

# Foreword: “Property” and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims

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## I. INTRODUCTION

The sharing economy: enterprises such as Uber,<sup>1</sup> Lyft,<sup>2</sup> Air BnB,<sup>3</sup> and . . . DogVacay.<sup>4</sup> As we are constantly reminded by the enterprises themselves, they are not taxicab companies, or hotels, or pet boarding services. They are merely technology platforms, which allow peer-to-peer sharing. They put riders together with drivers, hosts with guests, and pet owners with those willing to look after Fido for a few days. But they sure do look a lot like the industries they are trying so hard to *not* be, no?

The technology behind ridesharing enterprises is evolving at lightning pace, and because of that, the legal issues which arise when trying to fit these sharing enterprises into existing regulatory regimes can result in decisions that draw competing philosophies into focus. Police power hawks believe that these things should—like just about everything else—be subject to pervasive regulation. The public needs to be protected! Libertarians applaud free market forces at play. Let a thousand flowers of thought bloom! The property rights advocates . . . well, as I will suggest in this essay, we end up with a somewhat mixed bag.

I say that because these interests draw me in opposite directions. I am not a big fan of regulations which limit entry into markets, and which stifle innovation. But I also favor a regulatory system, if it must exist, which allows investment and reliance, without fearing the government will just decide one day to ignore its own regulatory requirements and exempt others similarly situated from the regulations which govern existing participants.

This essay will review several cases which the sharing economy has thus far produced, cases where taxicab companies have sued municipalities for

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<sup>1</sup> UBER, <http://www.uber.com> (last visited June 18, 2017).

<sup>2</sup> LYFT, <http://www.lyft.com> (last visited June 18, 2017).

<sup>3</sup> AIRBNB, <http://www.airbnb.com> (last visited June 18, 2017).

<sup>4</sup> DogVacay recently rebranded itself as Rover. See ROVER, <http://www.rover.com> (last visited June 18, 2017). Sidebar: this last one reminds me of Jack Handey’s faux sponsor of *Saturday Night Live*’s “Unfrozen Caveman Lawyer” skit, “Dog Assassin” (“When you can’t bear to put him to sleep, maybe it’s time to call . . . Dog Assassin.”). See *Sound of Young America: Jack Handey, Author, TV Writer and Creator of “Deep Thoughts,”* NPR (May 30, 2008) (downloaded using iTunes).

allowing ridesharing services to operate without medallions, most often employing a regulatory takings theory. I argue that the approach employed by these courts wrongly focus on the property interests involved, rather than where the real analytical question resides: what are the investment-backed expectations of those already providing vehicle-for-hire services in the marketplace. Shifting the analysis from artificial distinctions between property for purposes of the Takings Clause and other forms of property, would, I conclude, put the focus where it should be—an owner's expectations when she obtains a taxicab medallion. Doing so would place these questions in the proper takings context, to be measured along with the other factors which courts consider in most regulatory takings cases.

## II. A CRASH COURSE IN REGULATORY TAKINGS

The regulatory takings doctrine is built on the idea that certain exercises of government power have such a dramatic impact on private property that they are the functional equivalent of an affirmative exercise of eminent domain, and the government should either back off the regulation, or compensate the property owner. Most courts approach these cases by tracking the text of the Fifth Amendment,<sup>5</sup> and asking, in order: does the claimant own “private property,” has the property been “taken,” and if so, what compensation is “just.”<sup>6</sup>

The government may not intend to condemn property—it is only regulating it, most often under the “police power”—but as Justice Holmes famously opined, left unchecked by the Takings Clause, the police power would eventually to swallow up the very notion of private property.<sup>7</sup> The

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<sup>5</sup> The Takings Clause of the U.S. Constitution provides, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

<sup>6</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (“The critical terms are ‘property,’ ‘taken’ and ‘just compensation.’”). The most common remedy in regulatory takings cases is an award of just compensation. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005). In *Lingle*, the Court explained:

As its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power.’ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). In other words, it ‘is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.’ *Id.* at 315 (emphasis in original).

*Id.* Although in certain circumstances, declaratory or injunctive relief may be available. *See E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (“Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts’ power to award such equitable relief.”).

<sup>7</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of

principle driving the analysis is whether it is fair to require a single property owner (or a class of property owners) to shoulder the entire economic burden of worthy regulations: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>8</sup>

Justice Holmes also gave us the catchy but notoriously difficult-to-apply maxim that “[t]he general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”<sup>9</sup> What “goes too far,” and where the line is between regulations that may be applied without paying compensation, and a taking is one that has confounded the courts ever since.<sup>10</sup> In the ensuing decades, the Supreme Court struggled to draw that line, finally settling in *Lingle v. Chevron U.S.A. Inc.*<sup>11</sup> on a takings jurisprudence that, although continuing to be difficult to apply, at least was at least doctrinally clear.

In certain “relatively narrow” circumstances, it is easy to determine there’s been a taking, and the Supreme Court has established two categories of regulations that will be deemed *per se* takings triggering the right to compensation. First, “where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.”<sup>12</sup> Second, a *per se* taking also occurs when a regulation deprives an owner of “‘all economically beneficial us[e]’ of her property.”<sup>13</sup> But *Lingle* also affirmed that most regulatory takings cases

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human nature is to extend the qualification more and more, until at last private property disappears.”)

<sup>8</sup> *Id.* at 416; see *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that the Just Compensation Clause is designed “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

<sup>9</sup> *Pa. Coal Co.*, 260 U.S. at 416. More than a half-century later, Justice O’Connor, writing for a unanimous Court, would label Justice Holmes’ “goes too far” formula “storied but cryptic.” *Lingle*, 544 U.S. at 537 (citing *Pa. Coal Co.*, 260 U.S. at 416) (“In Justice Holmes’ storied but cryptic formulation, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”)

<sup>10</sup> “The rub, of course, has been—and remains—how to discern how far is ‘too far.’” *Lingle*, 544 U.S. at 538.

<sup>11</sup> 544 U.S. 528 (2005).

<sup>12</sup> *Id.* In support, the Court cited *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that a law requiring property owners to allow installation of a small cable box on buildings was a taking, and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a case analyzing a takings claim where an agency required landowner to dedicate a public easement as a condition of development approvals. *Id.*

<sup>13</sup> *Lingle*, 544 U.S. at 538 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis omitted)).

should be treated by the courts by applying a multi-factored balancing test which originated in the Court's earlier opinion in *Penn Central Transportation Co. v. City of New York*.<sup>14</sup> To determine whether a regulation "goes too far" when there is no physical invasion or near-total deprivation of economic benefit, a court examines the economic impact of the regulation (the loss in value experienced by the claimant resulting from the regulation), the property owner's "distinct investment-backed expectations," and the "character of the government action."<sup>15</sup>

Courts continue to struggle with what these factors actually mean.<sup>16</sup> No one factor of *Penn Central's* three is dispositive, and judges tend to throw them into a blender and somehow try to balance one versus the rest.<sup>17</sup> In other words, "regulatory taking" is shorthand for the notion that government's power to enact regulations affecting private property operates on a continuum, and when it crosses an equitable boundary determined in most cases by reference to a multitude of case-specific facts, the label attached to the exercise of power is irrelevant, and what matters is the impact of the regulation on the owner.<sup>18</sup> Against this backdrop, I next discuss several cases about ridesharing and takings.

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<sup>14</sup> 438 U.S. 104 (1978).

<sup>15</sup> *Id.* at 124–25 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). *Lingle* labeled the *Penn Central* test the "default" test. *See Lingle*, 544 U.S. at 538–39; *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor J., concurring) ("[O]ur polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances.")).

<sup>16</sup> John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 172 (2005) ("The next 'big thing'—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors.").

<sup>17</sup> *See, e.g.,* *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1269–71 (Fed. Cir. 2017); *Cass Cnty. Joint Water Res. Dist. v. Brakke (In re 2015 Application for Permit to Enter Land for Surveys and Examination)*, 883 N.W.2d 844, 849 (N.D. 2016); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 272–76 (Tex. App. 2016).

<sup>18</sup> *See Lingle*, 544 U.S. at 537 (The Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Kohler Act enacted pursuant to state's police power went "too far").

## III. SEVENTH CIRCUIT TO TAXIS: GET A CAT!

A panel of the U.S. Court of Appeals for the Seventh Circuit in two opinions authored by Judge Richard Posner (did you really expect anyone else would draw this assignment?), concluded that holdovers from the legacy economy—the owners of city-issued taxi medallions and permits—did not have their property taken under the Fifth Amendment when the city allowed ridesharing services to operate.<sup>19</sup>

The court acknowledged that the taxicab industry is “tightly regulated” by municipalities.<sup>20</sup> Indeed, you can’t operate a taxicab without a medallion or permit from the local municipality.<sup>21</sup> And ridesharing services, although somewhat regulated, are certainly subject to much less government gatekeeping, in that you don’t need major government permission to start chauffeuring people around for money via ridesharing services. That was the point the plaintiff taxicab operators objected to: we relied on the government-controlled market, which created a property right in our medallions and permits, they argued, and letting these interlopers do essentially the same thing we do without also having to get a medallion is a taking of our government-sanctioned property.

The panel rejected the claim in both cases,<sup>22</sup> calling the taxicab operators’ claim “absurd.”<sup>23</sup> Although it agreed that taxicab medallions are “property,” the court held that there was no taking because owning a medallion is a property right to operate a taxicab, and isn’t a property right to stop others from driving people around the city for money: “The City has created a property right in taxi medallions; it has not created a property right in all commercial transportation of persons by automobile in Chicago.”<sup>24</sup>

The panel acknowledged that if the cities were to have outright confiscated the taxicab medallions (which would have prohibited the

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<sup>19</sup> See *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, 839 F.3d 613 (7th Cir. 2016); *Ill. Transp. Trade Ass’n v. City of Chi.*, 839 F.3d 594 (2016), *cert. denied*, 197 L. Ed. 2d. 761 (2017).

<sup>20</sup> *Ill. Transp. Trade Ass’n*, 839 F.3d at 596 (“companies are tightly regulated by the City regarding driver and vehicle qualifications, licensing, fares, and insurance”); see also *Joe Sanfelippo Cabs, Inc.* at 614–15 (discussing municipal regulation of taxicabs in Milwaukee).

<sup>21</sup> See MILWAUKEE, WIS., CODE OF ORDINANCES § 100-50 (2017).

<sup>22</sup> See *Joe Sanfelippo Cabs, Inc.*, 839 F.3d at 615; *Ill. Transp. Trade Ass’n*, 839 F.3d at 596–97.

<sup>23</sup> See *Joe Sanfelippo Cabs, Inc.*, 839 F.3d at 615 (“The plaintiffs’ contention that the increased number of permits has taken property away from the plaintiffs without compensation, in violation of the constitutional protection of property, borders on the absurd.”).

<sup>24</sup> *Ill. Transp. Trade Ass’n*, 839 F.3d at 597.

taxicab operators from operating taxicabs), it would be a taking.<sup>25</sup> The panel reasoned:

A variant of such a claim would have merit had the City confiscated taxi medallions, which are the licenses that authorize the use of an automobile as a taxi. Confiscation of the medallions would amount to confiscation of the taxis: no medallion, no right to own a taxi, . . . though the company might be able to convert the vehicle to another use.<sup>26</sup>

But allowing Uber and Lyft to run services that *look* like taxicabs (but are not taxicabs) “is not confiscating any taxi medallions; it is merely exposing the taxicab companies to new competition—competition from Uber and the other transportation network providers.”<sup>27</sup> The court pointed to what it concluded were critical differences between the two: you can’t physically hail down an Uber or Lyft vehicle on the street but must use a smartphone application to do it for you, and a taxi’s fare structure is determined by the city, while ridesharing services’ are not.<sup>28</sup> And that, to the court, was the critical difference. Thus, ridesharing services are not taxicabs, and Uber and Lyft are as different from cabs as dogs are from cats. The court proclaimed:

Here’s an analogy: Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. Dogs on average are bigger, stronger, and more aggressive than cats, are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling. Feral cats generally are innocuous, and many pet cats are confined indoors. Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the “competing” animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination.<sup>29</sup>

In the same way that many cities require dogs to have a license, but not cats, the city can determine that taxicabs need a medallion, while ridesharing services do not.<sup>30</sup>

Because Uber and Lyft are not taxicabs, allowing them to drive people around the city for money doesn’t interfere with the rights of taxicabs to drive people around the city for money. The court told the taxi medallion owner that if they think Uber and Lyft have a competitive edge over

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<sup>25</sup> *Id.* at 596.

<sup>26</sup> *Id.* (internal citation omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* at 597–98.

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

traditional taxicab services, then they should get with the program and start competing (or perhaps start driving for Uber or Lyft).

IV. “YOU KEEP USING ‘TAXI MEDALLION.’ I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS!”<sup>31</sup>

In *Abramyan v. Georgia*,<sup>32</sup> the Georgia Supreme Court concluded that taxicab operators have no property interest in their taxi medallions which would allow them to stop ridesharing services from operating in the same space.<sup>33</sup> The Georgia legislature adopted a statute which made it easier for ridesharing services to operate, by limiting the power of local governments to regulate ridesharing and taxi services.<sup>34</sup> The statute prohibited local governments from adopting any new ordinances requiring either taxicabs or “vehicles for hire” to obtain a Certificate of Public Necessity, otherwise known as a taxi medallion.<sup>35</sup> These medallions subject taxicabs to “an extensive regulatory scheme.”<sup>36</sup>

The previous version of the statute required Georgia taxis *and* vehicles for hire to obtain a medallion in order to operate.<sup>37</sup> As a result of the amended statute, Georgia municipalities could increase the number of ridesharing vehicles, and the medallion owners asserted that this interfered with their “exclusive right to provide rides originating in the city limits which charged fares based on time and mileage.”<sup>38</sup> They asserted, in effect, that they had a government-sanctioned monopoly on taxicab-like services, and that the legislature’s new law loosening that monopoly was a regulatory taking.<sup>39</sup>

The Georgia Supreme Court applied Georgia takings law (which mirrors, in large part, Fifth Amendment law), and concluded that government-issued licenses can be “property” protected by the regulatory takings doctrine, but that the medallion owners didn’t quite possess the exclusive rights they

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<sup>31</sup> See Nobody115 & Brad, *You Keep Using That Word, I Do Not Think It Means What You Think It Means*, KNOW YOUR MEME (JUNE 27, 2012), <http://knowyourmeme.com/memes/you-keep-using-that-word-i-do-not-think-it-means-what-you-think-it-means> (“You Keep Using That Word, I Do Not Think It Means What You Think It Means” is a phrase used to call out someone else’s incorrect use of a word or phrase during online conversations. It is typically iterated as an image macro series featuring the fictional character Inigo Montoya from the 1987 romantic comedy film *THE PRINCESS BRIDE*.”).

<sup>32</sup> *Abramyan v. Georgia*, No. S17A0004, 2017 Ga. LEXIS 385 (May 15, 2017).

<sup>33</sup> *Id.* at \*5–8.

<sup>34</sup> *See id.* at \*1–2.

<sup>35</sup> *Id.* at \*1.

<sup>36</sup> *Id.* at \*2.

<sup>37</sup> *See id.* at \*1–2.

<sup>38</sup> *Id.* at \*3.

<sup>39</sup> *See id.*

argued they did.<sup>40</sup> A medallion isn't a government promise to enforce a monopoly, nor is it a guarantee that the government would limit the number of competitors offering the same or similar services:

Further, even if this Court were to assume *arguendo* that former OCGA § 36-60-25 (a) and the regulatory scheme enacted by the City of Atlanta—which, together, control the application, transferability, use, renewal, and revocation of CPNCs [taxi medallions], as well as permit CPNC holders to use their medallions as collateral for a secured loan—created a protected property right, the harm about which Appellants complain is not amongst the rights associated with the taxi medallion.<sup>41</sup>

A municipality could have, for example, simply increased the number of medallions.<sup>42</sup> Yes, a medallion is a monopoly of sorts, but it isn't one that is limited in size. The regulating municipality can always increase the number of medallions, even if that “waters down” the value of the existing medallions.<sup>43</sup> And that's what happened here. No property interest meant no taking, and the court did not need to analyze the claims further. In essence, the court concluded that the legislature was responding to changing economics, and was within its authority to have opened the ride-for-hire market to more competition, and didn't need to “pay for the change.”<sup>44</sup>

#### V. WHAT THE KING GIVETH, THE KING MAY TAKETH AWAY?

Our final case is *Boston Taxi Owners Association v. City of Boston*,<sup>45</sup> a case in which a federal district court rejected a takings claim that was premised on the city's failure to enforce its medallion requirements against ridesharing services.<sup>46</sup> The owners of taxi medallions thought that they had

<sup>40</sup> *Id.* at \*4–5.

<sup>41</sup> *Id.* at \*5–6.

<sup>42</sup> *See id.* at \*6–7 (citing *Minneapolis Taxis Owners Coalition, Inc. v. City of Minneapolis*, 572 F.3d 503 (8th Cir. 2009) (rejecting a takings claim when a municipality increased the number of medallions it issued)) (“Appellants have pointed to no law that would have prevented the City of Atlanta or the legislature from increasing the [medallion] limit (and thus, the number of drivers) as those variables changed, and there is no reasonable basis to conclude that any property interest Appellants may have in their respective [medallions] extends to exclusivity or a limited supply of [medallions].”).

<sup>43</sup> *See id.*

<sup>44</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”).

<sup>45</sup> 84 F. Supp. 3d 72 (D. Mass. 2015).

<sup>46</sup> *Id.* at 78 (“Plaintiffs assert that the City has effectively taken the exclusive rights to operate taxicabs within Boston from medallion owners without just compensation by its

some kind of special relationship with the city,<sup>47</sup> perhaps understandably so. After all, taxi medallions are tough to get, are expensive, require the owner to comply with stringent regulations, and are the only commercial vehicles which can pick up passengers on the street (in other words, be “hailed”). But apparently, this relationship wasn’t special enough, because the city, according to the plaintiff, wasn’t doing much of anything to crack down on ridesharing services like Uber, Lyft, and Sidecar.<sup>48</sup> While their models differ somewhat, at their core these services allow owners of private vehicles to give rides to passengers that might otherwise be using taxis. And this meant trouble for the owners of taxi medallions because this lower-cost competition hurts their bottom line.<sup>49</sup> The owners sought a preliminary injunction.<sup>50</sup>

The bulk of the court’s order rejecting the relief is devoted to the likelihood of success on the merits part of the injunction test, and the court concluded it was very unlikely that the plaintiffs would be able to show either a taking, or a violation of their equal protection rights.<sup>51</sup> The court held that the owners did not possess a property interest in the market value of a taxi medallion, which is derived through the closed nature of the taxi market.<sup>52</sup> The court reasoned, “[u]ltimately, purchasing a taxicab medallion does not entitle the buyer to ‘an unalterable monopoly’ over the taxicab market or the overall for-hire transportation market.”<sup>53</sup>

It’s that word “unalterable” that lies at the heart of the court’s rationale. Yes, you thought you had a relationship with the city, but you operators mistakenly thought that part of the deal in return for you going through the hoops of getting a medallion was that the city would not let others compete with you unless they also went through those same hoops. It wasn’t.

The court continued:

Finally, the Court fails to perceive how the City’s decision *not* to enforce Rule 403 against TNCs constitutes a “taking” of plaintiffs’ property. The City’s inaction undoubtedly permits new companies to offer services that directly compete with traditional taxicab services but simply allowing increased

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continuing decision not to enforce Rule 403 against TNCs.”).

<sup>47</sup> *See id.* at 79–80.

<sup>48</sup> *See id.*

<sup>49</sup> *See id.* at 81 (“The City’s inaction undoubtedly permits new companies to offer services that directly compete with traditional taxicab services but simply allowing increased market competition, which may ultimately reduce the market value of a medallion does not constitute a taking.”).

<sup>50</sup> *See id.* at 77.

<sup>51</sup> *Id.* at 78–82.

<sup>52</sup> *Id.* at 79–80.

<sup>53</sup> *Id.* (internal citations omitted).

market competition, which may ultimately reduce the market value of a medallion does not constitute a taking.<sup>54</sup>

Taxis owe their existence to the highly regulated market into which the operators voluntarily injected themselves.<sup>55</sup> In other words, if you live by the sword . . .<sup>56</sup> However, even if a medallion is a property interest, the plaintiff's claim was not that the city rendered taxicab medallions valueless, only that by not enforcing the rules against rideshare services, it made those medallions *less* valuable, which put the analysis, according to the court, in *Penn Central's* three factors territory. The court focused on the owners' "investment-backed expectations" and held that they are "significantly tempered" because the market is highly regulated. Live by the sword . . . Ironically, that the market is highly regulated and controlled seems to be the operators' exact point. Their claim is that the city was not policing the monopoly well enough.

#### VI. SOME THOUGHTS ON THE TAKINGS ANALYSIS

The various analyses these courts undertake—all focused on defining the property interest—are not completely satisfying, and, I suggest, detract from the correct approach, which should focus the taking calculus on the "investment-backed expectations" *Penn Central* factor, in which the question of "property" is baked in.

I first take issue with the Seventh Circuit's conclusion that ridesharing services are wholly different than taxicabs. These services—at least from the consumer's standpoint—operate a heck of a lot like taxis do. You hail a ride (not with your arm and a sharp whistle, but with your fingers and your smartphone), you get in, you go, you get where you are going, you pay the driver (again, with the app, not by handing the driver cash or your credit card). Is that enough of a difference to say that ridesharing isn't taxicabbing? On that, I am mostly with the taxicab operators. Having used Uber and Lyft more than a few times, they sure do seem like taxis with some very inconsequential differences.

But to the Seventh Circuit panel, those distinctions were enough. Whether to regulate ridesharing services the same as taxicabs was within the discretion of the city, in the same way that many cities require pet dogs to have a license, but not cats. Don't like having to obtain a license for

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<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> *See id.* at 79 (citing *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262 (5th Cir. 2012), for the proposition that "a protected property interest simply cannot arise in an area voluntarily entered into . . .").

<sup>56</sup> *See id.* ("The Court agrees that the market value in a taxicab medallion, which is derived solely from the strict regulation of taxicabs in the City, cannot constitute a protected property interest in the context of the Takings Clause.")

your pet? Be sure to get a cat. You don't want to get a taxi medallion? Drive an Uber. That seems like a very blithe approach to those who may have invested hundreds of thousands of dollars in a taxicab medallion, perhaps rightfully believing that the city had a *pet* license requirement. To those who already relied on the regulatory system in place to invest in a medallion, and who thought this was a high barrier to entry into the driving-people-around-for-money market? Chumps.<sup>57</sup> Like the *Boston Taxi* court's approach, this is a case of "what the King giveth, the King may taketh away," much like the cases which hold that there is no property right in the continued existence of a statute.<sup>58</sup> And that is really the Seventh Circuit panel's main thrust.<sup>59</sup> You shouldn't rely on a regulation, unless the things you are relying on are welfare benefits, or employment, or other forms of "New Property," a holding implicit in the panel's conclusion that medallions are "property," just not property for purposes of this takings claim.<sup>60</sup> Owners of New Property can rely. But not here, this is Old Property. Why there's a difference, I can't really say.

The Georgia Supreme Court's approach is also less than satisfying. The government's ability to expand the regulated market really doesn't go to whether you possess property, but rather the nature of what the property right entails. This is an owner-centric analysis about expectations, and not whether the plaintiff has a "legitimate claim of entitlement" to a taxicab medallion.<sup>61</sup> Each of the three opinions that we reviewed above concluded that the plaintiffs' taxi medallions were "property," just not property for purposes of takings analysis. The Seventh Circuit even concluded that if the municipalities were trying to revoke the medallions, the owners would undoubtedly possess property entitling them to due process. But "property" for purposes of takings analysis is a different story, according to the court. It shouldn't be. Instead of focusing on what the nature and scope of the property interest owned by the plaintiffs, and treating it as a separate,

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<sup>57</sup> Ever since Chief Justice Roberts made "chumps" a legal term of art, I am committed to employing that term every time the opportunity presents itself. See *Arizona State Legislature v. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting) ("What chumps!"). You should too.

<sup>58</sup> See, e.g., *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004).

<sup>59</sup> See *Ill. Transp. Trade Ass'n v. City of Chi.*, 839 F.3d 594, 599 (2016), *cert. denied*, 197 L. Ed. 2d. 761 (2017) ("A 'legislature, having created a statutory entitlement, is not precluded from altering or even eliminating the entitlement by later legislation.'").

<sup>60</sup> I'm referring to entitlements. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

<sup>61</sup> See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (defining property for Due Process purposes as a "legitimate claim of entitlement.").

threshold analysis as these courts do, I think the better approach is to conclude the plaintiffs own property because they have a government-backed license to operate taxicab services. This is a license that has “the law behind it,”<sup>62</sup> and thus should be easily considered property within the meaning of both the Takings Clause and the Due Process Clause. The analysis each of our courts undertake on what the owners’ legitimate expectations were, and the extent to which they invested into the licensing scheme based on those expectations—in other words, *Penn Central*’s “legitimate investment-backed expectations” factor—is the more appropriate home for these questions.

Third, what of the *Boston Taxi* court’s reasoning that taxicab licenses are merely government-issued licenses, and because the market has been highly regulated, the owners do not possess Fifth Amendment property? This too is less than satisfying. The entrance of app-based ridesharing services has revealed one thing perhaps not evident before: that there’s really not much of a need for tight regulation of the ride-for-hire market, at least as a gatekeeping function. The *Boston Taxi* court’s analysis should be reserved for such things where the license at issue truly is a government gift, and the market would not exist but for the government.

The paradigmatic example of that, in my view, is the Hawai’i Supreme Court’s decision in *Damon v. Tsutsui*,<sup>63</sup> which turned on whether a lessee had offshore fishing rights allegedly granted to his predecessor during the Hawaiian Kingdom period. Exclusive fishing rights were originally created in 1839 when the King (who, as the sovereign, possessed allodial title to all land and fishing rights) “gave” a portion of them “to the common people.”<sup>64</sup> These rights—which granted fishing rights to tenants of the locality (the ahupua’a, for those knowledgeable in Hawaiian property concepts), as long as they remained tenants—were eventually codified by statute. The *Damon* court made it clear that these rights were limited and stemmed from, and thus were dependent upon, the King’s original gift: “But for this gift or grant the tenants would not have had any rights; and they have them only to the extent and with limitations expressed in the grant.”<sup>65</sup>

After annexation of Hawai’i by the United States in 1898, the Hawai’i Organic Act of 1900 repealed these laws, exempting those who could show “vested rights” by judicial confirmation. Those who did not confirm their fishing rights were not “vested” under the Act and were subject to the repeal of the King’s gift: “In our opinion those persons who became tenants after April 30, 1900, as did Tsutsui in 1929, did not have any

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<sup>62</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1978).

<sup>63</sup> 31 Haw. 678 (Terr. 1930).

<sup>64</sup> *Haalelea v. Montgomery*, 2 Haw. 62, 65 (Kingdom 1858).

<sup>65</sup> *Damon*, 31 Haw. at 688.

‘vested’ rights within the meaning of the Organic Act and therefore the repealing clause was operative as against them.”<sup>66</sup>

But the ability to use a fishery attached to a specific parcel of land which was originally gifted from the sovereign is a long way from piloting a car on city streets. The fishing right at issue in *Damon* was solely the product of positive law that could be altered or repealed by the sovereign, while the latter is more akin to a right shared by everyone, and has a normative component immunizing it from undue government regulation without condemnation and payment of just compensation. As Justice Thurgood Marshall once noted:

Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish “core” common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.<sup>67</sup>

I conclude by asking what difference does it make whether a court undertakes this analysis as part of its “property” determination, or as part of the *Penn Central* inquiry? The big difference, in my view, is that the *Penn Central* factors are inherently fact-based, and “depends largely upon the particular circumstances [in each] case.”<sup>68</sup> In other words, shifting the analysis from the threshold “property” question to the owner’s specific investment-backed expectations would allow some of these claims now dismissed by summary judgment to be determined by juries. These should be case-specific factual inquiries and not only a determination of the legal nature of the interest allegedly taken. Instead of being placed in the hands of judges, these questions should be resolved by juries.<sup>69</sup>

## VII. CONCLUSION

Shifting the analytical focus from the “property” question to *Penn Central*’s investment-backed expectations would clarify the way courts approach ridesharing takings claims, allow these questions to be viewed in their larger context, and would permit juries, not judges, to make the determination of whether there’s been a taking.

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<sup>66</sup> *Id.* at 693.

<sup>67</sup> *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

<sup>68</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>69</sup> *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720–21 (1999) (“[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.”).