7DVE].

¹⁴² *Id.*

¹⁴³ See generally Ruth Berins Collier, Veena Dubal & Christopher Lee Carter, *Disrupting Regulation, Regulation Disruption: The Politics of Uber in the United States*, 16 PERSPS. ON POL. 919 (2018) (explaining the regulatory disruption caused by Uber).

¹⁴⁴ See Martineau, *supra* note 141.

¹⁴⁵ See Collier et al., *supra* note 143, at 923.

¹⁴⁶ *Why Uber Should be Regulated Like Taxis?*, TAXIMOBILITY, <https://www.taximobility.com/blog/why-uber-should-be-regulated-like-taxis/> [https://perma.cc/KA59-9M47] (last visited Feb. 12, 2020).

that Uber is a transportation company and should be required to comply with regulations for taxicabs.¹⁴⁷ Similarly, hotel owners argue that Airbnb and its hosts are essentially hospitality companies, and should be required to comply with the same regulations as hotel companies.¹⁴⁸

Both stakeholders are wrong. First, legacy incumbents fail to consider the context in which legislation and regulations were originally drafted and implemented. For example, today's taxi regulations are the byproduct of the economic crisis that took place in the mid-1930s.¹⁴⁹ As people lost their jobs and were looking for work during the Great Depression,¹⁵⁰ the taxi market became saturated with drivers and taxis.¹⁵¹ This drove fares down, derailed the business models of taxi operators, and forced them to adopt questionable business practices to generate income.¹⁵² Nearly ninety years later, the global economy must adapt to significant technological advances and maximize benefits.¹⁵³ Regulations should focus on the wellbeing of consumers *and* maximize the social and economic value of new innovation.¹⁵⁴ Rather than implementing entry control regulations or price fixing, the regulations should focus on safety concerns and protect passengers and third parties on the streets.¹⁵⁵ By narrowing the regulatory

¹⁴⁷ See Reeve T. Bull, *Uber and the Future of Regulation*, REGUL. REV. (Apr. 26, 2018), <https://www.theregreview.org/2018/04/26/bull-uber-future-regulation/> [https://perma.cc/Z9SG-YESC].

¹⁴⁸ Jessica Montevago, *Hotel Group Calls for Stricter Tax Regulations on Airbnb*, TRAVEL MKT. REP. (Apr. 19, 2018), <https://www.travelmarketreport.com/articles/Hotel-Group-Calls-for-Stricter-Tax-Regulations-on-Airbnb> [https://perma.cc/8CN7-B9JZ].

¹⁴⁹ See Posen, *supra* note 44, at 419.

¹⁵⁰ *And the Medallion Goes to . . . the Taxicab Monopoly!*, CITIZENS AGAINST GOV'T WASTE (Aug. 12, 2016), <https://www.cagw.org/and-the-medallion-goes-to-the-taxicab-monopoly/> [https://perma.cc/6JV8-NMWK].

¹⁵¹ *Id.*; see also *Can Uber Ever Make Money?*, ECONOMIST (Apr. 27, 2019), <https://www.economist.com/business/2019/04/27/can-uber-ever-make-money> [https://perma.cc/543M-ATLJ].

¹⁵² Posen, *supra* note 44, at 410.

¹⁵³ See *supra* Part I.A.

¹⁵⁴ *Id.*

¹⁵⁵ Steven Cohen, *Regulating the Sharing Economy: Uber and Airbnb*, STATE OF THE PLANET (July 30, 2018),

objective to the specific issue of safety, policies can protect the public without decimating the future of Uber and other peer-to-peer (P2P) companies.¹⁵⁶

Second, P2P companies are more than digital brokers.¹⁵⁷ Airbnb does more than merely connect guests with hosts,¹⁵⁸ and Uber does more than connect passengers with drivers.¹⁵⁹ In both cases, the websites are providing platforms that facilitate services that are potentially dangerous to users and third parties.¹⁶⁰ Without regulations that manage safety and other risks presented by these services, governments would need to regulate each individual service provider that makes use of the platform.¹⁶¹ It would be impossible to regulate every Uber driver or Airbnb host directly without imposing regulations on the platforms themselves.¹⁶² An unregulated platform would provide overwhelming risk exposures to users and third parties.¹⁶³

A. *Polarized Positions and an Example of Attempted Compromise in New York*

Despite the persuasive arguments against unregulated and over-regulated digital markets, both camps remain firmly positioned in their respective corners of the regulatory ring.¹⁶⁴ Examples of key

<https://news.climate.columbia.edu/2018/07/30/regulating-sharing-economy-uber-airbnb/> [<https://perma.cc/XF94-EZHF>].

¹⁵⁶ *Id.*

¹⁵⁷ See Claude Forthomme, *Platform Capitalism: The Economy of the Future?*, IMPAKTER (Apr. 25, 2017), <https://impakter.com/platform-capitalism-economy-future/> [<https://perma.cc/YW5H-EM4M>].

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See* Cohen, *supra* note 155.

¹⁶¹ *See* Benjamin Edelman & Damien Geradin, *Spontaneous Deregulation: How to Compete with Platforms that Ignore the Rules*, HARV. BUS. REV. (Apr. 2016), <https://hbr.org/2016/04/spontaneous-deregulation> [<https://perma.cc/2MGM-5UMG>].

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ *See* Gabriele Holtermann, “Hosting Changed Everything”: NYC Airbnb Hosts Fight Back Against Rental Law, BROOKLYN PAPER (Aug. 8, 2025, at 15:00 ET) <https://www.brooklynpaper.com/nyc-airbnb-hosts-fight-local-law-18-short->

stakeholders rejecting regulatory compromises abound on both sides of the issues.¹⁶⁵

With both sides clamoring for legislators to implement favorable laws, local lawmakers in Brooklyn, New York proposed a bill that addressed the concerns of local Airbnb hosts and other anti-Airbnb stakeholders.¹⁶⁶ The bill sought to ease restrictions on one-to-two-family homeowners looking to rent their property short-term by eliminating the need for the owners to be physically present in the home during the rental period and also eliminating a provision that required all internal doors in the dwelling to lack keylocks, therefore allowing any occupant access to all internal rooms within the dwelling.¹⁶⁷ Proponents of local tourism and less restrictive STR regulations support the bill's reform to Local Law 18.¹⁶⁸ However, advocates for more affordable housing blame STRs as a cause of the affordable housing issue and seek more restrictive regulations.¹⁶⁹ Although the bill sought to address each side's concerns, the refusal of both sides to concede any meaningful ground precludes compromise.

B. *Public Choice Theory*

With a campaign finance system that allows the abundantly wealthy to contribute significant amounts of funds to candidates, special interests are invited to influence policy outcomes.¹⁷⁰ Even when there may be public support for a specific law or regulation

term-rentals/ [<https://perma.cc/P29S-BNXZ>] (reporting the divide between NYC property owners seeking less restrictive STR regulations and NYC community members desiring increased regulation to mitigate the affordable housing problem); *Rideshare Drivers Organize as Earnings Decline*, U.S. RESIST NEWS (Dec. 9, 2025) <https://www.usresistnews.org/2025/12/13/rideshare-drivers-organize-as-earnings-decline/> [<https://perma.cc/6UAD-BRZE>] (highlighting national protests by Uber and Lyft drivers against their employers without securing meaningful compromise from the companies);

¹⁶⁵ See, e.g., Holtermann, *supra* note 164.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See *Influence of Big Money*, BRENNAN CTR. FOR JUST. <https://www.brennancenter.org/topics/money-politics/influence-big-money> [<https://perma.cc/3EWK-5NLV>] (last visited Dec. 24, 2025).

that conflicts with the objectives of key stakeholders, special interests remain capable of influencing legislative outcomes through substantial political donations.¹⁷¹ Public choice theory explains why reasonable regulations that are supported by the majority are not implemented to regulate specific business activities.¹⁷² It also explains why policy makers often implement regulations that are not supported by the majority but are favored by a significant minority of voters for whom the issue is of paramount importance. One of the primary principles of public choice theory highlights the lack of incentives for voters to monitor government effectively. In a book on public choice, Anthony Downs explained that the average voter is “largely ignorant of political issues and that this ignorance is rational.”¹⁷³ Although the result of an election is often very important to the electorate, an individual’s vote rarely decides an election. Consequently, the direct impact of an educated vote is almost negligible, because the individual voter has very little impact on the election’s outcome. For this reason, spending time following political debates and specific issues is “not personally worthwhile for the voter.”¹⁷⁴

On the other hand, taxi drivers, hotel owners, P2P operators, special interest groups, and those who rely on them do have an incentive to follow the debate and vote. For these key stakeholders, these issues have a direct impact on their livelihoods and futures. Although their vote is still only worth one, they are single-issue voters and are much more likely to base their vote on this specific issue. Special interest groups that represent key stakeholders make their living based on the outcomes of these issues

¹⁷¹ *See id.*

¹⁷² *See* William F. Shughart II, *Public Choice*, LIBR. OF ECON. & LIBERTY, <https://www.econlib.org/library/Enc/PublicChoice.html> [<https://perma.cc/CJ6V-ECH8>] (last visited Sept. 8, 2024); Jane S. Shaw, *Public Choice Theory*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 150, 150–54 (David R. Henderson ed., 1993) (available at: <https://oll.libertyfund.org/titles/henderson-the-fortune-encyclopedia-of-economics>) [<https://perma.cc/9SEQ-7XQD>].

¹⁷³ Shaw, *supra* note 172, at 151.

¹⁷⁴ *Id.* (“Evidence for this claim is found in the fact that public opinion polls consistently find that less than half of all voting-age Americans can name their own congressional representative.”).

and spend significant resources garnering support for their cause among similarly situated voters.

A review of the parties' positions and the role of government officials reveals that a regulatory compromise is the ideal outcome for this process. On the one hand, P2P companies and users of this technology have privacy and property rights that are infringed upon by government regulations meant to safeguard the public and minimize risk profiles.¹⁷⁵ If there are government regulations that effectively minimize risk without infringing on anyone's rights, those measures should be adopted. On the other hand, complete protection of the users' rights cannot be preserved without exposing the public to some degree of risk. This calls for a compromise.

III. THE ROLE OF THE JUDICIARY: PLUGGING THE GAPS OF POLITICAL PROCESS

In most democratic societies, the judicial branch is supposed to interpret laws and regulations and apply them to different cases. It serves as an effective check of powers against lawmakers and the executive branch. The hallmark of a genuine democracy is an independent court system. What does this mean? An independent judicial system is one in which decisions are made based on the merits of the case rather than on the power or influence of relevant stakeholders. If a key leader or lawmaker is dependent on wealthy individuals with special interests, they might be more inclined to draft and implement laws that clearly favor their donors and not try to balance conflicting interests with a compromise give-and-take. In many cases, the judicial system can check or offset political decisions that might not be based on the merits.

There are a few primary reasons why a country's court system is more independent than their lawmaking counterparts. Unlike lawmakers, who are voted in and out of office every four or six years, federal judges in many countries serve for life. This means that judges can make decisions based on the merits of a law or regulation because they do not need to appease specific constituents to keep their jobs. Moreover, in many countries, judges do not

¹⁷⁵ See Jefferson-Jones, *supra* note 84, at 560.

always make the final ruling. Instead, juries of civilians often decide outcomes. Juries, in addition to judges, are more insulated from the negative influence of special interests. Jurors are anonymous, serve for only one dispute, and, since they are comprised of a group of individuals from different backgrounds, are not connected to any specific special interest.

While jurors and judges are less vulnerable to special interests than legislators, the adjudicative and adversarial process is also more formal than the legislative process. The information that is used to make important decisions is vetted through the submission of written documents, pretrial discovery, and the promise not to commit perjury. Conversely, there is much less transparency and scrutiny into the information that lawmakers use to make laws. As a result of the enhanced independence of the courts, judges and juries are in an ideal position to check legislative decisions that are overbroad, blunt, and not nuanced.

As a result of the influence of special interests over policymaking in the U.S., the judiciary will play a significant role in the regulatory debate. As legislative and regulatory decisions move toward the extremes of the policy spectrum, the role of independent judges can account for the interests of both parties in technology disputes.¹⁷⁶ As we have seen, stakeholders on both sides of issues related to digital innovation often refuse to compromise, anchoring their arguments in unrealistic regulatory extremes. For these reasons, judges must enforce compromises and demonstrate to both camps that their polarized policy positions will not be corroborated. The significant role of the courts in this regulatory war of attrition triggers important questions about the dynamic between legislative and judicial branches and the types of judicial review that will adapt to ongoing risk exposure while promoting compromise.

¹⁷⁶ For multiple reasons, judges are less vulnerable to the influence of special interests. First, many judges are not elected to office but are appointed and given life terms. They are not at risk of losing their seat if they make a ruling that conflicts with the interests of voters. Second, the nature and the primary function of the judicial position is to be completely independent of other interests. Whereas legislators represent the interests of constituents, the primary responsibility of the judge is to be independent of all interests. This is so judges rule on the merits of a case rather than the objectives of relevant stakeholders.

A. *Judicial Review*

Judicial review is the process by which a judge reviews the lawfulness of a decision or action made by a public body. While the judicial branch as a whole will play a significant role in shaping regulations for the sharing economy moving forward, judges that are truly independent will be the most effective at encouraging compromise and checking the power of special interests. The following section will explore some of the most important substantive and procedural factors that will impact the extent to which different courts can meet the demand of governing the sharing economy.

Historically, U.S. jurisprudence does not use proportionality as a legal principle or to the same extent that other nations use it to review the constitutionality of specific policies.¹⁷⁷ According to Jon Hart Ely, U.S. jurisprudence tends to focus on clause-based interpretation, which focuses on the interpretation of legislation rather than focusing on the need for a specific law and the extent to which it infringes on individuals' rights.¹⁷⁸ Consideration of U.S. case law in the context of Fourth Amendment protections, which govern police searches and seizures, is illustrative. In cases involving allegations that a police officer has violated the Fourth Amendment, U.S. courts often adopt a rules-based approach that generally focuses on the amount of discretion that should be afforded to officers and how that affects individual rights to be free of unwarranted searches and seizures.¹⁷⁹ When using proportionality, however, courts tend to focus more on the specific facts of the instant case to see what compelled the police to arrest and/or search and the extent to which they infringed on the rights of the citizen that was searched and/or arrested.¹⁸⁰ The more individualized approach is better suited for cases in the sharing economy because the laws, products, and services are new. The case-by-case approach

¹⁷⁷ Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3101 (2015).

¹⁷⁸ See Michael J. Veron, *Democracy and Distrust: A Theory of Judicial Review Book Review*, 56 TUL. L. REV. 447, 448 (1981) (reviewing Jon H. Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

¹⁷⁹ See Jackson, *supra* note 177, at 3130–33.

¹⁸⁰ See *id.* at 3134–36.

will enable the courts to determine when governments can implement regulations that may infringe upon the property rights of Airbnb hosts. Given new products or services and their underdeveloped regulatory frameworks, consideration of fact-specific contexts that trigger legal challenges is necessary to help the law evolve organically. The facts of each case accelerate the regulatory process as the impact of new technology on relevant stakeholders comes into sharper focus.

In the context of Airbnb and Uber cases, a more individualized approach using proportionality would yield better outcomes than other forms of review. For example, when an Airbnb host has been negatively affected by STR legislation, the court must consider the availability of housing and its impact on housing prices at the time that the rule was executed. As previously explained, regulations that consider the extent of the problem (e.g., housing shortages) when they are implemented will signal to legislators that their regulations need to be tailored. After all, government officials in cities where there is ample available housing need not implement the regulations that potentially infringe rights, while those with extreme shortages do. This is the best way to maximize the chances that both sides can reach a compromise over time.

In U.S. cases involving judicial review of regulations governing Airbnb and Uber, courts have applied principles of reasonableness and balance rather than a formal proportionality test.¹⁸¹ They look at whether the regulations serve legitimate governmental interests and if they are narrowly tailored to achieve those goals without being overly broad or restrictive. For Airbnb cases, judicial review focuses on zoning laws, STRs, and local ordinances; courts have typically balanced government interests and individual rights in the context of zoning rights cases.¹⁸² In the case of Uber, the courts have balanced threats to public safety and the

¹⁸¹ See *infra* notes 182–83 and accompanying text.

¹⁸² See *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016); *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019); *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113 (D. Mass. 2019).

positive economic impact of ridesharing in the context of insurance requirements and mandatory background checks.¹⁸³

Given the power of special interests in representative democracies, courts will play a significant role in promoting compromises between the two camps of the sharing economy. The following section will focus on the German version of judicial review and contrast it with the U.S. version. It will demonstrate how certain German judicial approaches and other methods, models, and types of judicial review facilitate compromise and equitable outcomes in legal disputes and encourage legislatures to implement such compromises. More specifically, it will: (i) explain why proportionality is the right tool for promoting compromise in technology disputes; (ii) explain the different forms of proportionality by using case studies; and (iii) argue that the German system of structured proportionality is the ideal form for finding agreeable solutions by applying it to scenarios arising out of municipal regulations of Airbnb. This section compares and contrasts how different systems will facilitate or impede the development and regulation of the sharing economy. It is not written to suggest that the American judicial system should adopt German methods of judicial review.

In the case of Airbnb, regulations proposed by hotels and their industry representatives focus on safeguarding the public and mitigating rent inflation but infringe on privacy and property rights.¹⁸⁴ Similarly, Airbnb's and Uber's argument that they should be regulated only as virtual intermediaries would not adequately protect renters, riders, and cities from the harmful effects of digital platforms. This requires a solution that yields measures that temper rent inflation and safety risks without completely infringing on users' privacy and property rights.¹⁸⁵ According to Véronique Zanetti, when there is a political stalemate, key stakeholders must consider a resolution that is imperfect for interested parties, arguing, "The intractability of disagreement, even among experts, i.e., the

¹⁸³ See, e.g., *Greater Houston Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670 (S.D. Tex. 2015).

¹⁸⁴ See Bivens, *supra* note 77, at 16–17.

¹⁸⁵ See Edelman & Geradin, *supra* note 16, at 296, 314; Kevin Werbach, *Lessons for Policymakers and Regulators on the (Predictable) Future of the Digital Economy*, PENN WHARTON PUB. POL'Y INITIATIVE, Jan. 2017, at 7.

fact that there is reasonable dissent remaining even after the exchange of arguments, makes it necessary to consider procedures in order to find common ways out of dissension.¹⁸⁶

Understanding that a compromise by both sides is needed, the search for further guidance focuses on a solution that will manage the risk while minimizing infringement of user rights.¹⁸⁷ The tool for reaching this compromise is proportionality.¹⁸⁸ A proportionality test accepts that some infringement is acceptable and that there will not be an eradication of all risks associated with P2P services. That means they must choose a solution that protects the public good while minimizing infringement of rights. A review of proportionality jurisprudence across different parts of the world reveals that countries employ different forms of proportionality analysis in constitutional disputes.¹⁸⁹ The primary distinction between these approaches lies in how courts and tribunals weigh the government's intrusion on the right against the public good it aims to achieve.

Specifically, countries including the U.S. and South Africa follow an approach that considers multiple factors and strikes a balance, with courts applying it differently from case to case.¹⁹⁰ In other nations that employ a structured proportionality test, courts conduct a more rigid, sequenced examination, applying each step of the test in the original order.¹⁹¹ While there are minor differences between each country's implementation of structured proportionality tests, they all follow a similar path.

B. *Structured Proportionality*

Structured proportionality is a doctrine that uses a trigger clause and three additional steps to determine the constitutionality of a given measure.¹⁹² First, the court examines whether the law's

¹⁸⁶ Véronique Zanetti, *Proportionality and Compromises*, 17 J. MORAL PHIL. 75, 78 (2020).

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See* Jackson, *supra* note 177, at 3104–10.

¹⁹⁰ *Id.* at 3099 n.23, 3100.

¹⁹¹ *Id.* at 3099–100.

¹⁹² *Id.* at 3099.

objective is legitimate and whether to trigger subsequent scrutiny.¹⁹³ Under structured proportionality analysis, the process of reviewing the law's objective (hereafter the "trigger clause") serves as the gateway to a three-step inquiry focused on the relationship between the means and ends of the legislation and the degree of the intrusion on the relevant right.

Canadian courts provide a great example of structured proportionality review. Canada's version of the trigger clause first examines whether an investor's right is being infringed.¹⁹⁴ If an infringement of interests protected by a right occurs, then the constitutionality of the means used is examined through a three-step inquiry into: (a) rationality; (b) minimal impairment; and (c) proportionality "as such."¹⁹⁵ Whereas the first two steps of this test focus on means-ends analysis, the third step compares the marginal improvement from two regulations and the marginal intrusion on the investor's rights between them.¹⁹⁶

1. *Rationality*

As opposed to the trigger clause, which focuses on the merits of the government objective, this step focuses on the means chosen to meet the government objective. During this element of the analysis, the courts identify and often reject means that are overly broad or not reasonably related to the ends. While the implementation of this step varies, most measures that satisfy the trigger clause also pass the rationality analysis.¹⁹⁷

2. *Minimal Impairment*

The minimal impairment step focuses on the balance of alternatives for meeting the government's interest. In practice, courts consider whether there are less restrictive alternatives that achieve the same government objective as the challenged measure.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See *id.*; Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 393 (2007).

¹⁹⁷ Jackson, *supra* note 177, at 3113 n.84, 3114.

If the claimant cannot demonstrate that the less restrictive alternative equally advances the law's purpose, the challenged measures will remain in place. Consequently, many alternatives that effectively protect the public good (but not as effectively as the original) and provide less intrusive options regarding the claimant's rights are not sufficient to overturn the challenged measure.¹⁹⁸

3. *Proportionality "As Such"*

Proportionality "as such" is a doctrine that prioritizes the rights of the investor or business and thereby puts the burden of justification regarding the extent to which their rights are being intruded upon on the government. Unlike the first two steps (rationality and minimal impairment), which focus exclusively on the means-ends analysis, this step requires a direct comparison between the severity of the government measure and the extent to which it infringes on the investor's rights.¹⁹⁹ In other words, the proportionality "as such" step compares the need for the challenged measure and its effectiveness with the extent to which the investor's right is infringed. For this reason, government measures that pass the rationality and minimal impairment steps often fail to satisfy the proportionality "as such" step.²⁰⁰ Although less formal versions of proportionality provide greater latitude to decision-makers regarding the form of analysis, the strict footprint of structured proportionality ensures that arbitrators and judges will follow the same line of inquiry.²⁰¹

C. *Alternatives to Structured Proportionality*

As mentioned above, a review of U.S. constitutional law reveals a de facto examination of factors like those balanced in South African courts. U.S. courts balance factors in many contexts, including challenges related to the Dormant Commerce Clause and cases concerning the First Amendment. Like the minimal

¹⁹⁸ *Id.* at 3114–15.

¹⁹⁹ *Id.* at 3116–17; Grimm, *supra* note 196, at 389.

²⁰⁰ An example of a scenario that passes the first two steps but fails under the third is provided in Part III.D.3.

²⁰¹ See Jackson, *supra* note 177, at 3146.

impairment analysis, U.S. jurisprudence often employs a “least restrictive means” analysis to determine whether a government measure is sufficiently tailored to its purpose.²⁰² The result is that judges look to see if there is a net impact favoring the plaintiff or the government.²⁰³

In countries, like South Africa, where courts implement a multi-factor analysis, the factors are not individual, ordered steps; instead, they are part of an overall balancing exercise that the courts use to determine an outcome.²⁰⁴ While the factors provide guidance to judges who can often select which factors to focus on and how much weight to give each, judges in countries that use structured proportionality are required to consider every factor in a specific order. The accountability brought by a rigid and comprehensive proportionality test ensures that all factors that need to be considered are included in the judicial analysis. Examples below demonstrate the primary differences between German structured proportionality and U.S. balancing.

1. *U.S. Balancing*

Balancing is used by state and federal courts in deciding between the competing interests represented in a case.²⁰⁵ “When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.”²⁰⁶

The *Mathews vs. Eldridge* case is an example of a scenario in which the U.S. Supreme Court used a balancing approach to resolve

²⁰² *See id.*

²⁰³ *See id.* at 3146–47.

²⁰⁴ *See id.* at 3099 n.23.

²⁰⁵ Balancing, Law Library – American Law and Legal Information (JRank), <https://law.jrank.org/pages/4637/Balancing.html> [https://perma.cc/9DGH-2Y58] (last visited July 27, 2020).

²⁰⁶ Incitement Movement from Clear and Present Danger Test, *U.S. Constitution Annotated*, Legal Information Institute, Cornell Law School, <https://www.law.cornell.edu/constitution-conan/amendment-1/incitement-movement-from-clear-and-present-danger-test> [https://perma.cc/EUV4-N7LN] (last visited Oct. 31, 2025).

the dispute.²⁰⁷ George Eldridge was disabled due to chronic anxiety and back strain.²⁰⁸ For these reasons, he started receiving social security checks for his disability.²⁰⁹ After several years of receiving checks, he was informed by letter that his disability status was ending and that his benefits would be terminated.²¹⁰ While the standard operating procedures of the Social Security Administration allowed Eldridge to seek reconsideration, Eldridge's benefits were cut off until that reconsideration could take place.²¹¹ Eldridge challenged the termination of his benefits without an evidentiary hearing on his disability.²¹²

The Court's decision went against Elridge and set a precedent against the requirement for providing hearings before terminating benefits.²¹³ In the opinion, the Court implemented a balancing test to determine the outcome. More specifically, it weighed the importance of Elridge's individual liberty and property right in benefits versus the governmental interest in avoiding the increased administrative and fiscal burden which resulted from increased procedural requirements.²¹⁴ The Court made a general declaration and value judgment that the administrative burden of providing a hearing outweighed the importance of the individual's right. Under the structured proportionality test, the analysis would place more consideration on the individual facts of the case. Whereas the balancing assumes that the private interests of all disabled are the same, the structured proportionality analysis would ascertain the specific right of the individual versus the specific burden of providing a hearing in the specific case. Simply put, it places more value on the facts of each case than it does on a net outcome of all terminations of disability benefits.

²⁰⁷ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

²⁰⁸ *Id.* at 324 n.2.

²⁰⁹ *Id.* at 323.

²¹⁰ *Id.* at 324.

²¹¹ *Id.*

²¹² *Id.* at 324–25.

²¹³ *Id.* at 349.

²¹⁴ *Id.* at 332, 347–49.

D. *Why Structured Proportionality is the Best Option*

The following section explains how the third step of proportionality analysis often produces different outcomes than balancing and multi-factor tests that do not incorporate this step. By going beyond rationality and minimal impairment, the proportionality “as such” test can make the doctrine more rigorous than strict U.S. scrutiny or any interpretation of the multi-factor test. While the judicial backstop provided by structured proportionality is always a useful tool, it is especially important during a global populist surge. During these times, laws and regulations are disproportionately beneficial to local, established business owners over those with new products that come from other states and countries.

1. *The Proportionality “As Such” Step: The Difference Maker*

Only through this step does the court take full account of the severity of deleterious effects of a measure on individuals or groups. The real consideration is how deeply the right is infringed. Other considerations include: (a) the seriousness of the danger that the law is preventing; and (b) the likelihood that the danger will materialize.

“By going beyond rationality and minimal impairment, the ‘proportionality as such’ test can make the doctrine more rigorous than U.S. strict scrutiny” or any interpretation of the multi-factor test, which ends after the least restrictive means test.²¹⁵ In the seminal Canadian dispute involving structured proportionality, Chief Justice Dickson explained that:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The

²¹⁵ Jackson, *supra* note 177, at 3116.

more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. By including the “as such” proportionality test, structured proportionality will maximize the chances of finding an alternative that protects the public good without precluding its success and provide a better bridge and judicial check against legislation.²¹⁶

2. *Structured Proportionality: Maximizing Chances of Finding Compromise vs. No Third Step*

The Israeli case *Beit Sourik Village Council v. Government of Israel* shows how the third sub-test of structured proportionality (proportionality “as such”) can change outcomes: after finding the fence’s purpose legitimate and its means rational, the court annulled multiple route segments because the incremental security benefit did not reasonably outweigh the additional injury to local residents.²¹⁷ In cases such as the *Beit Sourik* case, structured proportionality provides more reasonable outcomes than those that are reviewed without the third step.

This case, which focuses on the conflict between the security of Israelis in occupied territories and Palestinian access to farmland, appeared in front of the Israeli High Court of Justice.²¹⁸ While this case focuses on international humanitarian law, it demonstrates how a rigorous application of the “as such” step provides balanced solutions that protect the public good and respect landowners’ and foreign investors’ rights.

Beginning in 2002, Israel constructed a separation fence in the West Bank intended to protect Israeli civilians and settlements

²¹⁶ R. v. Oakes [1986], 1 S.C.R. 103, 139–40 (Can.).

²¹⁷ HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr., 58(5) PD 807 (2004) (Isr.), translated in 38 ISR. L. REP. 83 (2005).

²¹⁸ *Id.*

from security threats originating in the occupied territory.²¹⁹ Although public debate often referenced the 1949 Armistice (Green) Line, the Court emphasized that the route's legality turned on security necessity and proportionality rather than strict adherence to the Green Line; parts of the fence reached beyond the authorized space and separated Palestinian inhabitants from their farmland, triggering the Court's proportionality review.²²⁰ The lawsuit's proceedings, which challenged the Israeli Defense Force's (IDF) attempt to extend its ownership of territory, concluded that the security provided by a fence²²¹ was a legitimate aim but annulled specific route segments as disproportionate, requiring rerouting and passageways so that comparable security could be achieved with less injury to farmland access.²²² The third step of the test enabled the court to reach this conclusion.

The Israeli Court's review of the first three steps upheld the IDF's original demarcation of the outlines for the fence. First, the Israeli High Court of Justice determined that Israeli protection against violent attacks from the occupied territory was a legitimate purpose for building a fence.²²³ Next, the Israeli Court concluded that the government's decision to place the fence near the top of a mountain was a rational step toward that objective.²²⁴ In the third step, Israel's original placement of the fence survived the minimal impairment analysis because any lower alternative placement along the hill that provided a less severe infringement upon Palestinian access to farmland would not provide as much security. In the third step, the court explained that a "less restrictive means" referred only

²¹⁹ See U.N. DOCS., THE IMPACT OF THE BARRIER ON WEST BANK COMMUNITIES (2004), <https://www.un.org/unispal/document/auto-insert-199846/> [<https://perma.cc/7JAX-SL4C>] (noting the Israeli government's decision in 2002 to begin construction of a separation barrier in the West Bank for security purposes).

²²⁰ *Beit Sourik Vill. Council*, 58(5) PD ¶ 30 (describing separation from farmland and access burdens).

²²¹ *Id.*

²²² *Id.* ¶¶ 33–34, 60, 71, 75–77 (recognizing legitimate security aim; holding several segments disproportionate; directing rerouting and access measures).

²²³ *Id.* ¶¶ 33–34.

²²⁴ *Id.* ¶¶ 51, 57.

to an alternative that equally advanced the law's purpose while intruding less on rights.

While the location of the fence passed the minimal impairment step of the test, the court's strict application of proportionality "as such" produced a different outcome that required Israelis to move the fence to a location lower than the original placement that represented a lesser intrusion of Palestinian human rights. More specifically, the court held that the marginal improvement to security and protection of Israeli civilians from the original line to the lower location was far less than the marginal intrusion on Palestinian human rights imposed by the higher location.²²⁵ A test that stops after minimal impairment analysis would rule that the fence's higher location should remain in place because the lower location would not be as effective in protecting Israelis. However, when comparing the marginal improvement of the higher with the lower location to the marginal intrusion on Palestinians' rights to access their farmland, the court found that a lower location should be the final placement.²²⁶

This is a prime example of how the structured proportionality test maximizes the chances of finding solutions that simultaneously promote public interests and respect the rights of individuals or groups. While not necessarily true for all cases, in some, the facts and potential solution provide a "large-small" tradeoff, where a large gain in one value can be achieved at the cost of only a small sacrifice in another.²²⁷ More specifically, the regulation or legislation arises out of a choice in which there is a trade-off between very small gains in one category against very large losses in another. In these situations, there are often alternatives that can narrow the margin by reducing the losses to one party and the gains to the other. This is precisely what happened in the *Beit Sourik* case. The decision to move the line of demarcation and fence back from its proposed position lessened the gain for the Israeli alternative and lessened the loss to the Palestinian population,

²²⁵ *Id.* ¶ 60 (incremental security benefit does not reasonably outweigh added injury); *see also id.* ¶¶ 71, 76.

²²⁶ *Id.* ¶¶ 71, 75–77 (annulling specified segments and directing rerouting consistent with the Court's reasons).

²²⁷ David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 75–78 (1990).

effectively reaching a compromise. Ultimately, this was a compromise that did not require the court to make a value judgment between Palestinian rights and the public safety of Israelis.

Under a balancing approach, the courts would focus on balancing local Palestinians' property rights and freedom to movement against Israelis' public interest in security.²²⁸ It would require a value judgment between the comparative importance of these conflicting rights and interests.²²⁹ As explained above, the proportionality "as such" function focuses on the relative extent to which the current placement of the fence infringes upon Palestinians' freedom of movement versus the extent to which a lower fence placement would infringe upon the security of the Israeli public.²³⁰ In assessing the relative infringement of each location's placement, the analysis encourages judges to find alternatives that can attempt to find a solution where there is a more equitable outcome for both Palestinian rights and security of the local Israeli population.²³¹

3. *Airbnb and the "As Such" Approach (Seattle vs. San Antonio)*

Seattle, as referenced above, has adopted traditional regulatory requirements for Airbnb users that should be more effective at reducing Airbnb-related problems than problem-specific regulations. Although tailored regulations are the more balanced alternative,²³² a proportionality test that does not include the "as such" prong might not identify this option and instead uphold the broad regulations.²³³ As the graphic below demonstrates, the structured proportionality test would likely produce a different outcome. The marginal improvement in noise reduction, inflated

²²⁸ Michael Kleinman, *The Benefits and Dangers of Proportionality Review in Israel's High Court of Justice*, 29 EMORY INT'L L. REV. 589, 589 (2015).

²²⁹ *Id.* at 634.

²³⁰ *See id.* at 589.

²³¹ *See* Jackson, *supra* note 177, at 3118.

²³² Jack Karsten, *Alternative Perspectives on the Sharing Economy*, BROOKINGS (July 13, 2016), <https://www.brookings.edu/articles/alternative-perspectives-on-the-sharing-economy/> [https://perma.cc/8FHX-VBFA].

²³³ *See* Jackson, *supra* note 177, at 3117–18.

rent, and housing shortages from traditional bed and breakfast regulations that would diminish the usage of Airbnb²³⁴ does not outweigh the marginal intrusion on investors' rights between minimizing overall usage and implementing nuanced regulations.²³⁵ Therefore, Seattle's blunt measures would not pass the "as such" step.

Airbnb	
Step 1: Are requirements that Airbnb lessors comply with bed and breakfast regulations effective at reducing noise pollution and inflated rent problems?	Yes
Step 2: Are there less restrictive alternatives to stringent bed and breakfast regulations, and are other measures that minimize usage equally effective at fixing the problems caused by Airbnb?	Yes
Step 3: Which is greater: the marginal improvement to affordable housing shortages and noise concerns from citywide licensing requirements, OR the marginal intrusion on investors' rights caused by citywide licensing requirements?	Marginal Intrusion

The graphic above does not encapsulate the calculus of every upcoming dispute. Rather, it demonstrates how the structured proportionality test maximizes the probability that judges will identify and encourage more balanced alternatives that recognize the interests of additional stakeholders. For example, in the San Antonio context, the structured proportionality test would likely uphold the measures that are tailored to ensure that hosts only post one listing.²³⁶ The marginal improvement to rent inflation and availability of affordable housing from Seattle's stringent bed and breakfast regulations, as opposed to using density-based regulations,

²³⁴ Edelman & Geradin, *supra* note 16, at 314.

²³⁵ *Id.* at 315.

²³⁶ See Sokolowsky, *supra* note 126.

is far less than the marginally greater intrusions on hosts' constitutional rights.

E. *What Types of Claims Can Be Brought?*

While structured proportionality is an effective doctrine that the court can use to check the powerful connections of local hotel companies and taxi companies to government officials, there are other procedural choices that can maximize the likelihood of compromise and fairness.

In addition to differences among the ways in which different nations implement the proportionality test, there are myriad differences between the ways in which they review challenges to regulations and legislation.²³⁷ The following section explores the judicial review of legislative and regulatory frameworks for managing market risks associated with the introduction of innovative products into the local economy. More specifically, it will: (i) examine how courts review legislative decisions that are founded upon predictions of the risks associated with new products or services; (ii) explain how different rules about the type of claims that can be challenged will impact the extent to which regulatory frameworks facilitate or impede the evolution of innovative products; and (iii) consider the medium and long-term effects of decisions rendered by courts in different systems on the adaptability of such frameworks.

1. *Abstract vs. Concrete*

A review of the impact of courts, and especially constitutional courts, on legislative politics will help determine which systems are most likely to encourage compromise and adaptive regulations. There are some types of constitutional review that are more conducive to adaptation and likely to encourage legislative compromise. This section focuses on how the timing of review, types of claims, and effects of judicial decisions can maximize the likelihood a compromise is reached and facilitate or

²³⁷ See Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 J. CONST. L. 977, 979 (2001).

impede agile legal and regulatory frameworks that can accommodate rapid change. References to the German model of judicial review will highlight certain components of review and how the U.S. model might be less adaptive and able to reach compromise.

There are two primary forms of constitutional review that are implemented by courts in Western democracies.²³⁸ First, concrete review requires review in a particular case where the law has already been applied.²³⁹ Second, abstract review determines the constitutionality of a statute or government practice without any reference to a specific case.²⁴⁰ Abstract review is prevalent in parliamentary democracies.²⁴¹ In these countries, the constitution empowers certain actors, including legislators, to initiate judicial review of legislation in the absence of any concrete case.²⁴² Abstract review takes place after a bill has been passed or before its promulgation. In most cases, the court cannot deny a request for abstract review. Typically, the minority of parliamentary deputies has the power to initiate review.²⁴³ This is a potent tool and weapon for opposition parties that serves as a formidable check against special interests and maximizes the likelihood of reaching compromised solutions.

As mentioned above, public choice theory rests on the idea that politicians, just like the average civilian, are economically and politically self-interested. Using the government in the pursuit of self-interests is viewed as entirely appropriate and legitimate. In many situations, the constituents that politicians tend to hear and benefit from are largely special interests.²⁴⁴ Representatives are unlikely to hear much from the broader constituency, who stand to lose only a little while special interests stand to gain a lot. The average civilian does not care about the day-to-day progress of every

²³⁸ Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 591 (2014).

²³⁹ *See id.*

²⁴⁰ *Id.*

²⁴¹ Georg Vanberg, *Abstract Judicial Review, Legislative Bargaining, and Policy Compromise*, 10 J. THEORETICAL POL. 299, 300 (1998).

²⁴² Ginsburg & Versteeg, *supra* note 238, at 591.

²⁴³ Vanberg, *supra* note 241, at 300.

²⁴⁴ *See, e.g.,* Gupta, *supra* note 23.

policy decision.²⁴⁵ For this reason, there is more incentive for politicians to focus on the interests of the few constituents and lobbying firms who are invested in particular policy outcomes.²⁴⁶ This is how policy positions that favor the few over the majority receive support from the majority of politicians.

For these reasons, the judicial system plays a valuable role in policy development because judges are less vulnerable to the influence of special interests. In countries that focus on abstract review, the courts can play a more active role in blocking the advances of special interests because the courts are included in the decision making process before policies are promulgated.²⁴⁷ Because lawmakers in the minority who are not swayed by the immediate economic gains of complying with special interests can appeal the merits of a policy and defer to the courts, abstract review can often check the influence of special interests.²⁴⁸

For example, assume that a local lobbying firm is acting on behalf of local hotel owners in country or state X, where Airbnb has recently established its presence. Fearing competition from lower Airbnb prices, a hotel lobbying firm persuades the majority of lawmakers to implement Seattle-style short-term rental bans to prevent future housing scarcity and price inflation associated with Airbnb's entry into the local real estate market. The legislative minority in X, which is not influenced by the lobbying firm or special interests, wants to protect the housing market from external pressure but also does not want to drive hosts out of business. For this reason, the minority proposes the adaptive density measures similar to those implemented in San Antonio which discourages speculators and hosts from exacerbating the housing crisis. These measures acknowledge the potential problem, establish measures to address it if or when it arises, and provide a solution that mitigates inflation while still allowing certain hosts to continue operating.²⁴⁹ In a country with abstract review, the minority can defer to the court to make a decision about which policy position is more reasonable given the stated objectives. A reasonable court, insulated from

²⁴⁵ Light, *supra* note 36, at 354.

²⁴⁶ *Id.*

²⁴⁷ Vanberg, *supra* note 241, at 314.

²⁴⁸ *Id.*

²⁴⁹ See, e.g., Sokolowsky, *supra* note 126.

special interests, is likely to endorse a compromise — the policy that regulates only if and when the specific problem arises and allows both sides to accomplish their objectives.

Reviews of the impact of abstract review focus on its indirect, anticipatory effects.²⁵⁰ Because opposition legislators can initiate abstract review, political representatives that develop a given bill are forced to consider the legislative opponents' interests and objectives when drafting legislation and considering various policy positions.²⁵¹ By forcing the majority to consider these interests, the system facilitates compromise. These policy compromises are manifested in two forms. The main variable between the two forms is the degree of judicial deference to the legislative process.²⁵²

First, when the court demonstrates very little deference to the legislature or when there is an upcoming election, legislators are more likely to compromise and obviate the need for judicial review of the bill under consideration.²⁵³ In these circumstances, the majority will compromise with minority parties by making a significant policy concession to persuade their opponents to refrain from initiating judicial review.²⁵⁴ In this case, the non-deferential court encourages the parties to reach a compromise and bypass the need for abstract review.

When the majority faces a more deferential court, the majority will moderate its proposal in order to increase the probability that the court will uphold it.²⁵⁵ By threatening the validity of majority legislation, abstract review provides an incentive for majorities to moderate their proposals in anticipation of the review. The parties may strike a political compromise with the opposition to dissuade them from raising a petition for judicial review in the first place, bypassing the courts completely. A stricter court induces the majority to be more moderate in making a proposal that it expects to come under judicial scrutiny.²⁵⁶ In addition to encouraging legislative compromise, abstract review enhances

²⁵⁰ Vanberg, *supra* note 241, at 300.

²⁵¹ *Id.*

²⁵² *Id.* at 314.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 314–15.

communication between lawmakers and judges which provides a more formidable check against the influence of special interests. In the event the majority of lawmakers are swayed by special interests, rules that provide the minority with recourse to challenge laws that are not reasonable or beneficial will maximize the likelihood that lawmakers get it right the first time.

Under abstract review, legislators can refer a bill for judicial review to the courts to see if the contemplated action is lawful.²⁵⁷ As mentioned above, existing regulatory frameworks for incumbent companies in industries that compete with P2P are insufficient. Governments must create new categories of businesses for emerging companies in the sharing economy. As P2P taxi services such as Uber, Sidecar, and Lyft gained traction in several California cities, the Public Utilities Commission distinguished the new P2P companies from legacy industries and created a new business category called Transportation Network Company.²⁵⁸ Establishing a new category afforded lawmakers the opportunity to pass tailored laws and regulations to manage the evolving safety risks posed by these companies. Under abstract review, legislators seeking to manage evolving risks could refer new legislation to the courts for judicial review. Given the rapid pace of change in the platform economy, there will be new business categories and accompanying regulations. These regulatory frameworks should manage risks while respecting the rights of users and providers. The ability of legislators to understand the lawfulness or constitutionality of new legislation will simplify the legislative process and maximize the chances that lawmakers will pass sensible legislation. Alternatively, in the U.S.

²⁵⁷ For example, the German Constitutional Court ruled that it would be unconstitutional for the military to shoot down a hijacked plane. The case came to the court as an abstract matter, before any such situation had arisen. Craig Whitlock, *German Court Overturns Law Allowing Hijacked Airlines to Be Shot Down*, WASH. POST (Feb. 15, 2006), <https://www.washingtonpost.com/archive/politics/2006/02/16/german-court-overturns-law-allowing-hijacked-airliners-to-be-shot-down/> [https://perma.cc/6U4X-TLE4]. In the United States, such a case would only arise after the military had shot down a plane, and the victims' relatives were bringing a lawsuit alleging violation of constitutional rights.

²⁵⁸ *Transportation Network Company*, FREE DICTIONARY, <https://encyclopedia2.thefreedictionary.com/transportation+network+company> [https://perma.cc/6AW9-APBW] (last visited Sept. 9, 2024).

system, legislators implement laws and regulations that are challenged by individual claimants who were negatively impacted by them. While the outcome of the case is binding, the process takes much longer and struggles to keep pace with the ongoing demand for the creation of new business categories and measures that regulate the sharing economy.

F. *Legislative and Judicial Prognosis*

Given that high-tech companies are blazing trails at record speed,²⁵⁹ regulatory frameworks for many of these innovations do not exist.²⁶⁰ Consequently, the inherent part of rulemaking to maximize the benefits and minimize the risks of new products requires lawmakers to draft policies based on prognosis.²⁶¹ For example, as Uber expanded into new markets, there were a myriad of safety concerns related to driver integrity and vehicle standards.²⁶² In order to determine the appropriate scope and nature of regulations, policymakers must rely on forecasts and predictions about the evolution of the product and its potential dangers.²⁶³ In this context, there are a series of legal issues that arise and will directly impact the evolution of the sharing economy.²⁶⁴ The following section will identify and examine some of these issues, drawing where relevant on comparative approaches to managing them.

As mentioned above, in a representative democracy, the legislature is responsible for lawmaking while the judiciary enforces

²⁵⁹ See, e.g., *How Six Companies Are Using Technology and Data to Transform Themselves*, MCKINSEY DIGIT. (Aug. 12, 2020), <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/how-six-companies-are-using-technology-and-data-to-transform-themselves/> [https://perma.cc/V8YQ-24KN].

²⁶⁰ Eggers & Turley, *supra* note 27, at 3–4.

²⁶¹ Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEGIS. 147, 152–53 (2016).

²⁶² Kate Taylor & Benjamin Goggin, *49 of the Biggest Scandals in Uber's History*, BUS. INSIDER (May 10, 2019, 11:38 AM), <https://www.businessinsider.com/uber-company-scandals-and-controversies-2017-11> [https://perma.cc/63ZY-XYF2].

²⁶³ Davidson & Infranca, *supra* note 72.

²⁶⁴ *Id.*

the law.²⁶⁵ Every system develops its own line where the lawmaking ends and the judiciary begins.²⁶⁶ The line between legislative and judicial powers is blurred in the context of prognostication and the sharing economy. While legislators and regulators are responsible for drafting rules and regulations to manage the risk associated with innovation, it is understood that the margin for error is greater than under normal circumstances.²⁶⁷ This tension triggers a debate that the scope of judicial review should be broader with new innovations that have never been regulated before.²⁶⁸

According to Dieter Grimm, the German system has established a nuanced system for striking an appropriate balance between legislative power and judicial review when reviewing regulations and legislation that involves prognosis about the impact of new products.²⁶⁹ Grimm cites the Codetermination case that appeared before the German Federal Constitutional Court.²⁷⁰

Rather than relying on the conventional levels of scrutiny that balance the effectiveness of the law or regulation with the extent to which it infringes on the rights of civilians, the German system has a special doctrine for examining regulations that rely on legislative prognosis. The level of scrutiny applied is determined by the industry, company, and product.

Not every piece of legislation should be held to the same degree of critical scrutiny. Some laws are

²⁶⁵ *Overview – Rule of Law*, U.S. FED. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> [<https://perma.cc/MB8W-F2ES>] (last visited Sept. 9, 2024).

²⁶⁶ *Separation of Powers in Different Countries*, AISHWARYA SANDEEP, <https://aishwaryasandeepp.wordpress.com/2021/08/04/separation-of-powers-and-administrative-law/> [perma.cc/6KZH-BT2J] (last visited Sept. 9, 2024).

²⁶⁷ William D. Eggers et al., *Regulation that Enables Innovation*, DELOITTE INSIGHTS: GOV'T & PUB. SERVICES (Mar. 23, 2023), <https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2023/regulatory-agencies-and-innovation.html> [<https://perma.cc/5ZZ4-8PH7>].

²⁶⁸ Grimm, *supra* note 196, at 391.

²⁶⁹ *See id.*

²⁷⁰ *Id.*

justified by the simple fact that they do some public good. But as the social costs (whether borne individually or collectively) of a policy rise, in terms of burdens imposed or liberties constrained, the need for justification increases accordingly.²⁷¹

The nature of the right that is infringed determines the standard of review of the prognosis and the evidence that is used to balance the public interest and the extent of the infringement. When rights that are deemed more fundamental are infringed by the legislation, the court will perform a more thorough analysis using evidence to determine the effectiveness of the measure and the legislative prognosis. This is summed up in the Codetermination case:

On the one hand, uncertainty about future developments, even in matters of great import, cannot justify a prohibition to legislate. On the other hand, uncertainty alone cannot justify exempting a political realm from judicial control. The court thus developed a scale of scrutiny that ranges from whether the legislature's prognostications are evidently wrong (*Evidenzkontrolle*) to a reasonableness test (*Vertretbarkeitskontrolle*) to strict scrutiny (*intensivierte inhaltliche Kontrolle*), depending on the nature of the policy area, the possibility of basing the decision on reliable facts, and the importance of the constitutionally protected goods or interests at stake.²⁷²

This system provides a check against the legislation that might be influenced by special interests. What the right is determines levels of scrutiny, and the level of scrutiny determines whether or not the legislation is unconstitutional. While the levels of scrutiny were developed in the U.S. to review any legislation that potentially

²⁷¹ Micah Elazar, "Public Use" and the Justification of Takings, 7 J. CONST. L. 249, 251 (2004).

²⁷² Grimm, *supra* note 196, at 391.

violates equal protection, the German system crafted a doctrine specifically for reviewing legislation that involved some kind of prognosis.

1. *Evidence Based Review of Legislative Prognosis:
Managing an Evolving Framework*

In order to determine whether the infringement is reasonable, the structured proportionality test will consider the extent to which the danger exists or is likely to exist over time.²⁷³ In the context of rent inflation, the supply of affordable housing and socioeconomic data of locals who live in given areas is directly connected to the existing danger or likelihood of future danger due to rent inflation.²⁷⁴ If the data reveals that there is not a significant supply of affordable housing and that people in the given area have an income below the average salary, the purchase of homes by speculators will have a deleterious impact on the local population.²⁷⁵ In such a case, there is a significant likelihood that locals will be displaced and the danger will be manifested.²⁷⁶ On the other hand, if the socioeconomic data reveals that people in a given area earn an annual income that is above average and there is a significant availability of affordable housing, the likelihood of displacement is significantly lower.²⁷⁷ For these reasons, judges should rely on evidence when applying the proportionality test. Without specific data about a city's housing supply, socioeconomic data about its inhabitants, or lodging options more broadly, it will be impossible to reach reasonable answers about the proportionality of STR regulations. Moreover, by using evidence and data to measure STR claims, the courts will encourage legislators and regulators to implement the type of "smart regulations" that are explained *supra* in Part I.D.2.

²⁷³ See Jackson, *supra* note 177, at 3100.

²⁷⁴ See VIEWPOINT CLOUD, *supra* note 18, at 3–4.

²⁷⁵ See Hinsliff, *supra* note 119.

²⁷⁶ Nicole Gurran & Peter Phibbs, *When Tourists Move In: How Should Urban Planners Respond to Airbnb?*, 83 J. AM. PLAN. ASS'N 80, 80 (2017)

²⁷⁷ Cf. Barron, Kung & Proserpio, *supra* note 161, at 33 (the study shows empirical data explaining the effect of STRs on the housing economy).

Within the body of literature on evidence-based review, a subdiscipline has emerged focusing on the role of evidence-based review of legislation that was based on legislative prediction of the market risk associated with a product.²⁷⁸ This subcomponent of the literature is tailor-made for reviewing the equity of regulatory frameworks of the sharing economy. As the products and services of the sharing economy continue to change and evolve over time, the related risk exposures and measures for managing them will need to change as well. While the use of evidence in the context of judicial review is clearly a positive development, the ways in which it is applied is the focus of ongoing debate.²⁷⁹ Legal experts disagree about whether judges should apply the proportionality test using the evidence that was available to legislators at the time that the law or regulation was drafted or that which is available at the time of judicial review.²⁸⁰

Before the court can use evidence to apply the proportionality test, it must determine which type of evidence-based review it will apply: ex post or ex ante. When the court bases its decision exclusively on the knowledge or evidence available at the time of drafting the legislation, it uses an ex ante perspective.²⁸¹ Alternatively, when the court conducts its proportionality review using evidence that is available at the time of litigation or judicial review, when the risks associated with new technological services and products have crystallized and evolved, it uses an ex post perspective.²⁸²

Arguments in favor of the ex ante perspective in representative democracies focus on the original design of the nation's legislative process and argue that law should be made by

²⁷⁸ See, e.g., Sean J. Kealy & Alex Forney, *The Reliability of Evidence in Evidence-based Legislation*, 20 EUR. J.L. REFORM 40 (2018).

²⁷⁹ See, e.g., Klaus Meßerschmidt, *Evidence-based Review of Legislation in Germany*, 4 THEORY & PRAC. LEGIS. 209 (2016); see also Rob van Gestel & Jurgen de Poorter, *Putting Evidence-based Law Making to the Test: Judicial Review of Legislative Rationality*, 4 THEORY & PRAC. LEGIS. 155 (2016).

²⁸⁰ Roland Ismer & Christian von Hesler, *Ex Post Review of Legislative Prognoses by the European Court of Justice: The Temporal Dimension of Rational Law-making*, 4 THEORY & PRAC. LEGIS. 279, 282 (2016).

²⁸¹ *Id.*

²⁸² *Id.*

legislators (and not the courts).²⁸³ These high-level arguments often refer to the design of the respective country's constitution or its founding fathers. The argument continues to state that legislators are better equipped to be finders of facts and are voted directly into office for the primary purpose of representing their constituents' interests in the legislative process.²⁸⁴ According to the *ex-ante* camp, the courts are finders of fact and should not challenge the lawmaking authority of legislators.²⁸⁵

While the assertion that the founding fathers intended for legislators to implement the law and judges to interpret it is a valid assertion, it does not account for the realities of today's representative democracies and multi-branch authoritarian governments. At the time that the Constitution was drafted, the outcome of elections was not directly tied to the amount of money that candidates were able to raise. Nor was the legislative process highly vulnerable to the sophisticated and subtle tactics of powerful lobbying groups. For these reasons, the role of the court has changed, as it now needs to play a more active role in preserving liberal democracies.

In the context of cases dealing with laws and regulations for the sharing economy, the *ex post* perspective is better suited because it allows the court to account for the extent to which market forces and laws that regulate them have changed since the inception of the laws or regulations. Because the market forces and relevant laws and regulations of new products and services are likely to change, a court's ability to look at the facts related to these changes will help the court determine the constitutionality and the effectiveness of a regulatory scheme moving forward.

As mentioned above, the type and pace of technological changes within the sharing economy are unprecedented. Consequently, the regulations are often as new as the products they aim to regulate and many of the risk exposures that the legislators are trying to manage can change significantly in a matter of months.²⁸⁶ Results from a risk assessment in the preliminary years of

²⁸³ See van Gestel & de Poorter, *supra* note 279, at 159–60, 177.

²⁸⁴ *Id.* at 177.

²⁸⁵ *Id.*

²⁸⁶ Eggers & Turley, *supra* note 27, at 2.

a new technology will differ from those that evolve over significant periods of time. As the investment cycle advances and the business model evolves, the number and type of users will change. Consequently, the types of risks and the likelihood that they will manifest will change as well. For example, when Airbnb first launched its services, it was used by a small fraction of travelers around the world who were interested in finding a less expensive place to stay for extended vacations and hosts who were looking for supplemental income.²⁸⁷ As the idea and the website gained traction with hosts and users, the product and the related risk profile changed significantly over time.²⁸⁸ Speculators' purchased additional properties which diminished the availability of long-term rentals for locals, sharply reducing supply and increasing rent prices.²⁸⁹ As the popularity of STRs increased, the types of users changed. People began to rent out homes and host parties for their friends.²⁹⁰ This increased the amount of noise pollution and trash at these sites.²⁹¹ As the regulatory framework adapts to the changes in the usage, the risk profile will change.

Ex post review is the preferable option when considering both sides of the proportionality review equation. By reviewing evidence several months or years later after the original implementation of a law, the court will be in a better position to examine the effectiveness of the regulation and the extent to which it infringes the property rights of STR hosts.

2. Los Angeles: Ex post and Proportionality "As Such"

In July 2021, three European scholars published the results of their research project, which focused on the impact of STRs on

²⁸⁷ See Alison Griswold, *Airbnb Is No Longer the Nice Guy of the Sharing Economy*, QUARTZ (Dec. 5, 2016), <https://qz.com/842996/what-happens-when-a-30-billion-startup-stops-being-nice-and-starts-being-real> (on file with the Columbia Business Law Review).

²⁸⁸ See *id.* (discussing regulatory reactions to Airbnb's growth in cities such as Santa Monica, San Francisco, and Berlin).

²⁸⁹ *Id.*

²⁹⁰ Shirley Nieuwland & Rianne van Melik, *Regulating Airbnb: How Cities Deal With Perceived Negative Externalities of Short-Term Rentals*, 23 CURRENT ISSUES IN TOURISM 811, 813 (2020).

²⁹¹ *Id.*

the housing market in Los Angeles County. Using an experimental research design, the team used exogenous variations provided by the implementation of Home Sharing Ordinances in Los Angeles County. According to the study, researchers found “that 18 out of 88 cities [in the county] implement regulations that essentially ban informal vacation rentals.”²⁹² While lawmakers in these eighteen cities did not explicitly forbid hosts from renting out their homes, they did implement requirements that made the entire business proposition unprofitable for many homeowners who complied with them. According to the study, “Hosts renting out entire properties are ... subject to the same formal regulations as regular hotels and bed and breakfasts.”²⁹³ These are considered “de facto bans” because in most cases it makes no sense for homeowners who want to rent out their house to guests throughout the year to invest hundreds of thousands of dollars in structural adjustments to comply with regulations. More specific results of the study revealed that Home Sharing Ordinances reduce Airbnb listings by about fifty percent²⁹⁴ and reduce house prices by two percent on average.²⁹⁵ The authors of the study explain that these two statistics “capture[] the fact that houses cannot be used for their most profitable use anymore.”²⁹⁶

If potential hosts challenge the legality of the STRs in those eighteen cities of Los Angeles County, an ex post review of evidence would allow for a much more nuanced and accurate proportionality analysis. More specifically, specific data about the impact of STRs on host listings and the supply and cost of housing in those areas would help the court determine the effectiveness of said regulations and the extent to which they infringe on the property rights of homeowners. It is not the objective of this paper to weigh in on the outcome; it is merely to demonstrate how ex post review would allow for more reasonable and accurate outcomes. Courts which consider the fifty percent decrease in listings and the two percent

²⁹² Hans R.A. Koster, Jos van Ommeren & Nicolas Volkhausen, *Short-term Rentals and the Housing Market: Quasi-experimental Evidence From Airbnb in Los Angeles*, J. URB. ECON., July 2012, at 1, 2.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 18.

decrease in value could determine the extent to which property rights were infringed rather than just understanding that owners could not realize the full value of their homes. Conversely, the same numbers can help the court determine the extent to which the measures were effective at achieving the objectives concerning housing shortages and the purchase price of homes in the eighteen counties. Ultimately, this is what is necessary to perform the “as such” components of proportionality. The numbers allow for weighing the extent of effectiveness against the degree of infringement.

While the proponents of ex ante review make compelling ideological arguments about institutional design, the practical advantages of ex post review are more persuasive. Unlike review of regulations in established industries, examination of the impact of STRs in the sharing economy often has no reference point. Because industries in the sharing economy are new, the regulations are the first attempts at regulating the sharing economy’s products. Without a reference point to consider effectiveness, judges need as much data as possible to make a final decision about proportionality. For these reasons, ex post review must be implemented in cases that challenge the legality of STRs and ridesharing.

G. *What are the Effects of Judicial Review?*

The impact of a decision of unconstitutionality varies based on different systems of judicial review. Whereas a decision of unconstitutionality renders a law or regulation void in the U.S., it can merely serve as a recommendation in other systems. In some Latin American countries, the courts use a device called *amparo*.²⁹⁷ In countries that use *amparo*, a successful constitutional challenge only applies to the complainant in the case at hand.²⁹⁸ An unconstitutional act that affects 500 people would require 500 lawsuits.²⁹⁹ For example, consider an Airbnb host who challenges the constitutionality of an on-premises law for STRs. If the court upholds the challenge, the claimant in the case is the only host who

²⁹⁷ Tom Ginsburg, Comparative Constitutional Review 3 (July 30, 2008) (unpublished manuscript) (on file with U. Chi. L. Sch.).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

can rent out their house without being on the premises for the period of the guests' stay. This system is not adaptive because it would require several claimants to generate a significant change to a relevant law.

Once again, the German Constitutional Court's system of judicial review works well with the challenges facing legal and regulatory officials in the digital economy. "The German Constitutional Court has two choices in rendering a finding of unconstitutionality. It can find legislation null and void (*nichtig*) or incompatible (*unvereinbar*) with the Basic Law. In the latter case, the court declares the law to be unconstitutional but not void," and works with the legislature to find a solution that satisfies both branches of government.³⁰⁰ Rather than declaring a law or regulation null and void, the court sets a deadline by which the legislature must modify the legislation to make it complicit with the Basic Law.³⁰¹ In some cases, the court actively influences the legislature's deliberations by making "suggestions" about specific wording of the law.³⁰² In some cases, "the German Constitutional Court will sustain a challenged statute but warn the legislature that it is likely to void it in the future, or suggest conditions for the constitutional application of the statute."³⁰³

One of the most well-known cases invoking this second option arose in 1978, when a farmer living near a proposed fast breeder nuclear reactor challenged the reactor's operating license on the ground that the licensing regime failed to comply with statutory safety requirements.³⁰⁴ Because the reactor technology was novel, scientific evidence regarding long-term risks was incomplete, and the legislature had enacted only general precautionary standards.³⁰⁵ The German Federal Constitutional Court was thus required to

³⁰⁰ *Id.* at 4

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 8, 1978, 49 Entscheidungen des Bundesverfassungsgerichts Kalkar [BVerfGE] 89 (Ger.) *translated in* Donald P. Kommers & Russel A. Miller, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 177 (3d ed. 2012) (case referred to as "Kalkar I").

³⁰⁵ *See id.* at 179.

balance the state's obligation to protect public safety against the infringement of individual property rights.³⁰⁶ Rather than invalidating the regulatory framework, the Court held that constitutional requirements were satisfied so long as the legislature continuously monitored emerging scientific evidence and stood ready to amend the legal regime as risks became better understood.³⁰⁷

Given this option, the court can choose to hold off on making a final judgment of the regulation, especially when the technology is new and there is too much uncertainty. It also facilitates adapting legislation to meet the ongoing and inevitable changes to the risk environment and positive impacts of related products and services over time. When the sharing economy first introduces a new product or service to the market, it is impossible to determine whether or not a regulation is effective, overbroad, or sufficiently tailored.

This type of option is tailor-made for regulations of new technology because there is often significant uncertainty when a product or service using new innovations hits the market. As mentioned above, the use of abstract review allows the legislature to send a regulation to the Constitutional Court before it is promulgated.³⁰⁸ While this is helpful in many cases dealing with regulations of new products or services, there are other cases where the technology and its uses and impact are so new that the court does not want to make a premature judgment. In cases dealing with new technology, the German court has held off because it did not have enough data with which its government could make a decision about the effectiveness of specific regulations.³⁰⁹ Even if the technology is not new to the world but new to the host country, a wait-and-see approach is well advised because each host country comprises a new investment climate.

³⁰⁶ *See id.* at 181.

³⁰⁷ *See id.* at 179–80.

³⁰⁸ *See supra* text accompanying notes 238–58.

³⁰⁹ *See supra* text accompanying notes 300–303.

1. *Partial Nullity: U.S. and Germany*

Rather than declaring a law null and void, the German system allows and encourages collaboration and communication between judges and legislators. Whether the courts suggest or demand changes to a law or the legislature sends new legislation to the courts for abstract review, the system facilitates back-and-forth communication between the branches. As demonstrated above, this encourages compromise, and it maximizes the likelihood that original drafts of legislation will try to accommodate differing perspectives.

For example, if a proposed law limited all inhabitants of a city to post one listing on Airbnb and required the owner to always be on the premises, the courts in Germany would have two options. First, if the court recognized that limiting hosts to one listing was a reasonable measure for restraining rent inflation but disagreed with the on-premises requirement, it could nullify the on-premises part while maintaining the listing limitation. Alternatively, if the court believed that density requirements are a better way of managing rent inflation than the listing limitation, it could recommend or require legislators to implement density requirements in an isolated area.

In contrast, systems like the U.S. that solely void laws do not encourage communication between the branches and make it very hard to reach a compromise.³¹⁰ In the event that the courts disagreed with on-premises requirements but agreed with listing limits, they would have to nullify the entire law and wait for lawmakers to reinitiate the legislative process. This process would be far more time-consuming and less likely to result in a compromise.

CONCLUSION

The sharing economy has positive and negative impacts on global business.³¹¹ In many cases, there are reasonable regulations that minimize costs and maximize benefits.³¹² However, legislators

³¹⁰ See Johanan D. Mussel & Matthew Shugart, *Majoritarian Politics in a Consensus Democracy: How Judicialization of Politics Helped Lay Bare the Contradictions of Israel's Constitution*, FRONTIERS IN POL. SCI., Apr. 2025, at 11.

³¹¹ See *supra* Part I.A., I.B.

³¹² See, e.g., Edelman & Geradin, *supra* note 16, at 296.

and regulators often fail to implement these laws and regulations because special interest groups support polarized policies that do not represent compromises.³¹³ Because regulators and lawmakers often fail to pick compromises, the judiciary will play a significant role in the evolution of the new gig economy. A review of judicial systems in different countries highlights the aspects of legislative and regulatory review that will promote compromise and adapt to the pace of technological change that requires nimble legal and regulatory frameworks.

³¹³ See *supra* Part II.B.