

PROPERTY

LIFE, LIBERTY, AND THE PURSUIT OF HOME-SHARING

Government officials are cracking down on the fundamental right to earn income from one's property.

◆ BY CHRISTINA SANDEFUR

In 2012, Glenn Odegard fell in love with Jerome, Ariz., a tiny, historical former copper mining town that had transformed into a tourist destination after the mine shuttered in the 1950s. Although he lived in the Phoenix area several hours to the south, Odegard dreamed of buying a second home in Jerome, but he wasn't sure he could afford to do so. Then he found his "home sweet home"—a house that had been abandoned and left vacant for 60 years after a landslide filled it with rocks and mud. He saw an opportunity: if he restored the 118-year-old house to its original condition, he could contribute to the town's restoration and recoup his costs by renting the home to visitors. So he bought the property and painstakingly transformed it from a hazard to a historic beauty featured on the cover of *Arizona Highways* magazine.

His reward was to be deemed a criminal. After they issued the relevant permits, town officials changed their minds and decreed that "vacation rentals" were no longer legal, threatening Odegard with fines and even jail time for allowing guests to stay in his private home. When asked to justify their actions, Jerome officials said banning short-term rentals was necessary to protect the safety of visitors who might not be aware of potholes in the streets. The ban would also maintain cleanliness, they said, because nonresidents might not know when garbage day is. They even claimed the prohibition would provide enough long-term housing to encourage citizens to run for offices in city government.

MAKING RESPONSIBLE HOMEOWNERS INTO OUTLAWS

Odegard's story is part of a disturbing campaign against property rights in the sharing economy, a campaign that is stifling economic opportunity and a new means of tourism that has connected property owners and travelers. Property owners can rent their homes to make money and help pay their mortgages. Consumers benefit from more choice and lower prices; communities attract visitors who support local businesses; and people like Odegard are incentivized to buy dilapidated homes and fix them up.

To get a sense of how grand this revolution is, consider that home-sharing websites like Airbnb now offer more rooms than the Hilton or Marriott chains. With expensive hotels no longer their only option, visitors who might otherwise have been deterred by the high cost of lodging are visiting new destinations and patronizing local economies. In 2013, visitors to Coachella Valley, Calif., booked over a quarter-million nights at short-term rental homes, pouring more than \$272 million into local businesses and creating 2,500 jobs. And home-sharing isn't just for tourists. A recent study by the travel-expense company Concur found that home-sharing bookings by business travelers have grown 56 percent over last year.

But regulators aren't rewarding these entrepreneurs for creating value. Instead, they're punishing people—sometimes, as in Odegard's case, with criminal penalties—for allowing overnight guests. In 2008, Sedona, Ariz. made renting residential property for fewer than 30 days a crime, punishable by six months in jail and a \$2,500 fine. That ordinance defined "rent" so broadly that it would apply to purchasing a time share, contracting for home



improvements, and even hiring a babysitter. That's modest compared to Kauai County, Hawaii, where homeowners face fines of up to \$10,000 per night if they let people stay in their homes. Officials have even dispatched investigators to beaches throughout the islands to interrogate tourists about where they're staying.

Other cities are imposing burdensome regulations, though not complete bans. Rancho Mirage, Calif. requires at least one occupant be 30 years old, thus discriminating against legal adults who are younger. Nashville limits the number of properties that may be "non-owner-occupied short-term rentals" to 3%, meaning that homeowners who didn't join the home-sharing movement early on are out of luck.

Other places have now taken home-sharing bans a step further, with new restrictions that have consequences far beyond property rights. The cities of San Francisco and Anaheim haven't just imposed massive penalties on homeowners who rent their homes, they have also enacted new ordinances that force home-sharing platforms like Airbnb and Homeaway to police homeowners who use their websites. San Francisco's law threatens these companies

with \$1,000 daily fines for each listing of an outlawed rental. New York state lawmakers recently cracked down on online advertising for home-sharing, imposing similar fines on people who publicize their willingness to let guests stay in their apartments. Probably the most draconian rule was recently imposed by Chicago, whose new 58-page ordinance levies a \$10,000 licensing fee on rental platforms like Airbnb and forces homeowners who want to advertise their homes to sign a document swearing they have read and understand the new ordinance's highly technical language. Hidden among the ordinance's labyrinthine requirements is a provision requiring homeowners to open their homes to city inspectors "at any time and in any manner"; another promising to hand over any personal information the city considers "reasonably require[d]" to issue the license; and still another requiring homeowners to comply with sanitation standards like those imposed on commercial kitchens, even though home-sharers don't prepare meals for their guests.

Rules like these go beyond restricting property rights. Punishing people for sharing information treads on free speech

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rights guaranteed by the First Amendment as well as the federal Communications Decency Act, a law that bars government from holding website owners accountable for things other people say on their websites. Cities argue that protections for free communication don't apply because officials can prohibit advertising for illegal services, and these cities have criminalized home-sharing, which also makes the ads illegal. But as the Fifth Circuit Court of Appeals observed in a similar case, that argument is circular: if government can criminalize harmless behavior in order to empower itself to censor people, constitutional rights are doubly at risk. Airbnb and Homeaway recently filed lawsuits against San Francisco and Anaheim, arguing that their ordinances violate the freedom of speech.

Restrictions like Chicago's also violate the rule against "unconstitutional conditions." Time and time again, the Supreme Court has held that government cannot force people to waive their constitutional rights in exchange for permission to use property that belongs to them. Government can require that people sign waivers in some circumstances, but when officials force people to relinquish crucial legal protections in exchange for permission to use their own land, people are more likely to be confronted with offers they cannot refuse. As the Supreme Court has put it, the rule against unconstitutional conditions "functions to insure that the Government may not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly." Forcing Chicago homeowners to waive their Fourth Amendment rights against search and seizure is far beyond the city's legitimate regulatory power.

Prohibitions on home-sharing are often nothing more than a turf war by existing businesses that use their local political power to block possible competition. A recent *New York Daily News* editorial argued that homeowners who rent out their guest rooms "compete with the city's hotels and threaten the jobs they create." But by that logic, officials should also forbid people from letting friends or relatives spend the night or come over for dinner, in order to increase business for the nearest Motel 6 and Denny's.

Another motive behind anti-home-sharing campaigns is old-fashioned NIMBYism. Although phrased in terms of preventing noise, limiting neighborhood traffic, or protecting people against nuisances, these efforts are often little more than the desires of locals to keep visitors away. After all, cities already have rules that forbid noise, excess traffic, or other nuisances. Cities don't ban backyard barbecues just because some get noisy, or prohibit graduation parties because guests sometimes park on the street. Diverting valuable police resources to monitoring short-term rentals instead of enforcing existing anti-nuisance laws does nothing to improve neighborhoods—and may make things worse by creating an atmosphere of snooping and suspicion. San Francisco voters recently rejected a local initiative to forbid home-sharing precisely because it threatened to turn neighbors into spies watching over each other's back fences to ensure that the guests are just friends rather than Airbnb customers.

More recently, local politicians have taken to blaming home-sharing for the lack of affordable housing in major cities. Dale Carlson, one of the leaders of the San Francisco anti-home-sharing initiative, told the *Wall Street Journal* last year that the city was suffering "the worst housing crunch ... since the 1906 earthquake," so that "to lose housing units for tourist accommodations" was "just insanity." But the blame for San Francisco's housing shortage belongs with city officials, not with homeowners who decide what to do with their property. San Francisco makes it prohibitively difficult to construct new housing, imposing burdensome regulations, delays, and costs whenever a developer seeks permission to build. A recent report from the National Association of Home Builders showed a 30% increase in the cost of complying with regulations in just the past five years. Federal Judge Charles Breyer recently ruled that "the limited supply—and correspondingly high price—of rental units in San Francisco" was the result of "structural decisions made by the City long ago in the management of its housing stock."

In fact, rather than exacerbating the cost of housing, home-sharing often helps homeowners cover their mortgages in the face of soaring costs. Airbnb reports that in 10 of America's largest cities, more than half of its hosts would be unable to pay their bills without the extra income from home-sharing, and 13% would have faced foreclosure. In New York City, 76% of Airbnb hosts use their home-sharing income to stay in their homes.

Meanwhile, the costs to taxpayers of enforcing bans on home-sharing are astronomical. Last year, Santa Monica, Calif. estimated that it would cost nearly half a million dollars in just the first year to staff a full-time task force to implement its ban on home-sharing. It took more than a year for the city to convict its first homeowner: Scott Shatford, a 13-year resident, had listed five properties for rent and even written a book on home-sharing. Although there were no accusations that his properties were poorly maintained or that guests had been cheated, local prosecutors charged him with a crime, fined him \$3,500, and put him on two years' probation. He has since announced plans to leave California for Colorado.

FOUNDATION OF ALL OTHER RIGHTS

Private property is a fundamental human right—the guardian of all other rights. It is impossible to imagine freedom of the press or religion for people who are prohibited from having printing presses or churches. America's Founders understood this and referred to private property in the Constitution more than any other right.

But decades of bad court decisions and government regulations have chipped away at this foundation of freedom—most obviously in cases involving so-called "regulatory takings." In these cases, the government deprives owners of the right to use their property, without actually transferring legal title to the government. Although government cannot seize legal title without paying the owner "just compensation," courts have allowed the

government to restrict the use of property without compensation in all but the most extreme circumstances.

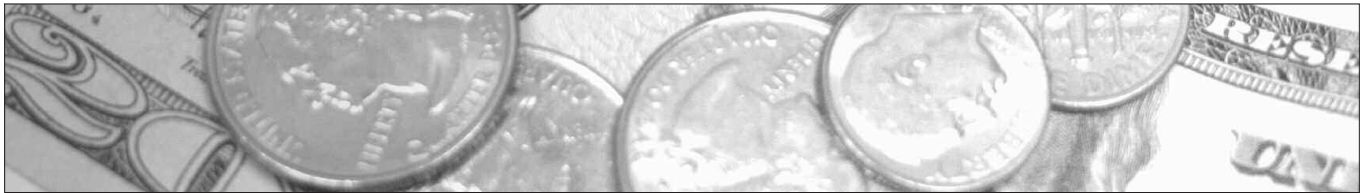
As a result, cities now routinely enact home-sharing regulations and bans without having to worry about paying owners for restricting property rights or justifying such regulations in court. Because owners can still rent their property long-term and can live in the homes themselves, home-sharing bans do not completely destroy the entire economic value of a home, meaning that owners are usually not entitled to any compensation, no matter how much the restriction costs them.

To combat such unfairness and ensure that owners receive payment for the rights that are taken from them, Goldwater Institute attorneys have developed new draft legislation called the Property Ownership Fairness Act. Modeled on Arizona's Proposition 207—which was enacted in the wake of the infamous *Kelo v. New London* eminent domain case to protect Arizona property owners against government overreaching—the legislation allows the government to restrict pollution, nuisances, or other harmful uses of property, but it bars officials from taking away an owner's right to build, renovate, or rent unless the government pays just compensation. Arizona's Prop. 207 is by far the nation's strongest and most successful protection for property rights. Its enactment in 2006 sent a powerful message to officials that they cannot take property without paying for it or change the rules

governing property to serve the interests of politically powerful businesses or NIMBY neighbors.

In May, Arizona lawmakers went a step further, adopting legislation that expressly forbids local governments from passing blanket bans on home-sharing. Like Prop. 207, the new law allows local communities to enforce nuisance rules that protect quiet, clean, and safe neighborhoods, but blocks one-size-fits-all prohibitions that cause more problems than they solve. Passed with overwhelming bipartisan support, the new law put an end to the days when homeowners like Jerome's Odegard could face jail time and thousands of dollars in fines for letting guests stay in their homes. With its first-in-the-nation protection for home-sharing and its broader statutory protection against burdensome property regulations, Arizona is without a doubt the most property rights friendly state in the union.

For the rest of the nation, the Property Ownership Fairness Act opens an opportunity for property owners to defend themselves against abuses by politically powerful lobbyists who stand to gain from taking away land or restricting the rights of its owners. Officials in California, Hawaii, New York, Illinois, and other states aren't doing residents—or travelers—any favors by slapping responsible taxpaying homeowners with large fines. Instead, they are limiting choices, hindering the tourism industry, and depriving people of the right—and the incentive—to use their property as they see fit. **R**



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