REGULATORY TAKINGS AND RIDESHARING: "JUST COMPENSATION" FOR TAXI MEDALLION OWNERS?

*David K. Suska**

Introduction 184
I. The Taxi Industry and Ridesharing 185
A. Taxis and Medallions 185
B. Ridesharing 188
II. The Takings Clause and Government Regulation 190
A. *Mahon* and the Advent of Regulatory Takings 191
B. *Penn Central*'s Ad Hocery 192
C. *Lucas* and Per Se Takings 193
III. Regulatory Accommodation of Ridesharing 194
A. Massachusetts 195
B. Chicago 196
IV. "Just Compensation" for Medallion Owners? 198
A. Medallions as Protected Property 198
B. Applying *Penn Central* 201
1. Economic Impact 201
2. Distinct, Investment-Backed Expectations 202
3. Character of the Government Action 204
V. The Case for Transition Relief 205
A. Internalizing Regulatory Costs and Benefits 206
B. Accelerating Legal Change 207
C. Preserving Investment Incentives 209
D. Counterarguments and Further Considerations 210
Conclusion 212

* J.D. Candidate, 2016, University of Chicago Law School; M.A., 2009, University of Michigan; B.A., 2008, University of Michigan. Many thanks to Professor Jonathan Masur for comments on multiple drafts, and more generally, for taking an interest in this project from an early stage. Thanks also to Professors Daniel Abebe, Anup Malani, and Tom Ulen for comments on an earlier draft. Professors William Baude, Richard Epstein, and Saul Levmore were generous with their time in conversations about takings and legal transitions. Of course, all errors are mine.

INTRODUCTION

What to do about the sharp diminution in the value of taxi medallions resulting from the regulatory accommodation of ridesharing services like Uber?[1] This is a live issue in federal court,[2] and those with firm convictions about the sanctity of property rights and free markets should sense the dilemma it poses. On one hand, the Takings Clause mandates that government pay "just compensation" when its policies significantly devalue and interfere with private property.[3] This arguably describes the effect of regulations enacted in places like Massachusetts and Chicago,[4] which permit nearly anyone with a smartphone and car to compete for passenger fares alongside those previously made to obtain government-issued medallions.[5] On the other hand, competitive outcomes are generally efficient, and many must revel in the welfare gains from the lower barriers to entry that ridesharing entails. Indeed, to many, it is appropriate and even necessary that investments in medallions dissipate so the economic benefits of this new competition are fully realized.

This Article addresses both doctrinal and normative aspects of the issue of compensating medallion owners. It first argues that medallion owners lack a doctrinally plausible regulatory takings claim. While a few commentators have already advanced this position,[6] none has offered more than conclusory analysis in support.[7] The primary contribution of this Article, then, is its thorough discussion grounded

---

1. *See, e.g.*, Josh Barro, *Under Pressure from Uber, Taxi Medallion Prices Are Plummeting*, N.Y. TIMES: UPSHOT (Nov. 27, 2014), http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html.

2. *See* Ill. Transp. Trade Ass'n v. City of Chicago, No. 14 CV 827, 2015 WL 5610880 (N.D. Ill. Sept. 22, 2015) (dismissing Chicago medallion owners' takings claim); Bos. Taxi Owners Ass'n v. City of Boston, 84 F. Supp. 3d 72, 79 (D. Mass. 2015) (denying Boston medallion owners' motion for preliminary injunctive relief).

3. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (setting forth the modern approach to determining if a regulation effects a taking).

4. 540 MASS. CODE REGS. § 2.05 (LexisNexis 2015); CHI., ILL., MUN. CODE ch. 9-115 (2015).

5. Drivers must be eligible to join a licensed transportation network. *See* discussion *infra* Part III.

6. *See, e.g.*, *Chicago Ridesharing: Ridesharing Drivers Fight Back; Join Lawsuit to Challenge Chicago's Cab Cartel*, INST. FOR JUST., http://ij.org/chicago-ridesharing-backgrounder (last visited Feb. 1, 2016) [hereinafter *Chicago Ridesharing: Drivers Fight Back*]; John O. McGinnis, *Against Compensation for Uber's Competitors*, LIBR. L. & LIBERTY (June 20, 2014), http://www.libertylawsite.org/2014/06/20/against-compensation-for-ubers-competitors/.

7. To be fair, the existing commentary is found in advocacy pieces and blog posts, which may not be adequate vehicles for a dispassionate and thorough study.

in precedent. Following this analysis, the Article pivots from the courts to argue that a legislative policy of compensating medallion owners as part of regulatory change—a policy of transition relief—may be preferable to letting losses lie. The mere suggestion will seem an anathema to those who ascribe economic progress to unmitigated forces of creative destruction,[8] but a second aim of this Article is to show that transition relief may actually yield efficient regulatory incentives and outcomes.

What follows is a roadmap. Part I offers background on the taxi industry, medallion system, and ridesharing. Part II surveys the Supreme Court's regulatory takings jurisprudence. Part III examines legislation authorizing ridesharing in Massachusetts and Chicago. Such legislation exemplifies regulation conceivably giving rise to a medallion owner's takings claim. Parts IV and V develop and defend the Article's doctrinal and normative arguments, as previewed above.

I.
The Taxi Industry and Ridesharing

This Part sketches the rise and regulation of the taxi industry, focusing in particular on the medallion system. It then considers ridesharing in its modern, commercial form. The objective is to demonstrate that rideshare drivers compete in the market for passenger fares that governments traditionally have reserved for medallioned taxis.[9]

A. *Taxis and Medallions*

Automobiles began to populate the streets of major American cities in the last years of the nineteenth century, and it did not take long for many to recognize the economic potential in offering passengers a faster alternative to the horse and buggy.[10] In fact, the first person killed in an automobile accident in the United States, Henry Bliss, owes his unfortunate distinction to the taxi that struck him on West

8. *See generally* J.A. Schumpeter, *An Economic Interpretation of Our Time: The Lowell Lectures*, *in* The Economics and Sociology of Capitalism 339, 349 (Richard Swedburg ed., 1991).

9. A more sophisticated way to demonstrate this would be with the type of demand-side analysis familiar in the antitrust context.

10. *See Taxi History: Part 1, 1890s-1930s*, PBS, https://web.archive.org/web/20010827012202/http://www.pbs.org/wnet/taxidreams/history/index.html (last visited Jan. 11, 2016) [hereinafter *Taxi History*]. For a comprehensive study of taxis and their development, see Gilbert Gorman & Robert E. Samuels, The Taxicab: An Urban Transportation Survivor (1982).

74th Street, in New York City, on September 14, 1899.[11] Notwithstanding this potentially ruinous reputational setback, taxis would continue to proliferate through the 1920s.[12] One of the most successful operators during this period was a Russian immigrant to the Midwest named Morris Markin.[13] Markin founded Checker Taxi in 1922 and expanded his business greatly with the purchase of Yellow Cab Company in 1929. The onset of the Great Depression in the years following Markin's expansion, however, transformed the industry forever.[14] Excess supply led to cutthroat competition for fares.[15] Drivers looking to cut costs might skip maintenance or drop insurance coverage, leaving passengers vulnerable, which in turn only further suppressed demand.[16] In short, the market seemed ripe for intervention by governments more confident than ever of their ability to regulate.[17]

The dominant method of taxi regulation as implemented by local governments became vehicle licensing, otherwise known as the "medallion system."[18] Medallions are small, metal plates that attach to the hood of a vehicle, certifying it as authorized to respond to "street hails" within the issuing government's jurisdiction.[19] Street hails are the type of on-demand, variable-rate rides available to prospective passengers standing along any thoroughfare.[20] For regulatory purposes, medallioned taxis are generally distinguished from the primary alternative mode of for-hire transportation, "livery vehicles" or "liveries." Liveries offer prearranged rides for a fixed rate.[21] They are not subject to the most onerous regulations governing medallioned taxis but also are ineligible to accept street hails. The regulatory divide between street hails and prearranged rides is thought to be sensible because of the search costs involved in soliciting on-demand

11. *See* David G. Allan, *Surprising Details About First American Killed by a Car*, BBC (Sept. 13, 2014), http://www.bbc.com/autos/story/20130912-a-landmark-death-114-years-later.

12. *See Taxi History*, *supra* note 10.

13. *See id.*

14. *See id.*

15. *See id.*; *see also* Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation, and Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 77 (1996).

16. *See* Dempsey, *supra* note 15, at 76–77.

17. *See Taxi History*, *supra* note 10. For an alternative account of the tumult in the industry that emphasizes technological change and the consequent introduction of medallions as a system of vehicle licensing, see Edward C. Gallick & David E. Sisk, *A Reconsideration of Taxi Regulation*, 3 J.L. ECON. & ORG. 117 (1987).

18. *See Taxi History*, *supra* note 10.

19. *See id.*; *see also* Gallick & Sisk, *supra* note 17, at 123.

20. Think of the iconic yellow or checkered taxi with a meter inside.

21. Think of a limousine ferrying businessmen to the airport for a flat fee.

transportation.[22] As a prospective passenger cannot easily distinguish taxis that are passing on the basis of quality and price, regulation that standardizes along both dimensions facilitates transacting.[23]

Boston became the first major American city to adopt a medallion system in 1930, followed by Chicago in 1934 and New York City in 1937.[24] By issuing only a limited number of medallions—initially 1575 in Boston, 4108 in Chicago, and 13,566 in New York City[25]—governments could limit competition among taxis and more tightly control their operations. Typical of the New Deal period, the earliest regulations imposed maximum driving hours and minimum vehicle standards.[26] Eventually they required drivers to accept all hails and instituted uniform rate regulation, first in the form of fixed fares according to geographic zones and later based on time and distance with the advent of the meter.[27] In exchange for compliance, medallioned taxis could count on exclusivity—only they could legally accept street hails.[28]

What most characterizes the medallion system's development in the decades following its widespread adoption is scarcity. Governments have infrequently auctioned additional medallions since the 1930s,[29] generating a thriving secondary market where they trade at a steep premium.[30] For example, there are 1825 medallions currently outstanding in Boston, an increase of only 250 since the first issuance

22. *See* Gallick & Sisk, *supra* note 17, at 118 (explaining the problem of search costs); *cf.* Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV.: DIALOGUE 88 (2015) (explaining how Uber "has basically eradicated search costs").

23. Such regulation may also help drivers and potential passengers overcome "empty core bargaining," which exists when players in a cooperative game cannot arrive at a stable equilibrium. For an illustration of this concept as applied to the market for taxis, see John Shepard Wiley, Jr., *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 557–62 (1987).

24. *See* ANNA BARTLETT & YESIM YILMAZ, OFFICE OF THE CHIEF FIN. ADVISOR, GOV'T OF D.C., TAXICAB MEDALLIONS: A REVIEW OF EXPERIENCES IN OTHER CITIES 2 (2011), http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/ocfo_taxicab_briefing_note.pdf.

25. *Id.*

26. *See* Dempsey, *supra* note 15, at 77–87 (reviewing regulations in various cities).

27. *Id.*; *see also* Gallick & Sisk, *supra* note 17, at 117–21.

28. *See* Dempsey, *supra* note 15, at 97–98.

29. *See* BARTLETT & YILMAZ, *supra* note 24, at 2.

30. An entire industry has developed to serve the secondary market for medallions, with firms offering brokerage and securitization services. *See* Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years, Now Uber May Be Changing That*, WASH. POST: WONKBLOG (June 20, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/20/taxi-medallions-have-been-the-best-investment-in-america-for-years-now-uber-may-be-changing-that.

seventy-five years ago.[31] Early purchasers have profited from the restricted supply— medallions sold on the secondary market in Boston for $700,000 as recently as April 2014[32]—yet their windfall has come at the expense of passengers and non-owner drivers. Passengers face higher prices, poorer service, and longer wait times than one would expect in a market with unrestricted entry, while non-owner drivers often earn less than the minimum wage after paying medallion leasing or financing fees.[33] It is in this context that an alternative service has developed, one whose growth is reminiscent of the taxi industry itself in the early twentieth century.

B. Ridesharing

In its modern and commercial form, ridesharing is just another mode of on-demand, variable-rate transportation.[34] Like taxi drivers, rideshare drivers cruise city streets in search of hails. Unlike taxi drivers, however, they typically use private vehicles and rely on the ubiquity of smartphones rather than the flailing arms of prospective passengers to find the next fare.

To operate as a rideshare driver, one first affiliates with a ridesharing service, otherwise known as a "transportation network provider" ("TNP"). Prominent TNPs include Uber and Lyft. Each TNP operates an Internet-based application to connect drivers with passengers also affiliated with the TNP.[35] A typical fare begins when a driver uses a smartphone to activate the application, and a passenger, also having activated the application on a smartphone, enters a request for a ride. The TNP feeds locational data received from all drivers'

---

31. Bartlett & Yilmaz, *supra* note 24, at 2.

32. *See* Barro, *supra* note 1.

33. *See* Gary Blasi & Jacqueline Leavitt, Driving Poor: Taxi Drivers and the Regulation of the Taxi Industry in Los Angeles (2006), http://www.taxi-library.org/driving-poor.pdf; *cf.* Office of Bus. Affairs & Consumer Prot., City of Chi., Taxi Fare Study (2014), http://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2014/August/Chicago_Taxi_Fares_Study_Final_Aug2014.pdf.

34. There is little scholarly background on ridesharing as of yet. For a primer on ridesharing, see Andrew Amey et al., *Real-Time Ridesharing*, 2217 Transp. Res. Rec. 103 (2011).

35. *Id.* at 104–10. In other words, TNPs operate as platforms in a two-sided market. Drivers wishing to affiliate with a TNP typically pay a fee for access to the platform, consent to a background investigation, and provide proof of insurance and vehicle standards. *See, e.g.*, *Uber Needs Partners Like You.*, Uber, https://get.uber.com/drive/ (last visited Feb. 1, 2016); *cf.* Joann Weiner, *The Hidden Costs of Being an Uber Driver*, Wash. Post (Feb. 20, 2015), http://www.washingtonpost.com/news/get-there/wp/2015/02/20/the-hidden-costs-of-being-an-uber-driver/ (identifying the aforementioned and additional costs of being a TNP driver).

and the prospective passenger's cell phones into an optimizing algorithm to arrange the fare, direct one driver to the passenger's location for pickup, and determine the optimal route to the requested destination.[36]

Pricing is analogous to metered taxis in that it is calculated according to distance and time, and rideshare drivers pay a percentage of each fare to the TNP,[37] just as taxi drivers who lease a medallion commonly pay a percentage of each fare to its owner. However, rideshare pricing differs from taxi metering in two important ways. First, payment is handled exclusively through the TNP, which stores credit card information for all users. Second, some TNPs use "dynamic pricing."[38] That is, the TNP may scale the distance-and-time fare according to current supply and demand for ridesharing in a particular area, pricing some drivers into and some passengers out of the market. This is in contrast to taxi metering, which employs a static metric to calculate fares.

Advocates of ridesharing emphasize the efficiency gains from improved asset utilization and freer entry on the supply side, which materialize as lower prices to passengers and new opportunities for persons seeking flexible work arrangements.[39] The second-order benefits are numerous and perhaps no less important. For example, inexpensive and reliable ridesharing may disincentivize private vehicle ownership, which in turn may reduce traffic congestion and the need for dedicated parking facilities in densely populated areas. It may also improve access to transportation services in areas traditionally underserved by taxis. And to the extent passengers substitute ridesharing for taxi services, eliminating cash exchanges, TNPs' payment systems may reduce tax evasion.

Critics argue that many of the benefits suggested above are illusory or offset by losses elsewhere.[40] For example, some have argued

---

36. *See* Amey et al., *supra* note 34, at 107.

37. *See* Weiner, *supra* note 35; *see also, e.g.*, *New York City*, UBER, https://www.uber.com/cities/new-york/ (last visited Feb. 1, 2016).

38. The most prominent example is Uber's "surge pricing," which the company implements according to supply-demand imbalances on its network. *See* Dan Kedmey, *This Is How Uber's "Surge Pricing" Works*, TIME (Dec. 15, 2014), http://time.com/3633469/uber-surge-pricing/.

39. *See, e.g.*, *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy; *cf.* Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html (discussing the benefits and costs of such flexible work arrangements).

40. *See* Rogers, *supra* note 22, at 91–102 (surveying criticisms of Uber).

that the emergence of "do-it-yourself" rideshare drivers will destroy a class of professional taxi drivers with accumulated, intricate knowledge of a city's streets.[41] More commonly, critics emphasize that rideshare drivers neither purchase medallions nor comply with other regulations imposed on taxis, eliminating for them the greatest expenses of operating in the market for on-demand, variable-rate transportation.[42] Without a medallion and regulatory compliance, the argument goes, rideshare drivers are prone to deliver unsafe services while pricing below taxis, steering passengers into their vehicles to the detriment of public safety.[43]

II. THE TAKINGS CLAUSE AND GOVERNMENT REGULATION

The Takings Clause conditions the power of federal, state, and local governments to interfere with private property.[44] It is therefore an oft-used tool for property owners seeking to challenge burdensome regulations. As originally understood, however, the Takings Clause applied only when the government physically appropriated or occupied private property.[45] Requisition of a steel mill would trigger the compensation requirement, for example, but mere regulation that as effectively dispossessed the owner of his mill and operating revenue would not. The Supreme Court changed course in 1922, recognizing these outcomes as economically equivalent from the owner's perspective. This Part begins with an overview of the Court's landmark decision that year, *Pennsylvania Coal Co. v. Mahon*.[46] Familiarity with

41. *See* Eric Goldwyn, *Will Uber Destroy the Driving Profession?*, NEW YORKER (June 23, 2014), http://www.newyorker.com/tech/elements/will-uber-destroy-the-driving-profession.

42. Ironically, Uber's CEO once embraced this critique in characterizing Lyft's business practices as "regulatory arbitrage." *See* Jessi Hempel, *Interview with Uber CEO Travis Kalanick*, FORTUNE (July 23, 2013), http://fortune.com/2013/07/23/video-and-transcript-uber-ceo-travis-kalanick/.

43. *See, e.g.*, Susan Milligan, *The Trouble with Uber*, U.S. NEWS & WORLD REP. (July 15, 2014), http://www.usnews.com/opinion/blogs/susan-milligan/2014/07/15/how-uber-can-be-unfair-and-downright-dangerous.

44. The Takings Clause was incorporated against state governments through the Fourteenth Amendment in *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

45. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) (noting that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"); *cf*. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–92 (1995). *But see* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 242 (1999) (demonstrating that the historical record is ambiguous).

46. 260 U.S. 393 (1922).

Mahon helps when applying modern takings doctrine, which this Part subsequently reviews.

A. Mahon *and the Advent of Regulatory Takings*

The facts of *Mahon* are straightforward. Pennsylvania's legislature passed the Kohler Act in 1921, proscribing coal mining likely to cause subsidence of residential structures.[47] Pennsylvania Coal owned mineral and support estates underneath Mahon's home, and when the company announced its intention to mine, Mahon successfully sought an injunction under the Act.[48] Deprived of access to the deposits comprising the support estate, Pennsylvania Coal claimed the Act effected an unconstitutional taking of private property without just compensation.[49]

Justice Holmes wrote for the Court. While conceding that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"[50] his opinion concluded that the Kohler Act had "gone too far."[51] Rather than offering a test for discerning how far was "too far," however, Justice Holmes analyzed several factors in general terms. First, he characterized the "extent of the taking" as "great."[52] In so doing, he considered the Act's effect on the support estate alone, emphasizing that Pennsylvania law recognized it as a distinct property interest and that the prohibition on mining had "very nearly the same effect for constitutional purposes as appropriating or destroying it."[53] Second, Justice Holmes dismissed any public interest in enjoining the mining. Only Mahon's house would be at risk and adequate notice would mitigate the danger.[54] Finally, Justice Holmes rejected an argument that the Act conferred reciprocal advantages on Pennsylvania Coal that might offset its loss.[55]

Justice Brandeis dissented, arguing that the outcome should have followed earlier decisions in which the Court refused to classify land

47. *See id.* at 412. For an enlightening discussion of the circumstances surrounding *Mahon* and the impact of the Court's decision, see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 13–47 (1995).

48. *Mahon*, 260 U.S. at 412.

49. *Id.*

50. *Id.* at 413.

51. *Id.* at 415–16.

52. *Id.* at 414.

53. *Id.*

54. *Id.* at 413–14.

55. *Id.* at 415–16.

use restrictions enacted under the police power as takings.[56] He also took issue with the manner in which Justice Holmes analyzed the extent of the taking.[57] Justice Brandeis reasoned that the proper measure would reflect Pennsylvania Coal's loss relative to the value of its entire property interest, comprising the support and mineral estates (the Act would not inhibit mining of the latter).[58] So analyzed, the impact was not as significant as Justice Holmes contended.

The enduring relevance of *Mahon* lies of course in establishing that a regulation may effect a taking that requires just compensation. But the case also remains important because of the emphasis on diminution in value in determining if a regulation stretches "too far," and for the debate between Justice Holmes and Justice Brandeis about how to measure diminution.[59] More than fifty years passed before the Court revisited regulatory takings and sought to bring these issues into sharper focus.

B. Penn Central*'s Ad Hocery*

The most important modern decision on regulatory takings is *Penn Central Transportation Co. v. City of New York*.[60] The case arose from a commission's designation of Grand Central Terminal under New York City's Landmark Preservation Law. The designation required the property owner, Penn Central, to receive clearance from the commission before changing the Terminal's facade.[61] When the commission rejected a proposal to construct an office tower in the airspace above the Terminal as "nothing more than an aesthetic joke,"[62] Penn Central filed suit, claiming the Law effected a regulatory taking under *Mahon*.[63]

The Supreme Court rejected Penn Central's claim. Writing for the Court, Justice Brennan formulated a multi-factor balancing framework that remains the foundation for analyzing most regulatory takings cases. The factors include: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with the claimant's distinct, investment-backed expecta-

56. *Id.* at 418 (Brandeis, J., dissenting).
57. *Id.* at 419.
58. *Id.*
59. *See* Bruce A. Ackerman, Private Property and the Constitution 156 (1977) (describing *Mahon* as "the most important and most mysterious writing in takings law").
60. 438 U.S. 104 (1978).
61. *Id.* at 115–18.
62. *Id.* at 118.
63. *Id.* at 119.

tions; and (3) the character of the government action.[64] The Court decided each cut against classifying the Landmark Preservation Law as a regulatory taking. First, it judged the economic impact on Penn Central as modest. Even without lease revenue from the proposed office space, Penn Central would derive a "reasonable return" by continuing to operate Grand Central Terminal as it existed.[65] Moreover, the Law vested Penn Central with transferable development rights that would "mitigate whatever financial burdens" it imposed.[66] Second, the Law did not interfere with Penn Central's investment-backed expectations because the Terminal had operated as an eight-story railway station with some office space and concessions for sixty-five years, and that "must be regarded as Penn Central's *primary* expectation regarding the use of the parcel."[67] Finally, the Court characterized the Law as a regulation reasonably related to the promotion of the general welfare, as opposed to something closer to the paradigmatic taking that involves physical invasion of private property.[68]

While perhaps an improvement upon *Mahon*'s "goes too far" standard, the *Penn Central* framework suffers from its own imprecision and accordingly has generated unpredictable results. The Court neither clearly defined the factors to be considered nor advised the weight each should receive. Thus, as Professor Serkin has remarked, "Looking for consistency in takings cases is a little bit like finding shapes in the clouds: you can see them if you look hard enough, but they say more about the observer than the clouds themselves."[69]

C. Lucas *and Per Se Takings*

While *Penn Central* remains the starting point for analyzing regulatory takings claims, its imprecision has led some on the Court to define bright-line rules that cut away at its applicability. One such rule was announced in *Lucas v. South Carolina Coastal Council*.[70] The case involved a real estate developer who paid nearly $1 million in 1986 for two oceanfront lots in South Carolina.[71] Two years later, South Carolina's legislature adopted the Beachfront Management Act,

64. *Id.* at 124–25 (citations omitted).
65. *Id.* at 136.
66. *Id.* at 137.
67. *Id.* at 136 (emphasis added).
68. *Id.* at 138.
69. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 741 (2005).
70. 505 U.S. 1003 (1992).
71. *Id.* at 1006.

effectively barring development of the lots.[72] The developer sought just compensation, contending the Act had rendered his property "valueless."[73]

Justice Scalia wrote for the Court. A taking will be found without a case-intensive inquiry, he wrote, "where regulation denies all economically beneficial or productive use of land,"[74] and where the challenged regulation is not justified by "background principles of the State's law of property and nuisance."[75] In other words, under *Lucas*, a court first assesses the economic impact of the regulation, just as under *Penn Central*. If there is a complete wipeout, then the regulation presumptively is a taking, rebuttable through a showing that the regulated use would violate some common law principle. If there is residual value in the property, however, then analysis proceeds under *Penn Central*.

The significance of this per se alternative hinges on two issues. First is whether *Lucas* applies only to regulations affecting real property. On one hand, Justice Scalia's opinion clearly countenances a distinction between personal and real property. He notes that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless."[76] On the other hand, the Court has held that even intangible property, like a trade secret,[77] can fall victim to a regulatory taking. Perhaps mitigating the practical import of this uncertainty is a second issue, how courts approach "den[ying] all economically beneficial or productive use."[78] If read literally, *Lucas* will almost never apply, because regulators should be expected to strategically preserve owners with a modicum of use.

III.
Regulatory Accommodation of Ridesharing

This Part examines regulations adopted in Massachusetts and Chicago that authorize rideshare drivers to compete for passenger fares alongside medallioned taxis. Such regulations exemplify the type of government action arguably giving rise to a medallion owner's tak-

72. *Id.* at 1007.
73. *Id.* at 1003 (noting that the trial court agreed that the property was "valueless" under the Act).
74. *Id.* at 1015.
75. *Id.* at 1029.
76. *Id.* at 1027–28.
77. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).
78. *Lucas*, 505 U.S. at 1015.

ings claim, and they may be contrasted with the response of governments elsewhere. For example, officials in Philadelphia have warned that drivers without a medallion face impoundment and fines if caught picking up passengers,[79] while officials in Portland fined Uber nearly $70,000 for operating in violation of several ordinances.[80]

A. *Massachusetts*

Taxis in Boston are regulated under Police Department Rule 403 ("Rule 403").[81] Rule 403 defines a taxi as "[a] vehicle used or designed to be used for the conveyance of persons for hire from place to place,"[82] and among other things, it requires all taxi operators to obtain a medallion.[83] In late 2011, ridesharing services like Uber entered the for-hire transportation market in Boston.[84] The City has neither issued regulations applicable to these services nor enforced Rule 403 against their drivers, leaving them to operate in a legal gray area.[85] In July 2014, Mayor Martin J. Walsh established a Taxi Advisory Committee to examine the regulatory framework and suggest new policies, but the Committee has not yet proposed significant changes.[86]

In contrast to the Committee's inaction, and perhaps in response to it, the Massachusetts Department of Transportation in January 2015 amended its regulation of for-hire vehicles.[87] The amended regulation

79. *See* Jared Shelly, *City Council to PPA: Legalize Lyft and Uber*, PHILA. BUS. J. (Jan. 30, 2015), http://www.bizjournals.com/philadelphia/news/2015/01/30/city-council-to-ppa-legalize-lyft-and-uber.html.

80. *See* Sara Roth, *Task Force: Uber Can Restart in Portland, with Conditions*, KGW: PORTLAND (Apr. 6, 2015), http://www.kgw.com/story/money/business/2015/04/06/task-force-uber-can-re-start-in-portland-with-conditions/25376969.

81. BOS. POLICE DEP'T, HACKNEY CARRIAGE RULES AND FLAT RATE HANDBOOK § 1 (2008), http://www.cityofboston.gov/TridionImages/Rules_tcm1-3045.pdf. The Acts of 1930 established a medallion system for regulating "hackney carriages" (taxis) in Boston and authorized the Police Commissioner to administer such regulations. Accordingly, the police department has a Hackney Carriage Unit led by an Inspector of Carriages. *See id.*

82. *Id.*

83. *Id.*

84. *See* Travis Kalanick, *Uber Bahsstuhn Is Live!*, UBERBLOG (Oct. 24, 2011), http://blog.uber.com/2011/10/24/uber-bahsstuhn-is-live/.

85. *See* Nicole Dungca, *Even as Uber, Lyft Gain Riders, Drivers Face $500 City Fines*, BOS. GLOBE (May 27, 2015), https://www.bostonglobe.com/metro/2015/05/26/even-uber-and-lyft-become-ubiquitous-boston-police-tickets-them-for-being-illegal/AntttSe6sBJ64nqIsKhU9K/story.html.

86. *See City of Boston Taxi Advisory Committee*, BOSTON, http://www.cityofboston.gov/intergovernmental/taxiadvisory.asp (last visited Feb. 1, 2016).

87. *See* Nicole Dungca, *State Issues Initial Regulations for Ride-Sharing Operations*, BOS. GLOBE (Jan. 3, 2015), https://www.bostonglobe.com/metro/2015/01/03/state-takes-major-step-regulating-ride-share-companies-such-uber-lyft/eQKKXBZaW9km1MlRa09inN/story.html.

recognizes a new type of service entity, a Transportation Network Company ("TNC"), and establishes procedures for TNCs to register with the Commonwealth.[88] A TNC is defined as an "entity operating in Massachusetts that, for consideration, will arrange for a passenger to be transported by a driver between points chosen by the passenger."[89] TNC-affiliated vehicles are distinguished from taxis in that they may only provide "pre-arranged transportation services."[90] In the context of the regulation, however, "pre-arranged" essentially means acquired through a TNC's Internet-based application.[91] It has little to do with arranging a ride at some meaningful temporal remove from the desired pickup, as is the case with liveries. TNC-affiliated drivers also are not permitted to solicit or accept a "street hail,"[92] but again, the regulatory distinction between "pre-arranged" and "street hail" lies in whether the prospective passenger pushes a button on a smartphone or waves and shouts.

Accordingly, the Department of Transportation's amended regulation is seen as narrowing the exclusive domain of medallioned taxis to flailing-arms hails and taxi-only queues.[93] Whether one thinks this perception is fair, it has undercut the value of medallions on Boston's secondary market. Whereas trading was liquid at about $700,000 per medallion in early 2014, it has since dried up, with prices dipping to $350,000 in 2015.[94]

B. *Chicago*

Taxis in Chicago are regulated under chapter nine of the Municipal Code ("Chapter 9").[95] In September 2014, an amendment to Chapter 9 took effect that authorizes ridesharing services to operate throughout the city.[96] The amendment requires each service to pay

88. *See* 540 Mass. Code Regs. § 2.05 (LexisNexis 2015).

89. *Id.*

90. *Id.*

91. *Id.* § 2.05(4.5)(A).

92. *Id.*

93. *See* Dungca, *supra* note 85.

94. *See* Suzan O'Halloran, *As Uber & Lyft Hire More Drivers, Taxicab Medallion Values Tank*, Fox Bus. (Apr. 8, 2015), http://www.foxbusiness.com/technology/2015/04/07/as-uber-lyft-hire-more-drivers-taxicab-medallion-values-tank/.

95. Chi., Ill., Mun. Code ch. 9 (2015).

96. *See* Office of Bus. Affairs & Consumer Prot., City of Chi., TNP License Fact Sheet (Nov. 11, 2015) [hereinafter TNP License Fact Sheet], http://www.cityofchicago.org/city/en/depts/bacp/supp_info/transportation-network-providers.html.

$10,000 or $25,000 annually for a license as a TNP.[97] The amount due primarily depends on whether the average driver affiliated with the TNP is on the road more than twenty hours per week, but it does not scale according to the number of drivers affiliated with the TNP.[98] For example, a TNP with 10,000 affiliated drivers averaging ten hours per week will owe $10,000 annually for a license, or $1 per driver.[99]

Chapter 9 continues to grant "exclusive permission" to medallion owners and lessees to operate "taxicabs."[100] Before the September 2014 amendment, this exclusivity meant a monopoly in the market for on-demand, variable-rate transportation services.[101] After the amendment, however, medallion holders' exclusive operations appear limited to responding to "traditional street hails," explicitly defined as those in which passengers "us[e] hand gestures and verbal statements."[102]

As in Boston, the changed regulatory environment in Chicago has narrowed the exclusive domain of medallioned taxis and accelerated a devaluation of medallions trading on the secondary market. The average sale price of a medallion traded between October 2014 and July 2015, the ten months following Chapter 9's amendment, was $247,000.[103] That marks a decline of about twenty-five percent from the average sale price of a medallion traded in the ten months before the amendment.[104] Moreover, this twenty-five percent drop likely understates the extent of the devaluation, as liquidity also has dried up in the secondary market. There were only fifteen medallions traded between October 2014 and July 2015, compared to 234 traded during the ten months preceding the amendment.[105]

---

97. *Id.* Lyft and Sidecar became the first businesses to obtain a TNP license in Chicago in November 2014, while Uber received a TNP license in February 2015 after negotiating with the City on a package of supplemental safety guarantees. *See* Fran Spielman, *Uber Finally Gets City License After Safety Guarantees*, CHI. SUN-TIMES (Feb. 16, 2015), http://chicago.suntimes.com/chicago-politics/7/71/372440/uber-finally-gets-city-license-safety-guarantees.

98. TNP LICENSE FACT SHEET, *supra* note 96.

99. To put this in context, Chicago's taxi union estimated that Uber had 13,000 affiliated drivers as of February 2015. *See* Spielman, *supra* note 97.

100. *See* MUN. CODE ch. 9-112-020(b).

101. *See id.* at ch. 9-114-280 (restricting liveries to fixed-rate, prearranged fares).

102. *See id.* at ch. 9-115-180 ("No transportation network driver shall accept or respond to passengers' or potential passengers' requests for service via traditional street hails, including hand gestures and verbal statements. . . .").

103. *See Chicago Taxicab Medallion Prices*, CHI. DISPATCHER (June 11, 2015), http://chicagodispatcher.com/chicago-taxicab-medallion-prices-p235-117.htm.

104. *See id.*

105. *See id.*; *see also* Odette Yousef, *Changes in Taxi Industry Leave Cab Owners Underwater*, WBEZ91.5 (Apr. 21, 2015), http://www.wbez.org/news/changes-taxi-industry-leave-cab-owners-underwater-111920.

IV.
"Just Compensation" for Medallion Owners?

We have seen that the Takings Clause affords property owners some measure of protection from regulatory interference with their investments and expectations. Does it therefore require governments to compensate medallion owners for losses flowing from the regulatory accommodation of ridesharing? This Part answers that question negatively—medallion owners lack a doctrinally plausible takings claim.

A. Medallions as Protected Property

The Takings Clause protects "private property," and therefore a threshold issue is whether medallions—or more precisely, the rights medallions embody—qualify as such. The Supreme Court has held that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[106] In other words, there is no constitutional definition of property, and instead judges must look in each case to the contours of state law and perhaps custom.

Courts have generally refused to recognize medallions as property that the Takings Clause protects.[107] For example, in *Minneapolis Taxi Owners Coalition v. City of Minneapolis*,[108] the Eighth Circuit held that medallion owners lacked a protectable interest under Minnesota law in the market value of their assets or the closed nature of the taxi industry.[109] The case arose in response to Minneapolis's uncapping the number of medallions it could issue, a regulatory change that owners argued was tantamount to destroying the marketability of existing medallions.[110] Two considerations seemed to motivate the holding. First, the court emphasized the nature of the challenged regulation, noting several times that Minneapolis had not gone so far as to revoke existing medallions or inhibit owners' ability to operate taxis.[111] Second, the court pointed to the heavily regulated nature of the taxi industry as an inherent limitation on whatever interest medal-

---

106. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

107. In addition to the cases discussed in this Part, see Steve Oxenhandler, Comment, *Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest*, 27 Transp. L.J. 113, 132 (2000) ("As the case law relating to taxicab licenses reveals, the vast majority of states do not consider a taxicab license a Fifth Amendment, compensable property interest.").

108. 572 F.3d 502 (8th Cir. 2009).

109. *Id.* at 509.

110. *Id.* at 507.

111. *Id.* at 507–09.

lion owners have in the assets.[112] The court invoked Justice Scalia's opinion in *Lucas*, stating that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless."[113]

The opinion in *Minneapolis Taxi Owners Coalition* has guided other courts in their approaches to this issue. The Fifth Circuit cited it extensively in *Dennis Melancon, Inc. v. City of New Orleans*,[114] a case concerning an ordinance that classified medallions as "privileges and not rights" and that restricted their transferability.[115] Several owners challenged the ordinance as a regulatory taking. The Fifth Circuit rejected the claim, holding that medallions are "privileges subject to extensive regulation" under Louisiana law.[116] For support, the court referred to the Eighth Circuit's discussion of the heavily regulated nature of the taxi industry.[117] More recently, district courts in Massachusetts and Illinois cited *Minneapolis Taxi Owners Coalition* and *Dennis Melancon* in orders denying relief to medallion owners in Boston and Chicago.[118] These actions partially concern the regulations discussed in Part III, *supra*.[119] Several claims remain pending as of this writing, but given the tenor of the orders, medallion owners in both cities should not expect to fare any better than those in Minneapolis and New Orleans.

An exception to the prevailing view is found in *Boonstra v. City of Chicago*.[120] *Boonstra* involved a regulatory takings claim brought in response to a Chicago ordinance that imposed a moratorium on the assignment of medallions.[121] The City moved to dismiss the claim on grounds that medallions were not protected under the Takings Clause,[122] but an Illinois appellate court rejected that argument.[123]

112. *Id.* at 508–09.
113. *Minneapolis Taxi Owners Coal.*, 572 F.3d at 509 (alteration in original) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992)) (internal quotation marks omitted).
114. 703 F.3d 262 (5th Cir. 2012).
115. *Id.* at 266.
116. *Id.* at 274.
117. *Id.* at 272–74.
118. Bos. Taxi Owners Ass'n v. City of Boston, 84 F. Supp. 3d 72, 79 (D. Mass. 2015); Ill. Transp. Trade Ass'n v. City of Chicago, No. 14 CV 827, 2015 WL 5610880, at *3 (N.D. Ill. Sept. 22, 2015).
119. *See Bos. Taxi Owners Ass'n*, 84 F. Supp. 3d at 79–80.
120. 574 N.E.2d 689 (Ill. App. Ct. 1991).
121. *Id.* at 693.
122. *Id.*
123. *Id.* at 694.

Looking to the characteristics that "the City of Chicago, itself, gave to its taxicab licenses," the court held that medallions were "more than just mere personal permits . . . to pursue some occupation or carry on some business subject to regulation under the police power."[124] Instead, "[i]n a functional sense, [medallions] embraced the essence of property in that they were securely and durably owned and marketable."[125]

One might critique *Minneapolis Taxi Owners Coalition* and decisions citing to it as excessively formalistic. As noted, the Eighth Circuit emphasized the substance of the challenged regulation, reiterating several times that Minneapolis had not gone further than to uncap the number of issuable medallions.[126] But why should the scope of the regulation determine if a property interest exists in the first place? The court arguably conflates the antecedent property issue with whether the regulatory change is tantamount to a taking. Moreover, to focus on the new rule is to obscure the "existing rules or understandings" that define property interests.[127] Medallions are purchased and in many places are renewable effectively at the owner's will.[128] They are leased, transferred, and securitized.[129] Indeed, an entire industry has developed based on the understanding that medallions are property like many other intangible assets.[130] These attributes do not definitively resolve the issue, but courts should grapple with them in conducting a more functional analysis of whether medallions are "property" or "privileges subject to extensive regulation." Both property and privileges may be subject to extensive regulation. Nomenclature should be a tool and not a reason for classification.[131]

Notwithstanding this critique, it remains the objective of this Part to evaluate the doctrinal plausibility of a medallion owner's takings claim. The surveyed cases indicate a strong presumption against according medallions protected status. Most owners will face an uphill battle even to reach the issue of whether the regulatory accommodation of ridesharing amounts to a compensable taking. However, *Boon-*

---

124. *Id.*
125. *Id.*
126. Minneapolis Taxi Owners Coal. v. City of Minneapolis, 572 F.3d 502, 507–09 (8th Cir. 2009).
127. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).
128. *See* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 155 (2013).
129. *See* Badger, *supra* note 30.
130. *See id.*
131. *Cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN 65–67 (1985) (arguing that some normative conception must underlie the definition of private property for purposes of the Takings Clause).

stra suggests that some courts might at least entertain the possibility of medallions constituting private property, and therefore it is worth advancing the analysis.

B. *Applying* Penn Central

If some courts might regard medallions as protected property, even if most would not, then the stage is set for applying the doctrinal framework for distinguishing regulation from regulatory taking. To facilitate this fact-intensive inquiry, this Part assumes a claim brought on behalf of Chicago medallion owners in response to the September 2014 amendment of Chapter 9.[132] The amendment has not completely destroyed the value of Chicago medallions,[133] rendering analysis under *Penn Central* appropriate.[134]

1. *Economic Impact*

The first and most important of the *Penn Central* factors is the economic impact of the regulation on the claimant.[135] The larger the impact, the more likely a court is to deem the regulation at issue a taking. But how are courts to measure economic impact? If the market value of the claimant's loss is the numerator,[136] what is the denominator serving as a frame of reference? The Supreme Court has instructed that the answer is the value of the asset as a whole.[137] Yet even if judges know what ratio to consider, they remain without much guidance as to what the ratio must be for a plaintiff to prevail. The Court noted in *Penn Central* that neither an 87.5% nor a 75% diminution in value had been adequate in earlier cases, but it also attributed those decisions to an exception for restrictions on "noxious uses of property,"[138] leaving the issue muddled.

132. CHI., ILL., MUN. CODE ch. 9-115 (2015). The amendment is discussed *supra* Section III.B.

133. *See supra* Section III.B.

134. *See supra* Section II.C.

135. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (noting that the "touchstone" of the Court's regulatory takings jurisprudence is the "severity of the burden that government imposes upon private property rights").

136. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("The Court . . . has employed the concept of fair market value to determine the condemnee's loss.").

137. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

138. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

Two further considerations relevant to economic impact are "reciprocity of advantage,"[139] and whether the regulation allows the owner to earn a "reasonable return on . . . investment."[140] The former derives from Justice Holmes's analysis in *Mahon* and should be understood as limiting compensation to cases in which the property owner does not also benefit from the regulation.[141] The latter derives from Justice Brennan's emphasis in *Penn Central* on the plaintiff's ability to continue operating Grand Central Terminal as a train station and limited retail space.[142]

In view of the foregoing, the first *Penn Central* factor undercuts medallion owners' case for compensation. Medallions in Chicago have lost twenty-five percent of their market value since Chapter 9 was amended in September 2014.[143] Even if one assumes that the loss is entirely due to the regulatory change, it falls well short of what might plausibly trigger takings liability. Moreover, a court would almost certainly conclude that the amended regulation still allows an owner to earn a reasonable return from street hails and pickups at taxi stands.[144] Criticism of this conclusion on normative grounds is perhaps fair, but it is better directed at the doctrine.

2. *Distinct, Investment-Backed Expectations*

There is little consensus about what distinct, investment-backed expectations entails. Justice Brennan offered essentially no explanation in *Penn Central*, and as one scholar reflected, "it is hard to fathom what the Court had in mind."[145] A plausible interpretation is that it works to filter out speculative, future uses of property that would inflate the owner's loss if accounted for in appraising economic impact. This would accord with the occasional use of "reasonable" instead of "distinct" in the caselaw.[146] Another interpretation is that it is intended to filter out claims where an owner's initial investment reflected expectations of future, value-depleting regulation. This is

---

139. "Reciprocity of advantage" is sometimes analyzed under the third *Penn Central* factor: character of the government action. *See* Thomas W. Merrill, *The Character of the Government Action*, 36 VT. L. REV. 649, 663–67 (2012).

140. *Penn Cent.*, 438 U.S. at 136.

141. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also supra* Section II.A.

142. *Penn Cent.*, 438 U.S. at 136; *see also supra* Section II.B.

143. *See supra* Section III.B.

144. The amended regulation restricts these activities to vehicles displaying a medallion. *See* CHI., ILL., MUN. CODE. ch. 9-115-180 (2015).

145. William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 50 (1995).

146. *See* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 107 (1995).

consistent with a line of analysis in a seminal law review article cited in *Penn Central*,[147] and it bears resemblance to the economic theory of "rational expectations."[148]

If a court embraces the first interpretation, focusing on filtering out speculative losses, then this factor does not clearly point in either direction. An investment of several hundred thousand dollars to obtain a medallion represents distinct expectations that might seem reasonable in light of the City's history of stringently enforcing its medallion requirement for many decades. Indeed, this is just the contention that owners in Chicago have made.[149] Yet one could also argue that the nature of the highly regulated taxi industry makes any expectation of stability or insulation from regulatory change unreasonable.[150] To put it colorfully, one who thrives by regulation must be prepared to fail by regulation. Or as Justice Scalia wrote in *Lucas*, "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless."[151]

However, if a court instead thinks of this factor as filtering out claims where initial investments discounted for the risk of regulatory change, then compensation for medallion owners is almost certainly unwarranted. Simple algebra will illustrate the point. Consider that the market value of any asset should equal the risk-adjusted, present value of its future cash flows. The cash flows from owning a medallion are the recurring lease payments it earns. If there is no risk in owning a medallion—including no risk of adverse regulatory change, non-re-

147. *See Penn Cent.*, 438 U.S. at 127–28 (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967)).

148. *See* Thomas J. Sargent, *Rational Expectations*, CONCISE ENCYCLOPEDIA ECON., http://www.econlib.org/library/Enc/RationalExpectations.html (last visited Feb. 1, 2016).

149. Complaint at 3–5, Ill. Transp. Trade Ass'n v. City of Chicago, No. 14 CV 827, 2015 WL 5610880 (N.D. Ill. Sept. 22, 2015). Any attempt to discern, or verify, investment-backed expectations is complicated by owners' numerosity and heterogeneity. While a majority of owners in Chicago have only one medallion, two percent of owners control 2856 medallions, more than forty percent of the outstanding stock. *See* Badger, *supra* note 30. And this is to say nothing about differences that may depend on when a particular owner purchased. Reference to market prices, which theoretically aggregate these private expectations, therefore seems preferable to eliciting anecdotal testimony.

150. This is where the Eighth Circuit's discussion of the highly regulated taxi industry in *Minneapolis Taxi Owners Coalition* is relevant. *See supra* Section IV.A.

151. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

newal, or revocation—then its market price should approximate the present value of receiving lease payments in perpetuity.[152]

FIGURE 1: PRESENT VALUE OF A RISK-FREE MEDALLION IN PERPETUITY

$$PV = L / r$$

In Figure 1, *PV* is the present value of a risk-free medallion in perpetuity; *L* is the cash flow from leasing it each period; and *r* is the risk-free discount rate per period. To determine if medallions were priced as zero-risk instruments prior to the regulatory accommodation of ridesharing in Chicago, one can input market information into the formula. For example, in July 2012, more than two years before Chapter 9 was amended, the statutory lease rate for a medallion was $18,200 annually.[153] The risk-free discount rate, derived from the yield on a thirty-year U.S. Treasury bond, was 2.59% annually.[154] With these numbers, one determines that a medallion owner forecasting zero risk as of July 2012 should have been unwilling to sell for less than $702,000. The average price of a medallion traded on Chicago's secondary market in July 2012, however, was $360,000.[155] In other words, medallions were selling at a discount of almost 50% to what they should command in a risk-free world. Some of this discount is surely attributable to the possibility of demographic, economic, or technological change. But much of it also must be attributable to the prospect of adverse regulatory change, for medallion owners enjoy considerable insulation from a shifting landscape so long as governments require medallions to pick up passengers and cap supply.[156] The implication, then, is that this factor also militates against requiring compensation.

3. *Character of the Government Action*

The third *Penn Central* factor, the character of the government action, is even less exact than the first two. One interpretation is that it

---

152. *See* Richard Sansing & Peter Van Doren, *Escaping the Transitional Gains Trap*, 13 J. POL'Y ANALYSIS & MGMT. 565, 567–68 (1994).

153. CHI., ILL., MUN. CODE ch. 9-112-240 (2012) (amended 2015).

154. *See Daily Treasury Yield Curve Rates*, U.S. DEP'T TREASURY, http://www.treasury.gov/resource-center/data-chart-center/interest-rates (last visited Feb. 1, 2016).

155. *See Chicago Taxicab Medallion Prices*, CHI. DISPATCHER, http://chicagodispatcher.com/clients/chicagodispatcher/July2012MedallionPrices.pdf (last visited Feb. 1, 2016).

156. This explains why medallions fared so well as an investment for more than seventy years. *See supra* Section I.A.

instructs a court to situate the regulation at issue on a continuum of government action. Physical appropriation that always requires compensation is at one end, and at the other end is the type of routine regulation, such as a zoning ordinance, that is virtually immune from takings liability.[157] Another consideration that may be relevant is whether the regulation "confers benefits" or "prevents harms," on the theory that actions of the latter type are more closely related to the State's legitimate use of the police power. Indeed, the distinction derives from an early twentieth-century treatise on the police power,[158] but it is tenuous if it exists at all,[159] and the Court has downplayed its relevance in cases after *Penn Central*.[160]

The City of Chicago's accommodation of ridesharing through the amendment to Chapter 9 seems closer to the type of routine government action rarely triggering takings liability than it does to a physical appropriation of property. It is not obviously better viewed as conferring benefits than it is as preventing harms. Accordingly, medallion owners in Chicago find no support from this third *Penn Central* factor, just as they found no support from the first two.

V.
THE CASE FOR TRANSITION RELIEF

To say medallion owners lack a doctrinally plausible takings claim from the regulatory accommodation of ridesharing is to say little about the normative desirability of compensating them for such change. In this Part, I suggest that a legislative decision to compensate medallion owners—a policy of transition relief[161]—may be preferable to letting losses lie. Those who ascribe economic progress to unmitigated forces of creative destruction will bristle at the suggestion, assuming it is rooted in a protectionist sentiment or idiosyncratic notion of fairness. To the contrary, the argument here rests on a normative framework that prioritizes only efficient regulatory incentives and outcomes.

---

157. *See* Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 46 (2005).

158. *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–47 (1904).

159. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

160. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024 (1992).

161. For an overview of law and economics scholarship on transition relief, see Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 N.Y.U. L. REV. 391, 396–405 (2010).

A. Internalizing Regulatory Costs and Benefits

Perhaps the most straightforward argument in favor of a compensation policy is that it will force government to internalize the costs of its actions.[162] In other words, compensation will prevent government from ignoring the burdens its regulations impose and ensure that they are enacted and changed only when social benefits exceed social costs. It will require regulators to operate under a price system, yielding more efficient policymaking.

An oft-noted shortcoming of this internalization strategy, however, is that there is no obvious way to achieve symmetry with respect to regulatory benefits.[163] Put differently, the Fifth Amendment has no "Givings Clause,"[164] and therefore government will pay when it imposes costs but not receive when it distributes gains. This is problematic if one takes the goal of internalization to be generating efficient, and not simply less, regulation.

Another common critique is that the internalization approach fails to account for the transaction costs of compensating.[165] Especially in the case of a generally applicable regulation, it may be prohibitively expensive to identify each burdened party and devise an adequate settlement.[166] The task seems insurmountable if one starts thinking about also trying to identify those who have benefited from the regulation, so that some of their gains may be extracted.

What makes transition relief for medallion owners uniquely compelling, however, is that it presents an opportunity to achieve symmetrical internalization of regulatory costs and benefits at relatively little expense. In other words, neither of the aforementioned drawbacks of compensation-as-internalization have much force in this setting. To understand why, consider that those who primarily benefit from the regulatory accommodation of ridesharing—its drivers and passen-

---

162. *See, e.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 84–85 (1993); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 73–74 (8th ed. 2011).

163. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 574–75 (2001).

164. *Id.* at 551, 553.

165. The canonical exposition of this problem is found in Professor Frank I. Michelman's article, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

166. *See* POSNER, *supra* note 162, at 75 ("When a government regulation affecting property values is general in its application, as will normally be the case, the costs of compensation would be very high, especially if efforts were made, as in economic logic they should be . . . to take account of people benefited by the regulation, by awarding them negative compensation (i.e. taxing away their windfalls).").

gers[167]—engage in transactions that are already taxed. Thus, a government that enacts a ridesharing ordinance to the detriment of medallion owners need only calibrate the amount of the tax to account for the cost of transition relief. A simple exaction per fare would collect revenue according to intensity of use, which should roughly track the concentration of benefits. Funds could then be earmarked and transfers executed cheaply, as medallion owners are registered with the issuing (and presumptively taxing) government. Indeed, it is hard to think of a situation better suited for achieving redistribution from those benefitted to those burdened by a discrete policy change. But understand that the aim here is not redistribution. It is quite the opposite. Internalization aims to enact regulations with net benefits by ensuring that those who benefit from a particular regulation also bear its attendant costs.

One point worth addressing at this juncture is whether a tax would dampen ridesharing activity levels, and if so, whether this is an unwelcome consequence of the proposal. A tax almost certainly will reduce activity levels,[168] but this is not necessarily a bad thing. The optimal activity level, at least from a welfarist perspective, is the one reflecting complete internalization. I assume throughout this Part that the social benefits of sanctioning ridesharing exceed the social costs, but were the opposite true, a tax commensurate with the net social loss should reduce ridesharing activity to zero. And that would be the efficient result.

B. Accelerating Legal Change

In addition to generating more efficient regulation, compensation for medallion owners may accelerate the legal transition to ridesharing. Professor Levmore has suggested this focus on timing as an alternative lens through which to analyze difficult compensation questions.[169] Levmore begins with the uncontroversial assumption that losers from a proposed regulation who expect to go uncompensated will lobby to impede the change. That sinks resources into

167. I make a critical although plausible assumption here, that the benefits of ridesharing services are concentrated among its users. One might also wish to allocate a part of the annual licensing fee a ridesharing service pays to medallion owners.

168. Any tax will drive a wedge between the price paid and price received for goods and services, reducing total output in the relevant market. The significance of this effect will depend on the elasticities of supply and demand. For a basic illustration, see Alex Tabarrok, *Tax Revenue and Deadweight Loss*, MARGINAL REVOLUTION UNIV., http://www.mruniversity.com/courses/principles-economics-microeconomics/deadweight-loss-definition-yacht-tax (last visited Feb. 1, 2016).

169. Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1665–66 (1999).

wasteful rent-seeking, but it also imposes another, less obvious cost. To the extent the losers succeed in at least delaying the new regulation's implementation, and on the assumption that the regulation will produce net benefits once in effect, society is made worse off from having to wait. Thus, what may be preferable in certain instances is to compensate the losers to undermine their incentive to obstruct, perhaps financing the effort with taxes on winners under the new legal regime.[170] This state of the world might be worse than one in which no payoff is required, to be sure, but the important insight is that the status quo may be inferior to both.[171]

This argument neatly meshes with the strategy for achieving internalization of regulatory costs and benefits as outlined above. Compensating medallion owners from exactions on ridesharing activity operationalizes the idea of buying off losers with taxes on winners. Of course, the tactic is only worth contemplating if medallion owners constitute a potent interest group, so that they might be capable of obstructing change. But this seems more than plausible, given that medallion owners constitute a relatively small faction with an intense financial interest at stake, in light of the very measured expansion in the supply of medallions over time,[172] and considering their apparent successes in blocking ridesharing services from operating in some cities and states. Finally, note that compensation to facilitate a legal transition is not necessarily an approach limited to locales where ridesharing is currently prohibited. It is obviously worth considering in those locales, but owners in cities like Boston and Chicago are battling to repeal regulations already in effect. Transition relief even at this later stage may undermine such efforts.

Some will object that medallion owners are likely to engage in rent-seeking to block the regulatory accommodation of ridesharing with or without transition relief. Perhaps this is because transition relief might not fully compensate medallion owners to the extent of their private losses. Or perhaps it is because any amount of promised compensation could mobilize beneficiaries to lobby for an even bigger

170. *Id.*; *cf.* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 571 (1986) ("Compensating losers buys off opponents and taxing winners can help finance such an effort.").

171. *See* Masur & Nash, *supra* note 161, at 400–01 (summarizing Levmore's argument similarly).

172. *See supra* Section I.A; *see also* Josh Barro, *New York Taxi Mogul, Seeking a Bailout, Says He's Too Big to Fail*, N.Y. TIMES: UPSHOT (Apr. 10, 2015), http://www.nytimes.com/2015/04/11/upshot/new-york-taxi-mogul-seeking-a-bailout-says-hes-too-big-to-fail.html.

payoff. Either way, according to this thinking it is futile, if not counterproductive, to try to purchase medallion owners' acquiescence.

I concede this possibility, but this is not a fatal critique. Medallion owners facing modest rather than catastrophic losses may just as well temper their opposition to change. Some may continue to lobby, but perhaps many more will move on to other opportunities—owner-drivers may switch to ridesharing, for example—once they know a wipeout is off the table. It is ultimately an empirical question in which direction, and how strongly, transition relief will pull. This discussion merely explains why it may pull in a direction that facilitates change.

C. Preserving Investment Incentives

A final argument in favor of transition relief for medallion owners is that it may preserve incentives for risk-averse actors to invest in property that may be regulated, and more generally, to deal with government. After all, the appeal of making significant outlays on the basis of stable legal rules and government commitments dims with what appear to be takings without just compensation or even a phasing-in of change.[173] Again, this is a different justification than one deriving from reliance interests—it is centered on incentives and expectations.

Many will point out that foreknowledge of a general policy of transition relief will yield a "moral hazard" problem,[174] causing over-investment based on a disregard of the possibility of change. Moral hazard arises throughout takings law, however, and one way to mitigate its effects is to surprise with a decision to compensate after investments have been made. This is what transition relief for medallion owners facing the regulatory accommodation of ridesharing entails—surprising with compensation after initial investments were made.[175]

Others may wonder why transition relief is necessary when we ordinarily expect individuals to insure privately against risk, either through contract or asset diversification. There is a substantial literature as to why a private market for insurance against adverse govern-

173. *Cf*. Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021 (2007) (arguing that transition relief may be warranted in some instances to induce socially beneficial investments).

174. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 593–95 (1984) (explaining moral hazard in the context of insurance policies that hypothetically could protect against adverse government action).

175. Of course, if government surprises with transition relief too many times, it comes to be expected, and any mitigating effect is lost.

ment action generally does not exist,[176] and the various explanations need no recap here. The point about diversification is stronger, but it presumes that medallion owners could have acquired comparably valuable assets with uncorrelated risks. Some owners could have—the two percent in Chicago who control more than forty percent of the issuance, for example.[177] But for many owners, like the majority in Chicago who hold a single medallion,[178] diversification was probably unrealistic.

D. Counterarguments and Further Considerations

The discussion so far has focused on why it may be desirable to compensate medallion owners as part of the legal transition to ridesharing. The broadest foreseeable objection is simply to the way this Article has framed the problem facing medallion owners. Some might argue it is technological innovation and the growth of ridesharing services that has upset the status quo, not government action.[179] From this perspective, the real grievance of a medallion owner is that government failed to enforce preexisting regulations against rideshare drivers. But just as there is no takings liability for government inaction,[180] there should be no transition relief for medallion owners left unprotected in the face of ambient change.

While it seems true that much of the harm to medallion owners stems from technological innovation and government inaction, this objection overlooks how some governments have indeed acted to sanction ridesharing services. The way they have done so in Massachusetts

176. *See* Blume & Rubinfeld, *supra* note 174, at 592–97; *see also* Masur & Nash, *supra* note 161, at 408–26 (surveying the existing literature and arguing that a better explanation for the market failure is insurmountable pricing difficulties).

177. *See* Badger, *supra* note 30.

178. *See id.*

179. For one version of this critique, see *Chicago Ridesharing: Drivers Fight Back*, *supra* note 6 ("If companies like the taxi companies had their way in the past, Chicagoans would still be hailing horse-and-buggies. Just as gas-powered taxis provided new competition for horse-drawn hansom cabs, the new technology enabling ridesharing provides new competition against traditional taxicabs and dispatch services. Taxi owners do not have a constitutional right for the government to shut down ridesharing drivers, just like typewriter manufacturers or candle makers did not have a constitutional right to force the government to shut down personal computer designers or light bulb inventors.").

180. *See* Valles v. Pima Cty., 776 F. Supp. 2d 995, 1003 (D. Ariz. 2011) ("Plaintiffs have not cited any authority to suggest that a government's *inaction or omissions* can amount to a taking, and this Court is not aware of any such case law."). *But see* Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014) (arguing that government inaction should sometimes give rise to takings liability).

and Chicago, for example, is through a narrowing of the rights a medallion vests in its owner.[181] One only needs to observe the market reaction to this regulatory change to understand its significance.[182] And while such change may not give rise to a doctrinally plausible takings claim, leaving courts unable to compel compensation, legislatures can more flexibly maneuver. If medallion systems were always suboptimal regimes, or if they have recently become so, then the question legislatures should ask now is how to get to the second-best world. I have suggested that transition relief for medallion owners is a possible answer.

Another concern is whether the foregoing argument for transition relief includes any coherent limiting principle. In other words, what justifies going to the expense of compensating medallion owners in response to the regulatory accommodation of ridesharing, but not doing the same for those who stand to lose from ordinary change? Unease about this is practical and not easily dismissed. As Justice Holmes observed, "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[183]

As it turns out, the affirmative case for compensating medallion owners itself provides something of a limiting principle—the exceptionally low transaction costs of devising an efficient scheme of transition relief in this context.[184] Far from facing the impossible task of identifying those benefitted and burdened by ordinary regulatory change, governments for the most part know the affected parties.[185] There is work to be done when it comes to determining efficient payouts, to be sure, but market data makes the task manageable. Consider that Justice Holmes's admonition has little force in a world without transaction costs—everyone who stands to benefit from regulatory change could pay everyone who stands to lose, so that some are made better and none worse, at no administrative cost. The world of medallion owners and ridesharing is not quite that, but it is much closer than we typically get.

A final objection is rooted in scholarly accounts of the Takings Clause that focus on political process failures.[186] Although variations

181. *See supra* Part III.
182. *See supra* Part III.
183. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
184. *See supra* Section IV.A.
185. *See supra* Section V.A.
186. *See* FISCHEL, *supra* note 47, at 120–40; Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 133–38 (1992); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–48 (1991)

in focus exist across the literature, the emerging theme is that compensation should be reserved for those who lack the political clout to ensure that they are not singled out to bear regulatory burdens.[187] The upshot is that medallions owners, as a potent interest group, are not worthy candidates of recompense. They should be expected to have their interest adequately represented in the regulatory process, and if that process yields adverse outcomes, so be it.

We have already seen one difficulty with this line of thinking—if medallion owners constitute a potent interest group, this fact may actually bolster the argument for compensation as a means of facilitating the legal transition to ridesharing. Setting aside this possibility, however, one might question whether medallion owners really are so politically protected. Many scholars have argued that a primary method of shielding oneself from harmful regulation is "economic exit."[188] In other words, the mere recognition that productive assets can flee to a more hospitable jurisdiction is often enough to influence regulators favorably. The problem for medallion owners is that their assets become worthless outside the issuing government's jurisdiction. In a real sense, economic exit is unavailable, and regulators know it.

Conclusion

Legal transitions often exacerbate a perennial tension between incumbent firms and start-ups, and the situation of medallion owners facing the regulatory accommodation of ridesharing is no exception. This Article has considered both doctrinal and normative aspects of whether to compensate medallion owners as part of such change. As a doctrinal matter, it has argued that medallion owners lack a plausible regulatory takings claim. While others have espoused this same view, none has offered more than conclusory analysis in support. This Article has endeavored to fill that gap in the literature with a thorough discussion grounded in precedent. At the same time, this Article also has suggested that transition relief for medallion owners may be normatively preferable to letting losses lie, at least from a perspective focused on generating efficient regulatory incentives and outcomes. Without question, further empirical study is required before regulators

---

("[W]hen the government threatens to intervene in a way that will burden many citizens, these citizens need to look to the political process rather than to takings law for any relief, but . . . when the government singles out a private party, in the sense that the government's aims could have been achieved in many ways but the means chosen placed losses on an individual or on persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking.").

187. *See* Treanor, *supra* note 45, at 866–72 (summarizing the literature).

188. *See, e.g.*, FISCHEL, *supra* note 47, at 138.

may confidently embrace transition relief as a part of an optimal ridesharing policy. The foregoing merely serves to demonstrate that it is worth studying.