

REGULATING RIDE-SHARE APPS: A STUDY ON  
TAILORED REREGULATION REGARDING  
TRANSPORTATION NETWORK COMPANIES,  
BENEFITTING BOTH CONSUMERS AND DRIVERS.<sup>1</sup>

ANDREA BOLTON

ABSTRACT

Recently, the development of on-demand drivers hailed via mobile apps has transformed the transportation market, but regulations across the country have not yet caught up. Though some cities have put into place legislation that regulates ride-sharing in terms of insurance and safety minimums, transportation network companies such as Uber and Lyft have shed a national light on the taxi monopolies across the country, as well as the outdated regulatory regimes in which they operate. In order to best serve the consumer, local governments should reconsider their transportation codes to cover the necessary safety and protection requirements and accommodate the flexible business model of ride-sharing. Consumers will benefit from healthy competition and increased service quality, economic stimulus, and the creation of jobs. Further, as the freelance job market becomes more prevalent, workers in these jobs need protections. Reregulation should be considered as technology changes around us.

I. INTRODUCTION

Ride-sharing apps, such as those created by the increasingly popular companies Uber and Lyft, have certainly changed how some people look at catching a ride across the world. Instead of hailing a cab or calling a dispatcher, one only has to download an app on their phone.<sup>2</sup> Taken from the concept of a taxi, a car will meet you and take you to your destination; but ride-share apps deliver on-demand service and easy payment simply through your phone, and the app can track the

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<sup>1</sup> The author would like to note that the information contained in this comment is up to date as of July 27, 2015. Due to the ever-changing legal scenario of the ride-sharing business, not every change regarding the companies' relationships, operations in certain cities, and individual practices could be included in this publication.

<sup>2</sup> See *Downloading The App*, UBER HELP, <https://help.uber.com/h/20ff0367-9680-4517-baf0-6b0d218264e2> (last visited Sept. 8, 2015) (informing users about the operating systems on which the Uber application can run); *How Do I Request A Ride?*, UBER HELP, <https://help.uber.com/h/7ef159ca-3674-4242-bc0c-b29024958b26> (last visited Sept. 8, 2015) (informing users how to request an Uber ride).

driver's progress and alert you upon their arrival.<sup>3</sup>

Despite the convenience of such an app, the ride-sharing companies have faced resistance and backlash in many cities. Some cities have passed regulations equating ride-share drivers to taxi drivers.<sup>4</sup> Other cities do not have laws that address ride-sharing, and face taxi associations pushing forward litigation concerning the lack of regulation. Most recently, some cities became concerned that ride-share companies could be negatively affecting traffic, air quality, noise, and public health.<sup>5</sup> For those who object to the companies, the main aggressors being taxi operators and associations, the biggest concerns are complicated insurance issues and deceptive business practices stemming from the companies avoiding local regulations.<sup>6</sup> However, some progressive governments have chosen to take these ride-sharing companies as they are, designating new regulations in certain situations.<sup>7</sup>

This comment intends to highlight the importance of tailored reregulation of existing transportation codes in order to allow ride-share app companies to legally function with the flexibility of their profitable business model in order to benefit consumers. The remainder of this introduction will discuss the brief history of the burgeoning companies and will briefly discuss the relevant history of the taxi business, which has grown to form transportation monopolies across the country. Section II addresses the hostile relations between Uber and local government throughout Alabama, and Section III will delve into the reregulation that has already begun regarding ridesharing, including litigation, as well as both new and amended codes on the municipal and state levels. Section IV considers the importance of the categorization of ride-share drivers as employees or independent contractors and the possibility of a new category of worker, dependent contractors, in the face of an ever-growing freelance industry.

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<sup>3</sup> See *App Features*, UBER, <https://uber.com/features> (last visited Sept. 8, 2015) (showing the features of the Uber App).

<sup>4</sup> Emily Dobson, *Transportation Network Companies: How Should South Carolina Adjust Its Regulatory Framework?*, 66 S.C. L. REV. 701, 711 (2015) (citation omitted).

<sup>5</sup> See Kate Rogers, *NY Mayor de Blasio and Uber Reach Deal*, CNBC (July 22, 2015, 6:37 PM), <http://www.cnbc.com/2015/07/22/uber-nyc-growth-cap-tkkt-.html>. Following a lengthy and social-media blasted battle in New York, Mayor de Blasio decided against enacting a cap on for-hire vehicles similar to the cap on taxis to prevent pollution from over-population until a study could be done showing their effects. *Id.*

<sup>6</sup> Anna Gallegos, *The Four Biggest Legal Problems Facing Uber, Lyft and Other Ridesharing Services*, LXBN (June 4, 2014), <http://www.lxbn.com/2014/06/04/top-legal-problems-facing-uber-lyft-ridesharing-services/>.

<sup>7</sup> Dobson, *supra* note 4, at 707–12.

### A. Company Backgrounds

Uber was created in 2009 by Garrett Camp and Travis Kalanick, who launched the first test run in New York City in 2010.<sup>8</sup> Based in San Francisco and available in 141 cities in the United States,<sup>9</sup> Uber offers a sliding scale of services for passengers. UberX, the cheapest option, allows people without commercial or livery licenses to drive their personal cars like taxis.<sup>10</sup> Uber also offers an SUV service; Uber-Black, for upscale cars; and UberTAXI, an on-demand service provided through locally licensed taxicabs.<sup>11</sup>

Lyft, also based in San Francisco,<sup>12</sup> and available in sixty cities throughout the nation,<sup>13</sup> was inspired as competition for Uber on a lower-priced scale.<sup>14</sup> While Uber was offering almost exclusively black-car service, Lyft sought to introduce a cheaper ride-share option.<sup>15</sup> The founders of Lyft intended the app as a mobile offshoot of their company Zimride, which was a ride-share option specifically for universities and for long-distance trips.<sup>16</sup>

Uber and Lyft are mobile-based ride-sharing apps that connect passengers to a ride on demand. Customers “use a smartphone app to locate, schedule, and pay for their travel.”<sup>17</sup> The services are easy and cashless; payment is only accepted via the mobile application.<sup>18</sup> The companies recruit drivers who use their personal vehicles.<sup>19</sup> To utilize a ride-share program, a potential customer downloads the mobile phone

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<sup>8</sup> Travis Kalanick, *Uber's Founding*, UBER: NEWSROOM (Dec. 22, 2010), <http://blog.uber.com/2010/12/22/ubers-founding/>.

<sup>9</sup> *See Our Cities*, UBER, <https://www.uber.com/cities> (last visited Jan. 27, 2015) (listing cities where Uber is currently available).

<sup>10</sup> UBER, <https://www.uber.com> (last visited Sept. 8, 2015).

<sup>11</sup> *See id.*

<sup>12</sup> *See* Third Amended Complaint ¶ 1, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059 (N.D. Cal. 2014) (No. 3:13-cv-04065-VC), 2014 WL 5359368, at \*1.

<sup>13</sup> *See Cities We're In*, LYFT, <https://www.lyft.com/cities> (last visited Sept. 9, 2015).

<sup>14</sup> Kim-Mai Cutler, *Zimride's Lyft Is Going To Give Uber Some Lower-Priced Competition*, TECHCRUNCH (May 22, 2012), <http://techcrunch.com/2012/05/22/zimrides-lyft-is-going-to-give-uber-some-lower-priced-competition/>.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 U.S. Dist. LEXIS 4166, at \*2 (W.D. Tex. Jan. 14, 2015).

<sup>18</sup> *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, 2014 U.S. Dist. LEXIS 42068, at \*21 (D. Mass. Feb. 28, 2014) *report and recommendation adopted in part, rejected in part by* No. 13-10769-NMG, 2014 U.S. Dist. LEXIS 42063 (D. Mass. Mar. 27, 2014).

<sup>19</sup> *See id.* at \*19.

application.<sup>20</sup> The Uber application shows a “map of the user’s location or designated pickup point” and informs the customer about the number of available cars and wait times in the area.<sup>21</sup> Once a ride is selected, the application “displays the driver’s name and photograph on the user’s smart phone, and sends a text message to the user with the driver’s projected arrival time and cell phone number.’ This ‘spur-of-the-moment assignment’ summons an Uber affiliated vehicle ‘just as quickly as a taxi.’”<sup>22</sup> Instead of charging a standard fare, “Uber determines the fares or rates charged for each category of vehicle for each paying customer.”<sup>23</sup> The metered price is calculated on a per-minute or per-mile basis, depending on the car’s speed, on top of a base flat rate.<sup>24</sup> However, the prices are variable because Uber implements a supply and demand based surge-pricing model.<sup>25</sup>

In order to increase driver supply when demand for services is high, the base rate is multiplied, so drivers make more money.<sup>26</sup> Lyft’s fares are calculated based on time, distance, a base rate, and a Trust & Safety fee.<sup>27</sup> Lyft also changes the multiplier of the base-fare based on supply and demand.<sup>28</sup> Uber’s website claims there is no need to tip any drivers, although customers are able to tip. When using the UberTAXI service, a 20% gratuity is automatically applied, but drivers and customers have had problems with this policy.<sup>29</sup> Lyft’s fare includes a tip for the driver, but allows riders to add an additional tip.<sup>30</sup> Yet, while Lyft’s website claims 100% of the tip goes to the drivers,<sup>31</sup> current litigation claims otherwise.<sup>32</sup>

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<sup>20</sup> Mary Beth Quirk, *How Do Uber and Lyft Work And Why Should I Even Care?*, CONSUMERIST (Sept. 18, 2014), <http://consumerist.com/2014/09/18/how-do-uber-and-lyft-work-and-why-should-i-even-care/>.

<sup>21</sup> *Boston Cab Dispatch*, 2014 U.S. Dist. LEXIS 42068, at \*22.

<sup>22</sup> *Id.* at \*22–23 (citations omitted).

<sup>23</sup> *Id.* at \*20.

<sup>24</sup> *Id.*

<sup>25</sup> *See What Is Surge Pricing?*, UBER, <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdc119> (last visited Sept. 8, 2015).

<sup>26</sup> *See id.*; Travis Kalanick, *Surge Pricing Followup*, UBER (Jan. 3, 2012), <http://blog.uber.com/2012/01/03/surge-pricing-followup/>.

<sup>27</sup> *Cost of a Ride with Lyft*, LYFT, <https://www.lyft.com/help/article/1515660> (last visited Feb. 28, 2015).

<sup>28</sup> *See* Ryan Lawler, *Lyft Launches Reverse Surge Pricing With Dynamic ‘Happy Hour’ Discounts*, TECHCRUNCH (Mar. 18, 2014), <http://techcrunch.com/2014/03/18/lyft-happy-hour/>.

<sup>29</sup> *Boston Cab Dispatch*, 2014 U.S. Dist. LEXIS 42068, at \*21.

<sup>30</sup> Quirk, *supra* note 20.

<sup>31</sup> *Paying for Lyft Rides*, LYFT, <https://www.lyft.com/help/article/1003538> (last visited Sept. 27, 2015).

<sup>32</sup> *See* Third Amended Complaint, *supra* note 12, ¶ 2.

After the trip is over, riders rate their drivers.<sup>33</sup> Both companies use the feedback to ensure that drivers are providing quality service that is safe and enjoyable.<sup>34</sup>

While Uber and Lyft are the most popular ride-share app companies, they are not the only ones.<sup>35</sup> Sidecar is the less widely available,<sup>36</sup> but a most fearsome competitor to the ride-share ringleaders, according to THE WALL STREET JOURNAL.<sup>37</sup> An extensive comparison of UberX, Lyft, and Sidecar against taxis in major cities found Sidecar to be the ride-share winner.<sup>38</sup> Uber and Lyft's surge pricing models, which set prices based on supply and demand,<sup>39</sup> disproved their claims of "[b]etter, faster, and cheaper than a taxi."<sup>40</sup> The rides in UberX and Lyft cars were up to four times higher than a taxi.<sup>41</sup> The Sidecar rides averaged around 10% lower than the taxi rides.<sup>42</sup> In this major market-based test, taxis turned out to be the quickest option for test passengers during rush hour.<sup>43</sup>

### *B. The Taxi Industry*

While ride-sharing mobile apps are a recent innovation, they are not exactly reinventing the wheel. The concept of for-hire drivers has

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<sup>33</sup> *The Star Rating System*, LYFT, <https://www.lyft.com/help/article/1453135> (last visited Sept. 22, 2015).

<sup>34</sup> *Id.*; Nairi, *Feedback Is a Two-Way Street*, UBER: NEWSROOM (Apr. 23, 2014), <http://blog.uber.com/feedback>.

<sup>35</sup> See Joe Starkey, *Uber? Lyft? Summon? Which of the 5 SF Rideshares Is Really the Best?*, THRILLIST (Mar. 26, 2014), <http://www.thrillist.com/entertainment/san-francisco/comparing-the-5-rideshare-options-in-sf-thrillist-san-francisco> (comparing ride-share competition in the San Francisco area alone, where many start-up companies, such as Uber, began).

<sup>36</sup> Sidecar is only available in only ten cities. *Riders: Availability*, SIDECAR, <https://www.side.cr/riders> (last visited Sept. 8, 2015); cf. *Cities We're In*, *supra* note 13 (noting that Lyft is available in 60 cities); *Our Cities*, *supra* note 9 (stating that Uber is available in 60 cities).

<sup>37</sup> Geoffrey A. Fowler, *Testing UberX, Lyft and Sidecar Against a Cab in Six Cities*, WALL ST. J., (Mar. 12, 2014), <http://www.wsj.com/news/articles/SB10001424052702304250204579433113467536876>.

<sup>38</sup> *See id.*

<sup>39</sup> See Travis, *Surge Pricing Followup*, *supra* note 26.

<sup>40</sup> Fowler, *supra* note 37; UBER, <http://www.uber.com> (last visited Jan. 30, 2015).

<sup>41</sup> See Fowler, *supra* note 37.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

been around since horse-drawn coaches, called hackneys, in seventeenth-century Europe.<sup>44</sup> Even London hackneys faced licensing regulations meant to limit the “promiscuous use” of hackneys.<sup>45</sup> Regulation of modern taxicabs began during the Great Depression.<sup>46</sup> Most municipalities across the nation have heavy regulations addressing transportation services including: market entry, price setting, and driver requirements regarding finances and operations.<sup>47</sup>

Entry regulations limit the number of taxis in a city via medallions or licenses to operate.<sup>48</sup> Depending on the city, these medallions are only obtained via purchase<sup>49</sup> or a public convenience and necessity application.<sup>50</sup> Many cities have capped the issued number of medallions, which means a taxi driver must find someone who wishes to sell his or her medallion.<sup>51</sup> In cities with capped systems, low supply and high demand dictate astronomical values, which makes entry into the market difficult.<sup>52</sup> While medallions may be capped in places like New York City, that does not mean there are only 13,150 drivers on the street.<sup>53</sup> Those drivers operate medallion taxis, but there are also livery cabs.<sup>54</sup> While both operate as vehicles for-hire, a medallion taxi is licensed “to accept hails from passengers in the street.”<sup>55</sup> Livery cabs cannot accept street hails and must be “dispatched from a livery base station on a pre-arranged basis.”<sup>56</sup>

Another common regulatory method implemented to limit the number of for-hire vehicles in a city is to require approval based on

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<sup>44</sup> Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 *TRANSP. L. J.* 73, 76 (1996).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 109.

<sup>48</sup> Rohin Dhar, *The Tyranny of Taxi Medallions*, *PRICEONOMICS* (Apr. 10, 2013), <http://blog.priceonomics.com/post/47636506327/the-tyranny-of-the-taxi-medallions>.

<sup>49</sup> *Id.*

<sup>50</sup> Timothy Sandefur, *State “Competitor’s Veto” Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 *HARV. J.L. & PUB. POL’Y* 1009, 1010 (2015).

<sup>51</sup> Rohin Dhar, *supra* note 48. New York City limited the issued medallions to 11,787 in 1937, and it was not until 2004 that the city proposed to expand the limit to 13,150 medallions. *Id.*

<sup>52</sup> *Id.* Medallion prices in Boston have reached up to \$625,000, and the value for medallions has increased almost 7,000% for corporate medallion holders. *See id.*

<sup>53</sup> *Noel v. N.Y.C. Taxi & Limousine Comm’n*, 687 F.3d 63, 66 (2d Cir. 2012).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (quoting N.Y.C. ADMIN. CODE § 19-502(1)).

<sup>56</sup> *Id.* (citing § 19-502(1)).

certificates of public convenience and necessity (“CPCN”).<sup>57</sup> Los Angeles, Houston, Chicago, and St. Louis all use the CPCN method.<sup>58</sup> This limitation essentially determines whether the applicant should be filing a CPCN by examining the following factors: demand, proof the current taxicabs are not adequately serving the public, and proof of inefficient management.<sup>59</sup> Safety and financial stability of the applicant are also concerns.<sup>60</sup> For applicants seeking approval of a license under public convenience and necessity, the biggest issue is the considerations given to the long-term effects of the license.<sup>61</sup> Such effects include: the number of proposed additional taxis, future traffic congestion, and the overall impact on existing permit holders in terms of competition and lost revenue.<sup>62</sup>

Big taxicab monopolies and cities hoping to keep CPCN systems in place might find solace in a Tenth Circuit case decided in 2004, *Powers v. Harris*, which held “intrastate economic protectionism constitutes a legitimate state interest”<sup>63</sup> in an extremely deferential rational basis test. Timothy Sandefur, an attorney for the Pacific Legal Foundation, commented that this holding “flies in the face of the entire philosophical framework of due process of law—indeed, of constitutionalism itself.”<sup>64</sup> The Due Process Clause prohibits states from restricting their citizens’ right to practice a trade via “occupational licensing laws that lack a rational connection to the applicant’s skill in practicing the trade.”<sup>65</sup>

However, CPCN laws, unlike ordinary licensing laws, are unrelated to the applicant’s fitness or capacity to practice the trade.<sup>66</sup> The intentions of CPCN laws are to limit entry into an industry.<sup>67</sup> In *Greater Houston Small Taxicab Co. Owners Association v. City of Houston*,<sup>68</sup> small taxicab companies challenged the city’s decision to release 211 new certificates of public convenience and necessity using

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<sup>57</sup> See Sandefur, *supra* note 50, at 1010.

<sup>58</sup> Dempsey, *supra* note 44 at 79–83.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at 81.

<sup>62</sup> See *id.* at 81 n.35.

<sup>63</sup> *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 276–77 (2004)).

<sup>64</sup> Sandefur, *supra* note 50, at 1019 (citation omitted).

<sup>65</sup> *Id.* at 1022–23; see also *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 238–40 (1957); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889).

<sup>66</sup> Sandefur, *supra* note 50, at 1024.

<sup>67</sup> *Id.*

<sup>68</sup> *Greater Houston Small Taxicab Co. Owners Ass’n v. City of Houston (Greater Houston)*, 660 F.3d 235, 237 (5th Cir. 2011).

a weighted lottery system that favored larger companies.<sup>69</sup> Houston had previously capped the certificates, but decided to issue 211 more.<sup>70</sup> Eligibility to receive a certificate is based on size; for example, a cab company was considered “large” if already in possession of over eighty certificates, or “mid-small” if in possession of between four to twenty-four certificates.<sup>71</sup> Because of the weighted system, large companies were eligible to receive over half of the new certificates, and smaller companies challenged the process “on the grounds it was devised simply to protect the market position of large firms against competition from newcomers.”<sup>72</sup> The court upheld the lottery, finding the city could justify the program because larger cab companies are “more likely [to] offer a broader range of services that better serve consumer needs.”<sup>73</sup> Unlike the Tenth Circuit’s extremely deferential decision, the Fifth Circuit used rational basis to analyze the lottery, and found “promoting full-service taxi operations is a legitimate government purpose.”<sup>74</sup>

Taxicabs once fought the same battle against regulations that ride-share companies are fighting now. Economists disagree over whether deregulation of the transportation industry has proved a success.<sup>75</sup> Champions of deregulation believed the free market would succeed in bringing about more taxi services with faster response times and lower fares, claiming the government would save money without oversight costs.<sup>76</sup> Some economists cite to studies that indicate the lack of formal entry requirements allowed both supply and prices to rise, while the influx of drivers caused the quality of service to decline.<sup>77</sup>

In a compilation of studies on deregulation, analysis Adrian T. Moore and Ted Balaker found that the studies concluding that taxi deregulation is harmful were of less significance.<sup>78</sup> Furthermore, any deregulation studies fail to account for the influx of services provided by companies that, prior to deregulation, were considered black market or

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Sandefur, *supra* note 50, at 15 (citing *Greater Houston*, 660 F.3d at 238–39).

<sup>73</sup> *Greater Houston*, 660 F.3d at 240.

<sup>74</sup> *Id.*

<sup>75</sup> See Adrian T. Moore & Ted Balaker, *Do Economics Reach a Conclusion on Taxi Deregulation?*, 3 *ECON J. WATCH* 109, 117 (2006).

<sup>76</sup> Dempsey, *supra* note 44, at 101.

<sup>77</sup> *Id.*

<sup>78</sup> Moore & Balaker, *supra* note 75, at 117–18.

illegal, which results in skewed quality control data.<sup>79</sup> Moore and Bakker also point out that not all cities even regulate taxi markets comprehensively; 12% of markets already allow open entry, while 23% do not regulate fare prices.<sup>80</sup> Because the data cannot conclusively determine that deregulation is harmful to consumers, there is no reason to believe that a tailored overhaul of current transportation codes, which allow ride-sharing, would not benefit consumers. Legal operation not only provides healthy competition, but local government oversight of these new market participants.

These new technologies bring about companies with business models that do not fit into the existing regulatory regimes. The regulations in place attempt to manage legal issues such as employee relations, liability, and consumer protection.<sup>81</sup> Companies such as Uber and Lyft use a business model that does not fit the existing mold to fill a marketplace niche. Both companies use independent contractors as drivers<sup>82</sup> and employ surge-pricing mechanisms based on supply and demand.<sup>83</sup> Overall, Uber and Lyft maintain the argument that based on their business models, the existing licensing laws and regulations in place should not apply to them<sup>84</sup>—and they are probably right. The existing regulatory schemes in many places are usually too restrictive or unnecessary to encompass the business that ride-sharing companies such as Uber and Lyft seek to continue.

## II. THE FIGHT FOR RIDE-SHARING IN ALABAMA

In 2014, Uber entered the stage for three cities in Alabama: Auburn, Tuscaloosa, and Birmingham.<sup>85</sup> By 2015, ride-sharing was in negotiation in two more cities: Huntsville and Mobile.<sup>86</sup> The company

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<sup>79</sup> *Id.* at 116.

<sup>80</sup> *Id.* at 110.

<sup>81</sup> See Dempsey, *supra* note 44, at 77–83.

<sup>82</sup> Maya Kosoff, *2 Lawsuits Could Dramatically Alter the Business Model for Uber and Lyft*, BUS. INSIDER (Jan. 30, 2015), <http://www.businessinsider.com/uber-lyft-business-models-threatened-by-lawsuits-2015-1>.

<sup>83</sup> See Lawler, *supra* note 28; Travis, *Surge Pricing Followup*, *supra* note 26.

<sup>84</sup> Uber and Lyft include language in their licensing agreements that negates the idea that either is a transportation provider, and therefore should not be held to the standards of such providers. See *Lyft Terms of Service*, LYFT (Sept. 11, 2015), <https://www.lyft.com/terms>; *Terms and Conditions*, UBER (Apr. 8, 2015), [www.uber.com/legal/usa/terms](http://www.uber.com/legal/usa/terms).

<sup>85</sup> Melissa Brown, *Uber Transit Service Launches in Tuscaloosa, Auburn and Other SEC Hometowns*, AL.COM (July 29, 2015, 11:09 AM), [http://www.al.com/news/tuscaloosa/index.ssf/2014/08/uber\\_transit\\_service\\_launches.html](http://www.al.com/news/tuscaloosa/index.ssf/2014/08/uber_transit_service_launches.html).

<sup>86</sup> Cameron Smith, *Dear Birmingham, Mobile and Huntsville Welcome Uber. Why Can't We?*, AL.COM (July 29, 2015, 4:48 PM), [http://www.al.com/opinion/index.ssf/2015/07/dear\\_birmingham\\_mobile\\_and\\_hun.html](http://www.al.com/opinion/index.ssf/2015/07/dear_birmingham_mobile_and_hun.html).

had ongoing operations for some time in the Auburn and Tuscaloosa markets, but contentions with the Birmingham City Council prevented business from ever reaching the Magic City's streets.<sup>87</sup> In July 2014, Birmingham amended its licensing and regulation ordinance to define app-based transportation companies as vehicles for hire.<sup>88</sup> This decision by the City Council faced significant criticism from citizens and the media in the weeks leading up to the vote.<sup>89</sup> All transportation companies would still be required to have a business license, public needs certificate, conduct background checks on drivers, and undergo inspections.<sup>90</sup> However, Uber refuses to submit to ordinances that seek to "regulate a 21<sup>st</sup> century transportation alternative in a 20<sup>th</sup> century fashion."<sup>91</sup>

Councilwoman Kim Rafferty, chair of the transportation committee, commented that the purpose of the new codes was to "recognize app-based companies as transportation companies [and] ensure that any transportation business that's conducted in the city of Birmingham that impacts our citizens, that takes our money, that they're qualified and they're safe in their operations[.]"<sup>92</sup> However, the changes made to Section 12-16 included minimum wait times.<sup>93</sup> Uber's response was that "[p]rearrangement minimums are exclusively protectionist measures that benefit one group of businesses at the expense of another[.]" and that it would refuse to operate in a market with such conditions if the proposal was passed.<sup>94</sup>

Uber also argued that, as currently written, their business model

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<sup>87</sup> *Id.*; Brown *supra* note 85.

<sup>88</sup> Cody Owens, *Transportation Conflicts?*, WELD (July 28, 2014), <http://weldbham.com/blog/2014/07/28/transportation-conflicts/>.

<sup>89</sup> Jon Reed, *Uber Supporters Rally Outside Birmingham City Hall, Meet With Council President*, AL.COM (July 31, 2015, 2:21 PM), [http://www.al.com/news/birmingham/index.ssf/2015/07/uber\\_supporters\\_rally\\_outside.html](http://www.al.com/news/birmingham/index.ssf/2015/07/uber_supporters_rally_outside.html).

<sup>90</sup> Joseph D. Bryant, *'Just Play Fairly': No Special Treatment - or Mistreatment - for Uber, Birmingham City Leaders Say*, AL.COM (July 24, 2014, 11:17 AM) [hereinafter Bryant, *Just Play Fairly*], [http://www.al.com/news/birmingham/index.ssf/2014/07/just\\_follow\\_the\\_rules\\_no\\_speci.html](http://www.al.com/news/birmingham/index.ssf/2014/07/just_follow_the_rules_no_speci.html).

<sup>91</sup> Joseph D. Bryant, *A Make or Break Moment for Uber: Birmingham Council Vote Could Seal Fate of App's Availability in City*, AL.COM (July 29, 2014, 4:45 AM) [hereinafter Bryant, *A Make or Break Moment for Uber*], [http://www.al.com/news/birmingham/index.ssf/2014/07/post\\_38.html](http://www.al.com/news/birmingham/index.ssf/2014/07/post_38.html).

<sup>92</sup> Owens, *supra* note 88.

<sup>93</sup> UBERCOMMS, BIRMINGHAM POSITION STATEMENT 1 (July 30, 2014), <http://www.scribd.com/doc/235447853/Birmingham-Position-Statement>.

<sup>94</sup> *Id.*

could not operate within the Birmingham Transportation Code.<sup>95</sup> Under Section 12-16-1, Birmingham requires potential drivers to request a certificate of public necessity and convenience (“CPNC”) in order “to operate one vehicle as a public service vehicle upon the streets of the City, which authorization shall be limited to one of the types of service defined hereinabove and which may also be limited as to the type of vehicle.”<sup>96</sup> Uber feels that UberX does not fit into any of the definitions in the sections, which include limousines, taxicabs, public service vehicles, and vehicles for hire.<sup>97</sup> The factors considered in granting a CPNC are the number of vehicles for hire already operating, “whether existing transportation is adequate to meet the public need, the probable effect of additional vehicles for hire on local traffic conditions and the character, experience and responsibility of the applicant and the adequacy of the service which the applicant proposes to give.”<sup>98</sup>

Once a CPNC is approved, a further application is required in order to add to the number of operating vehicles for hire, stating:

(1) The name and address of the applicant. (2) A statement of whether any information furnished on the original application has changed, and if so, indicate the changes. (3) A description of each such additional vehicle, including the make, model, passenger seating capacity, year of manufacture, state license number, motor number or Vehicle Identification Number (VIN), and name and address of the owner. (4) Any other relevant information which the Revenue Division of the Finance Department may require.<sup>99</sup>

Uber also found this process “prohibitively slow” and preventative for the supply and demand based business model.<sup>100</sup>

Further sections of Birmingham’s transportation regulations did not allow Uber to participate, such as minimum rates and trip times for luxury sedans and limos.<sup>101</sup> The commercial insurance and terminal requirements of Birmingham’s transportation regulations also eliminated Uber’s ability to operate UberX.<sup>102</sup> Section 12-16-23 requires vehicles for hire be stored and operated from fixed and properly zoned

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<sup>95</sup> *Id.* at 1–2.

<sup>96</sup> *Id.* at 2 (quoting BIRMINGHAM, ALA., CODE § 12-16-1 (2014)).

<sup>97</sup> *Id.* at 2–3.

<sup>98</sup> *Id.* at 5 (quoting § 12-16-13).

<sup>99</sup> UBERCOMMS, *supra* note 93, at 5–6 (quoting §12-16-19).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 4–5 (citing § 12-16-8).

<sup>102</sup> *Id.*

locations.<sup>103</sup> Requiring Uber to have a terminal for dispatch and storage of cars not in use is entirely out of place with the UberX business model, which would “partner with residents of Birmingham, allowing them added economic opportunity out of the use of their own private vehicle.”<sup>104</sup> Uber argued compliance with 12-16-23 would be “overly burdensome.”<sup>105</sup>

Moreover, Section 12-16-5 required UberX drivers to carry full-time commercial insurance, presenting the same problems as the terminal requirement considering that drivers only use the cars for commercial purposes part-time.<sup>106</sup> Although Uber provides a commercial insurance policy of up to \$1 million for drivers while carrying passengers,<sup>107</sup> this would not meet the requirements of the ordinance.<sup>108</sup> Requiring each driver to carry his or her own policy would be “prohibitively expensive.”<sup>109</sup> Councilman Johnathan Austin indicated in a statement that the adequacy of the service of UberX was Birmingham’s biggest concern: “We want Uber but with UberX you just don’t know because it’s a different model. So you could have a driver who might not have been trained, you could have a driver who does not know the city.”<sup>110</sup> However, many argued protection of the local taxi industry was the real issue, especially for Councilwoman Rafferty.<sup>111</sup> Consultants, who advised on the transportation code in the past and were representatives for taxi companies, had recently been hired to work for Rafferty amidst the ride-share debate in July 2014.<sup>112</sup>

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<sup>103</sup> *Id.* at 6 (citing § 12-16-23).

<sup>104</sup> *Id.*

<sup>105</sup> UBERCOMMS, *supra* note 93, at 6.

<sup>106</sup> See Bryant, *A Make or Break Moment for Uber*, *supra* note 91.

<sup>107</sup> *Id.*

<sup>108</sup> See UBERCOMMS, *supra* note 93, at 1, 4.

<sup>109</sup> *Id.* at 4.

<sup>110</sup> Joseph D. Bryant, *#BirminghamNeedsUber?: As Council Considers Taxi Regulations Uber Urges Supporters to Lobby Officials*, AL.COM (July 29, 2015, 4:41 PM), [http://www.al.com/news/birmingham/index.ssf/2014/07/post\\_34.html](http://www.al.com/news/birmingham/index.ssf/2014/07/post_34.html). Even a year after the City Council’s decision, Birmingham citizens remain determined to bring the transportation defects left by existing options to light, engaging Councilwoman Rafferty on social media with long wait times during busy weekends and stories of rude and harassing cab drivers at the airport. Madison Underwood, *From Long Waits for Rides to Rude Drivers, Busy Weekend Highlights Birmingham’s Cab System Failures*, AL.COM (July 29, 2015, 4:48 PM), [http://www.al.com/news/birmingham/index.ssf/2015/07/from\\_missed\\_rides\\_to\\_rude\\_driv.html](http://www.al.com/news/birmingham/index.ssf/2015/07/from_missed_rides_to_rude_driv.html).

<sup>111</sup> Joseph D. Bryant, *Birmingham Leaders Cry Foul Over Legislation to Place Uber, App Companies Under State Control*, AL.COM (Apr. 28, 2015, 5:26 PM), [http://www.al.com/news/birmingham/index.ssf/2015/04/birmingham\\_leaders\\_cry\\_foul\\_ov.html](http://www.al.com/news/birmingham/index.ssf/2015/04/birmingham_leaders_cry_foul_ov.html).

<sup>112</sup> Owens, *supra* note 88.

Uber faced similar regulation issues when the company began operations in Tuscaloosa in September 2014.<sup>113</sup> As soon as UberX launched, the drivers were in violation of city regulations aimed at for-hire drivers, which required chauffeur licenses, insurance minimums, police department run background checks, and vehicle inspections.<sup>114</sup> Both Tuscaloosa and Uber claimed to have attempted to negotiate, but by October, the city directed police officers to arrest any Uber drivers operating in Tuscaloosa until the regulations were met, as they would be in violation of the city code.<sup>115</sup> Uber headed towards more friendly cities and no Tuscaloosa drivers were arrested; at least not for simply being an Uber driver.<sup>116</sup> Before Tuscaloosa issued the ultimatum, one driver's arrest may have triggered city officials' decision to push for stricter regulation.<sup>117</sup> A twenty-one year old Uber driver, Brandon Oliver, was arrested "with a quarter-pound of marijuana and an open liter of peach vodka."<sup>118</sup> He was driving on a suspended license and did not have a tag light.<sup>119</sup> Oliver, among other Uber drivers, was issued citations for violations of Tuscaloosa's for-hire vehicle regulations, such as failure to have a business license, chauffeur permit, or proper insurance.<sup>120</sup>

In January 2015, Auburn, Alabama passed regulations that equated Uber and other mobile ride-sharing app companies to taxi companies in terms of insurance, licensing, and vehicle identification guidelines.<sup>121</sup> The city council amended the city code definition of vehicles for hire "regardless if they are booked by calling or hailing a taxi

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<sup>113</sup> Stephen Dethrage, *Tuscaloosa Gives Uber Ultimatum, Vows to Start Arresting Its Drivers; Move May End Operations There*, AL.COM (Oct. 06, 2014, 6:11 AM), [http://www.al.com/news/tuscaloosa/index.ssf/2014/10/tuscaloosa\\_gives\\_uber\\_ultimatu.html](http://www.al.com/news/tuscaloosa/index.ssf/2014/10/tuscaloosa_gives_uber_ultimatu.html).

<sup>114</sup> *Id.*

<sup>115</sup> Stephen Dethrage, *Is Uber Over in Tuscaloosa? Spokesman Neither Confirms nor Denies; No Rides Available Thursday*, AL.COM (Oct. 09, 2014, 1:07 PM), [http://www.al.com/news/tuscaloosa/index.ssf/2014/10/is\\_uber\\_over\\_in\\_tuscaloosa\\_spo.html](http://www.al.com/news/tuscaloosa/index.ssf/2014/10/is_uber_over_in_tuscaloosa_spo.html).

<sup>116</sup> See Jason Morton, *Future of Uber Ride-Sharing Service Uncertain as Tuscaloosa Ultimatum Threatens Arrests*, TUSCALOOSANEWS (Oct. 12, 2014, 12:54 AM), <http://www.tuscaloosaneews.com/article/20141009/NEWS/141019992>.

<sup>117</sup> Stephen Dethrage, *Uber Driver Arrested with Marijuana, Peach Vodka in Tuscaloosa Prompts Criticism of Ride-Sharing*, AL.COM (Sept. 18, 2014, 11:00 AM), [http://www.al.com/news/tuscaloosa/index.ssf/2014/09/uber\\_driver\\_arrested\\_with\\_mari.html](http://www.al.com/news/tuscaloosa/index.ssf/2014/09/uber_driver_arrested_with_mari.html).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Katherine Haas, *City of Auburn Passes Regulations Equating Uber with Taxi Companies*, OPELIKA-AUBURN NEWS (Jan. 8, 2015, 10:45 AM) [hereinafter *City of Auburn Equates Uber with Taxi Companies*], [http://www.oanow.com/news/auburn/article\\_b40ea90c-9755-11e4-aac1-bf9c8b9d2e77.html](http://www.oanow.com/news/auburn/article_b40ea90c-9755-11e4-aac1-bf9c8b9d2e77.html).

or by using a mobile application.”<sup>122</sup> This ordinance, like Birmingham and Tuscaloosa, would require drivers to maintain commercial insurance liability rather than use the procedures in place by Uber, and would also require the vehicles to display either the word “taxi, vehicle for hire or the name of the company” in three inch letters on least one door on each side.<sup>123</sup>

Uber chose to pull out of the Auburn market upon the enactment of the new guidelines, claiming they were too burdensome.<sup>124</sup> Uber responded to the change with three main complaints: the background checks required for licensing, which slowed their procedures already in place “above and beyond the city requirements;” the insurance requirements, and the vehicle identification requirements, which were simply unfair on for-hire Uber drivers using personal vehicles.<sup>125</sup>

The swift exit of Uber from these Alabama markets has left citizens—passengers and potential drivers alike—confused and annoyed.<sup>126</sup> One Auburn passenger left in the lurch upon the suspension of operations commented: “Uber brought supplemental income to those looking for extra work while simultaneously providing consumers a service at more competitive pricing. The last time I checked, free market economics and the act of creating jobs were American ideals, but apparently not in this case.”<sup>127</sup> The potential for access to transportation at the touch of one’s fingertips was gone almost as soon as it came.

In Birmingham’s case, the option never even hit it the ground. Assistant City Attorney Michael Fliegel said the regulations were “common sense” public safety measures. Fliegel denied the regulations were unfair to Uber, but rather put Uber on the same playing field as the rest of the transportation companies in Birmingham: “What we’ve done was basically define them in the ordinance. We want you to come and play, but play fairly.”<sup>128</sup>

This is exactly the problem. Alabama wants to put innovations, such as ride-sharing companies, on the same playing field—but they are playing an entirely different game. By lumping mobile-based vehicles for hire such as Uber under existing categories, the ordinances

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Katherine Haas, *Uber Suspends Operations in Auburn*, OPELIKA-AUBURN NEWS (Jan. 16, 2015, 6:40 PM) [hereinafter Haas, *Uber Suspends Operations in Auburn*], [http://www.oanow.com/news/auburn/article\\_3d2caa5a-9d18-11e4-80ac-abbc029d4e29.html](http://www.oanow.com/news/auburn/article_3d2caa5a-9d18-11e4-80ac-abbc029d4e29.html).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Bryant, *Just Play Fairly*, *supra* note 90.

protect the interests of the existing taxicab and transportation companies by eliminating competition altogether. Birmingham City Council hired consultants heavily-involved in the transportation industry, and was quoted as being concerned with companies taking “our money.”<sup>129</sup> Further, the modified code included minimum wait times, which seems to protect slower companies who could not compete with UberX’s on-demand system.<sup>130</sup> Other transportation requirements throughout the state, such as the identification requirements in Auburn and chauffeur-license requirements in Tuscaloosa, are seemingly aimed at prohibiting models such as UberX, where everyday people use their personal cars.

These cities seemed to kick Uber out of town by forcing them to meet existing regulations favoring traditional transportation companies; however, municipal governments do have a legitimate interest in protecting the safety of their citizens and can enact laws to do so, as long as the regulations are rational.<sup>131</sup> The cities argue the ordinance changes are to ensure regulation that protects consumers.<sup>132</sup> Tuscaloosa and Auburn were correct in asserting that, even before the amendments were made, Uber, or at least the drivers, were operating as illegal and unlicensed for-hire vehicles.<sup>133</sup>

Uber is unlikely to fight in any city that decides to pursue regulatory strategy. In January 2015, Uber representatives explained the company’s decision to stop operating in Auburn: “While 21 U.S. jurisdictions have created permanent regulatory frameworks that recognize ridesharing as a new transportation alternative, Auburn has chosen to put forth burdensome regulations that disregard our innovative business model.”<sup>134</sup> With its business model doing well across the nation and its legal team tied up defending lawsuits, Uber’s focus is elsewhere.<sup>135</sup> Rules in the best interest of the consumers are rational, but arguably, not all of these regulations are. If the most important interests to protect are those of the consumer, then among safety concerns should be regulations that allow for competitive pricing and service.

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<sup>129</sup> Owens, *supra* note 88.

<sup>130</sup> See UBERCOMMS, BIRMINGHAM POSITION STATEMENT 1 (Jul 30, 2014), <http://www.scribd.com/doc/235447853/Birmingham-Position-Statement>.

<sup>131</sup> Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 46 F. Supp. 3d 888, 892 (E.D. Wis. 2014) (citations omitted).

<sup>132</sup> See *City of Auburn Releases Licensing Requirements for Uber and Other “Ride-Share” Drivers*, WTVM.COM (Oct. 3, 2014, 10:00 PM), <http://www.wtvm.com/story/26693720/city-of-auburn-releases-licensing-requirements-for-uber-and-other-ride-share-drivers>.

<sup>133</sup> See *id.*

<sup>134</sup> Haas, *Uber Suspends Operations in Auburn*, *supra* note 124.

<sup>135</sup> See Davey Alba, *Uber’s Desperate Fight to Avoid a Massive Class Action Suit*, WIRED (Aug. 7, 2015, 7:58 PM), <http://www.wired.com/2015/08/uber-class-action-lawsuit/>.

Similarly, in March 2015, before ride-share companies entered the market, the Huntsville City Council updated their vehicle-for-hire ordinance to include transportation network vehicles and allow operation within city limits.<sup>136</sup> While the amendment initially looked positive for companies such as Uber, the ordinance held transportation network vehicles to the same standards as all other transportation providers, and required strict regulatory compliance, including a Certificate of Public Convenience and Necessity, individual vehicle liability insurance, and Huntsville Police Department background checks.<sup>137</sup> Allegedly, Huntsville city officials reached out to Uber regarding the company's launch in the city before the adoption of the code.<sup>138</sup> Despite the less-than-warm welcome Uber has received throughout the state, less than a month after the Huntsville ordinance was amended, the company announced they were "actively exploring the Mobile market."<sup>139</sup> These explorations proved fruitful, as in June 2015, Uber finally announced the Mobile launch.<sup>140</sup>

However, when the Uber drivers first hit the streets, they were technically illegal, as the Mobile Transportation Regulations did not allow for transportation network companies.<sup>141</sup> The Mobile City Council worked to resolve this issue, Uber continued to operate during this time, and an amendment was passed a month after the launch allowing Uber to stay.<sup>142</sup> While Mobile is the first city to successfully allow such amendment in Alabama, the road to ride-sharing was not without tension; Uber executives threatened to pull out of the city if the new ordinance required drivers to carry commercial insurance,<sup>143</sup> and it

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<sup>136</sup> Steve Doyle, *Uber Ridesharing Service Not Coming to Huntsville Anytime Soon*, AL.COM (Mar. 30, 2015, 4:43 PM), [http://www.al.com/business/index.ssf/2015/03/uber\\_balks\\_at\\_new\\_guidelines\\_f.html](http://www.al.com/business/index.ssf/2015/03/uber_balks_at_new_guidelines_f.html).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Michael Finch II, *As Uber Ponders a Move into Mobile, Here's a Look at the Company's Track Record Across the State*, AL.COM (Apr. 4, 2015, 12:41 PM), [http://www.al.com/business/index.ssf/2015/04/as\\_uber\\_ponders\\_a\\_move\\_into\\_mo.html](http://www.al.com/business/index.ssf/2015/04/as_uber_ponders_a_move_into_mo.html).

In April of 2015, Uber posted employment ads to gauge interest in the market, seeking independently contracted drivers "who can make as much as \$20 an hour." *Id.*

<sup>140</sup> Monica, *UberX is Arriving Now in Mobile*, UBER: NEWSROOM (June 11, 2015), <http://newsroom.uber.com/al/2015/06/algulfcoast/>.

<sup>141</sup> See Michael Finch II, *Uber Cars on Mobile Streets, but Not yet Legal*, AL.COM (June 19, 2015, 8:16 PM), [http://www.al.com/news/mobile/index.ssf/2015/06/mobie\\_uber\\_driver\\_i\\_dont\\_mind.html](http://www.al.com/news/mobile/index.ssf/2015/06/mobie_uber_driver_i_dont_mind.html).

<sup>142</sup> Michael Finch II, *Mobile Gives Uber the Greenlight to Continue Operating in the City Limits*, AL.COM (July 14, 2015, 3:43 PM) [hereinafter Finch II, *Mobile Gives Uber the Greenlight*], [http://www.al.com/business/index.ssf/2015/07/mobile\\_gives\\_uber\\_the\\_greenlig.html](http://www.al.com/business/index.ssf/2015/07/mobile_gives_uber_the_greenlig.html).

<sup>143</sup> Michael Finch II, *Uber: We'll Leave Mobile if Insurance Requirements are Included in*

launched a social-media smear campaign against the city council, despite wanting local cooperation.<sup>144</sup>

In April of 2015, a Representative for the Alabama Legislature introduced HB509, which attempts to put the Uber hostility throughout the state in the rearview mirror.<sup>145</sup> HB509 would recognize transportation network companies in Alabama and take the oversight out of the control of individual municipalities and into the Alabama Public Service Commission.<sup>146</sup> If passed, “[t]he bill would require annual safety inspections for vehicles used, third-party background checks on drivers and a zero-tolerance policy for drug and alcohol use. The companies would also have to maintain trip records for a year, and keep driver records for at least one year.”<sup>147</sup> However, the bill does not necessarily mean that Uber will come and play once passed. Some of these same requirements, such as third-party background checks, were deemed too burdensome in Auburn.<sup>148</sup> An opinion piece regarding the bill declared that Uber’s negotiation tactics were perhaps the problem: “Uber is not being blocked from operating in Alabama; it is refusing to operate in Alabama unless we comply with its demands.”<sup>149</sup>

### III. REGULATION OF RIDE-SHARING

#### A. Recognition in Regulation

Many cities are individually deciding on regulation of ride-sharing, but Nevada is leading the statewide ban on companies such as Uber and Lyft.<sup>150</sup> Virginia banned ride-sharing app companies, but state officials lifted the ban upon assurances that the companies would comply with stricter regulations such as in-depth background checks and adequate insurance coverage.<sup>151</sup> While most statewide action regarding

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*Proposed Ordinance*, AL.COM (July 14, 2015, 8:41 AM), [http://www.al.com/business/index.ssf/2015/07/uber\\_well\\_leave\\_mobile\\_if\\_insu.html#incart\\_story\\_package](http://www.al.com/business/index.ssf/2015/07/uber_well_leave_mobile_if_insu.html#incart_story_package).

<sup>144</sup> Finch II, *Mobile Gives Uber the Greenlight*, *supra* note 142.

<sup>145</sup> H.R. 509, 2015 Reg. Sess. (Ala. 2015), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2015rs/PrintFiles/HB509-int.pdf>.

<sup>146</sup> *Id.*

<sup>147</sup> Mike D. Smith, *Bill Would Open Doors for Services like Uber in Alabama*, AL.COM (July 29, 2015, 4:45 PM), [http://www.al.com/news/birmingham/index.ssf/2015/04/bill\\_aims\\_to\\_give\\_app-based\\_tr.html](http://www.al.com/news/birmingham/index.ssf/2015/04/bill_aims_to_give_app-based_tr.html).

<sup>148</sup> *Id.*

<sup>149</sup> *Should Alabama Lawmakers Pave the Way for Uber?*, AL.COM (July 29, 2015, 4:50 PM), [www.al.com/opinion/index.ssf/2015/05/should\\_alabama\\_lawmakers\\_pave.html](http://www.al.com/opinion/index.ssf/2015/05/should_alabama_lawmakers_pave.html).

<sup>150</sup> Scott Sonner, Associated Press, *The Only State that Allows Prostitution Just Banned Uber*, BUS. INSIDER (Nov. 26, 2014, 2:28 PM), <http://www.businessinsider.com/nevada-bans-uber-2014-11#ixzz3Q4Rx8EZD>.

<sup>151</sup> Luz Lazo, *Virginia Reaches Deal with Uber, Lyft, to Allow Services to Operate in the*

ride-sharing bans has been judicial, Illinois actually pushed through legislation.<sup>152</sup> The Illinois House of Representatives passed two bills: “the Uber Bill,” or House Bill 4075, and House Bill 5331.<sup>153</sup> The Uber Bill put stricter regulations on for-hire drivers, such as requiring “commercial insurance and chauffeur’s licenses, and would have allowed car insurance companies to suspend private coverage during commercial operation.”<sup>154</sup> The Uber Bill’s ultimate purpose was to enact “statewide regulations on commercial ridesharing and preventing local governments from adopting rules to fit their communities.”<sup>155</sup> However, former Governor Pat Quinn vetoed both bills and the “one-size-fits-all” approach to regulation of the innovation.<sup>156</sup> The Governor has a point: ride sharing cannot fit into old molds.

### *B. Separation of Regulatory Schemes*

In September of 2011, the taxicab permit cap in Milwaukee was challenged on state constitutional grounds.<sup>157</sup> The city established a downward-floating cap in 1992, allowing no increase or new permit issuances, but the cap could decrease should a permit be revoked or not renewed.<sup>158</sup> The city failed to establish a rational basis for the cap, and the court found a violation of the constitution, enjoining the cap from being enforced.<sup>159</sup> Pending appeal, the city amended the cap ordinance—approximately 1,700 drivers applied for the 100 newly issued permits, and the city voluntarily dismissed the appeal.<sup>160</sup> Longtime

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*State*, WASH. POST (Aug. 6, 2014), <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/08/06/virginia-reaches-deal-with-uber-lyft-to-allow-services-to-operate-in-the-state/>. As of February 2015, South Carolina has also implemented a cease and desist order against Uber throughout the state, until such time the Public Service Commission grants the company the proper passenger carrier classifications. *Uber Ordered to Stop Operating in South Carolina*, WLTX19 (Jan. 15, 2015, 10:41 PM), <http://www.wltx.com/story/news/local/2015/01/15/uber-ordered-to-stop-operating-in-south-carolina/21834029/>.

<sup>152</sup> Laurie Kulikowski, *Uber Banned in 5 U.S. Cities that Want Your Taxi Business*, MAIN ST. (Sept. 3, 2014, 9:15 AM), <http://www.mainstreet.com/article/uber-banned-in-5-us-cities-that-want-your-taxi-business>.

<sup>153</sup> *Id.*

<sup>154</sup> Eric Reed, *Uber Zooms Through Legislative Road Block*, MAIN ST. (Aug. 27, 2014, 2:55 PM), <http://www.mainstreet.com/article/uber-zooms-through-legislative-road-block>.

<sup>155</sup> Kulikowski, *supra* note 152.

<sup>156</sup> Reed, *supra* note 154.

<sup>157</sup> *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, 46 F. Supp. 3d 888, 890 (E.D. Wis. 2014).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 891.

permit-holding drivers in Milwaukee, who alleged the increase in permits violated equal protection and due process under the United States Constitution, challenged the cap increase in federal court in 2014.<sup>161</sup> The judge denied the plaintiffs requested preliminary injunction, as the judge found they had not shown they would suffer irreparable harm or were likely to succeed on the merits; facing that failure, the plaintiffs dropped the case.<sup>162</sup>

Then Uber and Lyft came to Milwaukee.<sup>163</sup> Unlike some cities, which were up-in-arms to run them out of town, or force the companies to meet regulation requirements that did not match the services offered,<sup>164</sup> Milwaukee did the exact opposite. The city adopted a new ordinance to regulate ride-sharing, created a designation of “network companies,” and further eliminated the cap on taxicab vehicle permits.<sup>165</sup> This move by the city ensured the companies would be able to operate legally and be subject to regulations in the best interest of their citizens.

But this new ordinance led plaintiffs in *Joe Sanfelippo Cabs Inc. v. City of Milwaukee* to bring substantive due process and equal protection challenges.<sup>166</sup> The ordinance considers a vehicle a “network vehicle” if it operates under contract service arranged through a “network company;” for a fixed fare determined before the passenger enters the vehicle.<sup>167</sup> “Network companies” are defined as transportation companies that use online or digital platforms such as smartphone apps.<sup>168</sup> The plaintiffs moved for injunctive relief.<sup>169</sup>

In order to succeed on the merits of the due process claim, alleging the removal of the cap constituted deprivation of property in violation of the Fourteenth Amendment,<sup>170</sup> the plaintiffs needed to establish a protected property interest and show the city had no rational basis for removing the cap.<sup>171</sup> The taxicab drivers claimed the property interest existed in the secondary market value of the permits, and the city

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 891.

<sup>164</sup> Haas, *Uber Suspends Operations in Auburn*, *supra* note 124.

<sup>165</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 891.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* The court clarified that taxicab companies that utilize smartphone apps for dispatch can qualify as network companies under the ordinance. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”).

<sup>171</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 892.

caused devaluation by removing the cap.<sup>172</sup> The argument is essentially that the secondary market value is devalued because when the cap existed, the only way to get a permit was to buy one, and permit holders could sell them based on supply and demand.<sup>173</sup> Without a cap, there is no demand for secondary permits, and the permit's only value is income derived from transportation services.<sup>174</sup> From 1992 until the new ordinance eliminated the cap, the cost to buy a permit in Milwaukee rose from \$85 to \$150,000.<sup>175</sup> In opposition, the city argued "the law must entitle a person to a benefit and not merely provide an expectation of one."<sup>176</sup> However, the court did not address the merits of the plaintiffs establishing a property interest protected under the Fourteenth Amendment because it found the plaintiffs were "unlikely to be able to establish that the City lacked a rational basis for removing the cap."<sup>177</sup>

The rational basis test requires that an ordinance have a rational relationship to a legitimate governmental purpose, and only voids the ordinance if the court finds the ordinance arbitrary or irrational.<sup>178</sup> Milwaukee provided four justifications that the court found to overcome rational basis scrutiny.<sup>179</sup> First, "faced with new companies like Uber and Lyft that were redefining the way that taxicab services operated in Milwaukee and were entirely unregulated," the city needed to find a way to regulate network companies.<sup>180</sup> The answer was to expand the number of permits available, as licensing permits are the mode of regulation.<sup>181</sup> Second, with original expansion of one-hundred permits in February of 2014, the city realized there was an unexpected demand for permits.<sup>182</sup> Third, the ordinance allowed the city to increase availability of cost-effective transportation.<sup>183</sup> Lastly, Milwaukee was under a state court order to remove the cap.<sup>184</sup> The court reasoned that any one of these four factors would suffice as a rational basis, and,

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<sup>172</sup> *Id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> John Kerr, *Milwaukee's Taxi Monopoly Comes Crashing Down*, REAL CLEAR POL'Y (Sept. 10, 2014), [http://www.realclearpolicy.com/blog/2014/09/10/milwaukees\\_taxi\\_monopoly\\_comes\\_crashing\\_down\\_1070.html](http://www.realclearpolicy.com/blog/2014/09/10/milwaukees_taxi_monopoly_comes_crashing_down_1070.html).

<sup>176</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 892 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* (citations omitted).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 892.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

when combined, the plaintiffs were unlikely to succeed on the merits of a due process challenge against the removal of the cap.<sup>185</sup>

*Joe Sanfelippo Cabs Inc.* also raised an Equal Protection claim under the Fourteenth Amendment, arguing Milwaukee's new ordinance unconstitutionally holds network vehicles to lesser regulations than traditional taxicabs.<sup>186</sup> Equal Protection challenges to government action are analyzed on different scrutiny levels depending on the classifications made.<sup>187</sup> The plaintiffs, as taxicab drivers, are not members of a protected class entitled to elevated scrutiny. The court analyzed the Equal Protection claim under rational basis scrutiny.<sup>188</sup> The city regulates network vehicles and traditional taxicabs differently in three aspects: fares, appearance, and the "provision of information about how a customer can complain."<sup>189</sup> Standard taxicabs must charge a metered fare as prescribed by the ordinance, while network vehicles can charge "whatever the market will bear" as long as the passenger and driver have prearranged the fee electronically.<sup>190</sup> The court found a rational basis for the differential regulation of fares in consumer protection:

in the event of a dispute, the combination of the pre-ride fixed price agreement and the electronic record of the agreement protects consumers. In contrast, when a consumer [hails a taxicab], she is not similarly protected. Even if a passenger orally agreed on a fixed price before the ride began, there would be no record of that agreement.<sup>191</sup>

Further, as the plaintiffs offered no contradictory argument, the court found they would be unlikely to succeed in establishing that the city's exemption of network vehicles from statutory visual marking requirements for taxicabs was irrational.<sup>192</sup>

Milwaukee requires taxicabs to be painted a certain color and display certain information, but did not require the same of network vehicles, under the reasoning that the purpose of the visible markings was

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 893.

<sup>187</sup> See Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014).

<sup>188</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 893 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 893–94.

to allow easy identification of licensed vehicles.<sup>193</sup> This consumer protection safeguard is not necessary for network vehicles, as passengers prearrange transport via smartphone apps, are usually familiar with the company, and are aware a driver will contact them through the company.<sup>194</sup> The third way the Milwaukee ordinance regulated network vehicles and traditional taxicabs differently involved customer grievances.<sup>195</sup> Taxicabs are required to display in the vehicle how to complain, while network vehicles must provide the same information when the passenger hails the car electronically.<sup>196</sup> The court did not find it irrational that the method of hailing the ride should correlate to the method of communicating grievance procedures.<sup>197</sup>

Overall, the plaintiffs failed to prove they were likely to succeed on the merits of their Equal Protection claim.<sup>198</sup> Accordingly, the court was not required to assess whether irreparable harm would result, but did so nonetheless “in order to provide a complete analysis.”<sup>199</sup> The court rejected loss of revenue and business as a basis for irreparable harm to the taxicab companies.<sup>200</sup> While serious, in a balance of the harms, the city and public held virtually identical interests and faced harm upon an injunction.<sup>201</sup>

The taxi industry faced a setback as the Milwaukee ordinance continued to be enforced without an injunction, but *Joe Sanfelippo Cabs Inc.* could have significant implications for ride-sharing companies. There are already over twenty jurisdictions that have taken to regulating ride-sharing differently than traditional transportation in one way or another.<sup>202</sup> *Joe Sanfelippo Cabs Inc.* illustrates that adjusting regulation to fit the companies’ business models is not a violation of equal protection, and, in fact, makes more sense for the cities, allowing new business revenue and economic growth. The cities can still have oversight and regulations protecting consumers, but with structured guidelines, the companies are free to operate their own business models.

### C. Supply-and-Demand Based Pricing

The plaintiffs in *Joe Sanfelippo Cabs Inc.* had particular issue with

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<sup>193</sup> *Id.* at 893 (citations omitted).

<sup>194</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 893.

<sup>195</sup> *Id.* at 894 (citations omitted).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* .

<sup>200</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 894–95.

<sup>201</sup> *Id.*

<sup>202</sup> Hass, *Uber Suspends Operations in Auburn*, *supra* note 124.

whether the ride-share companies could charge different rates than traditional taxicabs.<sup>203</sup> Surge pricing, a pricing model that allows the drivers to charge more as demand increases, has proved a point of contention for Uber and Lyft. Uber originally unveiled the surge-pricing model for New Year's Eve 2012 in an effort to convince drivers to hit the streets, reserving the ability to lower the price multiplier if it got too large.<sup>204</sup> Potential riders are supposed to know and agree to the trip multiplier before they hail the ride.<sup>205</sup> The original roll-out brought over two-hundred complaints to Uber community support.<sup>206</sup> Halloween 2014 saw prices as high as 900% of original rates, costing at least one Uber passenger over \$300 for a twenty minute ride; she did not remember agreeing to the rates.<sup>207</sup> Uber touts their fast, cash-free payment method as a prime selling point,<sup>208</sup> and just pressing a button constitutes "an agreement to pay [a] driver for his services."<sup>209</sup> However, when agreeing to a car at surge pricing, the total estimated rate is not displayed—only the multiplier is.<sup>210</sup>

Apart from holiday surge-pricing, Uber faced further backlash and accusations of price gouging in times of emergency.<sup>211</sup> During Hurricane Sandy in 2012, New York City Uber drivers were charging double rates.<sup>212</sup> Meanwhile, no taxis or public transits were available, and passengers were not pleased.<sup>213</sup> Uber executives quickly responded, turning off surge pricing but paying drivers the difference in an attempt to

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<sup>203</sup> *Joe Sanfelippo Cabs Inc.*, 46 F. Supp. 3d at 891.

<sup>204</sup> Dan Kedmey, *This Is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), <http://time.com/3633469/uber-surge-pricing/>.

<sup>205</sup> Dug Begley, *UPDATE: Almost \$250 for 13 miles: Uber's 'Surge Pricing'*, CHRON: HIGHWAYMAN (Dec. 30, 2014, 3:27 PM), <http://blog.chron.com/thehighwayman/2014/12/almost-250-for-13-miles-ubers-surge-pricing/>. The driver in this instance only informed the passengers the rate would be increased and they were shocked to find the trip cost almost \$200 more than expected. *Id.*

<sup>206</sup> Travis, *Surge Pricing Followup*, *supra* note 26.

<sup>207</sup> Caroline Moss, *26-Year-Old Successfully Crowd Funds to Pay for her \$362 Halloween Uber Ride*, BUS. INSIDER (Nov. 2, 2014, 10:39 AM) <http://www.businessinsider.com/women-raises-362-to-pay-for-uber-ride-2014-11>.

<sup>208</sup> UBER, *supra* note 10.

<sup>209</sup> See Travis, *Surge Pricing Followup*, *supra* note 26.

<sup>210</sup> *Id.*

<sup>211</sup> Eric T. Schneiderman, *Taming the Digital Wild West*, N.Y. TIMES (Apr. 22, 2014), [http://www.nytimes.com/2014/04/23/opinion/taming-the-digital-wild-west.html?\\_r=3](http://www.nytimes.com/2014/04/23/opinion/taming-the-digital-wild-west.html?_r=3).

<sup>212</sup> Colleen Taylor, *Uber Kills Surge Pricing in NYC for Customers, Drivers Paid 2X Rate to Meet Post-Sandy Demand*, TECHCRUNCH (Oct. 31, 2012), <http://techcrunch.com/2012/10/31/uber-turns-on-surge-pricing-in-nyc-post-sandy-then-retreats-after-pr-backlash/>.

<sup>213</sup> *Id.*

get cars on the streets.<sup>214</sup> Following Sandy, New York Attorney General Eric Schneiderman announced his investigation into Uber's surge pricing in light of New York's price gouging laws.<sup>215</sup> However, in July 2014, Schneiderman and Uber came to an agreement regarding capped surge pricing during abnormal market disruptions, such as strikes, emergencies and national disasters.<sup>216</sup> Uber has adopted this policy nationwide for emergencies.<sup>217</sup>

Following the media and consumer backlash against Uber's surge pricing, Lyft, which had already capped prices at twice those of the base fares, decided to initiate an entirely dynamic pricing system.<sup>218</sup> While Uber's model only raises prices when demand is high, Lyft decided to launch "Happy Hour," which reduces prices when demand is low.<sup>219</sup>

Uber and Lyft both base their fares on a base rate, and then adjust according to trip length.<sup>220</sup> When they implement dynamic pricing, the companies are only using basic supply-and-demand principles.<sup>221</sup> *Joe Sanfelippo Cabs Inc.* pointed out the pricing difference is that the companies are allowed to charge what the market will bear.<sup>222</sup> If passengers are willing to pay for the ride, does the price they are willing to pay not become the value? Further, it should speak to the city regulatory boards that passengers would regularly pay three or four times the base fare of a ride-share than use a taxi.

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<sup>214</sup> *Id.*

<sup>215</sup> Schneiderman, *supra* note 211.

<sup>216</sup> Letter from Eric T. Schneiderman, N.Y. Attorney Gen., to Travis Kalanick, Co-Founder & CEO, Uber Techs. Inc., (July 8, 2014), [http://ag.ny.gov/pdfs/Uber\\_Letter\\_Agreement.pdf](http://ag.ny.gov/pdfs/Uber_Letter_Agreement.pdf). Under the agreement, in January 2015 during a blizzard across the Northeast affected New York City, Uber released a statement that surge pricing "prices will not exceed 2.8x the normal fare. . . . and all Uber proceeds will be donated to the American Red Cross to support relief efforts." Jordan Crook & Ryan Lawler, *Uber Will Cap Surge Pricing During Northeast Snowstorm*, TECHCRUNCH (Jan. 26, 2015), <http://techcrunch.com/2015/01/26/uber-will-cap-surge-pricing-during-northeast-snow-storm/>.

<sup>217</sup> Nairi, *Partnership With American Red Cross to Support Cities and Citizens During Disasters*, UBER: NEWSROOM (July 8, 2014), <http://blog.uber.com/UberARC>.

<sup>218</sup> Lawler, *supra* note 28.

<sup>219</sup> *Id.*

<sup>220</sup> Chris Stobing, *Uber vs Lyft: What's the Difference and Which Should I Use?*, HOWTOGEEK (June 25, 2015), <http://www.howtogeek.com/219126/uber-vs-lyft-what%E2%80%99s-the-difference-and-which-should-i-use/>.

<sup>221</sup> See *Prime Time*, LYFT, <https://www.lyft.com/help/article/1353884> (last visited Sept. 30, 2015); *What Is Surge Pricing?*, *supra* note 26.

<sup>222</sup> *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, 46 F. Supp. 3d 888, 893 (E.D. Wis. 2014).

Dynamic pricing works in favor of both the consumer and the drivers,<sup>223</sup> especially when fully dynamic and not merely increased.<sup>224</sup> Economists Stewart Dompe and Adam Smith hypothesized that cab drivers could also benefit from surge pricing, should governments chose to eliminate flat-rate fares across the board.<sup>225</sup> With flat rates, drivers have no incentive to accept a trip to a bad neighborhood or on a busy night.<sup>226</sup> While the public interest in a flat rate fixing is “to prevent drivers from surprising customers with high rates,”<sup>227</sup> arranging the fares ahead of accepting a trip on the ride-share apps eliminates that interest.<sup>228</sup>

#### *D. Commercial Insurance Coverage*

Many anti-rideshare regulations have focused on the insurance coverage of for-hire drivers.<sup>229</sup> Those opposed to platforms such as Uber and Lyft argue the drivers should be held to the same insurance standards as taxi drivers and demand regulation.<sup>230</sup> Uber and Lyft do not disagree that drivers must be insured, and both companies cover their for-hire drivers during a fare, which lasts from the time a passenger arranges for a pick up until the time the passenger is dropped off.<sup>231</sup> In fact, both companies offer flat insurance coverage across the nation, of \$1 million in third party liability, including uninsured or underinsured motorist coverage, during a trip.<sup>232</sup> Meanwhile, taxi insurance minimums vary city-by-city, and are often lower than Uber’s insurance

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<sup>223</sup> See Stewart Dompe and Adam C. Smith, *Regulation of Platform Markets in Transportation*, MERCATUS ON POL’Y, Oct. 27, 2014, at 1, 3, <http://mercatus.org/sites/default/files/Dompe-Smith-Platform-Markets-MOP.pdf>.

<sup>224</sup> See *id.*

<sup>225</sup> See *id.* at 4.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 3.

<sup>228</sup> *Id.*

<sup>229</sup> Kara L. DiBiasio, *Insurance Rules of the Road for Ride-Sharing Companies*, LAW360 (Nov. 19, 2014, 11:20 AM), <http://www.law360.com/articles/597389/insurance-rules-of-the-road-for-ride-sharing-companies>; Eric M. Johnson, *California Governor Signs Ridesharing Insurance Legislation*, REUTERS (Sept. 17, 2014, 11:26 PM), <http://www.reuters.com/article/2014/09/18/us-california-lawmaking-ridesharing-idUSKBN0HD01420140918>.

<sup>230</sup> See *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, 46 F. Supp. 3d 888, 893 (E.D. Wis. 2014).

<sup>231</sup> *Lyft Insurance Overview*, LYFT: BLOG, (April 11, 2014), [blog.lyft.com/posts/2014/4/11/lyft-insurance-overview](http://blog.lyft.com/posts/2014/4/11/lyft-insurance-overview); Nairi, *Eliminating Ridesharing Insurance Ambiguity*, UBER: NEWSROOM (March 19, 2015) [hereinafter Nairi, *Eliminating Ridesharing Insurance Ambiguity*], <http://blog.uber.com/uberXridesharinginsurance>.

<sup>232</sup> *Lyft Insurance Overview*, *supra* note 231; Nairi, *Eliminating Ridesharing Insurance Ambiguity*, *supra* note 231.

coverage—Uber makes a point to indicate where their nationwide insurance policy coverage exceeds taxi minimums across the country.<sup>233</sup>

When the companies' insurance policies do not cover drivers, ambiguities and attendant calls for regulation arise. Uber and Lyft drivers are considered for-hire and use their personal cars for the service.<sup>234</sup> If the driver is using their car and the ride-sharing app is not on, their personal insurance coverage is in effect, just as a typical driver.<sup>235</sup> Once a customer turns on the app, the driver's personal insurance coverage remains in effect up until the driver accepts a ride request, but Uber also provides a contingent policy in the event the personal insurance does not cover any incident.<sup>236</sup> Uber implemented the contingent policy to cover the "insurance gap" addressed in a media storm following the New Year's Eve death of a young girl while a driver was between trips.<sup>237</sup> While logged onto the app, but not carrying or en route to pick up a passenger, Uber driver Syed Muzaffar hit six-year-old Sofia Liu while she and her family were crossing a street in San Francisco.<sup>238</sup> While both her mother and brother were injured, Sofia did not survive.<sup>239</sup>

Despite Uber's assurances that at no time is a driver uninsured,<sup>240</sup> many states are warning citizens that ride-share companies may not cover liability in the event of an accident.<sup>241</sup> These warnings attempt to bring to light the limits of most personal insurance policies, which do not include driving for-hire.<sup>242</sup> Both for-hire drivers and potential passengers need to be aware of the limits, which are typically along the lines of: "We will not cover bodily injury or property damage arising out of the ownership, maintenance or use of a vehicle while used to

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<sup>233</sup> Nairi, *Eliminating Ridesharing Insurance Ambiguity*, *supra* note 231.

<sup>234</sup> See D.C. DEP'T OF INS., SEC. & BANKING, CONSUMER GUIDE: INSURANCE GAPS EXIST IN PRIVATE AUTOS-FOR-HIRE SERVICES (May 12, 2014), [http://disb.dc.gov/sites/default/files/dc/sites/disb/page\\_content/attachments/DISBConsumerGuideInsuranceGapsPrivateAutoforHire.pdf](http://disb.dc.gov/sites/default/files/dc/sites/disb/page_content/attachments/DISBConsumerGuideInsuranceGapsPrivateAutoforHire.pdf).

<sup>235</sup> Nairi, *Eliminating Ridesharing Insurance Ambiguity*, *supra* note 231.

<sup>236</sup> *Id.*

<sup>237</sup> DiBiasio, *supra* note 229.

<sup>238</sup> Kale Williams, *Uber Denies Fault in S.F. Crash That Killed Girl*, S.F. CHRON.: SFGATE (May 7, 2014), <http://www.sfgate.com/bayarea/article/Uber-denies-fault-in-S-F-crash-that-killed-girl-5458290.php>.

<sup>239</sup> *Id.*

<sup>240</sup> Ben Popken, *States Warn of Rideshare Risks for Passengers*, NBC NEWS (May 28, 2014, 3:52 PM), <http://www.nbcnews.com/business/consumer/states-warn-rideshare-risks-passengers-n116736>.

<sup>241</sup> *Id.*

<sup>242</sup> D.C. DEP'T OF INS., SEC. & BANKING, *supra* note 234.

carry persons or property for compensation or a fee.”<sup>243</sup> However, where personal insurance coverage does not suffice, Uber’s contingent coverage steps in.<sup>244</sup>

Cities and states that have begun regulating insurance of ride-sharing companies typically take one of two approaches.<sup>245</sup> Some have clarified existing taxi and livery regulations to include the likes of Uber and Lyft, categorizing ride-share companies as for-hire vehicles and requiring compliance with insurance regulations for all transportation companies in that jurisdiction.<sup>246</sup> Others have re-categorized the services as “TNCs,” or transportation network companies, which allows separate structures for regulation.<sup>247</sup> California passed legislation requiring insurance minimums for for-hire drivers of ride-share companies in September of 2014.<sup>248</sup> Governor Jerry Brown signed a bill requiring minimum coverage essentially equivalent to the figures Uber and Lyft already purported to provide across the nation, only requiring \$5,000 additional coverage for property damage.<sup>249</sup> However, the bill further requires “ridesharing companies’ insurance to cover drivers from the moment they turn on their app, not just when they accept a ride on their app” in response to the New Year’s Eve death of the six-year-old during the aforementioned “insurance gap.”<sup>250</sup>

Choosing to regulate insurance requirements for ride-sharing companies separately from other transportation companies such as taxicabs or limousines may be one of the most determinative factors in whether Uber or Lyft will enter a market. The cost to the individual drivers of having to retain a commercial insurance policy, as is required of for-hire vehicle drivers in many jurisdictions, might be prohibitive and outweigh the benefit of a job mostly used to supplement income. Meanwhile, allowing these companies to cover drivers with the companies’ blanket commercial insurance policies while using their automobiles for commercial purposes is more reasonable; this still allows govern-

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<sup>243</sup> *Id.*

<sup>244</sup> See Nairi, *Eliminating Ridesharing Insurance Ambiguity*, *supra* note 231.

<sup>245</sup> DiBiasio, *supra* note 229.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Johnson, *supra* note 229.

<sup>249</sup> *Id.* (requiring \$100,000 for death and personal injury and \$30,000 for property damage). Compare Nairi, *Eliminating Ridesharing Insurance Ambiguity*, *supra* note 231 (providing \$100,000 total accident coverage and \$25,000 for property damage), with *Lyft Insurance Overview*, *supra* note 231 (providing \$100,000 total insurance and \$25,000 for property damage).

<sup>250</sup> DiBiasio, *supra* note 229.

ments to protect the interests of the citizens and lets the business operate in an innovative model while creating jobs and access to transportation.

### *E. Background Checks*

Another difference between ride-share transportation and taxi service is the level of safety assumed when you get into the stranger's car.<sup>251</sup> Taxi and limousine drivers are required to hold a commercial license and commercial insurance in most states, but UberX and Lyft allow drivers to operate on non-commercial licenses, pursuant to background checks run by the companies.<sup>252</sup> Uber runs background checks against all counties the potential driver has lived in for the past seven years, federal courthouse records, the National Criminal Search, and the National Sex Offender Registry.<sup>253</sup> Hit-and-runs, fatal accidents, and reckless driving within seven years or driving without insurance or on a suspended license within three years precludes a driving partnership with Uber.<sup>254</sup> In 2014, the Taxi, Limousine, & Paratransit Association launched a campaign called "Who's Driving You?" in order to bring awareness to the potential risks associated with ride-share companies.<sup>255</sup> The campaign's website points out that despite these "extensive background check"<sup>256</sup> procedures, drivers are not subject to fingerprinting, and unfortunately, passengers have been assaulted.<sup>257</sup>

After Uber's assurances that its drivers are safe and the background checks are efficient, the "Who's Driving You?" campaign might just seem like stories of people who slip through the cracks. However, delving into in order to utilize the software, users must agree to the Terms and Conditions,<sup>258</sup> and the story starts to change. In fact, any Uber rider has accepted:

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<sup>251</sup> Popken, *supra* note 240.

<sup>252</sup> See, e.g., Joe Sullivan, *Details on Safety*, UBER: NEWSROOM (July 15, 2015), <http://newsroom.uber.com/2015/07/details-on-safety/>. While UberSUV, UberBLACK, and UberTAXI all require commercial licenses which involve background checks run by the state, Uber requires "[a]ll driver-partners wanting to use the Uber platform" to undergo their background check procedures. *Id.*

<sup>253</sup> *Id.* Uber will not partner with drivers with DUI's, drug related infractions, violent crimes, or other severe infractions within seven years. *Id.*

<sup>254</sup> *Id.* Lyft's background checks are roughly equivalent. See *Safety*, LYFT, <https://www.lyft.com/safety> (last visited Jan. 31, 2015).

<sup>255</sup> Popken, *supra* note 240.

<sup>256</sup> Sullivan, *supra* note 252.

<sup>257</sup> *Taxis, TNCs and Deregulation: Is History Repeating Itself?*, WHO'S DRIVING YOU?, <http://www.whosdrivingyou.org/history-repeating-itself> (last visited Sept. 12, 2015).

<sup>258</sup> This generally occurs on a smart phone screen while installing the app.

Uber does not guarantee the quality, suitability, safety or ability of third party providers. You agree that the entire risk arising out of your use of the services, and any service or good requested in connection therewith, remains solely with you, to the maximum extent permitted under applicable law. Uber shall not be liable for indirect, incidental, special, exemplary, punitive, or consequential damages, including lost profits, lost data, personal injury, or property damage related to, in connection with, or otherwise resulting from any use of the services, even if Uber has been advised of the possibility of such damages. Liability or losses arising out of: (i) your use of or reliance on the services or your inability to access or use the services; or (ii) any transaction or relationship between you and any third party provider, even if Uber has been advised of the possibility of such damages. Uber shall not be liable for delay or failure in performance resulting from causes beyond Uber's reasonable control. You acknowledge that third party transportation services requested through some request brands may offer ridesharing or peer-to-peer transportation services and may not be professionally licensed or permitted. In no event shall Uber's total liability to you in connection with the services for all damages, losses and causes of action exceed five hundred U.S. dollars.<sup>259</sup>

The focus on connecting potential riders with third party drivers makes Uber "more like a travel agent than an airline,"<sup>260</sup> and essentially leaves the company responsible only for the app itself.<sup>261</sup> By refusing to be defined as a transportation service, Uber claims no liability or responsibility for accidents or injuries or other claims related to the transportation services provided by the third-party drivers.<sup>262</sup>

Regulations regarding safety are generally addressed in the licensing stage with background checks. Currently, all that is necessary to drive for UberX or Lyft is a personal driver's license issued by the state, as long as a driver meets the company's background checks.<sup>263</sup> In order to operate a city-regulated for-hire vehicle, many jurisdictions require commercial licenses, or chauffeur licenses.<sup>264</sup> The companies claim their background checks are in-depth enough to meet a government's

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<sup>259</sup> See *Terms and Conditions*, *supra* note 84.

<sup>260</sup> Annie Lowery, *Is Uber's Surge-Pricing an Example of High-Tech Gouging?*, N.Y. TIMES (Jan. 12, 2014), n.

<sup>261</sup> *Id.*

<sup>262</sup> See *Terms and Conditions*, *supra* note 84.

<sup>263</sup> See DougH, *Uber Driver Requirements: Do You Qualify to Drive?*, RIDESHARINGDRIVER (Nov. 11, 2014), <http://www.ridesharingdriver.com/uber-driver-requirements-qualify/>.

<sup>264</sup> BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: TAXI DRIVERS AND CHAUFFEURS (2014), <http://www.bls.gov/ooh/transportation-and-material-moving/taxi-drivers-and-chauffeurs.htm>.

interest in protecting its citizens, and that further requirements would be burdensome.<sup>265</sup> However, the fine print agreed to by users suggests otherwise.

While the terms and conditions could just be a case of “belt and suspenders” liability coverage on the part of Uber’s legal team, the stories of ride-share drivers being approved despite having felony backgrounds or suspended licenses imply that perhaps the company background checks are not as thorough as indicated.<sup>266</sup> In cities where new regulations have been adopted for TNCs, licensing has not been an issue—the ride-share companies have continued to operate, hiring drivers based on their own background checks.<sup>267</sup> Some aspects of the ride-share business model shed light on the antiquated and blanket regulations in transportation codes throughout the country. Potential passengers cannot be expected to trade safety for convenience or economic growth when it comes to updating regulations for new technologies and company demands.

While consumer and traffic safety are important government interests, the potential for negotiation with the companies may be higher. Unlike with the blanket insurance requirements, background checks are less likely to be cost prohibitive to the companies, as they are already conducted on one level.<sup>268</sup> In cities and states where for-hire drivers must pass background checks run through the police department, Uber argued the lost time was prohibitive.<sup>269</sup> One may argue the potential in added profit and security may outweigh the lost time. However, while an important issue, because the existing licensing requirements focus on more cost-centric disputes, it is unlikely that the only bar to compliance with transportation regulations for a ride-share company will be with security.

### G. Economic Competition

Professor Gordon Tullock, a public choice scholar, termed the long-term effects of governmental grants of special privileges to particular groups of people “the transitional gains trap.”<sup>270</sup> After some

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<sup>265</sup> Joe Fitzgerald Rodriguez, *Uber Argues to State Against Calls for Fingerprint Criminal Checks*, S.F. EXAM’R (June 25, 2015), <http://www.sfexaminer.com/uber-argues-to-state-against-calls-for-fingerprint-criminal-checks/>.

<sup>266</sup> *TNC Background Checks Put Passengers in Harm’s Way, WHO’S DRIVING YOU?* (July 2, 2015), <http://www.whosdrivingyou.org/wp-content/uploads/2015/07/Criminal-Background-Checks-Fact-Sheet-1Jul2015.pdf>.

<sup>267</sup> *Id.*

<sup>268</sup> See Sullivan, *supra* note 252.

<sup>269</sup> Rodriguez, *supra* note 265.

<sup>270</sup> Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671 (1975).

period of time, the intended benefit of the privileges dissipates and little profit is made, but withdrawing the privileges from successors would cause economic harm.<sup>271</sup> The creation of the taxicab monopoly occurred by restricting entry into the markets, resulting in “large benefits to the initial generation of taxi cabs,” but harming the public by restricting competition.<sup>272</sup> Later generations receive no extra benefits, having paid market-rate for medallions, “[y]et, they will fight to prevent the medallion system from being eliminated, since these owners will be harmed by such elimination. Thus, the city will be stuck with an inefficient medallion system that will be difficult to eliminate. Eliminating the medallion program will harm existing taxis[.]”<sup>273</sup> True to form, the Boston Cab Dispatch Corporation sued Uber in 2013, claiming, among other things, that Uber used illegal business tactics to gain a market advantage, which resulted in unfair competition damaging to the taxi industry:

Uber’s business plan cuts corners illegally and undermines critical safety provisions of Boston taxi laws. Uber’s transportation system only succeeds because, unlike lawful competing taxi apps, it preys parasitically on established taxi services without paying for them and without obeying laws designed to protect taxi customers. Uber owns no cars, no medallions, no radio associations, and employs no drivers—preferring to pay nothing for infrastructure and profit from the investment of medallion owners and radio associations. . . . Uber adopts illegal methods because it can only operate profitably by misappropriating the infrastructure of existing taxi services. . . . Uber is violating nearly all substantive Boston taxi laws, lying to its customers, forcing taxi drivers who sign up with Uber to violate licensing laws and contracts with taxi owners, and discriminating unlawfully against handicapped, elderly and less wealthy users of public transportation.<sup>274</sup>

Professor Samito of Boston University argues that the plaintiffs’ complaint is merely based on the threat to economic competition and the lowered value of the taxi medallions.<sup>275</sup> The complaint also raised

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<sup>271</sup> *Id.* at 671.

<sup>272</sup> Mike Rappaport, *The Transitional Gains Trap*, LIBRARY L. & LIBERTY (Sept. 26, 2013), <http://www.libertylawsite.org/2013/09/26/the-transitional-gains-trap/>.

<sup>273</sup> *Id.*

<sup>274</sup> See Amended Complaint at ¶¶ 14–15, 40, *Boston Cab Dispatch, Inc. v. Uber Technologies, Inc.*, No.13-1069-10769-NMG, 2014 WL 1338148 (D. Mass. Jan. 26, 2014), (No. 13-cv-10769-NMG), 2014 WL 5359400.

<sup>275</sup> Christian G. Samito, *How A Supreme Court Precedent From 1837 Supports Uber’s Fight Against Taxi Monopolies*, FORBES (Sept. 18, 2014, 9:54 AM), <http://www.forbes.com>

other serious issues that follow from the ride-share companies failing to have licenses and conform to regulations—Uber’s refusal to accept payment other than via the app is illustrative of how its exemption from local ordinances tailored to “protect poor, disabled and elderly riders against discrimination” can be problematic.<sup>276</sup> However, all of the claims were based on unlawful operation and competition and economic harm, and the damages sought included all of Uber’s profits.<sup>277</sup>

Samito contends that the *Charles River Bridge* case,<sup>278</sup> which held a charter did not protect a company against competition, should prevent local governments from shutting down Uber.<sup>279</sup> In 1792, a charter was granted for the Charles River toll bridge, connecting Boston and Charlestown, to operate until 1856.<sup>280</sup> In 1828, another charter was granted for a toll bridge between Boston and Charlestown to the Warren Bridge Company.<sup>281</sup> The second bridge was to become toll-free six years after the company began receiving tolls.<sup>282</sup>

The owners of the Charles River Bridge sued, arguing the original charter granted exclusive rights to build the bridge in town.<sup>283</sup> The Court disagreed, holding the charter did not grant any exclusivity rights, meaning also “no undertaking not to sanction competition.”<sup>284</sup> As a precedent, Samito theorizes *Charles River Bridge* prevents outright bans of ride-share services merely on the grounds as competition for taxis—to do so would be “a rejection of the capitalist ethos of competition and innovation.”<sup>285</sup> However, he points out that *Charles River Bridge* should not prevent cities from regulating ride-share companies;<sup>286</sup> rather, cities may enact and enforce regulatory ordinances with legitimate consumer protection or public safety underpinnings, and are only precluded from effectuating regulation amounting to business protectionism.<sup>287</sup>

Allowing cities to block the entry of new companies solely on the

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/sites/realspin/2014/09/18/how-a-supreme-court-precedent-from-1837-supports-ubers-fight-against-taxi-monopolies/.

<sup>276</sup> Amended Complaint, *supra* note 274, ¶¶ 32–36.

<sup>277</sup> *See id.* ¶¶ 67–89.

<sup>278</sup> *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 549–50 (1837).

<sup>279</sup> Samito, *supra* note 275.

<sup>280</sup> *Charles River Bridge*, 36 U.S. (11 Pet.) at 536–37.

<sup>281</sup> *Id.* at 537.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 539.

<sup>284</sup> *Id.* at 548–49.

<sup>285</sup> Samito, *supra* note 275.

<sup>286</sup> *Id.*

<sup>287</sup> *See* Dempsey, *supra* note 44, at 77–83.

basis of competition goes against the principles of the free market: “absent an economy that allows consumer choice to drive production, productivity does not improve.”<sup>288</sup> Though the intent may be for taxi regulations to protect consumers, by keeping entry to the market limited and competition hard to come by, prices are artificially inflated.<sup>289</sup>

Uber is now involved in litigation all across the country, but many of the cases are held up in the removal and remand process.<sup>290</sup> Portland instituted a lawsuit against Uber in December of 2014, seeking to prohibit Uber from operating in the city unless they came into compliance with city code provisions for for-hire drivers.<sup>291</sup> In *City of Portland v. Uber Technologies, Inc.*,<sup>292</sup> the court denied Portland’s motion to remand to state court, finding Uber satisfied the amount-in-controversy requirement for diversity jurisdiction under 28 U.S.C. 1332(a) by showing the company would suffer lost profits in excess of \$75,000 if it were enjoined from doing business in Portland, and additionally that the cost of complying with the city’s regulations governing private for-hire transportation would exceed \$75,000.<sup>293</sup> Portland argued that illegal activity cannot constitute business profits.<sup>294</sup> The Court refused to address the argument, writing in the opinion: “[W]hether Uber’s activity is illegal is a question reserved for the merits in this case. The City cannot prevail on its motion to remand by putting the cart before the horse.”<sup>295</sup>

#### IV. INDEPENDENT CONTRACTORS V. EMPLOYEES

Uber CEO Travis Kalanick has said that “[t]he reason Uber could be expensive is because you’re not just paying for the car—you’re paying for the other dude in the car.”<sup>296</sup> Despite a heavy reliance on those

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<sup>288</sup> ABA SECTION OF ANTITRUST LAW, COMPETITION AS PUBLIC POLICY 4 (2010).

<sup>289</sup> Dompe & Smith, *supra* note 224, at 2.

<sup>290</sup> See, e.g., *City of Portland v. Uber Techs., Inc.*, No. 3:14-CV-01958-SI, 2014 WL 7146927 (D. Or. Dec. 15, 2014).

<sup>291</sup> Complaint for Declaratory Judgment of Unlawful and Unpermitted Activity, Injunctive Relief to Ensure Unlawful and Unpermitted Activity Ceases, and Statutory Violations at 1, *City of Portland*, 2014 WL 7146927 2014 WL 6893785 (No. 14CV18915), 2014 WL 6893785.

<sup>292</sup> *City of Portland*, 2014 WL 7146927.

<sup>293</sup> *Id.* at \*1–2.

<sup>294</sup> *Id.* at \*2.

<sup>295</sup> *Id.*

<sup>296</sup> Casey Newton, *Uber Will Eventually Replace All Its Drivers with Self-Driving Cars*, VERGE

(May 28, 2014, 03:52 PM), <http://www.theverge.com/2014/5/28/5758734/uber-will-eventually-replace-all-its-drivers-with-self-driving-cars>. Yet, that could all change with a few more years of research, as the dream of automated cars become more of a reality. See

drivers, both Uber and Lyft are involved in lawsuits that could change everything they do.<sup>297</sup> Drivers for both companies have sued, seeking reclassification as employees instead of independent contractors.<sup>298</sup> Financially, such a change would hold the companies responsible for the driver's tax and Social Security withholding and expenses reimbursement.<sup>299</sup> A report from August 2014 found estimates that 10—30% of companies are misclassifying their employees as independent contractors, which harms the employees as well as the government.<sup>300</sup> State and federal treasuries lose billions of dollars from unemployment insurance, workers' compensation funds, and tax revenues,<sup>301</sup> while independent contractors are not guaranteed minimum wage and similar workplace law protections.<sup>302</sup>

The employment status change would also mean that Uber and Lyft can be held liable for the drivers' tortious actions via respondeat superior.<sup>303</sup> Such a change would mean a world of difference in cases like the one six-year-old Sofia Liu's family brought.<sup>304</sup> Uber denied liability on the grounds that the driver was "never an employee, agent, joint venture or partner."<sup>305</sup> Employers are vicariously liable for the actions of their employees when they are under the scope of employment, or for tortious conduct committed outside the scope of employment in certain situations.<sup>306</sup> Such situations include when the employer intended the conduct or the consequences or was negligent or reckless, or the employee, relying on apparent authority, "purported to act or speak on behalf" of his employer, or was able to commit the tort

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Alexei Oreskovic, *A Vehicle Was Spotted That Looks like an Uber Self-Driving Car, but the Company Denies It*, BUS. INSIDER (May 21, 2015, 8:17 PM), <http://www.businessinsider.com/uber-denies-self-driving-car-2015-5>.

<sup>297</sup> See Maya Kosoff, *The California Labor Commission Just Ruled That an Uber Driver Is an Employee—Here's Why It Could Dramatically Change Uber's Business Model*, BUS. INSIDER (June 17, 2015, 11:21 AM), <http://www.businessinsider.com/uber-and-lyft-employee-lawsuits-could-change-business-models-2015-6>.

<sup>298</sup> Kosoff *supra* note 82.

<sup>299</sup> *Id.*

<sup>300</sup> SARAH LEBERSTEIN, NAT'L EMPLOYMENT LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2012).

<sup>301</sup> *Id.*

<sup>302</sup> See Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

<sup>303</sup> 27 AM. JUR. 2D *Employment Relationship* § 356 (updated 2015).

<sup>304</sup> See Williams, *supra* note 239.

<sup>305</sup> *Id.*

<sup>306</sup> RESTATEMENT (SECOND) OF AGENCY § 219 (Am. Law Inst. 1958).

because of his job.<sup>307</sup> On the contrary, employers of independent contractors can only be held vicariously liable for negligence during the performance of the employer's business, and only then if he was under a duty to have the act performed with due care.<sup>308</sup>

Plaintiffs in *O'Connor v. Uber Technologies, Inc.*,<sup>309</sup> alleged that the for-hire drivers had been misclassified as independent contractors "because they are required to follow a 'litany of detailed requirements imposed on them by Uber,' and because '[t]he drivers' services are fully integrated' into Uber's business of 'providing car service to customers.'"<sup>310</sup> The misclassification denied Plaintiffs the proper reimbursement for expenses related to their employment they were entitled to under California law.<sup>311</sup> California requires employer indemnification of all necessary expenditures and losses directly related to an employee's duties.<sup>312</sup> The Plaintiffs seek to bring a class action case on behalf of all Uber drivers.<sup>313</sup>

The difference between an employee and an independent contractor is based not only on the contract with the principal, but the control of the relationship.<sup>314</sup> One factor in determining if the relationship is that of an independent contractor or an employee is whether the work is a part of the regular business of the employer.<sup>315</sup> Other factors include the skill required in the particular occupation; whether the type of work generally requires a specialist or a supervisor; which party supplies the instrumentalities and tools for the job and the location of the work; the length of time of employment and method of payment; and the intention of the parties.<sup>316</sup> While these are all important, in California, "the key factor to consider in analyzing whether an entity is an

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *O'Connor v. Uber Techs., Inc. (O'Connor I)*, No. C-13-3826 EMC, 2013 U.S. Dist. LEXIS 171813 (N.D. Cal. Dec. 5, 2013).

<sup>310</sup> *Id.* at \*4 (citations omitted).

<sup>311</sup> *Id.* at \*2–3. *O'Connor* also raised class action claims against the misrepresentations surrounding the 20% "gratuity" included in the fare. *Id.* at \*1–2.

<sup>312</sup> *Id.* at \*14–15 (citations omitted).

<sup>313</sup> *Id.* at \*1.

<sup>314</sup> *See O'Connor I*, 2013 U.S. Dist. LEXIS 171813, at \*15–16 (citations omitted); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (Am. Law Inst. 1958) (detailing factors relevant to whether a person is a servant or an independent contractor).

<sup>315</sup> *O'Connor I*, 2013 U.S. Dist. LEXIS 171813, at \*15–16 (citation omitted); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2)(h) (stating that whether the work is part of the regular business of the employer is one factor in determining whether the person is a servant or independent contractor).

<sup>316</sup> *O'Connor I*, 2013 U.S. Dist. LEXIS 171813, at \*15–16 (citations omitted); *see also*

employer is the ‘right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.’”<sup>317</sup> To establish an employer/employee relationship, the court will look for “a comprehensive and immediate level of ‘day-to-day’ authority over employment decisions.”<sup>318</sup>

Uber moved to dismiss the action, relying on *Doe I v. Wal-Mart Stores, Inc.*, which found that contracting with suppliers for deadlines, prices, and quality of control, as well as monitoring the supplier’s working conditions, did not amount to an immediate level of day-to-day control to constitute direction of their daily activity and employee status, especially given the Licensing Agreement that negates any intention to create an employee relationship.<sup>319</sup> The plaintiffs argued that the level of control Uber had over the drivers was direct, as they were graded, “subject to termination, based on their failure to adhere to these requirements,” on conduct and conversations with customers, cleanliness of vehicles, and timeliness in pick-up and routes.<sup>320</sup> The court denied the motion to dismiss the misclassification claim, finding there were factors that could weigh in either side’s favor.<sup>321</sup>

Uber also moved to dismiss the class claims, arguing, as the defendants did in *Cotter v. Lyft*, that California law should not apply to class members outside the state, raising both Dormant Commerce Clause and state law objections.<sup>322</sup> The Dormant Commerce Clause prohibits a state’s laws from controlling conduct beyond its boundaries, but if parties have chosen to be bound by that state’s laws by contract, there is no Dormant Commerce Clause violation.<sup>323</sup> The court rejected the Dormant Commerce Clause claim on the basis of the Software Licensing Agreement Uber requires of all users, which includes a choice of law provision that reads:

This Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any

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RESTATEMENT (SECOND) OF AGENCY § 220(2) (detailing factors relevant to whether a person is a servant or an independent contractor).

<sup>317</sup> *O’Connor I*, 2013 U.S. Dist. LEXIS 171813, at \*15 (quoting *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682 (9th Cir. 2009)).

<sup>318</sup> *Id.* (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121, 132 (Cal. Ct. App. 2004)).

<sup>319</sup> *Id.* at \*16–18 (citing *Doe I*, 572 F.3d at 679–85).

<sup>320</sup> *Id.* at \*17–18 (citation omitted). The drivers also alleged they are fully integrated into Uber’s business of providing car services. *Id.* at \*19.

<sup>321</sup> *Id.* at \*20–21.

<sup>322</sup> *O’Connor I*, 2013 U.S. Dist. LEXIS 171813, at \*7, \*12 (citations omitted).

<sup>323</sup> *Id.* at \*7–8 (citations omitted).

disputes, actions, claims, or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in . . . San Francisco, California.<sup>324</sup>

The court also rejected Uber’s state law claims against the application of California law because of the choice of law provision, and denied the motion to dismiss the non-California class members.<sup>325</sup>

The nationwide class actions would have been a huge success for drivers, but, in a later order, the court decided that California law could not be applied extra-territorially.<sup>326</sup> The order revoking extra-territorial class status was filed on September 4, 2014, roughly one month after the court in *Cotter v. Lyft, Inc.* dismissed all non-California putative class plaintiffs.<sup>327</sup> The *O’Connor* court cited *Cotter* when explaining that the choice of law provision cannot act as a contract to overcome a California presumption against extra-territorial application of law.<sup>328</sup> The later order filed by the *O’Connor* court also dismissed three of four counts regarding the “gratuity” Uber charges passengers.<sup>329</sup> The plaintiffs argued under Section 17200 of the California Business and Professions Code that Uber’s conduct constituted “unlawful or fraudulent business acts or practices” through tortious interference and breach of an implied contract.<sup>330</sup> Uber advertises that passengers do not need to tip their drivers, as a 20% gratuity is included in the cost of the ride.<sup>331</sup> However, drivers do not receive the full amount of the said gratuity.<sup>332</sup>

Originally, the plaintiffs raised claims of both unlawful and fraudulent practices under the UCL,<sup>333</sup> but the court dismissed the fraudulent claim on a standing basis.<sup>334</sup> Because a plaintiff attempting to prove fraudulent business practices under the UCL has to prove that the practice is “likely to deceive members of the public,” the plaintiff has to

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<sup>324</sup> *Id.* at \*8, \*13–14. Uber also argued the Agreement only extended to “adjudicating the terms of the agreement” and not all disputes. *Id.* at \*7.

<sup>325</sup> *Id.* at \*13–14.

<sup>326</sup> *O’Connor v. Uber Techs., Inc. (O’Connor II)*, 58 F. Supp. 3d 989, 1004 (N.D. Cal. 2014). Plaintiffs are appealing the order. See *Uber Drivers*, UBERLAWSUIT.COM, <http://uberlawsuit.com> (last visited Sept. 30, 2015).

<sup>327</sup> *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1066 (N.D. Cal. 2014).

<sup>328</sup> See *O’Connor II*, 58 F. Supp. 3d at 1005 (citing *Cotter*, 60 F. Supp. 3d at 1065).

<sup>329</sup> *Id.* at 1008

<sup>330</sup> *Id.* at 994.

<sup>331</sup> *Id.* at 993.

<sup>332</sup> *Id.*

<sup>333</sup> See CAL BUS. & PROF. CODE §§ 17200–17210 (West 2008) (California’s Unfair Competition Law); *O’Connor II*, 58 F. Supp. 3d at 1001–03.

<sup>334</sup> *O’Connor II*, 58 F. Supp. 3d at 1001–03.

have actually relied on the misrepresentations.<sup>335</sup> Therefore, the court found that the drivers could not bring the gratuity suit under that particular statute, but could still challenge the lawfulness of the practice.<sup>336</sup> While the court found that drivers did not have standing under the UCL,<sup>337</sup> passengers are just as displeased, and a class action on behalf of customers who paid the false gratuities is moving forward in *Ehret v. Uber Techs., Inc.*<sup>338</sup> The plaintiffs allege that by failing to remit the entire “gratuity” to the drivers, the representations made to passengers are misleading, likely to deceive members of the public regarding the term, and increases the metered fee.<sup>339</sup>

Unlike in the driver class actions, the court in *Ehret* allowed the class certification to non-California citizens, accepting the argument that, because Uber is based in San Francisco, the decision to advertise in a misrepresentative manner and retain any portion of the gratuity was made in California.<sup>340</sup> As such, no extra-territorial application of California law would be required, despite the fact that the transactions occurred outside the state of California.<sup>341</sup> In March of 2015, the court denied Uber’s motion for summary judgment, finding that whether the drivers are employees, independent contractors, or employees under California law presented issues that needed to be decided by a jury.<sup>342</sup>

Further, in June of 2015, the California Labor Commissioner ruled that because Uber drivers are involved in every aspect of operations and do not have enough work freedom, they cannot be considered independent contractors.<sup>343</sup> The Commission found in *Uber v. Berwick* that, because this driver was an employee, Uber was responsible for her expenses, totaling \$4,152.20 for her two months of employment.<sup>344</sup> However, *Berwick* was not a class action and is limited in scope; therefore, this ruling does not immediately affect other drivers, although the

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<sup>335</sup> *Id.* at 1002 (citations omitted).

<sup>336</sup> *Id.* at 1003.

<sup>337</sup> *Id.* at 1001–03.

<sup>338</sup> 68 F. Supp. 3d 1121, 1126–27 (N.D. Cal. 2014).

<sup>339</sup> *Id.* at 1127.

<sup>340</sup> *Id.* at 1132.

<sup>341</sup> *Id.*

<sup>342</sup> Order Denying Defendant Uber Techs., Inc.’s Motion For Summary Judgment, 2015 U.S. Dist. LEXIS 30684, at \*3 (N.D. Cal. Mar. 11, 2015).

<sup>343</sup> *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at \*8 (Cal. Dept. Lab. June 3, 2015); see also Ellen Huet, *Uber Driver Is An Employee, Not Contractor, Rules California Labor Commission*, FORBES (June 17, 2015, 12:11 PM), <http://www.forbes.com/sites/ellenhuet/2015/06/17/uber-drivers-are-employees-not-contractors-rules-california-labor-commission/>.

<sup>344</sup> *Berwick*, 2015 WL 4153765, at \*8.

result may affect the similar pending litigation brought by other drivers.<sup>345</sup>

The parallel case to *O'Connor, Cotter v. Lyft, Inc.*, plaintiffs alleged that California law required Lyft drivers nationwide to be treated as employees, rather than independent contractors, and, by failing to do so, the drivers were deprived of California's minimum wage and other rights.<sup>346</sup> The complaint set forth facts supporting the drivers' status as employees, including: Lyft retains the discretionary right to terminate drivers; Lyft has incentive to control the means and manner of the drivers' service by taking a 20% administrative fee from gratuities given to drivers; drivers do not engage in any business distinct from Lyft, but are the sole source of income for Lyft; no special skills are required; drivers' tenure with Lyft is for an indefinite period of time; and, in order to drive for Lyft, one must have Lyft-provided software.<sup>347</sup> The court refused to allow the claims to move forward as a nationwide class because California law cannot be applied to extra-territorial plaintiffs, despite the choice-of-law clause in the Software Agreement.<sup>348</sup> However, plaintiffs filed an amended complaint with leave of the court, and litigation is moving forward on the issue.<sup>349</sup>

*Cotter* also featured a challenge Lyft's gratuity policy. Unlike Uber's policy, Lyft's gratuities are rider-elective.<sup>350</sup> If a rider chooses to pay gratuity to a driver on their credit card, "[t]he gratuity payment is then processed by a third party vendor, and Lyft subsequently takes an 'administrative fee' of twenty percent of the gratuity payment. Lyft transfers the balance of the gratuity payment the Driver's account."<sup>351</sup> The plaintiffs challenged this policy on the basis of conversion and California Labor Code Section 351,<sup>352</sup> which makes it unlawful for an employer to "collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron."<sup>353</sup> However, Sec-

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<sup>345</sup> Huet, *supra* note 343.

<sup>346</sup> *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1060–61 (N.D. Cal. 2014). The plaintiffs' argument was based on the fact that Lyft's principal place of business is in California, and, as such, the decisions leading up to the claims regarding independent contractor status (and a challenged administrative fee in violation of California law) were made in California. *Id.*

<sup>347</sup> Third Amended Complaint, *supra* note 12, ¶¶ 2, 24(f)–(h).

<sup>348</sup> *Cotter*, 60 F. Supp. 3d at 1065.

<sup>349</sup> Third Amended Complaint, *supra* note 12. The amendments reflect the court's decision not to apply California law to non-citizens, and attempt to certify a class of California Lyft drivers. *Id.* ¶¶ 2, 31–33, 157.

<sup>350</sup> *See id.* ¶¶ 19–21.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* ¶¶ 82, 100–10.

<sup>353</sup> CAL. LAB. CODE § 351 (West 2011).

tion 351 required reclassification of drivers from independent contractors to employees because independent contractors are not afforded the same protections.<sup>354</sup> Without employee status, the drivers did not have standing.

Uber and Lyft, as well as many other new technology companies that rely wholly on independent contractors, may be facing a business model overhaul if *O'Connor* and *Cotter* reclassify their drivers. The companies have valid points that the drivers supply their own cars and choose their own areas to work, are paid per-ride, and agreed to an independent contractor relationship. However, the companies' control over the drivers is more direct, as plaintiffs in both cases allege, than that of a typical independent contractor, and the companies' regular business could not occur without the drivers.<sup>355</sup> Again, these new and innovative companies seem unable to fit into one or the other well-established category of law and regulation, almost begging the question—should the regulations change to fit the changing times?

Recently, the answer seems to point to maybe. With freelance jobs on the rise and more companies hiring independent contractors to perform the sole tasks of their businesses,<sup>356</sup> perhaps reassessing the regulations meant to protect workers is necessary. Obsolescence is a cause of regulatory change that occurs when the market or technology change drastically, raising the cost of effective regulation.<sup>357</sup> This has happened previously with telecommunications and railroads regulations, where new technology essentially made old technology obsolete.<sup>358</sup>

While the argument is not that ride-sharing apps are sending traditional modes of transportation away, the business-models created by the on-demand service companies and freelance labor might be close to replacing the traditionally defined job market. In 2005, before on-demand service mobile applications were a labor issue, the status of newspaper delivery carriers was at issue in *St. Joseph News-Press & Teamsters Union Local 460*.<sup>359</sup> The carriers were deemed independent contractors,<sup>360</sup> but in a dissenting opinion, National Labor Relations Board Member Liebman posed the concept of a new classification in

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<sup>354</sup> Third Amended Complaint, *supra* note 12, ¶¶ 22–24.

<sup>355</sup> See *supra* Part IV.

<sup>356</sup> See Rachel Emma Silverman & Lauren Weber, *On-Demand Workers: 'We Are Not Robots'*, WALL ST. J. (Jan. 27, 2015), <http://www.wsj.com/articles/on-demand-workers-we-are-not-robots-1422406524>.

<sup>357</sup> ABA SECTION OF ANTITRUST LAW, *supra* note 288, at 4.

<sup>358</sup> *Id.*

<sup>359</sup> *St. Joseph News-Press*, 345 N.L.R.B. 474, 474 (2005), *overruled by* FedEx Home Delivery, 361 N.L.R.B. No.55 (2014).

<sup>360</sup> *Id.* at 483.

between employees and independent contractors, such as a “dependent contractor,” remarking:

As developing business practices blur the distinction between a classic employee and a classic independent contractor, the Board must ensure that the rights guaranteed by the [National Labor Relations] Act<sup>361</sup> do not erode for workers Congress intended to protect. My colleagues, however, have chosen to apply a rigid, outdated version of the common law agency test, one which ignores relevant economic factors and contradicts the true spirit of the common law: flexibility and growth to match a society in constant development. As a result, the Board is now out of step with present legal trends, both in this country and worldwide. Workers who not only would benefit from the Act’s protection, but who are legally entitled to it, will bear the consequences.<sup>362</sup>

The potential for a new classification makes sense with the emerging-technology based business models.

A third category, such as a dependent contractor, who may be entitled to more of the same protections of the law as employees, could be exactly what companies such as Uber and Lyft need. These employees would have the guarantees of minimum wage or the protections of California’s Section 351, which would prevent the companies from subtracting from drivers’ tips while maintaining the flexibility that the business models demand. While no United States jurisdictions have recognized a “dependent contractor” employment classification, Canada and Germany do recognize protections over such workers.<sup>363</sup> The potential for reregulation could protect not only ride-share drivers, but an abundant emerging population of “independent contractors” working for on-demand businesses, who “can choose when and where they work, but lack control over their payment and wage rates, and . . . can’t negotiate their work contracts.”<sup>364</sup> These workers lack the bargaining leverage to demand the protection they deserve. If they choose not to accept the terms of employment, there is no employment, and someone else will take the job.

When it comes to these emerging technologies, reregulation seems to be the best answer. Of course, the companies may reject the idea where the cost of the worker protections will reflect into the business; however, incorporating a third designation such as a dependent contractor, with fewer requirements on both the employer and worker’s

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<sup>361</sup> 29 U.S.C. §§ 151–169 (2012).

<sup>362</sup> *St. Joseph News-Press*, 345 N.L.R.B at 487 (Liebman, M., dissenting).

<sup>363</sup> Weber, *supra* note 302.

<sup>364</sup> *Id.*

behalf, would benefit all parties. The decision over which rights to protect under a new classification would be a complex process and could take years. Yet, the litigation currently pending in California could still have a wide-ranging effect on the business models of Uber and Lyft, as well as other on-demand mobile application companies, should the court decide that the drivers are, in fact, employees.

## V. CONCLUSION

Some facets of regulation cannot seek to be one-size fits all, and must be adjusted when the processes that the laws seek to regulate no longer fit the mold. Having separate regulatory schemes for the differing levels of transportation companies is not a new concept. Livery cabs and traditional cabs have different rules regarding dispatch and passenger pick up in cities such as New York.<sup>365</sup> Some jurisdictions have already categorized ride-share companies as TNCs and have carved out separate regulations that better fit the innovative business models, which do not always allow for compliance with existing ordinances.<sup>366</sup> Both California and the District of Columbia have accepted TNCs and used the new category to guarantee that the businesses are carrying proper liability insurance in order to protect their citizens.<sup>367</sup>

Insurance is perhaps the most important issue, as the requirements of traditional transportation law, without a designated ride-share company structure, can be the most prohibitive to ride-share companies. Of the traditional regulation issues, governments also have the most significant interest in insurance coverage and background check requirements, because these directly correlate to the safety and protection of its citizens.<sup>368</sup> While amending local ordinances to include regulation of ride-share companies does ensure regulation, doing so ignores the changing nature of technology and transportation, and does not permit the companies to operate as they choose. Putting all transportation companies on an even playing field with one-size-fits all regulations stifles competition and innovation, without allowing for flexibility in business models. When Birmingham, Alabama, decided to amend its city code to include mobile-based ride-share companies under the definition of for-hire vehicles and require minimum wait times of thirty minutes between requests and pick up, the city sent the message that

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<sup>365</sup> See *Noel v. N.Y.C. Taxi & Limousine Comm'n*, 687 F.3d 63, 66 (2d Cir. 2012).

<sup>366</sup> See e.g., *D.C. Council Votes to Keep App-Based Car Services in the District*, NBC WASH. (Oct. 28, 2014, 7:25 PM), <http://www.nbcwashington.com/news/local/DC-Taxis-to-Protest-Councils-Planned-Uber-Vote-280640202.html>.

<sup>367</sup> *Id.*; DiBiasio, *supra* note 229.

<sup>368</sup> Dempsey, *supra* note 44, at 77–83.

all for-hire vehicle companies needed to use the same business model, essentially outlawing economic competition in the transportation sector.<sup>369</sup>

By choosing to recognize companies such as Uber and Lyft through positive reregulation that accommodate their business models, these jurisdictions allow consumers more access to transportation and promote economic growth and market competition, which will ultimately benefit the consumer. The companies win all around. Their businesses can continue operations, and, with less burdensome regulation requirements to meet, the companies can focus on providing excellent service to the consumers.

Moreover, consumers benefit from more tailored regulations because they now have more access to another mode of transportation, which could be faster or cheaper depending on the competition. Cities would not only be opening an avenue for creating jobs and stimulating the economy, but also encouraging innovative business models through reimagined, yet productive, transportation ordinances.

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<sup>369</sup> See *supra* text accompanying notes 85–98.