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Keep on Truckin', Uber: Using the Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs

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Abstract

We are witnessing a revolution in the way we get around, if only we glance up from our phones. "Techies" and suit-clad professionals alike use their phones to request rides from tuxedo-attired professional chauffeurs in luxury vehicles, as well as from part-time nonprofessionals using their "daily-driver" to make some extra cash. It is indisputable that Transportation Network Companies (TNCs)—like Uber and Lyft—are providing unique alternatives to taxis and conventional charter-car carriers while simultaneously paving the way for a new era in transportation.

"App-based" car-for-hire platforms, said to be the cause of market "disruption," have met unwavering resistance from industry competitors, advocacy groups, and government regulators arguing that these services are illegal, unsafe, and competing unfairly. Consequently, TNCs have often faced outright bans, anachronistic regulations, and numerous legal hurdles. Whether the rationales for regulations and bans have been pretexts for protectionism and resistance to change, or legitimate expressions

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of concern for safety and fair business practices, it is clear that they are responses to TNCs supplying a demand for easy, affordable, and reliable transportation.

This Note examines whether the dormant Commerce Clause doctrine bars certain types of bans or regulations of TNC platforms. Though TNCs have not shown an eagerness to litigate challenges to their operations, this avenue of defense—a road once treaded by trucking and railroad companies—remains open to them. TNCs may thus look to revive the dormant Commerce Clause in the context of transportation regulations to challenge local limitations on their operations.

Importantly, this Note does not argue that any and all safety or labor concerns offered in efforts to regulate or limit TNC operations are unfounded or that invalidation of well-intentioned attempts to regulate for these concerns on dormant Commerce Clause grounds will somehow take care of them. Genuine concerns do exist, but the only way to seriously and judiciously confront them is through even-handed and constitutional legislation that recognizes that TNCs are parked and here to stay.

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I. Introduction

Getting a Lyft or calling an Uber has become as conspicuous as the decades-old gesture of raising a hand to hail a cab. Young "techies" and suit-clad professionals alike pull out their phones in front of office buildings and bars, requesting a ride and seeing their driver's car, user rating, and estimated time of arrival instantly on their screens.[1] With a GPS-equipped smartphone, one can find a ride across town or a personal chauffeur for the day with the touch of a button in hundreds of cities worldwide.[2]

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1. *See* LYFT, https://www.lyft.com (last visited Feb. 1, 2015) (explaining the application's features on the website home page) (on file with the Washington and Lee Law Review).

2. *See Where is Uber Currently Available?*, UBER, https://www.uber.com/cities (last visited Feb. 1 2015) (indicating that as of December 16, 2014, the service was available in fifty-three countries and more than 200 cities worldwide) (on file with the Washington and Lee Law Review); *Cities We're In*, LYFT, https://www.lyft.com/cities (last visited Feb. 1, 2015)

By affording riders the option of either getting a ride from a tuxedo-attired chauffeur in a luxury sport-utility vehicle or limousine, or from a nonprofessional in their "daily-driver," Transportation Network Companies (TNCs)[3] are offering unique alternatives to taxis.[4] It would be no exaggeration to say that we are witnessing a revolution in the way we get around, if we only glance up from our phones.[5]

(noting that Lyft currently operates in over sixty U.S. cities) (on file with the Washington and Lee Law Review).

3. *See* Tomio Geron, *California PUC Proposes Legalizing Ride-Sharing From Startups Lyft, SideCar, Uber*, FORBES (July 30, 2013), http://www.forbes.com/sites/tomiogeron/2013/07/30/california-puc-proposes-legalizing-ride-sharing-companies-lyft-sidecar-uber/ (last visited Feb. 23, 2015) (noting that TNCs are companies that use online-enabled, smartphone application platforms to connect drivers and passengers) (on file with the Washington and Lee Law Review).

4. *See* Suzanne Stathatos, *Debunking the Pink Mustache: Taxi Alternative Lyft Launches in San Francisco*, SF WKLY (Aug. 31, 2012), http://www.sfweekly.com/thesnitch/2012/08/31/debunking-the-pink-mustaches-taxi-alternative-lyft-launches-in-san-francisco (last visited Feb. 1, 2015) (reporting that Lyft has described itself as offering an iPhone or Android application "that lets you rent a 'friend with a car'") (on file with the Washington and Lee Law Review); John P. Pullen, *Everything You Need to Know About Uber*, TIME (Nov. 4, 2014), http://time.com/3556741/uber/ (last visited Feb. 1, 2015) (reporting that Uber offers several different levels of service, allowing passengers to choose between a ride in the likes of a Toyota Prius, all the way up to top-of-the-line posh options like Porsches and BMWs, with luxury SUVs, Lincoln Town Cars, and limousines in between) (on file with the Washington and Lee Law Review).

5. *See* Marvin Ammori, *Can the FTC Save Uber?*, SLATE (Mar. 12, 2013, 12:15 PM), http://www.slate.com/articles/technology/future_tense/2013/03/uber_lyft_sidecar_can_the_ftc_fight_local_taxi_commissions.single.html (last visited Feb. 1, 2015) ("Uber, SideCar, and Lyft are not simply a fad—they are the first indications of a transportation revolution now receiving considerable venture investment.") (on file with the Washington and Lee Law Review); Don Jergler, *Transportation Network Companies, Uber Gap Worries Insurers*, INS. J. (Jan. 10, 2014), http://www.insurancejournal.com/news/west/2014/01/10/316839.htm (last visited Feb. 1, 2015) (noting that Uber has "entered more than 60 markets" and is purportedly "generating $200 million a year in revenue beyond what it pays to drivers") (on file with the Washington and Lee Law Review); *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy (last visited Jan. 15, 2015) (explaining that the "sharing economy" allows for a type of business built on the sharing of resources so that consumers can access goods when needed and "act as an ad hoc taxi service [or] car-hire firm . . . as and when it suits them") (on file with the Washington and Lee Law Review).

Originally conceived as a response to consumer dissatisfaction with taxi monopolies,[6] Uber, Lyft, and other TNCs are paving the way for a new era in transportation by disrupting the traditional car-for-hire service industry.[7] TNCs create mobile phone applications that facilitate peer-to-peer car-for-hire services by connecting passengers who need a ride to drivers who have a car.[8] Though notable differences exist among the companies' services,[9] they all utilize smart-phone technology to

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6. *See* MARK W. FRANKENA & PAUL A. PAUTLER, FED. TRADE COMM'N, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION 155 (1984), http://www.ftc.gov/sites/default/files/documents/reports/economic-analysis-taxicab-regulation/233832.pdf (noting that the deliberate insulation of taxi companies from competition by local taxi commissions that colluded to limit the number of available licenses has resulted in dismal taxi service across the nation and has fleeced residents).

7. *See* Clayton Christensen, *Key Concepts—Disruptive Innovation*, http://www.claytonchristensen.com/key-concepts/ (last visited February 20, 2015) (describing a disruptive innovation as an innovation that helps create a new market and value network by disrupting an existing market and value network, displacing an earlier technology, and improving a product or service in ways that the market does not expect) (on file with the Washington and Lee Law Review).

8. *See* Patrick Hoge, *Lyft and Sidecar Replace Voluntary Donations with Set Prices*, S.F. BUS. TIMES (Nov. 18, 2013, 12:49 PM), http://www.bizjournals.com/sanfrancisco/blog/2013/11/lyft-sidecar-uber-ride-sharing.html?page=all (last visited Jan. 9, 2015) (explaining that these TNC services connect riders through smartphone applications to private individuals who give rides in privately-owned vehicles) (on file with the Washington and Lee Law Review); Maya Kosoff, *2 Lawsuits Could Dramatically Alter the Business Model for Uber and Lyft*, BUS. INSIDER (Jan. 30, 2015, 11:10 AM), http://www.businessinsider.com/uber-lyft-business-models-threatened-by-lawsuits-2015-1 (last visited Feb. 2, 2015) (noting that drivers utilize their own vehicles and are classified as independent contractors, though pending litigation seeks to reclassify drivers as employees) (on file with the Washington and Lee Law Review).

9. *See* Evan Dashevsky, *Uber vs. Lyft: Which Ride-Sharing App Is Best for You?*, PC MAG. (Nov. 18, 2014, 4:08 PM), http://www.pcmag.com/article2/0,2817,2472358,00.asp (last visited Feb. 1, 2015) (outlining the differences between Lyft and Uber's services app-based, ride-for-hire services) (on file with the Washington and Lee Law Review). For example, "UberX" and Lyft are lower cost options, allowing nonprofessional drivers to use their personal vehicles with no requirement that drivers obtain a car-for-hire license. *See id.* (describing the lower-cost services UberX and Lyft and how they operate). Alternatively, "Uber Black"—Uber's premium option—offers luxury sedans and SUVs whose drivers are required to maintain the same municipal and state licenses as other livery (for-hire) car services. *See* Pullen, *supra* note 4 (explaining Uber's ride-for-hire platform).

connect available drivers with riders seeking a ride, using algorithms that factor time and distance in their fare calculation much like a taxi meter.[10]

Such "app-based" car-for-hire platforms have met determined resistance from industry competitors, advocacy groups, and government regulators who argue that these services are illegal, unsafe, and competing unfairly.[11] Much of this debate has centered on whether these services amount to illegal taxicab operations or whether this model of transportation is in a class of its own, incapable of classification under outdated regulatory frameworks.[12]

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10. *See* Dashevsky, *supra* note 9 (relaying that each ride has a base fare, on top of which a per-minute and per-mile charge is added, based on an algorithm that varies by city and by the particular level of demand for the service at the time of day).

11. *See, e.g.*, Michael Cabanatuan, *S.F. Taxi Owners, Cabbies Join Forces Against Uber, Lyft, Others*, SFGATE, http://www.sfgate.com/bayarea/article/S-F-taxi-owners-cabbies-join-forces-against-5773407.php (last updated Sept. 23, 2014, 8:10 AM) (last visited Nov. 4, 2014) (noting that app-based rides, unlike taxis, are not serving all neighborhoods, providing accessible services to the disabled, or complying with air-quality requirements) (on file with the Washington and Lee Law Review); Christian Hill, *Eugene Tells Uber to Cease Operations*, REGISTER-GUARD (Oct. 30, 2014), http://registerguard.com/rg/news/local/32239677-75/eugene-says-uber-operating-illegally-warns-drivers.html.csp# (last visited Jan. 3, 2015) (explaining that Eugene city officials find Uber to be operating illegally because Uber has not obtained an operating license under the city's "public passenger vehicle" regulations) (on file with Washington and Lee Law Review); Tracey Lien & Russell Mitchell, *Uber Sued Over Unlawful Business Practices; Lyft Settles*, L.A. TIMES (Dec. 9, 2014, 8:00 PM), http://www.latimes.com/business/technology/la-fi-tn-uber-lyft-20141209-story.html (last visited Feb. 1, 2015) (noting that "Los Angeles and San Francisco district attorneys filed a consumer protection lawsuit against Uber on Tuesday [Dec. 9, 2014], alleging that the popular ride-hailing company misleads consumers about the service's safety, overcharges them and thumbs its nose at the law," while Lyft settled similar lawsuits) (on file with the Washington and Lee Law Review); Kale Williams, *Uber Sued Over Girl's Death in S.F.: Family Says Firm's App Violates Distracted-Driving Laws*, SFGATE, http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php (last updated Jan. 28, 2014, 12:42 PM) (last visited Feb. 1, 2015) (alleging, in a wrongful death action, that the phone-based interface that drivers use to find fares contributed to the death of six year-old pedestrian Sofia [Liu] who was struck and killed by an Uber service provider) (on file with the Washington and Lee Law Review).

12. *See RDU Cites Ride-Sharing Services as Illegal Taxis*, WRAL.COM (Sept. 26, 2014), http://www.wral.com/rdu-cites-ride-sharing-services-as-illegal-taxis/14019999/ (last visited Feb. 1, 2015) (reporting that police at Raleigh-Durham International Airport, treating Uber and Lyft as illegal taxis, have

Consequently, TNCs have often faced outright bans, anachronistic regulations, and numerous legal hurdles.[13] In Miami, anti-Lyft sting operations resulted in drivers facing hefty fines and impoundment of their personal vehicles.[14] In Washington, D.C., where Uber initially faced an outright ban, the city council, in its first attempt at regulating Uber, proposed a scheme by which the fare amount had to be at least five times that which a taxicab charged for the same ride.[15] San Francisco, the birthplace of Uber and Lyft, vacillated between allowing their unfettered operation and holding aspects of their operations

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been citing TNC drivers for not complying with airport permit regulations) (on file with the Washington and Lee Law Review).

13. *See, e.g.*, Press Release, Cal. Pub. Util. Comm'n, CPUC Cites Passenger Carriers Lyft, Sidecar, and Uber $20,000 Each for Public Safety Violations (Nov. 14, 2012) (declaring that the California Public Utility Commission issued $20,000 citations to Lyft, Sidecar, and Uber for operating illegally as charter-party carriers) (on file with the Washington and Lee Law Review); Lori Aratani, *Virginia Officials Order Uber, Lyft to Stop Operating in the State*, WASH. POST (June 5, 2014), http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/06/05/virginia-officials-order-uber-lyft-to-stop-operating-in-the-state (last visited Jan. 5, 2015) (maintaining that the app-based services were operating without proper permits, Richard D. Holcomb, commissioner of the Virginia Department of Motor Vehicles, sent a cease and desist letter to both Uber and Lyft) (on file with the Washington and Lee Law Review); Ellen Huet, *SF, LA District Attorneys Sue Uber, Settle with Lyft Over 'Misleading' Business Violations,* FORBES (Dec. 9, 2014, 6:44 PM), http://www.forbes.com/sites/ellenhuet/2014/12/09/sf-la-district-attorneys-sue-uber-and-lyft-over-misleading-business-violations (last visited Jan. 2, 2015) (alleging multiple business violations in California's suit that focuses on the companies' messaging to its riders as well as their airport practices) (on file with the Washington and Lee Law Review).

14. *See* Alyson Shontell, *Cops in Miami Are Running a Sting to Catch Lyft Drivers*, BUS. INSIDER (June 7, 2014, 11:36 AM), http://www.businessinsider.com/miami-cops-are-running-a-sting-to-catch-lyft-drivers-2014-6 (last visited Feb. 1, 2015) ("The county had been fining Lyft drivers up to $2,000 each for failing to get a chauffeur registration and for operating a for-hire vehicle without a valid for-hire license—both requirements for cabbies and limo operators.") (on file with the Washington and Lee Law Review).

15. *See* James Fallows, *Uber vs. Washington, D.C.: This Is Insane*, ATLANTIC (July 10, 2012, 9:33 AM), http://www.theatlantic.com/technology/archive/2012/07/uber-vs-washington-dc-this-is-insane/259614/ (last visited Feb. 1, 2015) (reporting that the regulation sponsored by Councilmember Mary Cheh proposed that in exchange for approval to operate in the District, Uber "sedans" would be required to charge a minimum of five times the "drop rate" for taxicabs) (on file with the Washington and Lee Law Review).

illegal—eventually deferring to the California Public Utilities Commission for a coherent approach to regulation.[16] Until San Francisco International Airport recently began allowing TNCs to operate at its terminals, every airport across the country maintained bans, enforced with various degrees of vigor and success.[17] Whether the rationales for regulations and bans have been pretexts for protectionism and resistance to change, or legitimate expressions of concern for safety and fair business practices, it is undeniable that they are responses to TNCs supplying a demand for easy, affordable, and reliable transportation.[18]

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16. *See* Larry Downes, *Lessons From Uber: Why Innovation and Regulation Don't Mix*, FORBES (Feb. 6, 2013), http://www.forbes.com/sites/larrydownes/2013/02/06/lessons-from-uber-why-innovation-and-regulation-dont-mix/ (last visited Feb. 1, 2015) (noting that regulatory bans and stiff penalties have been lifted, with attending promises to liberalize, pending Public Utility Commission agreements with TNCs) (on file with the Washington and Lee Law Review).

17. *See* Patrick Kulp, *San Francisco Airport First in the U.S. to Reach Deals with Uber, Lyft*, MASHABLE (Oct. 21, 2014), http://mashable.com/2014/10/21/san-francisco-airport-uber-lyft/ (last visited Feb. 1, 2015) ("Uber, Lyft and Sidecar drivers will now be legally allowed to pick up and drop off passengers at San Francisco International Airport, thanks to deals the airport just signed with the three companies.") (on file with the Washington and Lee Law Review); Jessica Kwong, *Lyft, Uber Secure SFO Deal*, SF EXAMINER (Oct. 21, 2014), http://www.sfexaminer.com/sanfrancisco/lyft-joins-sidecar-in-securing-sfo-deal/Content?oid=2909712 (last visited Feb. 1, 2015) ("Uber and Lyft have signed deals to operate legally at San Francisco International Airport . . . the first agreement of its kind for any airport in California.") (on file with the Washington and Lee Law Review).

18. *See* Jeff Stone, *Uber, Lyft Almost Always Cheaper than Traditional Taxis, Researchers Find*, INT'L BUS. TIMES (Oct. 13, 2014), http://www.ibtimes.com/uber-lyft-almost-always-cheaper-traditional-taxis-researchers-find-1703802 (last visited Jan. 1, 2015) (according to a recent market study, "[c]ustomers riding with Uber and Lyft will spend less than they would on the same ride with a taxi almost all the time, except in the hours that the transportation companies have surge pricing in effect") (on file with the Washington and Lee Law Review); Gwynedd Stuart, *Can Chicago's Taxi Industry Survive the Rideshare Revolution?*, CHI. READER (Oct. 1, 2014), http://www.chicagoreader.com/chicago/rideshare-chicago-uber-lyft-uberx-taxi-industry-cab-drivers-extinct/Content?oid=15165161 (last visited Jan. 1, 2015) (noting that "Uber and its ilk have made hailing a ride . . . and paying a reasonably low fare, as easy as a couple of swipes on a smartphone screen") (on file with the Washington and Lee Law Review).

Demonstrating a clear shift towards a new transportation landscape,[19] TNCs are blowing through all of the yellow and red lights that have presented roadblocks to their operations.[20] After evading classification and regulation under existing regimes, Uber and Lyft have themselves sought to exploit the logic of regulatory capture.[21] These tactics evince a broader strategy to avoid costly litigation and instead work to develop a cooperative regulatory climate.[22] In combination with growing recognition of their service's utility and benefits to consumers,[23] these strategic

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19. *See* Tomio Geron, *AirBnB and the Unstoppable Rise of the Sharing Economy*, FORBES (Jan. 23, 2013), http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/ (last visited Nov. 5, 2014) (noting that the sharing concept has created markets out of things that would not have been considered monetizable assets before and that this new paradigm is here to stay) (on file with the Washington and Lee Law Review).

20. *See, e.g.*, Alexa Vaughn, *Ride-Share Cars: Illegal, and All Over Seattle*, SEATTLE TIMES (June 16, 2014), http://seattletimes.com/html/localnews/2021206141_ridesharingappsxml.html (last visited Nov. 6, 2014) (noting that the drivers and vehicles with Lyft, Sidecar, and UberX are not licensed with the city of Seattle, and are thereby illegal, but that has not prompted the city to stop the increasingly popular ride-sharing services) (on file with the Washington and Lee Law Review).

21. *See, e.g.*, Ryan Lawler, *Mr. Kalanick Goes to Washington: How Uber Won in DC*, TECHCRUNCH (Dec. 4, 2012), http://techcrunch.com/2012/12/04/mr-kalanick-goes-to-washington-how-uber-won-in-dc/ (last visited Feb. 1, 2015) (noting that for a startup that had "previously eschewed politics," Uber is learning how to play the game—retaining the services of Jerry Hallisey, a former California Transportation Commissioner, being a case in point) (on file with the Washington and Lee Law Review).

22. *See id.* (pointing out that Uber has worked closely with D.C. lawmakers to craft favorable regulations, which it hopes other cities will seek to model).

23. *See, e.g.*, Farhad Manjoo, *With Uber, Less Reason to Own a Car*, N.Y. TIMES (June 11, 2014), http://www.nytimes.com/2014/06/12/technology/personaltech/with-ubers-cars-maybe-we-dont-need-our-own.html (last visited Nov. 11, 2014) (maintaining that ride-sharing has become a viable alternative to car ownership) (on file with the Washington and Lee Law Review); *see also* Emily Badger, *Are Uber and Lyft Responsible for Reducing DUIs?*, WASH. POST (July 10, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/10/are-uber-and-lyft-responsible-for-reducing-duis/ (last visited Nov. 12, 2014) (arguing that services such as Uber and Lyft may be contributing to a reduction in drunk driving and DUIs by giving the bar-hopping demographic a better way to get home at night) (on file with the Washington and Lee Law Review); Carolyn Said, *Uber, Lyft, Sidecar Try Carpool Service*, SFGATE, http://www.sfgate.com/technology/article/Uber-Lyft-Sidecar-try-carpool-service-5672983.php (last updated Aug. 6, 2014, 5:58 PM) (last visited Nov. 3, 2014)

maneuvers have led TNCs to become staples in the transportation landscapes of major metropolitan areas and sleepy suburbs alike.[24] In light of this reality, an ever-increasing number of state and local governments are beginning to find creative ways to accommodate and regulate TNCs to realize their benefits while simultaneously protecting the interests of safety and revenue.[25] Others, however, have persisted in maintaining bans.[26]

("The benefits of fewer cars on the road are obvious: less congestion, fewer emissions, cheaper costs, reduced parking hassles.") (on file with the Washington and Lee Law Review).

24. *See* Sean Doogan, *As Uber and Its Ilk Expand, Cities Like Anchorage Struggle to Regulate the 'Sharing Economy'*, ALASKA DISPATCH NEWS (Oct. 19, 2014), http://www.adn.com/article/20141019/uber-and-its-ilk-expand-cities-anchorage-struggle-regulate-sharing-economy (last visited Nov. 9, 2014) (noting Uber's explosive growth, both in terms of the ever-expanding number of cities it serves and its climbing worth) (on file with the Washington and Lee Law Review).

25. *See* Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing & New Online-Enabled Transp. Servs., D. 14-10-016, 2013 WL 5488494, at *1 (Sept. 19, 2013) (establishing California as the first state to provide a regulatory framework for TNCs); Jesse Paul, *UberX Joins Lyft in Offering Ride-Share Service to Denver Airport*, DENVER POST, http://www.denverpost.com/news/ci_27043840/denver-international-airport-begin-allowing-uber-operate-at (last updated Dec. 2, 2014, 1:23 AM) (last visited Jan. 5, 2015) (announcing that the Denver International Airport will begin allowing services like UberX and Lyft to operate at the main terminal) (on file with the Washington and Lee Law Review).

26. *See* Aman Batheja, *Uber, Lyft Rolling Forward, But Uncertainty Lingers*, TEX. TRIB. (June 10, 2014), https://www.texastribune.org/2014/06/10/uber-lyft-target-texas-cities-despite-unfriendly-r (last visited Jan. 5, 2015) (explaining that TNCs are illegal under Austin's current city transportation code and therefore banned) (on file with the Washington and Lee Law Review); Sheldon S. Shafer, *Uber and Lyft Pickups Banned from Airport*, COURIER-J. (Nov. 26, 2014, 5:25 PM), http://www.courier-journal.com/story/news/local/2014/11/26/uber-lyft-pickups-banned-airport/19545401 (last visited Jan. 5, 2015) (reporting that the Regional Airport Authority has advised that Uber and Lyft drivers who work for the ride-sharing programs cannot pick up passengers at Louisville International Airport) (on file with the Washington and Lee Law Review); *see also* Jared Shelly, *City Council to PPA: Legalize Lyft and Uber*, PHILA. BUS. J., http://www.bizjournals.com/philadelphia/news/2015/01/30/city-council-to-ppa-legalize-lyft-and-uber.html (last updated Jan. 30, 2015, 3:01 PM) (last visited Feb. 1, 2015) (noting Philadelphia's fractured regulatory landscape, as the City Council has introduced a resolution urging the state legislature to make the services legal pursuant to the Pennsylvania Public Utility Commission's approval for TNC operations in the state, despite the Philadelphia Parking Authority's ban on TNCs) (on file with the Washington and Lee Law Review).

This Note examines whether the dormant Commerce Clause doctrine bars certain types of bans or regulations of TNC platforms.[27] Though TNCs have not shown an eagerness to litigate challenges to their operations, this avenue of defense remains open—a road once treaded by trucking companies.[28] Although Uber has raised a dormant Commerce Clause challenge to the application of California law to drivers outside of California,[29] such challenges have not been mounted against efforts to regulate or thwart TNC operations generally.[30] While Congress retains authority to regulate in this area,[31] it likely will not, as most TNC roadway regulations appear to concern matters within the realm of states' police powers.[32] TNCs may thus look to revive the dormant Commerce Clause in the context of roadway regulations to challenge local limitations on their operations.[33] Rather than having to fight to establish themselves in each new

27. *See infra* Part VI (discussing whether certain TNC bans or regulations are constitutionally impermissible by analogizing to application of the dormant Commerce Clause doctrine in the transportation cases).

28. *See infra* Part V.B (discussing highway and railroad regulations examined by the Supreme Court in light of the dormant Commerce Clause's prohibition on unduly burdening interstate commerce).

29. *See* O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2013 WL 6354534, at *2 (N.D. Cal. Dec. 5, 2013) (noting that Uber argued against the application of California law to members of a putative class who utilize the app outside of the state).

30. *See infra* Part VI (noting that TNCs have yet to invoke the dormancy doctrine to resist regulatory hurdles, but that such challenges are arguably viable).

31. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (acknowledging that Congress may regulate the use of the channels and instrumentalities of interstate commerce as well as activities having a substantial relation to commerce interstate).

32. *See* Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) (noting that states retain the authority to regulate within their territory for the betterment of safety, health, morals, and general welfare of their inhabitants). *But see* Ammori, *supra* note 5 (noting that the FTC's power to regulate interstate commerce is just as broad as Congress's, and just as it regulated local taxi markets by challenging anticompetitive practices, it could similarly regulate TNCs because interstate travelers take Ubers to and from airports when they fly across state lines). Further, TNCs such as Uber, Lyft, and Sidecar are "California-based technology companies competing in multiple states," and thereby have a substantial effect on interstate commerce. *Id.*

33. *See infra* Part VI (discussing the potential advantages of challenging certain archetypical regulations and bans).

market, TNCs may be able to eradicate certain categories of regulatory barriers altogether by successfully challenging just one such regulation that is archetypical of other "types" of regulations.[34]

To maintain a grounded analysis, cognizant of the seemingly unpredictable application of the doctrine,[35] this Note examines TNCs in light of the United States Supreme Court's articulation of the dormant Commerce Clause in the "transportation" cases.[36] The Court's application of the doctrine in response to state attempts to regulate highways—particularly in the wake of their expansion and subsequent effect on interstate commerce—is instructive of how courts may apply the doctrine in the context of TNCs.[37] As the majority of regulations promulgated by state and local governments concerning TNCs purport to address various road safety concerns,[38] comparison to the Court's treatment of similarly motivated laws in the context of the transportation cases may provide insight to the approach courts will take if dormant Commerce Clause challenges are raised. This Note maintains that courts will likely utilize the ad hoc balancing

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34. *See* Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 397–98 (1998) (implying that if a particular type of restriction is violative of the self-executing dormancy principle, then sufficiently analogous regulations are similarly unconstitutional). So long as such invalidation was widely recognized and given credence, broader advances could be made by TNCs to penetrate domestic markets. *See* Lawler, *supra* note 21 (indicating that regulatory hurdles have stood in the way of more rapid expansion of the company's services). Acknowledging the speed bumps of the unavoidably piecemeal approach to expansion taken by Uber thus far, Uber CEO Travis Kalanick intimated that "[e]very city we [Uber] go to, eventually the regulators will make something up to keep us from rolling out or continuing our business." *Id.*

35. *See* Lawrence, *supra* note 34, at 403 (1998) (criticizing the Supreme Court's dormant Commerce Clause jurisprudence as "erratic," with "complex exceptions" and "dubious consistency").

36. *See infra* Part V (providing a framework for how courts will likely analyze most TNC regulations enacted in pursuit of local health and safety interests).

37. *See infra* Part V (discussing the insight that examination of dormant Commerce Clause challenges in the transportation cases may offer for evaluating potential dormancy challenges in the TNC context).

38. *See infra* Part VI (discussing the various types of TNC regulations—licensing, insurance, and otherwise—enacted in the name of protecting consumers and others on the road).

approach articulated in *Pike v. Bruce Church, Inc.*[39] to analyze the majority of TNC regulations and bans challenged on dormant Commerce Clause grounds.[40] However, if courts come to characterize certain types of TNC regulations and bans as discriminatory or impermissibly protectionist by virtue of their motivations or effects—finding that they unduly burden interstate commerce and a federal common market—they will be met with an almost certainly fatal form of strict scrutiny review that regards such discrimination as per se invalid.[41]

This Note is structured as follows: Part II will consider the breadth of Congress's commerce power and the extent to which states may regulate matters affecting interstate commerce. Explaining the dormant Commerce Clause and the limits it places on commerce-burdening regulations promulgated by states, Part III lays the foundation for contending that certain TNC regulations may run afoul of the dormancy principle. Part IV describes the framework that the Supreme Court has outlined for analyzing dormant Commerce Clause challenges. This is included for two reasons. First, to understand the current approach for evaluating dormancy challenges, it is important to note the potholes the Court has encountered in arriving at its modern interests-balancing test. Second, Part IV further explains how potential challenges will be evaluated and the consequences stemming from characterizing a particular regulation as discriminatory or not. If certain regulations come to be characterized as discriminatory, impermissibly protectionist, or overly extraterritorial in reach, they will likely violate the dormancy doctrine. On the other hand, if certain regulations are found to be nondiscriminatory and enacted in furtherance of a legitimate state interest by appropriate means, they will probably be constitutionally sound. In addition to providing concrete examples of the Court's application of the interests-balancing

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39. 397 U.S. 137 (1970).

40. *See infra* Part VI (arguing that most regulations will be subject to *Pike* balancing because their aim is to affect protections for consumer and roadway safety, unless they are characterized as impermissibly protectionist and thereby per se invalid).

41. *See infra* note 80 and accompanying text (outlining the dormancy doctrine's application and explaining that state regulations that discriminate against interstate commerce face a virtually per se rule of invalidity).

approach to dormancy challenges, Part V examines the Court's application of the doctrine in the context of transportation and roadway regulations. This section aims to give insight into the rubric by which roadway regulations of TNCs may be adjudged, particularly in light of the similar shake-up that TNCs are having on our transportation infrastructure—one akin to that caused by the rapid growth of the highway system and interstate trucking industry. Part VI reviews examples of existing and possibly forthcoming TNC regulations, arguing that while most are justified exercises of state's police powers, others may potentially run afoul of the dormancy doctrine. Recognizing states' interests in regulating TNCs, Part VI also proposes guidance for the formulation of viable regulations that maintain a predictable and fair marketplace for TNC platforms. Part VII will conclude.

II. The Commerce Clause and State Power to Regulate Commerce

Arguably the most far-reaching of the express domestic powers granted to Congress under Article I, § 8 of the Constitution is the power to regulate commerce.[42] The Court gave the commerce power its initial interpretation in *Gibbons v. Ogden*,[43] whereby it outlined the contours of the terms "commerce" and "among the several states."[44] An expansive vision of this grant of federal powers prevailed.[45]

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42. *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the power to regulate commerce among the several states."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3, at 247 (4th ed. 2011) (noting that an exceedingly expansive view of the commerce power has allowed Congress to enact legislation affecting all areas of life, even those that do not obviously appear to be economic or interstate in nature).

43. 22 U.S. 1 (1824).

44. *See id.* at 221–22 (finding a New York licensing requirement for out-of-state operators inconsistent with a congressional act regulating the coasting trade). In *Gibbons*, the Court considered the constitutionality of a New York state law giving individuals the exclusive right to operate steamboats on waters within state jurisdiction while requiring out-of-state boats to pay substantial fees for navigation privileges. *Id.* at 1–3. At issue was whether New York had exercised authority in a realm reserved exclusively to Congress, namely, the regulation of interstate commerce. *Id.* at 26–27. The Court resolved that the New York law was invalid on the ground that the Commerce Clause of the Constitution designated power to Congress to regulate interstate commerce and

Gibbons also gave the Court opportunity to examine whether Congress's power to regulate commerce is exclusive or concurrent with that of the states.[46] Although the case was resolved on Supremacy Clause[47] grounds, Justice Marshall considered whether state inspection laws that had an effect on interstate commerce were constitutional.[48] In delineating the nature of the commerce power, Justice Marshall resolved that such state regulation constituted an acceptable exercise of state police power as opposed to an impermissible exercise of the national power over interstate commerce.[49] Although this distinction was useful for recognizing acceptable exercises of state police powers, it left unresolved the issue of how to know when a state law does not comport with the national commerce power and the effect therefrom.[50]

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that the broad definition of commerce included navigation and other forms of commercial intercourse that is "intermingled with" the states. *Id.* at 189–90.

45. *See id.* at 196–97 ("This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed in the Constitution.").

46. *See id.* at 13–20 (examining whether the Constitution and its framers intended for "the States [to] have a concurrent power with Congress, of regulating commerce").

47. *See* U.S. CONST. art. VI, cl. 2 (stating that the Constitution and federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); *Gibbons*, 22 U.S. at 210 (declaring that "the acts of New York must yield to the law of Congress . . . .").

48. *See Gibbons*, 22 U.S. at 61–62 (examining whether such state laws, having a tangible effect on and amounting to a regulation of interstate commerce, can be executed in light of Congress's absolute power to regulate commerce among the states).

49. *See id.*

> These restrictions imply, that the general power to regulate commerce, is concurrently in the States, and that it may be exercised by the States in all cases to which these prohibitions do not extend. But, the same implication is still stronger from the nature and terms of those prohibitory clauses. The State may lay duties on imports and exports, to execute its *inspection laws*. That class of laws are, or may be, essential regulations of commerce, and they derive their authority altogether from State power. The existence of a power to pass them, is, therefore, expressly recognised by the constitution.

50. *See id.* (supplying guidance for when regulations may be characterized as exercises of a state's police powers).

Gibbons did not afford Justice Marshall a full opportunity to pass judgment on the existence of an implied negative aspect of the Commerce Clause, but Marshall did opine that there was "great force" in the argument for it.[51] Marshall did not hesitate to note that a state law could be "repugnant to the power to regulate commerce in its dormant state."[52] In 1849, however, the Court held "a state's action violative of the Commerce Clause" for the first time despite "the absence of a relevant federal statute."[53] Cementing this view of the Commerce Clause's breadth, the Court proclaimed that the grant of the commerce power in and of itself prohibited certain state legislation by rendering congressional power "exclusive" over "subjects . . . in their nature national."[54]

III. The Dormant Commerce Clause as a Limit on State Regulation of Commerce

The dormant Commerce Clause is the idea that courts may invalidate state laws for running afoul of the Commerce Clause or the limiting principles implied from it.[55] As illustrated above, the Supreme Court has interpreted the grant of power to Congress in Article I, § 8—to regulate commerce among the states—as implying a "dormant" or negative aspect, thereby limiting the ability of states to either "discriminate against"[56] or impose an "undue burden"[57] on interstate commerce.[58] This legal

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51. *Gibbons*, 22 U.S. at 209; *see also id.* at 227 (Johnson, J., concurring) (recognizing the dormant Commerce Clause principle by maintaining that Congress's power to regulate interstate commerce "must be exclusive").

52. *See* Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) (expounding on the contours of the of the commerce power after *Gibbons*).

53. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–4, at 1047 n.6 (3d ed. 2000) (discussing *The Passenger Cases*, 48 U.S. 283 (1849), in which the Court struck down charges on ship masters arriving from out-of-state ports to defray potential costs associated with incoming passengers).

54. Cooley v. Board of Wardens, 53 U.S. 299, 319 (1851).

55. *See* DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 209 (2004) (articulating the dormant Commerce Clause in its most simple formulation).

56. City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

57. Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951).

58. *See* Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1852) (declaring that

doctrine serves as a self-executing limitation on state power to regulate interstate commerce and is held to apply even when Congress has *not* acted or no preemption is found.[59] Although the dormant Commerce Clause has its opponents,[60] it is a centuries-old,[61] deeply ingrained doctrine,[62] showing no signs of fading from our constitutional tradition.[63] Recognized as one of the most

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the grant of the commerce power to Congress in and of itself precluded certain types of state lawmaking, for congressional power was deemed "exclusive" as to "subjects . . . in their nature national"), *overruled on other grounds*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

59. *See* BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.01 (1999) (maintaining that the Supreme Court "has fashioned a self-executing Commerce Clause, which, when applicable, prohibits state regulatory action even when Congress has not acted"); CHEMERINSKY, *supra* note 42, § 5.3, at 430 (noting that the restriction on state and local governments from passing unduly burdensome or protectionist laws applies even in the absence of a conflict between state and federal statutes); Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (maintaining that the Commerce Clause itself is "a limitation upon state power even without congressional implementation").

60. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 611 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., dissenting) (stating that "the negative commerce clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does not appear in the Constitution"); *see also* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 573 (1987) (contending that the dormant Commerce Clause "lacks any basis in constitutional democratic theory," and that the task of regulating commerce and invalidating state laws should not be left to an unelected federal judiciary).

61. *See* Gibbons v. Ogden, 22 U.S. 1, 199–200 (1824) (defining broadly the scope of Congress's power under the Commerce Clause to include an independent limit on state power, even where Congress has not acted).

62. *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 768 (1944)

> [It is] accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

63. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 435 ("The dormant commerce clause, of course, is firmly established and has been a part of constitutional law for almost two centuries."). As space prohibits a thorough examination and defense of the doctrine's foundations, this Note takes the dormant Commerce Clause as a given—"a doctrinal fact of life that the Court is unlikely to repudiate." Brannon P. Denning, *The Maine Rx Prescription Drug Plan and the*

important implied limits on state power, the Court's use of the doctrine has time and again put the brakes on the forces of localism that threaten the "retarding and Balkanizing [of] American commerce, trade, and industry."[64]

The doctrine has numerous justifications, but the central rationale is that "[t]he Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[65] Pointing out that impediments to interstate commerce are likely to harm the overall economy, Professor Donald Regan notes that "protectionism [by states] is inefficient because it diverts business away from presumptively low-cost producers without any colorable justification in terms of a benefit that deserves approval from the point of view of the nation as a whole."[66] Justice Kennedy reiterated the doctrine's importance to our Constitutional forefather's vision of government by repeating that "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[67] Positing that states and their citizens should not be harmed by laws in other states where they lack political representation, the doctrine maintains that the national economy is better off if state and local laws impeding interstate

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Dormant Commerce Clause Doctrine: The Case of the Missing Link[Age], 29 AM. J.L. & MED. 7 n.3 (2003).

64. Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring); *see* Redish & Nugent, *supra* note 60, at 574–75 ("[T]he Court, relying on the clause, has invalidated state licensing requirements, train length restrictions, mudguard requirements, truck length prohibitions, and various produce regulations." (citations omitted)).

65. Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935).

66. Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1118 (1986); *see* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 794–808 (2001) (arguing that primary purpose of the dormant Commerce Clause is to combat the trade protectionism that can result from decentralized regulation by individual states).

67. *See* C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (quoting THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

commerce are invalidated.[68] All of these justifications serve to emphasize that states' obstructions to interstate commerce and discrimination against those from other states frustrate the goal of maintaining a federal common market for goods and services.[69]

IV. Setting a Standard of Review for Dormant Commerce Clause Challenges

A. Initial Speed Bumps

Notwithstanding the doctrine's enshrinement in our constitutional jurisprudence, the Court has struggled to outline clearly the scope and application of the dormant Commerce Clause doctrine as well as how aggressively courts should scrutinize state and local laws.[70] Consistency has never been the hallmark of adjudication in this area of the law, and "no conceptual approach identifies all of the factors that may bear on a particular case."[71] After giving life to the doctrine in *Gibbons*, and to provide predictability for lawmakers and regulators, the Court attempted to draw rigid categories of areas where federal law was exclusive and those where states could regulate.[72]

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68. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 432–33 (illuminating the economic and political justifications for the dormant Commerce Clause).

69. *See id.* at 433 (noting that the numerous justifications for the doctrine are not mutually exclusive and instead share a common thread).

70. *See, e.g.*, The Passenger Cases, 48 U.S. 283, 283 (1849) (invalidating a New York law, by a Court split five to four, that required every incoming passenger to pay for the costs of health inspections and treatment, with every Justice writing a separate opinion); COENEN, *supra* note 55, at 209 ("Application . . . [of the doctrine] requires courts to make tough contextual judgments as they work their way through an endless stream of cases involving every imaginable form of state law.").

71. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978); *see also* COENEN, *supra* note 55, at 222 ("This introduction to the dormant Commerce Clause principle reveals . . . its doctrinal complexity. What's more, this summary understates that complexity because the Court sometimes structures its analysis in ways that do not fit neatly within this framework.").

72. *See* DiSanto v. Pennsylvania, 273 U.S. 34, 37 (1927) (distinguishing between state laws that directly interfered with interstate commerce, and thus were invalid, as opposed to those that only had an indirect effect and were permissible); Cooley v. Bd. of Wardens, 53 U.S. 299, 319–20 (1851) (distinguishing between subject matter that is national, in which event state laws are invalidated under the dormant Commerce Clause, and subject matter

Having recognized the difficulties of a formalistic, categorical approach, the Court shifted gears in 1945, moving instead towards an interests-balancing approach for seemingly nondiscriminatory laws, while retaining a categorical approach for those held to be impermissibly protectionist and discriminatory.[73]

B. Towards a Cohesive Analytic Framework: Incorporating an Interests-Balancing Approach

The Court's modern approach to dormant Commerce Clause challenges is no longer based on rigid categories—national versus local subject matter, and direct versus indirect interference—but rather on courts balancing the benefits of a law against the burdens that it imposes on interstate commerce.[74] The Court emphasized that dormant Commerce Clause analysis must turn on "the relative weights of the state and national interests involved."[75] Recognizing the fact-sensitive nature of determining whether a statute has violated the dormancy doctrine, one apt commentator and advocate of the Court's balancing approach pointed out that "[o]nly by an evaluation of all the facts and circumstances can such an issue be decided by the Court."[76]

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that is local, in which event state laws are allowed); *Gibbons*, 22 U.S. at 199–200 (1824) (drawing a distinction between a state's exercise of its police power and a state exercising the federal power over commerce).

73. *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945)

> Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such [as to make the law permissible].

74. The origin of this modern approach is generally credited to the scholarship of Noel Dowling. *See* Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 21–24 (1940) (advocating for what has become the modern balancing approach).

75. *S. Pac. Co.*, 325 U.S. at 770.

76. Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, *in* SELECTED ESSAYS ON CONSTITUTIONAL LAW: 1938–1962, at 280, 290. Dowling illustrated:

> Discrimination is a delusively simple term. How overreaching must a state measure be to merit condemnation as discriminatory? It seems apparent that in answering this question the Court must make the

Although this balancing approach afforded courts great discretion in weighing a law's burden on interstate commerce against its putative benefits to the state or local government, the Court has since delineated a predictable framework for ad hoc balancing[77] that involves a two-tiered structure for analyzing dormant Commerce Clause challenges.[78]

First, the Court asks whether the law, either on its face or in purpose or effect, discriminates against interstate commerce or out-of-state commercial actors.[79] Laws that do are subject to a per se presumption of invalidity[80] and are sustained only upon a

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> same sort of value judgment that it has been making in performing its broader protective function. Discrimination exists or not, depending upon whether there is an economic justification for the difference in treatment which the state accords interstate commerce.

Id. at 290.

77. *See* COENEN, supra note 55, at 220 ("The Court's many modern decisions set out an overarching structure . . . for evaluating dormant Commerce Clause cases."). *But see id.* at 222 (pointing out that the Court, at times, combines *Pike* balancing and extra-territoriality analysis, reverts to *Cooley's* local-versus-national rhetoric or combines terminology and tests from its older jurisprudence); CHEMERINSKY, *supra* note 42, § 5.3, at 440 (maintaining that the way in which the Court balances is not the same in all dormant Commerce Clause cases).

78. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 441 (explaining the two-tiered structure of analyzing dormant Commerce Clause challenges); Will Sears, *Full-Impact Regulations and the Dormant Commerce Clause*, 39 COLUM. J. ENVTL. L. 157, 162 (2014) (noting that courts employ this approach to distinguish between regulations that directly or purposefully discriminate against interstate commerce and facially neutral regulations that indirectly burden interstate commerce). There are, however, exceptions to the dormant commerce clause—situations where laws otherwise violative of the doctrine are permissible. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 431 (noting the Congressional approval exception and "the market participation exception"). Neither of these exceptions is relevant in this context because Congress has not approved any of these state or local actions, and state and local governments have not sought to favor their "own citizens in receiving benefits from state and local governments or in dealing with government-owned businesses." *Id.* at 431–32.

79. *See* COENEN, *supra* note 55, at 224 ("The core of the modern dormant Commerce Clause principle lies in its prohibition of state laws that discriminate against interstate commerce."); *e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977) (analyzing whether the challenged statute had a discriminatory effect on interstate sales in order to approximate the appropriate legal standard).

80. *See* Granholm v. Heald, 544 U.S. 460, 476 (2005) ("State laws that discriminate against interstate commerce face a virtually per se rule of invalidity.").

showing by the state that the law serves an important local purpose and less discriminatory alternatives do not exist.[81] Laws aiming to regulate commerce extraterritorially are similarly suspect under this strict per se rule.[82]

If, on the other hand, the law is deemed nondiscriminatory towards out-of-staters, then a simple balancing test is used.[83] This balancing approach weighs "the law's burdens on interstate commerce against its benefits."[84] If the law's burden is "clearly excessive" in relation to its "putative local benefits," it will be found unconstitutional.[85] In contrast to discriminatory laws, those deemed nondiscriminatory are presumptively valid and afforded deference.[86] This category is typically comprised of laws enacted pursuant to a state's police powers, aiming to safeguard local health and safety.[87] The Court's modern interests-balancing approach, outlined in *Pike v. Bruce Church, Inc.*,[88] is ordinarily used to evaluate the constitutionality of such regulations.[89]

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81. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 440 ("[T]he law . . . will be upheld only if it is necessary to achieve an important purpose.").

82. *See, e.g.*, Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986) ("New York's liquor affirmation statute . . . regulates out-of-state transactions in violation of the Commerce Clause.").

83. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 448 (explaining that local laws treating all alike, regardless of residence, are subject to a balancing test).

84. *Id.*

85. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

86. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 440 (noting that if the law is nondiscriminatory, then the presumption is in favor of upholding the law).

87. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 440 (explaining that laws enacted pursuant to a state's police powers are typically afforded deference, especially if they don't expressly aim to regulate commerce).

88. *See* 397 U.S. 137, 145–46 (1970) (concluding that the burden placed on interstate commerce by Arizona's state-of-origin packaging law is unconstitutional because Arizona's interest in identifying the origin of cantaloupes is outweighed by the heavy cost of building and operating a packing plant in Arizona). In *Pike*, the Court considered the constitutionality of a provision of the Arizona Fruit and Vegetable Standardization Act which prohibited interstate shipment of cantaloupes not packed in regular compact arrangements in closed standard containers. *Id.* at 138. Pike, the Arizona official in charge of enforcing the law, issued an order prohibiting a cantaloupe farming company from transporting uncrated cantaloupes from their Arizona ranch to a California packing and processing plant. *Id.* The Court maintained that a neutral statute with a legitimate purpose will be upheld unless the burden imposed on such commerce exceeds the putative local benefits. *Id.* at 142. Applying this test to the Arizona statute, the Court found it

C. Pike v. Bruce Church, Inc.*: The Court's Modern Balancing Approach*

Pike indicated that, "[w]here the statute regulates even-handedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[90] As summarized by Russell Chapin, the *Pike* balancing test should work as follows:[91] "As a threshold matter there is an inquiry as to whether the state interest is 'legitimate' (that is, not protectionist), and whether the regulation's effect on interstate commerce is 'incidental' (that is, regulation of interstate commerce is not the overriding state interest)."[92] A prima facie case to overturn the regulation can be made by showing discriminatory intent; that the regulation substantially burdens interstate commerce; or that the regulation burdens out-of-state interests more than it benefits in-state interests.[93] In response, the state must prove that "the regulation substantially serves legitimate local interests and that its burden on interstate commerce is justified by the claimed local benefit."[94] The state must also show that the incidental burden that the regulation has on interstate commerce regulation "is the least burdensome alternative."[95] To date, however, no

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unconstitutional given that the State's interest in promoting and preserving the reputation of Arizona growers was not important enough to justify the burden on interstate commerce prohibiting deceptive packaging imposed. *Id.* at 145.

89. *See* Russell f, Chadha, Garcia and the Dormant Commerce Clause Limitation on State Authority to Regulate, 23 URB. LAW. 163, 168 (1991) (outlining and summarizing the threshold questions and characterizations for dormant Commerce Clause analysis).

90. *Pike*, 397 U.S. at 142.

91. *See* Chapin, *supra* note 89, at 168 (detailing the analytical framework for dormant Commerce Clause analysis).

92. *Id.*

93. *See id.* (explaining how challengers can make a prima facie case that the dormancy doctrine has been violated when the *Pike* balancing test is used).

94. *Id.*

95. *Id.*; *see* CHEMERINSKY, *supra* note 42, § 5.3, at 451 (noting that the Court "generally includes a 'least restrictive alternative' component"); Minnesota v. Clover Leaf Creamery Co., 449 U.S 456, 473 (1981) (finding a recycling law constitutional because less commerce-burdening activities were unavailing).

nondiscriminatory state law has been invalidated on the ground that its goal could be achieved by means less burdensome on interstate commerce.[96]

As a consequence of the deference afforded to laws that appear tied to a state's police power, health and safety laws are typically invalidated only upon showing that the law's burdens on interstate commerce clearly outweigh its benefits.[97] But notably, the deferential *Pike* balancing is not without teeth.[98] Notwithstanding the Court's vacillations on the vigor with which it would invoke the doctrine, it has made it abundantly clear, particularly in the context of laws regulating key channels of interstate commerce, that "[the] Court, and not the state legislature, is . . . the final arbiter of the competing demands of state and national interest."[99]

1. A Difficult Threshold Question

Given the consequences of characterizing a state's purpose as either discriminatory or legitimate, addressing this threshold matter is critical in assessing the validity of a state regulation.[100] Unsurprisingly, difficulties arise in identifying whether the state law has a discriminatory purpose.[101] Facially nondiscriminatory

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96. *See* CHEMERINSKY, *supra* note 42, § 5.3, at 451 (noting that laws found violative of the dormancy principle based on the existence of a less restrictive alternative all involved discrimination).

97. *See Pike*, 397 U.S. at 142

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

98. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (recognizing that even statutes that regulate evenhandedly may fall victim to the dormancy doctrine).

99. S. Pac. Co. v. Arizona, 325 U.S. 761, 768 (1944).

100. *See supra* notes 80–89 and accompanying text (noting that discriminatory regulations receive a practically fatal variety of strict scrutiny whereas neutral regulations based on legitimate state interests receive deferential review).

101. *See* COENEN, *supra* note 55, at 240 (noting that three questions arise: "(1) What is a discriminatory purpose?; (2) How should courts go about the business of characterizing state purposes?; and (3) How does one prove that an

statutes preceded by preambles indicating a purpose to bolter a state's economic advantages while neutralizing out-of-state competition are few and far between.[102] The vast majority of cases are thornier, as not all regulations with an economic purpose are protectionist or discriminatory.[103] Many state laws that "guard against road wear, unfair trade practices, monopolization, and even theft have economic purposes entirely proper for states to pursue."[104]

An analogous issue is that of "*characteriz*[*ing*] the purpose with which the legislature has acted."[105] Looking past the state's purported safety justification, the Court in *Buck v. Kuykendall*[106] found that the "state's refusal to license the operation of a Portland-to-Seattle 'auto stage line' on the ground that the route applied for was already adequately served was impermissible."[107] The characterization of this regulation as discriminatory amounted to its violation of the dormancy principle. The primary purpose was not "regulation with a view to safety or to conservation of the highways, but the prohibition of competition."[108]

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allegedly improper purpose was the actual purpose that drove the government's decision?").

102. *See id.* (noting that it is easy to detect discrimination in cases where there is a "smoking gun," such as a near candid admission that the purpose of a law is to keep foreign goods out or to insulate local industry from competition); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (insisting that the courts must look beyond "the rare instance where the state artlessly discloses an avowed purpose to discriminate against interstate goods").

103. *See, e.g.*, Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 187–88 (1950) (explaining that a state's price-fixing of natural gas extracted in the state to curtail demand was not marked by a discriminatory purpose by reasoning that the law limited gas sales "whether destined for interstate or intrastate consumers" in a way reasonably tailored to conserving a scarce resource).

104. COENEN, *supra* note 55, at 242. *But see* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 526, 535 (1949) (endorsing broad state authority to protect the "health and safety" of residents but finding fault with license denial that would "protect and advance local economic interests").

105. COENEN, *supra* note 55, at 242

106. 267 U.S. 307 (1925).

107. COENEN, *supra* note 55, at 242.

108. *Buck*, 267 U.S. at 315.

V. The Transportation Cases

Although courts afford great deference to state regulations in the field of highway safety as challengers must overcome a "strong presumption of validity,"[109] the Supreme Court has established that maintaining a cohesive and unburdened national highway network is a substantial countervailing interest.[110] Particularly in transportation cases, the Court has shown a greater inclination to do more under the dormant Commerce Clause than merely suppress state protectionism.[111] Viewing an effective transportation network as essential to promoting a federal common market for goods and services, the Court often has not afforded ordinary *Pike* deference to challenged nondiscriminatory regulations.[112] Taking the transportation cases as a whole, it appears that a "specialized version of the *Pike* balancing test [emerges] in highway safety (or perhaps all safety) cases."[113]

*A. Interests-Balancing in Pre-*Pike *Transportation Cases*

Though the Court initially "sounded a theme of deference"[114] towards safety-oriented transportation regulations, the Court

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109. Lisa J. Petricone, *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443, 448–49 (1987).

110. *See* Regan, *supra* note 66, at 1177 (noting that there is a national interest in the existence of an effective transportation network linking the states, which is as essential to genuine political union as the suppression of protectionism).

111. *See id.* at 1182 (insisting that the Court appears to go beyond merely suppressing protectionism in transportation cases more often than it does in movement-of-goods cases); *infra* Part V.B (noting that the Court has critically examined commerce-burdening legislation aimed at regulating critical channels and instrumentalities of interstate commerce).

112. *See* Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) (noting that the doctrine has served to retard the Balkanization of "American commerce, trade, and industry"); Regan, *supra* note 66, at 1184 (indicating reasons for the special importance of an effective transportation network).

113. *See id.* at 1177 (delineating the recognized strong interest in maintaining an unburdened national transportation infrastructure).

114. COENEN, *supra* note 55, at 256; *see* South Carolina State Highway Dep't v. Barnwell Bros. Inc., 303 U.S. 177, 192 (1938) (upholding a vehicle weight and

soon shifted gears in the seminal pre-*Pike* case of *Southern Pacific Co. v. Arizona*.[115] "Using a balancing methodology to invalidate a facially neutral Arizona train-length law,"[116] the Court laid the foundation for ad hoc balancing in the transportation context.[117] Unlike in past examinations of transportation regulations enacted in the name of public safety,[118] the Court closely scrutinized all of the pertinent consequences of the state regulation alongside its intersection with the regulations of neighboring states.[119]

The Court began its examination of the challenged regulation by proceeding to outline the countervailing state and federal interests.[120] First analyzing the federal-interest side of the balance, the Court maintained that there was "no doubt that the Arizona Train Limit Law impose[d] a serious burden . . . on interstate commerce."[121] Acknowledging that Arizona was one of only two states limiting freight trains to seventy cars and stood

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width limit upon finding a "rational basis" for the state's judgment that its regulations reduced highway accidents).

115. 325 U.S. 761 (1945); *see supra* notes 73–76 and accompanying text (noting the Supreme Court's shift towards an interests-balancing approach in the context of safety-oriented regulations).

116. COENEN, *supra* note 55, at 257. "Train length" refers to the number of cars in length that a train is permitted to be. *See S. Pac. Co.*, 325 U.S. at 771–72 (defining "train length").

117. *See supra* note 73 and accompanying text (explaining that *Southern Pacific Co. v. Arizona* signaled a shift towards an interests-balancing approach for dormant Commerce Clause challenges); *see also* Bibb v. Navajo Freight Lines, Inc., 358 U.S. 520, 529 (1959) (concluding that an Illinois statute requiring use of contour rear fender mudguards on trucks and trailers operated on state highways, rather than customary straight mudguards, though a nondiscriminatory local safety measure, placed an unconstitutional burden on interstate commerce).

118. *See Barnwell Bros. Inc.*, 303 U.S. at 192 (affording deference to South Carolina's motor vehicle width and weight limits upon deeming it sufficient that there was a "rational basis" for the state's judgment that its regulations improved highway safety); Bradley v. Pub. Util. Comm'n, 289 U.S. 92, 94–98 (1933) (acceding to Ohio's refusal to authorize a new motorized common-carrier service between Cleveland and western Michigan by proceeding with a cautious balancing analysis).

119. *See S. Pac. Co.*, 325 U.S. at 773–79 (examining closely the practical effects that the regulation would have on interstate commerce).

120. *See id.* at 773 (evaluating the competing interests in regulating train length in this context).

121. *Id.*

alone in limiting passenger trains to fourteen cars, the Court intimated that Arizona's law was significantly out of step with other states' regulations.[122] An inevitable consequence of the law would be significant cost increases for carriers, requiring either the breaking up of long trains upon entrance into Arizona or rerouting them altogether to avoid entry into the state.[123] In evaluating the resulting burden on interstate, the Court noted that the regulation cost the Southern Pacific company alone about one million dollars per year; that 95% percent of Arizona's rail traffic was interstate in nature; that the law effectively controlled "train operations beyond the boundaries of the state" by requiring train reconfiguration as far away as Los Angeles, California and El Paso, Texas; and that the cross-border deliveries would almost certainly face delays.[124]

On the state-interest side of the balance, the Court took note of the trial court's findings "that the Arizona law had no reasonable relation to safety" and in fact "made train operation more dangerous."[125] Although the Arizona Supreme Court had not accepted these factual determinations, the U.S. Supreme Court was persuaded that any safety advantage gained by shortening trains was effectively "offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced."[126] The Court deemed it significant that the primary safety problems associated with long trains—so-called slack-action accidents—were "relatively the same" in Arizona as in Nevada, which handled "substantially the same amount of traffic" without regulating train lengths at all.[127]

The Court distinguished earlier cases upholding state laws that required locomotive headlights and full train crews both because those laws genuinely "removed or reduced safety hazards" and because they created no substantial interference

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122. *See id.* (noting that Arizona's regulation was inconsistent with the approach that the vast majority of states had taken).

123. *See id.* (accounting for the economic consequences that such a regulation would have on carriers).

124. *See id.* at 775 (noting the commerce-burdening practical realities resulting from the regulation).

125. *Id.*

126. *Id.*

127. *Id.* at 778.

with the interstate movement of trains.[128] In a similar vein, the Court distinguished *Barnwell* not only because it involved government-maintained highways but also because its stringent width and weight rules fell on intrastate and interstate truckers alike.[129] In contrast, as Chief Justice Stone explained in *Southern Pacific*, "the burden of [Arizona's train-length] regulation falls on interests outside the state" so that it was "unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."[130]

The Court in *Southern Pacific* emphasized that a state could not avoid the restraints of the dormant Commerce Clause by "simply invoking the convenient apologetics of the police power."[131] Rather, "the decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight and problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it."[132] The Arizona train law flunked this test because it generated "at most a slight and dubious" safety advantage while "preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency."[133]

In *Bibb v. Navajo Freight Lines, Inc.*,[134] the court utilized the same balancing approach to strike down an Illinois law requiring all commercial trucks operating in the state to be equipped with a certain type of mudguard.[135] Just as in *Southern Pacific*, there was no federal regulation on this point, but "straight" mudguards were the industry standard and "legal in at least 45 States."[136] Illinois maintained that curved mudguards were more effective in

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128. *Id.* at 779.

129. *See id.* at 765 n.2 (explaining that the burden of Arizona's regulation fell almost entirely on interests outside the state).

130. *Id.* at 765 n.2.

131. *Id.* at 780.

132. *Id.* at 775–76.

133. *Id.* at 779.

134. 359 U.S. 520 (1959).

135. *See id.* at 529 (invalidating an Illinois law requiring trucks to use "contour" mudguards whilst almost all states authorized—and in some instances mandated—the use of "straight" mudguards).

136. *Id.* at 523.

preventing stones and debris from being kicked up from the back of trucks, thereby having greater potential to reduce accidents resulting therefrom.[137] For trucking companies moving goods through Illinois the practical effect would be to require drivers to use one type of mudguards when traveling through Illinois, and another while in other states—or switch to curved mudguards altogether.[138] Unlike in *Southern Pacific*, the Court was unanimous in finding the statute unconstitutional.[139]

While acknowledging that state "safety measures carry a strong presumption of validity,"[140] the Court found the alleged benefits in increased safety were outweighed by the heavy burden on interstate commerce resulting from out-of-state truck drivers having to stop at the Illinois border to change mudguards.[141] Courts typically refused to pass judgment on the best way to achieve safety objectives, as policy decisions in this field are "for the state legislature, absent federal entry . . . ."[142] But, if the "total effect of a law as a safety measure in reducing accidents and casualties" does not outweigh the "national interest in keeping interstate commerce free from interferences which seriously impede it," the law may run afoul of the dormancy doctrine.[143]

Southern Pacific and *Bibb* laid the groundwork for the Court's subsequent application of the *Pike* balancing test in the transportation context, formalizing the analytic framework for evaluating nondiscriminatory regulations enacted in furtherance of local health and safety.

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137. *See id.* at 525 ("Illinois introduced evidence seeking to establish that contour mudguards had a decided safety factor in that they prevented the throwing of debris into the faces of drivers of passing cars and into the windshields of a following vehicle.").

138. *See id.* at 524 (noting the substantial burden and potential extraterritorial effect that this regulation would have on interstate commerce).

139. *See id.* at 520 (establishing that all the Justices agreed with Justice Douglas's reasoning and the Court's result).

140. *Id.*

141. *See id.* at 530 ("[T]he heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations.").

142. *Id.* at 524.

143. *Id.*

B. Pike *Interests-Balancing in the Trucking Cases*

Despite originally stating a reluctance to use the Commerce Clause to invalidate state regulations in the field of safety,[144] the Court struck down two nondiscriminatory statutes enacted in the name of regulating highway safety shortly after announcing the *Pike* balancing test.[145] Because the existence of a legitimate state interest in regulating transportation on municipal roads and interstate highways in furtherance of public safety is rarely in dispute, the Court has instead focused its attention on scrutinizing the rational relationship between the state objective and the regulation.[146] This approach to balancing in the transportation safety context was evident in *Raymond Motor Transportation, Inc. v. Rice*[147]—the first case in which a nondiscriminatory motor-vehicle law was invalidated using the *Pike* test.[148]

At issue in *Raymond* was whether Wisconsin regulations "governing the length and configuration of trucks that may be operated within the State" violate the dormant Commerce Clause.[149] Of particular relevance was a Wisconsin statute setting a limit of fifty-five-feet "on the overall length of a vehicle pulling one trailer" and prohibiting double-trailer trucks.[150] The Court ultimately ruled that the regulation violated the dormancy doctrine because its contribution to highway safety was no more

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144. *See Barnwell Bros.*, 303 U.S. at 190–91 (affording deference to a regulation enacted pursuant to a state's police powers).

145. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981) (finding an Iowa statute prohibiting the use of sixty-five-foot double trailer trucks within its borders unconstitutional); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978) (finding a Wisconsin regulation barring trucks longer than 55 feet from traveling on state highways without a permit to be unconstitutional).

146. *See, e.g.*, *Kassel*, 450 U.S. at 680–81 (Brennan, J., concurring) ("It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.").

147. 434 U.S. 429 (1978).

148. *See id.* at 447 (finding a Wisconsin statute limiting truck lengths to fifty-five feet violative of the dormancy doctrine).

149. *Id.* at 430.

150. *Id.* at 432.

than "speculative," while the burden it placed on interstate commerce was substantial.[151] *Raymond* was of limited precedential value,[152] however, because Wisconsin offered practically no evidence indicating that the longer trucks were less safe.[153] Additionally, the state offered no response to the challengers' contention that exclusion of sixty-five-foot "doubles" would significantly burden interstate commerce.[154] Less than three years later, the Court took notice of a nearly identical statute, but this time it was supported with substantial legislative findings on its local safety benefits.[155]

In *Kassel v. Consolidated Freightways Corp.*,[156] the Court again considered whether a truck-length limitation was an unreasonable safety measure in contravention of the dormant Commerce Clause.[157] Iowa, unlike all its neighboring states, prohibited sixty-five-foot "double" trucks within its borders, maintaining that this was a purely local regulation concerning roadway safety.[158] Although Iowa did offer some evidence of a safety justification,[159] the Court was unwilling to defer to Iowa's legislature that the statute furthered roadway safety—instead maintaining that the "illusory" safety justification unduly

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151. *See id.* at 447 (indicating that the balance tipped significantly in favor of invalidating the regulations).

152. *See id.* at 447 ("Our holding is a narrow one, for we do not decide whether laws of other States restricting the operation of trucks over 55 feet . . . would be upheld if the evidence . . . were not so overwhelmingly one-sided as in this case.")

153. *See id.* at 448 ("Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety.").

154. *See id.* at 445 (noting that the regulations were shown, "without contradiction," to "impose a substantial burden on the interstate movement of goods").

155. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671–72 (1981) ("Iowa [has] made a more serious effort to support the safety rationale of its law than did Wisconsin in *Raymond*, but its efforts was no more persuasive.").

156. 450 U.S. 662 (1981).

157. *See id.* at 664 (analyzing whether Iowa's prohibition of certain large trucks within the State unconstitutionally burdened interstate commerce).

158. *See id.* at 665 (noting that all other Western and Midwestern States authorized the sixty-five-foot doubles that Iowa sought to exclude).

159. *See id.* at 672 (noting that Iowa pointed to three ways in which the fifty-five-foot singles were "arguably superior: singles take less time to be passed and to clear intersections; they may back up for longer distances; and they are somewhat less likely to jackknife").

burdened interstate commerce.[160] Revealing an intention to apply a more rigorous version of rational basis review, the Court maintained that Iowa failed to produce any persuasive evidence that sixty-five-foot trucks are less safe than fifty-five-foot trucks.[161] The Court made clear that "[r]egulations designed for that salutary purpose [(safety)] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."[162]

Justice Powell's plurality opinion in *Kassel*, weighing the asserted safety purpose against the degree of interference with interstate commerce, has come to be "considered the standard of review for highway safety regulations challenged under the Commerce Clause."[163] Willing to second-guess legislative judgments in the field of safety, Powell's approach has informed the Court's subsequent treatment of municipal and state highway safety regulations.[164] Safety benefits deemed "demonstrably trivial,"[165] "illusory, insubstantial, or nonexistent,"[166] would be jettisoned, although it was unclear how closely the Court intended to scrutinize numerical cutoffs that necessarily arise in lawmaking.[167] *Kassel's* modified *Pike* approach to roadway regulations will likely be used by courts to evaluate nondiscriminatory TNC regulations enacted in furtherance of public health and safety.[168]

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160. *See id.* at 671–75 (reasoning that the law could actually increase costs and accidents as shippers would travel additional miles to circumvent Iowa or be compelled to use more trucks to transport goods through the state).

161. *See id.* at 671 (finding support in the record that the sixty-five-foot doubles were just as safe as the fifty-five-foot singles and sixty-foot doubles that Iowa law permitted.)

162. *Id.* at 670; *see id.* at 671 (concluding that an Iowa statute limiting truck-length violated the dormant Commerce Clause).

163. Petricone, *supra* note 109, at 449.

164. *See* COENEN, *supra* note 56, at 265 (noting that all of the Justices in *Kassel* agreed that "claimed safety justifications will not always support validation of commerce-burdening legislation").

165. *Kassel*, 450 U.S. at 697 n.8 (Rehnquist, J., dissenting).

166. *Kassel*, 450 U.S. at 681 n.1 (Brennan, J., concurring).

167. *See id.* at 697 (Rehnquist, J., dissenting) (arguing that numerical cutoffs generally incorporate a degree of arbitrariness and that "[l]ines drawn for safety purposes will rarely pass muster if the question is whether a slight increment can be permitted without sacrificing safety").

168. *See* Petricone, *supra* note 109, at 448 (stating that *Kassel* is "generally

Although the "4-2-3" decision in *Kassel* did reveal differences of opinion among the Justices, they all agreed that "claimed safety justifications will not always support validation of commerce-burdening legislation."[169] Justice Brennan, joined by Justice Marshall, concurred in the judgment that the Iowa law offended the dormancy doctrine.[170] In Justice Brennan's view, however, judicial second-guessing of legislative judgments "in the field of safety" is unwarranted and was unnecessary in the instant case.[171] Finding sufficient evidence that the law amounted to thinly veiled protectionism, Justice Brennan reasoned that the problem with the law lay in its impermissibly discriminatory purpose.[172] This difference in approach stemmed from the Justices' differing characterizations of the statute's purpose; namely, whether it was patently protectionist or aimed towards promoting local health and safety.[173] Occasionally, both motivations can be gleaned from a particular regulation.[174] But where an impermissibly discriminatory purpose cannot be unequivocally established, courts may nevertheless succumb to suspicions that a state's true purpose is self-serving, as seemed to be the case in *Kassel*.[175] Such considerations may color courts'

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considered the standard of review for highway safety regulations challenged under the commerce clause").

169. COENEN, *supra* note 55, at 264.

170. *See Kassel*, 450 U.S. at 679, 686 (Brennan, J., concurring) (viewing the same considerations that dictated the holding in *Raymond* as requiring invalidation of Iowa's regulation prohibiting sixty-five-foot doubles).

171. *Id.* at 680–81 n.1.

172. *See Kassel*, 450 U.S. at 686 (Brennan, J., concurring) (deeming the dormancy doctrine to proscribe protectionism by way of imposing undue financial and safety costs of road use on other states).

173. *See supra* Part IV.C (discussing the consequences of characterizing a regulation as either discriminatory and thereby presumptively invalid, or nondiscriminatory, subject instead to a *Pike* balancing test).

174. *Compare Kassel*, 450 U.S. at 670 (viewing Iowa's highway safety regulations as an effort to govern a matter of local concern), *with Kassel*, 450 U.S. at 681–85 (Brennan, J. concurring) (noting that by seeking to "discourage interstate traffic" on its highways, Iowa's regulation had "nothing to do with these purported [safety] differences" and were instead "*protectionist* in nature").

175. *See Kassel*, 450 U.S. at 685 (Brennan, J., concurring) (noting that while the majority opinion recognized "that the State's actual purpose in maintaining the truck-length regulation was 'to limit the use of its highways by deflecting some through traffic,'" it failed "to recognize that this purpose, being *protectionist* in nature, is *impermissible* under the Commerce Clause").

application of the *Pike* balancing test, compelling judges to characterize stated safety interests as "illusory" if "a heavy burden on commerce hangs in the balance."[176]

Most significantly, *Kassel* revealed that the dormant Commerce Clause is "alive and well in the road regulation context."[177] Taken together with *Raymond* and its pre-*Pike* predecessors, the Court demonstrated readiness to invalidate nondiscriminatory commerce-burdening regulations of transportation[178] during an era of rapid growth of the interstate highway system and trucking industry.[179] It is possible that lower courts may undertake a similar posture when faced with evaluating states' responses to the present, albeit unique, shake-up of our transportation infrastructure.[180]

VI. Dormant Commerce Clause Limits to TNC Regulations

A. TNC Regulations Fall Within the Purview of the Commerce Clause

State regulations of TNCs falls under the purview of the commerce clause because they regulate the channels and instrumentalities of interstate commerce as well as actions that substantially affect interstate commerce.[181] By regulating

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176. *See* COENEN, *supra* note 55, at 265 (noting that these factors may lead judges to forego the strong rule of deference in the context of local health and safety regulations).

177. *See id*. at 266.

178. *See supra* Part V (discussing safety-oriented nondiscriminatory transportation regulations found to violate the dormancy doctrine).

179. *See* WENDELL COX & JEAN LOVE, AMERICAN HIGHWAY USERS ALLIANCE, 40 YEARS OF THE US INTERSTATE HIGHWAY SYSTEM: AN ANALYSIS 4 (1996) (noting that following its authorization in 1956, the Interstate Highway System grew rapidly, both in terms of absolute length and in terms of traffic volume—carrying approximately 23% of the market share of all transportation systems).

180. *See* Regan, *supra* note 66, at 1182 (insisting that laws affecting the federal common market by regulating transportation have been subject to greater scrutiny by the Supreme Court than other nondiscriminatory commerce-burdening regulations).

181. *See* Heart of Atl. Motel, Inc. v. United States, 379 U.S. 241, 357 (1964) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (quoting Caminetti v. United States, 242 U.S. 470, 491

highways, airports, and other conduits through which interstate commerce moves—as well as people traveling from one state to another using TNC services—such regulations indisputably impinge on Congress's power to regulate interstate commerce.[182] But as *Gibbons* instructed, it is within the powers reserved to the states to regulate within their territory to improve the safety, health, morals, and general welfare of their inhabitants.[183] The critical inquiry is thus whether certain TNC regulations run afoul of the dormant Commerce Clause's restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce.[184] Given that courts have conferred on individuals injured by state action that violates an aspect of the Commerce Clause the right to sue and obtain injunctive and declaratory relief, it is foreseeable that either TNCs or their users may challenge TNC regulations on dormant Commerce Clause grounds.[185]

B. Challenged TNC Regulations Will Likely be Evaluated Using the Pike *Balancing Test as Modified by* Kassel

The safety of passengers and others on the road are the most frequently cited concerns prompting the regulation of TNCs.[186]

(1917))); United States v. Lopez, 514 U.S. 549, 558–59 (1995) ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." (citation omitted)).

182. *See supra* Part I (discussing the various state and local laws promulgated to regulate TNC operations).

183. *See* Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) (declaring that states' police power "embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health").

184. *See supra* Part IV (discussing the modern framework for analyzing dormant Commerce Clause challenges); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (establishing the modern interests-balancing approach).

185. *See* Dennis v. Higgins, 498 U.S. 439, 443–45 (1991) (granting individuals the right to sue for state violations of the Commerce Clause under 28 U.S.C. § 1983).

186. *See, e.g.*, Williams, *supra* note 11 (noting that driver use of their phones by way of these app-based softwares in the course of providing ride-for-hire services is not only a violation of the California vehicle code laws, but also poses great and sometimes deadly risk to those on the road); Lien & Mitchell, *supra*

Although certain types of TNC regulations are seemingly violative of the anti-discrimination principle, and thereby presumptively invalid[187]—particularly those emblematic of Washington, D.C.'s original "five times the taxi rate " proposal[188]—the majority of TNC regulations, like most regulations of ride-for-hire services, may be characterized as legitimate exercises of states' police powers.[189] Being enacted in the interest of public health and safety—even if influenced by industry competitors and advocacy groups seeking to veil protectionist motivations[190]—these regulations will likely be evaluated under the *Pike* balancing test as modified by *Kassel* and afforded significant deference as a result.[191] Taken together,

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note 11 (citing the consumer protection lawsuit filed against Uber alleging that this TNC has mislead consumers about the safety of its services and the fairness of its rates).

187. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935) (invalidating a seemingly neutral law declared to be operating like a protective tariff by depriving out-of-state competitors of the opportunity to undersell in-state sellers). Though veiled discrimination may be difficult to prove, the Court has struck down subtle protectionist measures through the use of "analogistic reasoning," declaring that "some laws . . . so closely parallel statutes that concededly violate the Constitution that those laws are likewise subject to judicial invalidation." COENEN, *supra* note 55, at 232; *see* Baldwin, 294 U.S. at 527 (reasoning that because the state had "set up what is equivalent to a rampart of customs duties," the seemingly neutral law was deemed impermissibly discriminatory and thus unconstitutional).

188. *See supra* note 15 and accompanying text (reporting on a proposed Washington, D.C. TNC regulation that would have required Uber sedans to charge a minimum of five times the "drop rate" for taxis in exchange for approval to operate in the District).

189. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 442 (1978) (noting that it is rarely disputed that states have a legitimate interest in regulating motor vehicles using its roads in order to promote highway safety); *supra* Part IV.C (discussing further the regulations promulgated to promote public safety and their potential treatment under the *Pike* balancing test).

190. *See* Ammori *supra* note 5 (mentioning a FTC report finding that many local taxi commissions colluded with and deliberately insulated taxi companies from competition by restricting the number of available license).

191. *See* Chapin, *supra* note 89 and accompanying text (regulations enacted pursuant to a legitimate exercise of state police powers will typically be evaluated under the *Pike* balancing test); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (stating that only regulations clearly excessive in relation to their putative local benefits will be held unconstitutional if they regulate even-handedly in pursuit of a legitimate local interest). *But see supra* note 187 and accompanying text (noting that seemingly neutral laws may be found to operate analogously to impermissibly discriminatory and unduly commerce-burdening

Pike, *Raymond*, and *Kassel* indicate that the Court will evaluate state laws regulating TNCs in the transportation context on a case-by-case basis, "considering the specific evidence as to the safety benefits of the laws compared to their burden on interstate commerce."[192]

C. Evaluations of Existing and Potentially Forthcoming TNC Regulations

What follows below is an examination of archetypical TNC regulations, analyzing both how they might be scrutinized and their potential validity. Although TNCs were originally viewed across the board by states as illegal taxicab operations, or in the case of Uber "Black" as illegitimate charter party carriers, the presently prevailing view is to characterize TNCs as "pre-arranged" transportation providers that require their own classification.[193] The consequences of this characterization are that a state or local government's regulation of TNCs should naturally be viewed in comparison to their regulations of other pre-arranged ride-for-hire providers.[194]

1. Licensing Fees; Vehicle Inspection and Background Check Requirements; and Insurance Policy Requirements; Fare Algorithm Standardization

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regulations).

192. CHEMERINSKY, *supra* note 42, § 5.3, at 453; *see supra* Part V (discussing the approach that the Court used to evaluate safety-oriented regulations in the transportation context).

193. *See* Geron, *supra* note 3 ("The CPUC had previously issued cease and desist rulings against Lyft, SideCar, and Uber, arguing that these companies needed to be licensed, but then reached interim agreements with them to operate."). Ridesharing apps are increasingly coming to be viewed as "pre-arranged" transportation providers and therefore are not considered the same as taxis. *Id.* Had ridesharing companies not come to be considered as pre-arranged transportation providers, they could be considered in the same category as taxis and thus banned outright without dormant Commerce Clause implications on the grounds that they were not complying with established taxi regulations. *Id.*

194. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (requiring even-handedness in the pursuit of legitimate local interests that incidentally burden interstate commerce).

State licensing and inspection requirements for businesses are typically routine, innocuous, and presumptively permissible exercises of state authority to regulate matters affecting commerce.[195] In *Gibbons*, the Court noted that states' concurrent power to enact laws that incidentally affect commerce included the authority to promulgate "inspection laws" and others of this sort.[196] Alongside such indisputably permissible regulations are requirements for pre-arranged ride-for-hire services to acquire certain liability insurance policies as well as to have their vehicles subject to inspection and their drivers subject to background checks.[197] Such consumer-protection and safety-oriented regulations have consistently evaded dormant Commerce Clause scrutiny because they are paradigmatic of legitimate state interests in protecting the health and safety of residents.[198] The standardization of measurements for fare calculation has also become accepted practice for protecting consumers from shoddy business practices, particularly in the context of taxi services.[199] Absent showings that TNCs are being discriminated against vis-à-vis other pre-arranged ride-for-hire services—possible examples being arbitrary denials of licensure applications or vastly disproportionate fees for license or insurance requirements—such TNC regulations will easily survive *Pike* balancing.[200]

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195. *See e.g.*, Gibbons v. Ogden, 22 U.S. 1, 61–62 (1824) (describing different, and presumptively authorized types of commerce-burdening state regulations, that states may enact).

196. *Id.* ("The State may lay duties on imports and exports, to execute its *inspection laws*.").

197. *See* Geron, *supra* note 3 (implying that TNCs' praise for the landmark operating agreement with the CPUC that imposed such conditions on providing service are accepted as a legitimate and desirable legal norm).

198. *See, e.g.*, Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 434 (2005) (finding that Michigan's imposition of flat one hundred dollar annual fee on trucks engaging in intrastate commercial hauling was a valid exercise of the state's police power, and did not violate dormant Commerce Clause).

199. *See, e.g.*, H.P. Hood & Sons v. DuMond, 336 U.S. 525, 532 (1949) (noting that states have broad powers to protect inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce).

200. *See* Am. Trucking Ass'n, 545 U.S. at 434 (concluding that an annual flat licensing fee was a valid exercise of the state's police power and did not violate dormant Commerce Clause).

2. Mandatory Pricing Schedules and Airport Service Bans

Requirements for mandatory pricing schedules and steep minimum charges for TNC services seem to be examples of quintessentially discriminatory or unjustified regulation.[201] Hailing from places like Miami and Washington, D.C., these minimum fare requirements have the practical effect of making TNC services cost-prohibitive for users. Although it is possible to argue that this amounts to discrimination against out-of-state TNCs—and thereby lend to the presumptive invalidity of such regulations—state and local governments may be able to demonstrate that these regulations are "even-handed" and apply to in-state and out-of state actors alike.[202] Given that these regulations will likely not facially discriminate against TNCs in particular and may be supported by various sorts of safety justifications, they will likely be evaluated under the *Pike—Kassel* interests-balancing test.[203] Courts may come to scrutinize such restrictions on service, particularly if the stated interests of state regulators are to make TNC services more costly with no reference to safety, as seemed to be the case in the Washington, D.C. proposal.[204] An examination of the reasons for a particular numerical determination may also follow, investigating for example, why regulators chose to set the minimum rate at five-times that of a taxi.[205] This type of regulation seems to be precisely the kind that would be subject to a rigorous and fact-intensive application of the *Pike—Kassel* test.[206] If no strong

201. *See*, *e.g.,* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (finding that Oregon's $2.25 per ton surcharge on disposal of out-of-state waste is discriminatory on its face and violates the dormant Commerce Clause in view of the $0.85 per ton charge imposed on solid in-state waste).

202. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

203. *See id. (*noting that nondiscriminatory safety-oriented regulations treated under a deferential interests-balancing approach).

204. *See* Fallows, *supra* note 15 (reporting on a Washington, D.C., proposal that would have allowed Uber to operate in the District in exchange for implementing a mandatory surcharge of five-times the taxi base charge).

205. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981) (scrutinizing numerical cut-offs in a truck-length limitation in finding it violative of the dormancy principle).

206. *See id.* (evaluating a statute's numerical limitation to determine whether it was justified in light of the evidence, or lack thereof, of increased safety).

safety justifications exist to support high base charges for TNC services and effectively regulate them out of existence in certain jurisdictions, then courts may find such regulations excessively burdensome on interstate commerce in relation to their "putative local benefit."[207]

Similarly, blanket airport bans restricting TNCs from transporting interstate travelers may be constitutionally suspect for lacking even-handedness.[208] Given that other pre-arranged ride-for-hire services are universally permitted to operate within the jurisdiction of quasi-public airport authorities if they comport with licensing and fee requirements, prohibiting outright the possibility for TNCs to arrange service agreements akin to those of other pre-arranged car-for-hire services, seems to amount to impermissible protectionism and discrimination.[209] Well-reasoned safety justifications for such blanket bans likely exist, and may lead courts to evaluate such bans under the modern interests-balancing approach. Justifications for the bans may point to rationales premised on limiting unsustainable levels of traffic at airports or to cost-prohibitive logistical difficulties in ascertaining when a driver has actually entered the airport's jurisdiction and how and whom to charge in such situations. Courts may look to see if there are less burdensome alternatives to such commerce-burdening blanket bans, searching to find if the allegedly nondiscriminatory aims of these bans could not be achieved by more carefully-tailored means.[210] If the safety benefits of such bans are "illusory" or solely that of marginally limiting airport traffic by forcing people to avoid driving or flying in to or out of a certain airport, then such bans may be held violative of the dormancy principle under the *Pike* balancing approach.[211]

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207. *Pike*, 397 U.S. at 142.

208. *See id.* at 142 (noting that such commerce-burdening regulation must be even-handed and an appropriate measure in light of the nature of the harm to be controlled for).

209. *See supra* Part IV.C.1 (discussing examples of analogous situations in which a purportedly nondiscriminatory regulation could still be found to discriminate).

210. *See Pike*, 397 U.S. at 142 ("And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

211. Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981).

3. Driver Uniform and Car Insignia Requirements

Such regulations, long used in the taxi context, will feasibly be introduced in the context of TNC regulation.[212] It is not hard to imagine the safety justifications for promulgating such regulations for car-for-hire services, given that they quite palpably serve to guard against consumer fraud while promoting consumer safety.[213] Challenges to such requirements will likely be met with evaluation under the *Pike—Kassel* test.[214] Though typically afforded deference, it is conceivable that such safety-oriented regulations can result in overly burdensome demands on TNCs and their drivers.[215] An illustrative example would be a requirement that drivers or cars in Virginia bear very particularized insignia or logos on their person or vehicle to identify themselves as TNC service providers.[216] To further promote consumer safety, a requirement that taxi-like plexi-glass screens be installed in cars providing TNC services, despite evidence showing that the safety gains are only marginal. It may be the case, however, that the vast majority of surrounding jurisdictions—such as Washington, D.C., West Virginia, and North Carolina—require a completely different insignia and have no requirement for a safety divider in the car. Such regulations, though ostensibly promoting consumer safety despite, may be found unduly burdensome on interstate commerce because their practical effect would be to force drivers to either avoid entering the state of Virginia while in the course of performing TNC services or to buy all of the extra equipment to simply comply

212. *See* Geron, *supra* note 3 (indicating that the CPUC is mirroring TNC regulations on existing regulatory frameworks, particularly those developed in the taxi context).

213. *See* Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) (noting that states' police powers are "designed to promote public convenience or the general prosperity or welfare, as well as . . . the public safety or the public health").

214. *See supra* Part V (indicating that regulations aimed at consumer protection and safety will be met with the modern interests-balancing test if challenged).

215. *See Kassel*, 450 U.S. at 671 (finding that the practical effects of this regulation would be significantly burdensome for the trucking industry as a whole).

216. *See id.* at 678 (drawing an exaggerated analogy to the challenged regulations in *Kassel*).

with the more restrictive law that would effectively change the industry standard.[217]

VII. Conclusion

Acutely aware of the challenges to national economic unity posed by various state highway regulations in the latter half of the twentieth century, the Supreme Court was steadfast in protecting the integrity of an unimpeded and cohesive interstate highway system.[218] Driven by similar concerns, courts today may lend traction to dormant Commerce Clause challenges to TNC regulations enacted in furtherance of public safety, particularly if they are premised on illusory rationales or are poorly tailored to this end.[219]

The viability of such challenges will depend on the disposition of judges with respect to their views on the proper role of the judiciary.[220] Courts may be hesitant to overturn state and local regulations of TNCs because of concerns about undermining the Constitution's carefully established structure for allocating power between federal and state governments.[221]

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217. *See id.* at 671 (indicating that regulations with extensive extraterritorial and economic consequences for an industry will be scrutinized closely).

218. *See supra* Part V (discussing the transportation cases wherein the Supreme Court deemed regulations unduly burdening interstate commerce as violative of the dormant Commerce Clause doctrine).

219. *See supra* Part VI (arguing that certain TNC regulations may run afoul of the dormant Commerce Clause's restriction against unduly commerce-burdening state regulations).

220. *See supra* note 60 and accompanying text (discussing the belief of some critics that the doctrine is baseless judicial activism that runs afoul of our democratic constitutional theory).

221. Courts may be persuaded by the view of some critics that the dormant Commerce Clause reverses the deliberate political inertia established by the Constitution, and thereby lend little consideration to such challenges. *See* Redish & Nugent, *supra* note 60, at 573

> Under the dormant commerce clause, the federal judiciary—the organ of the federal government most insulated from state influence and the organ traditionally feared most by the states—makes the initial legislative judgment whether state regulation of interstate commerce is reasonable. If the Court strikes down economic regulations, the states must somehow force Congress to reverse the decision of the Court through legislation—a process made difficult because of

Although it is within Congress's power to preempt all problematic commerce-burdening state and city statutes regulating TNCs, such a move seems unlikely as the matter of TNC regulation is typically viewed as a purely "local issue."[222] Alternatively, the Federal Trade Commission (FTC) could take action to combat allegedly anticompetitive practices of local taxi commissions or TNCs themselves as its power to regulate interstate commerce is just as broad as Congress's.[223] It is foreseeable that the FTC may become active in TNC regulation for other reasons—specifically, by developing uniform regulations concerning the privacy and data collection practices of TNCs.[224]

The dormant Commerce Clause may also prove to be a useful tool in challenging regulations requiring TNCs to communicate certain data or information on their webpages and applications to consumers in particular jurisdictions.[225] Because of the inevitable extraterritorial reach of state regulations of Internet webpages, they have time and again been held violative of the dormancy principle.[226] If the burdens posed by various webpage and app design and data regulations become overly restrictive and

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> Congress's inherent political inertia. Our historical and textual analyses lead us to conclude that this is clearly not the plan of the Constitution. State power to regulate interstate commerce was designed to be determined solely by the political judgment of Congress, where the states retain enough political power to block congressional action, since Congress's inertia is not against them.

222. *See* Ammori, *supra* note 5 (arguing that the FTC has the authority and legitimacy to regulate in this field).

223. *See id.* (noting that the FTC's § 5 authority grants it jurisdiction to regulate in this arena).

224. *See* Kurt Mueffelmann, *Uber's Privacy Woes Should Serve as a Cautionary Tale for All Companies*, WIRED (Jan. 23, 2015, 2:43 PM), http://www.wired.com/2015/01/uber-privacy-woes-cautionary-tale/ (last visited Feb. 4, 2015) ("In fact, the FTC used this power to go after Google and Facebook in 2011 for abusing customer information without prior disclosure of these practices to consumers.") (on file with the Washington and Lee Law Review).

225. *See* Michelle Armond, Note, *State Internet Regulation and the Dormant Commerce Clause*, 17 BERKELEY TECH. L.J. 379, 379–80 (2002) (noting that dormant Commerce Clause may pose as a strong tool for challenges to Internet regulations).

226. *See id.* (citing recent prominent cases where internet regulations were invalidated under the dormant Commerce Clause).

unmanageable for TNCs, then they may possibly utilize the dormant Commerce Clause to challenge them.[227]

This Note does not aim to argue that any and all safety concerns offered in efforts to regulate or limit TNC operations are unfounded or that invalidation of well-intentioned attempts to regulate for these concerns on dormant Commerce Clause grounds will somehow take care of them. Genuine safety concerns do exist, and the only way to seriously deal with them is to allay them through even-handed and constitutional legislation that recognizes that TNCs are here to stay, rather than turning a blind eye to them or trying to regulate them out of existence. This Note maintains that a critical step in achieving a greater balance among the wants of consumers, TNCs, and regulators is crafting legislation that is both thoughtful and constitutional, to which end the potential pitfalls of certain current regulatory schemes are illuminated.

Unless and until there is federal regulation of TNCs, this Note concludes that many state regulations currently on the books are constitutionally problematic, with surely many more to come.[228] In efforts to avoid running afoul of the dormant Commerce Clause, state and local governments may unwittingly realize the benefits and potential that these and other emerging app-based technologies have to offer.[229]

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227. *See id.* at 385–90 (discussing cases where Internet content providers successfully challenged the extraterritorial reach of internet regulations by invoking the dormant Commerce Clause).

228. *See* Kellie Mejdrich, *Airports Speed Up Plans to Regulate Ride-Sharing Apps Like UberX, Lyft*, ORANGE COUNTY REG. (Jan. 11, 2015), http://www.ocregister.com/articles/airport-647771-companies-state.html (last visited on Jan 11, 2015) (pointing out that "the struggle to regulate these companies at airports highlights a larger issue: a continually transforming transportation landscape," as there are more such services coming online every day).

229. *See supra* Part I (noting various quality of life improvements resulting from TNC operations, including the promotion of a sustainable and environmentally conscious transportation infrastructure).