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The Unfranchised Competitor Doctrine

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ABSTRACT

Courts have long resolved claims of unfair competition and protected property rights from unlawful interference. But when Uber upset the property right of the taxi medallion, medallion holders were almost entirely unsuccessful in the resulting litigation. Takings claims against local governments failed, as did unfair competition and antitrust claims against the company. They failed because courts supposed the taxi companies' property did not include the right to exclude competition, and medallion holders lacked a cause of action to privately enforce regulations limiting the number of market participants. This Article examines these suppositions and finds that both are misguided. To explain why, it unearths a long-neglected doctrine that turns some of competition law's foundational premises on their head.

One type of public franchise right—which this Article calls a protected special franchise—includes the right to exclude unauthorized competition. Courts of equity (as well as of law) recognized a cause of action to protect this right. This kind of claim—which the Article names "the unfranchised competitor doctrine"—allows a franchisee to enjoin a competitor that is operating without lawful authorization. At law, it permits the franchisee to recoup lost custom from the competitor. This Article applies the doctrine to reveal its departure from takings, antitrust, and unfair competition doctrine. These points of departure inform how the law can and should inform market disruptions, especially when the government has insulated an incumbent player from competition.

A better understanding of the unfranchised competitor doctrine provides broader lessons for how property law and equity doctrine can shape today's marketplace. It highlights the shift in regulation of "big tech" companies towards private regulatory enforcement. And it presents a variety of competition law, operating outside of the consumer welfare paradigm, that provides leverage for a variety of stakeholders.

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This Article is the first scholarly treatment of the unfranchised competitor doctrine in over fifty years. It clarifies the law of unfair competition in times of technological upheaval and regulatory transition. And it details a new way of thinking about who will pay for the costs of technological and market change.

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> For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already.
>
> —Oliver Wendell Holmes, Jr.[1]

INTRODUCTION

IT is commonly accepted that a business is not legally injured by facing competition. As Judge Richard Posner put it, "'[p]roperty' does not include a right to be free from competition."[2] But that is not always so. One such right—a species of public franchise—has historically protected the owner against competition, as when a franchised railway enjoins an unlicensed motor coach operator.[3]

The public franchise is a vested private right,[4] which can be defined as "a royal privilege in the hands of a subject, by which he either receives some profit, or has the exclusive exercise of some right."[5] In America, public franchises have been a common way that state and local governments have promoted the creation and operation of ferries,[6] toll bridges,[7] railroads,[8] and water[9] and electric utilities.[10] The special franchise con-

1. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

2. Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 596 (7th Cir. 2016). Even the patent right does not include the right to be free from competition, but only "the right to exclude others from using the patented object for direct commercial gain." Ted Hagelin, *The Experimental Use Exemption to Patent Infringement: Information on Ice, Competition on Hold*, 58 FLA. L. REV. 483, 543 (2006) (distinguishing "monopoly over the patent subject matter with monopoly over the patent subject matter market").

3. *See* Danville, Urbana & Champaign Ry. Co. v. T.L. Clark Truck Co., 231 Ill. App. 339, 341 (1923). This protection does not arise from common law, but rather equity. Part II presents the equitable doctrine and its implications in detail. There are, of course, other examples of property protecting against competition. I thank Maureen Brady for pointing out that covenants that run with the land have been, and still are, used to restrain competition. *See, e.g.*, Dunafon v. Del. McDonald's Corp., 691 F. Supp. 1232 (W.D. Mo. 1988).

4. For the importance of the "vested" point, and an argument that patents as public franchises can only be revoked through judicial (and not merely executive) power, see Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. (forthcoming 2021).

5. 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 14 (1793) (footnote omitted).

6. *See* Patterson v. Wollmann, 67 N.W. 1040, 1042–43 (N.D. 1896).

7. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 436–38 (1837).

8. *Danville*, 231 Ill. App. at 341.

9. *See* Henry C. Hodgkins, *Franchises of Public Utilities as They Were and as They Are*, 2 J. AM. WATER WORKS ASS'N, 739, 741–43, 747 (1915) ("The history of American water works is the most fruitful field for the study of franchises . . . .").

10. Chi. Mun. Gaslight & Fuel Co. v. Town of Lake, 22 N.E. 616, 617 (Ill. 1889).

fers the authority to engage in businesses (such as running a ferry or a toll bridge) that are not inherent rights, but privileges cities or states may refuse.[11] And historically, legislatures have protected special franchises from competition to incentivize investment and ensure that the service remain available to the public.[12] This Article focuses on such franchises, which it refers to as "protected franchises."[13]

The right of the franchisee to restrain new competition has a long and prominent legal history. In the *Charles River Bridge*[14] case, a franchised toll bridge sought to restrain another bridge from operating less than one hundred yards away.[15] *New State Ice Co. v. Liebmann*,[16] famous today for Justice Brandeis's "laboratories of democracy" dissent,[17] involved a franchised ice company seeking to enjoin a competitor who did not possess a franchise—that is, an "unfranchised competitor."[18] The right of the franchisee to exclude such a competitor was well-known. As one turn-of-the-century court observed, "There appear[ed] to be no con-

11. *See* Courtesy Cab Co. v. Johnson, 103 N.W.2d 17, 21 (Wis. 1960).

12. This Article concerns special franchises—governmental grants to engage in otherwise prohibited activities. For a recent, comprehensive discussion of *general* franchises—such as the franchise of incorporation or the general powers granted by a corporate charter—see Nelson, *supra* note 4. For the distinction between special franchise and a mere license to engage in an activity, see *infra* Section II.C.

13. Other public franchises, such as the corporate franchise, did not provide a right to be free from unauthorized competition.

14. 36 U.S. (11 Pet.) 420 (1837).

15. *See id.* at 447. Mostly relegated to property casebooks today, at the turn of the twentieth century, the decision was considered "one of the most noted and historic cases, ever argued before" the United States Supreme Court. *See* Charles Warren, *The* Charles River Bridge *Case*, 20 GREEN BAG 284, 346 (1908), *reprinted in* 3 GREEN BAG 2D 78, 78 (1999).

16. 285 U.S. 262 (1932).

17. Of course, that phrase never appears in Justice Brandeis's opinion. His dissent concludes that, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting).

18. The petitioner ice company possessed a certificate of convenience and necessity from the state. *Id.* at 281–82 (Brandeis, J., dissenting). The state commission was prohibited from granting another certificate unless it found that such a certificate was "necessary." *Id.* at 272. The Supreme Court held the statute conflicted with the Fourteenth Amendment because it "ha[d] the effect of denying or unreasonably curtailing the common right to engage in a lawful private business." *Id.* at 278. Essentially, the Court held that a statute providing the right to exclude a competitor from entering a *private* business violated substantive due process. The case neatly describes the unfranchised competitor doctrine:

> If this legislative restriction be within the constitutional power of the state Legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so.

Id. at 273.

troversy on this point."[19] The doctrine has slumbered for decades, little used by litigants, and little discussed by commentators.[20] Yet it deserves close attention.

The emergence of the "sharing economy" has spurred scholars to carefully explore the legal ramifications of technological and market change.[21] Recent attention has also been given to the impact of these drastic changes on the disrupted parties: should they be compensated? If so, how?[22] Should taxi medallion owners have been remunerated when Uber reduced the value of their medallions, either by the public or by Uber?[23] Diverse approaches have been offered from the perspectives of tort, antitrust, regulation, and other areas of the law. Missing from this conversation has been equity, which (as *New State Ice Co.* and *Charles River Bridge* show) has long dealt with the issue. The "unfranchised competitor doctrine" at law has similarly gone unstudied.

This Article incorporates insights from equity and property law to present a new approach to market disruption. As an example to focus the discussion, it uses Uber's entry into dozens of local taxi markets, often in violation of local ordinance or state law. Taxi medallion values plummeted across the country; it is almost certain they will never regain that value.[24] Of course, the taxi medallion is a bit of an outlier as far as contemporary regulatory devices go: the system intentionally lowers supply and protects medallion holders from competition. But the clash between Uber and taxis presents lessons for a broader range of disruptions, especially when government consciously decides to limit competition in a cer-

19. Patterson v. Wollmann, 67 N.W. 1040, 1042 (N.D. 1896).

20. For the last academic discussion of the doctrine, see the student-written *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 971–73 (1964).

21. *See generally* THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY (2018) (analyzing the sharing economy from the perspectives of regulation, innovation, employment and labor law, tax law, consumer protection and privacy law, among others); *see also, e.g.*, Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2030 (2020) (discussing the moral wrongness of competition harms); Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 101 (2019) (addressing when competition by market disruption should constitute unfair competition). *Cf.* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (arguing that the consumer welfare paradigm of antitrust law is unable to address the problems of market power in the modern economy involving network effects and platform markets).

22. *See, e.g.*, Eric Biber et al., *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561, 1606, 1616 (2017).

23. *Compare* David K. Suska, *Regulatory Takings and Ridesharing: "Just Compensation" for Taxi Medallion Owners?*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 183 (2016) (arguing that medallions owners should be compensated), *with* Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2017) (arguing that they should not) [hereinafter Wyman, *Taxi Regulation*].

24. *See* Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years. Now Uber May Be Changing That*, WASH. POST: WONKBLOG (June 20, 2014, 4:22 PM), https://www.washingtonpost.com/news/wonk/wp/2014/06/20/taxi-medallions-have-been-the-best-investment-in-america-for-years-now-uber-may-be-changing-that/?utm_term=.109eb0b6a254 [https://perma.cc/65DW-TAFS].

tain sector (as in the case of many public utilities, such as electric utilities). These clashes are not new.

The litigation following Uber's market entry reveals how courts thought about property. Courts typically rejected medallion holders' claims for two underlying reasons. First was the idea that property generally, and the taxi medallion specifically, does not include the right to exclude competition, even unlawful or unauthorized competition.[25] As evidence for this theory, courts noted that a medallion clearly lacked the right to exclude other medallions from the market,[26] and the medallion holder could not prevent the city from issuing more medallions.[27] Second was the belief that medallion holders had no cause of action against Uber.[28] Some courts said the taxi rules did not provide medallion holders with an implied right of action.[29] Others held that violating taxi rules did not constitute unfair competition because it was neither criminal nor an independent tort.[30] These two underlying principles meant that medallion holders were unsuccessful in their litigation both against Uber and against the cities that permitted Uber to operate in violation of local taxi rules. This Article examines those two suppositions and finds them misguided.

Courts of equity have long recognized the right of a protected franchisee to restrain a competitor who lacks lawful authority to operate. A ferry with an exclusive franchise will receive an injunction against an unlicensed ferry operator, even where no statutory cause of action exists.[31] But franchises need not be limited to a single entity in a market; with a non-exclusive franchise, multiple operators are granted the right to operate, to the exclusion of everyone else. The unfranchised competitor doctrine applies there too: although one franchisee may not exclude other franchisees, the franchisee *may* exclude those without legal permission to operate.[32] Some courts applied a nuisance per se theory, others a public nuisance, and others private nuisance, but all agreed that the franchisee possesses a cause of action.

This Article identifies and names this cause of action the unfranchised competitor doctrine. It demonstrates that this doctrine might have provided taxi medallion owners with a cause of action.

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25. *See* Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 596–98 (7th Cir. 2016).

26. *See* Bos. Taxi Owners Ass'n, Inc. v. City of Boston, 180 F. Supp. 3d 108, 117 (D. Mass. 2016).

27. *See Ill. Transp. Trade Ass'n*, 839 F.3d at 597.

28. *See* Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 218 F. Supp. 3d 389, 394–95 (E.D. Pa. 2016), *aff'd*, 886 F.3d 332 (3d Cir. 2018).

29. *See, e.g.*, *id.* at 394–95.

30. *See, e.g.*, Greater Hous. Transp. Co. v. Uber Techs., Inc., No. 4:14-0941, 2015 WL 1034254, at *20 (S.D. Tex. Mar. 10, 2015).

31. *See* Patterson v. Wollmann, 67 N.W. 1040, 1044–46 (N.D. 1896).

32. *See* Puget Sound Traction, Light & Power Co. v. Grassmeyer, 173 P. 504, 507 (Wash. 1918).

Courts never applied the unfranchised competitor doctrine against Uber. No plaintiffs pursued the theory. The most likely explanation is that medallions were long (properly) considered licenses. But the medallion has undoubtedly evolved since its Depression-era introduction. The taxi industry was de-regulated, and then re-regulated, in the late twentieth century, and cities offered unprecedented high-priced medallion auctions. A plausible case can be made that some medallions, once regulatory licenses, now constitute protected franchises.

The turn of the twentieth century to the 1930s saw the peak of the unfranchised competitor doctrine. It slowly faded from the law reporters over the next few decades. It is now a sleeping doctrine—neither repudiated nor relied on in recent decisions. But by looking back to what once was, it helps to show what could be today and also informs intellectual property understandings, especially in patent and trademark law.

The doctrine has broader implications whenever a government franchisee faces new competition. Looking to Uber and Lyft as an example, one can imagine a future where those companies—which have ushered in a new legal category known as a "transportation network company" or "TNC"—are franchisees. Realizing that Uber and Lyft did not fit within the traditional taxi rules, cities and states passed TNC laws that implemented new regulatory requirements tailored to TNCs. These laws require TNCs to maintain government licenses but also delegate regulatory functions (that in the case of taxis were governmentally enforced) to the private TNCs.[33]

These new regimes do not represent "de-regulation," so much as "re-regulation" of the taxi market. For instance, under the TNC laws, Uber and Lyft, instead of public officials, license drivers. In fact, Uber and Lyft issue the certificates.[34] If, like taxi medallions, the TNC license becomes a valuable, alienable property right, then these too could become franchise rights. Such a transformation would make some sense. The TNC model has shifted the enforcement of drivers' licensing to the private sector. Why should enforcement of the barriers to market entry not follow a similar shift to the private sector (through the unfranchised competitor doctrine)? Recent antitrust literature has explored regulating platform markets (such as Uber and Amazon) using traditional public utility approaches.[35] If that comes to pass, the franchise model—and the unfranchised competitor doctrine—will become even more important.

There has been growing political and academic concern about the distribution of income and wealth in society—examples include the progressive "New" New Deal, national conservatism, Catholic Integralism, and

33. *See, e.g.*, Transportation Network Companies Act, MASS. GEN. LAWS ch. 159A1/2 (2016); Transportation Network Providers Acts, 625 ILL. COMP. STAT. 57/32 (2015) (repealed 2020).

34. *See* MASS. GEN. LAWS ch. 159A1/2, § 4(a).

35. *See* Khan, *supra* note 21, at 797–803.

agonistic politics. Justice Clarence Thomas recently floated the idea that "some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated"[36] when governments entrust those platforms to perform functions "that the State has traditionally undertaken."[37] In particular, he wrote, "there is clear historical precedent for regulating transportation and communications networks this way."[38] He specifically invoked the franchise right, explaining that "governments have tied restrictions . . . to regulations that make it more difficult for other companies to compete with the carrier (such as franchise licenses)."[39]

Justice Thomas's concurrence echoed the approach of Lina Khan, who has influentially argued that current market platforms provide short-term consumer price benefits in exchange for long-term detriments to the political economic interests of "workers, producers, entrepreneurs, and citizens."[40] President Biden nominated Khan to the Federal Trade Commission, and her nomination was moved through committee on a bipartisan voice vote.[41] At her confirmation hearing, Khan was asked about Justice Thomas's opinion, and responded that regulators will need to choose between a paradigm of "enforcing competition laws and ensuring that these markets are competitive" and "recogniz[ing] that perhaps there are certain economies of scale, network externalities, that will lead markets to stay dominated by a very small number of companies, [which means] we need a different set of rules."[42] Given her academic writings, it is clear she believes that the "different set of rules" deserve close attention. Although Khan and Justice Thomas approach the question from an angle of explicit government regulation, the private law of property and equity doctrines provide a store of collected wisdom to inform the response to technological change. This Article excavates the unfranchised competitor to provide that wisdom.

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36. *See* Biden v. Knight First Amendment Inst., No. 20-197, slip op. at 6 (U.S. Apr. 5, 2021) (Thomas, J., concurring).

37. *Id.*

38. *Id.* at 5.

39. *Id.*

40. *See id.* at 737.

41. *See U.S. Lawmakers Vote to Send Lina Khan Nomination to Full Senate*, REUTERS (May 12, 2021, 12:59 PM), https://www.reuters.com/business/legal/us-lawmakers-vote-send-lina-khan-nomination-full-senate-2021-05-12/ [https://perma.cc/USC8-UZVN]. Notably, only four of the committee's fourteen Republican members voted no.

42. *Confirmation Hearing on the Nomination of Lina Khan to Be Commissioner of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 117th Cong. (2021), https://www.c-span.org/video/?511008-1/nasa-administrator-ftc-commissioner-confirmation-hearing [https://perma.cc/T7VA-MY3E]. On the specific question of common carrier regulation, she agreed with Justice Thomas that "[w]e have a long legal tradition thinking about what types of checks can be applied when you have a lot of concentration and common carriage is one of those tools." *Id.*

The Article proceeds in four parts. Part I traces a brief history of Uber and Lyft's entry into the taxi market, and taxi medallion owners' unsuccessful litigation attempts to stop that entry and receive compensation. Part II describes the franchise as a property right and presents the unfranchised competitor doctrine. Part III analyzes the taxi–Uber litigation as an example of how the unfranchised competitor doctrine could work today. Part IV highlights some broader implications of reviving the doctrine, with a focus on the doctrine's operation outside the consumer-welfare paradigm, its shift to private enforcement, and its alternative approach to transition relief. A brief conclusion follows.

I. MARKET BACKGROUND

This Article uses Uber's disruption of the taxi market as a concrete example of how the unfranchised competitor doctrine would work today. Part I traces how the taxi medallion, originally introduced in the 1930s as a regulatory device to reduce traffic congestion, became by the early 2010s a legal interest that that would arguably have provided protection against unauthorized market entrants. This Part then records Uber's unlawful entry in American markets and the litigation that followed.

A. *The Traditional Taxi Market*

The history of the taxicab industry is a history of competition and disruption. Even the name "taxicab" reveals the evolution of urban transportation: "taxi" comes from the taximeter, the device introduced in 1909 to precisely determine distance traveled,[43] and "cab" comes from the "cabriolet," a "fast, light, two-wheeled chaise drawn by one horse."[44] A brief trip through history reveals themes that are just as relevant to Uber's influence on the market today: technological change, drivers' relationship to capital, and successful (and failed) disruptions.

In pre-war America, the streetcar, and not the taxicab, dominated public urban transit. In 1912, streetcars accounted for 93% of American mass transit riders.[45] That dominance would be short-lived. Streetcars were typically granted municipal franchises that fixed the cost of the fare.[46] But World War I saw greatly increased inflation, which raised the operating costs of the streetcars without a commensurate increase in revenue.[47] "[T]he ensuing economic troubles brought bankruptcy for one-third of the streetcar firms by 1918."[48]

43. Edward G. Rogoff, *Regulation of the New York City Taxicab Industry*, CITY ALMANAC, Aug. 1980, at 1, 1.

44. GORMAN GILBERT & ROBERT E. SAMUELS, THE TAXICAB: AN URBAN TRANSPORTATION SURVIVOR 19 (1982).

45. *See id.* at 62.

46. *See id.*

47. *See id.*

48. *Id.*

Another great thorn in the streetcar's side was the jitney:

> So named because of its five-cent fare, the jitney was a privately owned and operated automobile. It was neither a taxicab nor a bus; rather it was a vehicle which traveled the streetcar routes ahead of the streetcars and picked up persons awaiting streetcars. In 1916 about twenty-four thousand jitneys were in operation.[49]

The jitney's disruption hit the streetcars hard. In Bridgeport, Connecticut in 1918, jitneys carrier an estimated 56% of public transportation riders.[50] Many streetcar operators lobbied cities and states to enact anti-jitney laws, and "[t]hese laws and the relative inexperience of jitney operators in business matters combined to wipe out nearly all the jitneys by 1920."[51] The failed disruption-by-jitney presents an interesting contrast to Uber's successful disruption of the taxi industry.

The bulk of taxi regulation we are familiar with today arose from the Great Depression.[52] Two main factors sparked the taxi oversupply crisis of the 1920s. First, there were no entry restrictions: medallions were not capped, and drivers could obtain a permit at will.[53] Second, the taxi business, as a "cash business," attracted unexperienced adventurers who neglected maintenance and depreciation costs.[54]

The history of the taxi medallion as entry restriction deserves close attention. The original taxi medallions were not intended to reduce competition but to reduce congestion. To use New York City as an example, gasoline-powered taxicabs were introduced in 1907.[55] The industry ballooned "from 2,800 taxicabs in 1913 to 15,000 in 1923."[56] The *New York Times* blamed Manhattan's traffic congestion on the taxicabs, and the city's hotel association complained about the quality of the drivers.[57] The number of cabs reached its peak of 21,000 by 1931 and settled to 14,000 in 1934 due in large part to a drop in rider demand.[58] According to the U.S. Department of Transportation, "cities across the country cried out for public control over the taxi industry" because "excess supply of taxis led to

49. *Id.*
50. *Id.* at 62–63.
51. *Id.* at 63.
52. This is true of many industries. As Alfred Kahn noted,

> [t]he period of the 1920s and 1930s, the very time when the constitutional issue was most strenuously contested and ultimately resolved, were especially propitious for [the] extension and blurring of the edges of the public utility concept, that is, of the boundaries between the industries appropriately regulated and those left to the regime of competition.

1 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: ECONOMIC PRINCIPLES 9 (1970).

53. *See* GILBERT & SAMUELS, *supra* note 44, at 67.
54. *Id.*
55. Rogoff, *supra* note 43, at 1.
56. *Id.* at 3.
57. *See id.*
58. *Id.*

fare wars, extortion, and a lack of insurance and financial responsibility among operators and drivers."[59]

The number of medallions was first capped in New York City by the Haas Act of 1937, a city ordinance named after then-alderman Lew Haas.[60] The law provided perpetual renewability and transferability of the 13,595 medallions outstanding at the time of its passage.[61] The law also divided medallions between fleet-owned and individual-owned medallions based on the number of medallions held that way at the time of the bill.[62] The cap would decrease to 11,787 because original owners chose not to renew their medallions and pay the ten-dollar fee, and that number remained static until the 1990s.[63] As Professor Edward Rogoff has explained, the committee did not envision the medallions ever becoming valuable assets and did not consider any mechanism for increasing the number of medallions.[64] Professor Katrina Wyman similarly concludes that the medallion cap was not "intended to create a valuable property right in the right to drive a cab on the City's streets," but rather was "aligned with other Depression-era legislative efforts to stabilize economic sectors thought to be suffering from too much competition."[65]

The Depression amplified the problems of oversupply and lax regulation, as thousands of unemployed men turned to hacking, and below-cost fare wars arose in cities across the country.[66] Outcry, and regulation, followed.[67] Those regulations can be distilled to five main categories: (1) entry restrictions in the form of medallions, (2) regulated fares to stand-

59. 1 L. CAROL SHAW ET AL., U.S. DEP'T OF TRANSP., TAXICAB REGULATION IN U.S. CITIES 6–7 (1983).

60. *See* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 168 (2013) [hereinafter Wyman, *Problematic Private Property*]. The law also separated medallions into "fleet medallions" and "individual medallions" to prevent the creation of a monopoly. *See* Edward G. Rogoff, Theories of Economic Regulation Tested on the Case of the New York City Taxicab Industry 89 (1980) (unpublished Ph.D. thesis, Columbia University) (on file with author).

61. Rogoff, *supra* note 43, at 4. The law mandated that at least forty-two percent of medallions be owner-driver owned; less than ten years earlier, almost ninety-five percent of medallions had been so owned. GRAHAM RUSSELL GAO HODGES, TAXI!: A SOCIAL HISTORY OF THE NEW YORK CITY CABDRIVER 67 (2007).

62. Rogoff, *supra* note 43, at 4.

63. *Id.* at 4–5.

64. *Id.* (noting one drafter of the bill stated: "It was a fluke, no one foresaw that these licenses would ever be valuable.").

65. Wyman, *Problematic Private Property*, *supra* note 60, at 169. Compare the conclusion of Professor Rogoff:

> Overall, seen in the light of the major adjustments to reduce demand for taxicab service, which began in 1930 and continued through World War II, the Haas Law, while it correctly identified the conditions of the industry, had little impact on them—a sharp contrast to the importance it would gain a decade later.

Rogoff, *supra* note 43, at 5.

66. Wyman, *Problematic Private Property*, *supra* note 60, at 169.

67. *See id.*

ardize price, (3) quality measures such as age of the vehicle, (4) minor employment protections for drivers, and (5) a requirement that taxis not wrongfully discriminate.[68] After decades without notable developments in taxi regulation, those five categories were largely unchanged when Uber entered the scene.[69]

No company has sparked more discussion of those taxi regulations than a company that owns no cabs at all: Uber.[70] Uber has faced criticism and litigation stemming from alleged violations of most of these regulations. Surge pricing conflicts with the regulated fare.[71] Uber's independent contractor employment model deprives drivers of many protections of employment law.[72] Critics argue that the sharing economy model facilitates, or even amplifies, wrongful discrimination.[73] This Article focuses on the most distinctive of the taxi market regulations and the one that caused Uber the most trouble: the entry restriction of the medallion. In recent litigation, taxi medallion holders have alleged that Uber harmed them by knowingly violating medallion ordinances.[74]

B. *Uber Enters the Market*

Uber largely convinced the public that it operated in a legal grey area, in which it may have exploited laws to work around them, but did not actually violate them.[75] Recent developments cast doubt on this view. This Article focuses on two primary violations of entry restrictions: first, Uber's operation of private black-car services[76] as taxicabs; and second, Uber's "ride sharing" model using drivers who are not licensed as taxi drivers and vehicles that are not licensed as cabs.

68. *See generally* Wyman, *Taxi Regulation*, *supra* note 23.

69. *See id.* at 99.

70. *See, e.g.*, Samuel R. Staley, *How Uber Exposed Decades of Flawed Taxi Regulations*, INSIDE SOURCES (Oct. 31, 2018), https://insidesources.com/how-uber-exposed-decades-of-flawed-taxi-regulations/ [https://perma.cc/QXV9-NXL2].

71. *See* Annie Lowrey, *Is Uber's Surge-Pricing an Example of High-Tech Gouging?*, N.Y. TIMES MAG. (Jan. 10, 2014), http://www.nytimes.com/2014/01/12/magazine/is-ubers-surge-pricing-an-example-of-high-tech-gouging.html?_r=0 [https://perma.cc/X4CQ-VN66].

72. *Cf.* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (denying motion for summary judgment where putative class of Uber drivers claimed they were employees, not independent contractors, and thus eligible for protections of California Labor Code).

73. *See generally* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1647 (2017) (surveying critique "that sharing economy firms facilitate discrimination").

74. *See infra* Section II.C.

75. *Cf.* Biber et al., *supra* note 22, at 1569, 1581 (hedging that "Uber, Airbnb, and other applications of the platform economy often are also arguably illegal, if not patently illegal, in many jurisdictions" but then classifying Uber as operating an "end-run" around taxi rules).

76. Typically designated "livery" services in regulatory schemes.

Uber was not always a ride sharing service. UberCab, as it was originally known, launched in San Francisco in June 2010 as a high-end black car service that connected licensed town-car fleets and drivers to riders.[77] "UberCab is everyone's private driver," the company boasted.[78]

Uber's first concerted unlawful activity was operating livery vehicles as cabs.[79] The first legal action against Uber was for using black car drivers (a livery service which must be pre-arranged)[80] to act as taxicabs (which could be hailed on the street, found at a cabstand, or ordered and dispatched with a call to the fleet). The California Public Utilities Commission (CPUC) regulates (and regulated) "[c]harter-party carrier[s] of passengers," which "includes any person, corporation, or other entity engaged in the provision of a hired driver service when a rented motor vehicle is being operated by a hired driver."[81] Charter-party carriers generally require a permit to provide transportation services.[82] Taxicab services in California are exempted from regulation by the CPUC and are instead regulated at the city or county level.[83]

In October 2010, both the CPUC and San Francisco Municipal Transportation Authority (SFMTA) issued Ryan Graves, then-CEO of UberCab LLC, notices to cease and desist.[84] The San Francisco letter explained that "[b]ecause UberCab LLC is operating without a permit and has demonstrated numerous violations, we demand that you cease and desist all activities, operations and advertisements related to car service in San Francisco."[85] The SFMTA noted that the "name UberCab indicates that

77. *See* BRAD STONE, THE UPSTARTS: HOW UBER, AIRBNB, AND THE KILLER COMPANIES OF THE NEW SILICON VALLEY ARE CHANGING THE WORLD 57 (2017).

78. *Id.* at 59 (internal quotation marks omitted).

79. For a helpful description of the regulatory violations committed by Uber and Lyft, see Onesimo Flores & Lisa Rayle, *How Cities Use Regulation for Innovation: The Case of Uber, Lyft and Sidecar in San Francisco*, 25 TRANS. RSCH. PROCEDIA 3756 (2017).

80. *See* CAL. PUB. UTIL. CODE § 5360.5 (West 2020).

81. *Id.* § 5360 (first internal quotation marks omitted). Uber would not introduce ride sharing for some years. Nonetheless, the Code exempts from regulation only ride sharing that would be considered work-related carpooling. *See id.* § 5353(h). If the primary purpose of ride sharing is to make a profit, then the Code governs. *See id.*

82. *See id.* § 5371. *See generally* Overton v. Uber Techs., Inc., 333 F. Supp. 3d 927, 935–37 (N.D. Cal. 2018).

83. *See* § 5353(g).

84. *See* Letter from Jarvis Murray, Enforcement & Legal Affairs Manager, SFMTA/Taxi Services, to Ryan Graves, Chief Exec. Officer, UberCab LLC (Oct. 20, 2010), https://techcrunch.com/2010/10/25/ubercab-now-just-uber-shares-cease-and-desist-orders/ [permalink unavailable]; Letter from Brian Kahrs, Investigator, Cal. Pub. Utils. Comm'n, to Ryan Graves, Chief Exec. Officer, UberCab Inc. (Oct. 19, 2010), www.taxi-library.org/cpuc-uber-cease-and-desist-2010.pdf [https://perma.cc/5J49-4F9F]; *see also* Ida Mojadad; *Who's Killing the Taxi Industry?* SFWEEKLY, http://www.sfweekly.com/news/whos-killing-the-taxi-industry/ [https://perma.cc/VXZ3-2YXF] (last updated June 14, 2019, 1:57 PM) (describing interactions between Uber and regulators).

85. Letter from Jarvis Murray to Ryan Graves, *supra* note 84.

you are a taxicab company or affiliated with a taxicab company" and were therefore "in violation of Division II of the Transportation Code Sections 1105(a)(1) failure to operate without a permit, 1106(a) failure to operate without a color scheme permit."[86] The service used limos, town cars, and black cars in violation of taxi rules, even though there were no registered taxis in UberCab's fleet.[87] Both letters described a violation of a charter-party carrier (i.e., Uber) advertising its services as being a taxicab service[88] and the San Francisco letter noted that UberCab's mile and minute rates rendered the company "clearly in violation of Type Certification requirements that are placed upon such devices by the Department of Agriculture's Weights and Measures Division."[89] The SFMTA issued a stern threat: a fine of $5,000 issued to both the driver and UberCab for each instance of unlawful conduct.[90]

Notwithstanding the numerous violations the agencies found, UberCab's status as a transportation outlaw in San Francisco would not last long. UberCab agreed to cease advertising itself as a cab service.[91] In January 2013, the CPUC agreed to evaluate companies like Uber, suspended its cease-and-desist order, and suspended a $20,000 fine.[92] The CPUC authorized UberX, the company's basic service level, to operate as a new regulatory category, a Transportation Network Company,[93] and granted it a permit to operate as a TNC.

Travis Kalanick, CEO of Uber from October 2010 until June 2017, was not apologetic for these early violations. In a 2012 interview, he explained that the San Francisco cease-and-desist letter "was the moment where I was like, for whatever reason, I knew this was the right battle to fight."[94]

Uber's use of livery drivers to accept hails through the app was a pattern in many markets. In New York City, Uber dispatched livery drivers without affiliating as a base, violating the city's livery rules.[95] In Washing-

86. *Id.*

87. *Id.*

88. *See id.* at 2 (citing § 5386.5); Letter from Brian Kahrs to Ryan Graves, *supra* note 84, at 1 (citing § 5386.5).

89. Letter from Murray, *supra* note 84, at 2.

90. *Id. Cf.* Letter from Brian Kahrs to Ryan Graves, *supra* note 84, at 1 (noting that operation of an unregistered charter party carrier is "punishable by a fine of up to $1,000 or by imprisonment in the county jail for up to three months, or both" and that "[e]ach day of continued violations is a separate and distinct offense").

91. *See* STONE, *supra* note 77, at 122.

92. *See* Class Action Complaint & Demand for Jury Trial at 3, Rosen v. Uber Techs., Inc., 164 F. Supp. 3d 1165, No. 3:15-cv-03866-JST (N.D. Cal. 2016).

93. Decision Adopting Rules & Regulations to Protect Public Safety While Allowing New Entrants to the Trans. Indus., Cal. Pub. Utils. Comm'n, Decision 13–09–045 (Sept. 19, 2013).

94. STONE, *supra* note 77, at 122.

95. *See id.* at 155. In Stone's telling, this violation was knowing and willful: Kalanick refused to register Uber as a base. He believed that it would make the company responsible for various fees and licensing require-

ton, D.C., Ron Linton, the head of the taxicab commission, stated that Uber was "operating illegally, and we plan to take steps against [it]," because its vehicles were not lawfully acting as either taxicabs or limos.[96] Linton followed up on this statement by notifying the press and ordering an Uber which was met "by five hack inspectors from the DC Taxicab Commission . . . [who] slapped the stunned driver with $1,650 in fines for driving an unlicensed vehicle in the District and not having proof of insurance on hand, among other infractions."[97]

A separate course of unlawful conduct from Uber was the initial use of ride sharing. Instead of recruiting persons licensed for X to perform Y (as in the livery violation), ride sharing involved persons who were not licensed for any commercial activity performing Y.

This violation, which is commonly associated with Uber, actually owes its genesis to two Uber competitors: Sidecar and Zimride. Sidecar[98] introduced its ride sharing app to San Francisco in February 2012. Journalist Brad Stone colorfully describes the idea:

> Anyone—not just taxi drivers or licensed chauffeurs, but your uncle Frank in his beat-up 2008 Accord with the bad paint job—could start driving, as long as he or she cleared an online background check, showed a driver's license and proof of insurance, and maintained a favorable rating from passengers. At first, riders using Sidecar were not required to pay a fee but encouraged to make a suggested donation to the driver, with Sidecar taking a 20 percent cut.[99]

Zimride, founded by John Zimmer and Logan Green, launched its app in May 2012.[100] Today it is known as Lyft. Regulators responded swiftly to the unlawful ride sharing model Zimride and Sidecar deployed. In August 2012, the CPUC issued cease-and-desist letters to Lyft, Sidecar,

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> ments not only in New York but in other cities where it wanted to expand, and he felt that Uber should stay free of the regulatory muck. Though the base law was rarely enforced, Uber was technically trying to entice drivers to break it by signing them up for a secondary source of rides.

Id. Elsewhere describing Uber's entry into New York, Stone writes that "Kalanick instructed [Matthew] Kochman [Uber's general manager for New York City] to ignore New York's Taxi and Limousine Commission and its rules, reasoning that its regulations, under the guise of consumer safety, were really there to protect entrenched taxi interests." *Id.* at 156.

96. Benjamin R. Freed, *Uber is Hacking into Washington's Taxi Industry, Linton Says*, DCIST (Jan. 11, 2012, 2:30 PM), https://dcist.com/story/12/01/11/uber-is-hacking-into-washingtons-ta/ [https://perma.cc/5ANF-UFVJ].

97. STONE, *supra* note 77, at 181.

98. Sidecar "went out of business in 2016, outfinanced and outmaneuvered by Uber and Lyft." *Id.* at 197.

99. *Id.*

100. *See id.* at 197–98.

and French ride sharing company Tickengo.[101] The Commission stated that ride sharing companies were operating as charter-party carriers and were subject to the accompanying regulations.[102] In June 2013, the Los Angeles Department of Transportation issued cease-and-desist letters to Lyft, Sidecar, and Uber, informing them that they were operating unlicensed commercial transportation services in Los Angeles in violation of Los Angeles Municipal Code Section 71.00.[103] Los Angeles similarly explained that Uber needed to comply with the charter-party carrier regulations of the CPUC.[104] Uber was undeterred by the Los Angeles letter, saying through a spokesman that "we'll continue to operate in the state of California."[105] The San Antonio Chief of Police also issued cease-and-desist letters to Uber and Lyft.[106] New Orleans issued a cease-and-desist notice before Uber even began operating in the city.[107]

The ride sharing companies' unauthorized market entries were widespread. In Pennsylvania, the Public Utilities Commission "directed Lyft to cease and desist from using the Lyft App until it secured authority to operate."[108] In Philadelphia, the parking authority maintained that Uber and

101. Tomio Geron, *Ride-Sharing Startups Get California Cease-and-Desist Letters*, FORBES (Oct. 8, 2012, 6:21 PM), https://www.forbes.com/sites/tomiogeron/2012/10/08/ride-sharing-startups-get-california-cease-and-desist-letters/#7e1c1d2351d3 [https://perma.cc/G8AG-BXMR].

102. *Id.*

103. Letter from Thomas M. Drischler, Taxicab Adm'r, L.A. Dep't of Transp., to Travis Kalanick (June 24, 2013) (Uber); *see also* Chris Welch, *Los Angeles Deals Setback to Uber, Other Ride-Sharing Apps with Cease and Desist Order*, VERGE (June 25, 2013, 3:01 PM), https://www.theverge.com/2013/6/25/4463498/los-angeles-deals-setback-uber-other-ride-sharing-apps-cease-desist-letter [https://perma.cc/Z4KL-H728].

104. *See* Letter from Thomas M. Drischler to Travis Kalanick, *supra* note 103.

105. Christina Chaey, *L.A. Tells Uber, Lyft, and SideCar to Cease and Desist. They're Not Going Anywhere*, FAST CO. (June 25, 2013), https://www.fastcompany.com/3013497/la-tells-uber-lyft-and-sidecar-to-cease-and-desist-theyre-not-going-anywhere [https://perma.cc/GRB6-YEAL].

106. *See* Vianna Davila, *Police Chief: Lyft, Uber Still Not Legal in San Antonio*, SAN ANTONIO EXPRESS-NEWS (May 7, 2014, 10:35 PM), https://www.mysanantonio.com/news/local/article/Police-chief-Lyft-Uber-still-not-legal-in-San-5460611.php [https://perma.cc/ES6F-TF62]; *see also* Greater Hous. Transp. Co. v. Uber Techs., Inc., No. 4:14-0941, 2015 WL 1034254, at *11 (S.D. Tex. Mar. 10, 2015) (describing citations in Houston and citations and cease-and-desist letter in San Antonio).

107. *See* Travers Mackel, *I-Team: City Leader Threatens Transportation Company with Arrest, Fines if It Brings Business to NOLA*, WDSU NEWS (Nov. 21, 2013, 6:00 PM), https://www.wdsu.com/article/i-team-city-leader-threatens-transportation-company-with-arrest-fines-if-it-brings-business-to-nola/3367261 [https://perma.cc/QP2B-D74H].

108. Lyft, Inc. v. Pa. Pub. Util. Comm'n, 145 A.3d 1235, 1238 (Pa. Commw. Ct. 2016). Lyft ultimately settled that complaint without admitting wrongdoing. *Id.*

Lyft were operating illegally, impounded one hundred TNC vehicles, and issued hundreds of citations to drivers.[109]

Virginia officials fined Uber and Lyft over $35,000 for operating as unlicensed taxi enterprises.[110] After those fines proved ineffective, the Commissioner of the Virginia Department of Motor Vehicles sent a cease-and-desist letter to both companies.[111] The ride sharing violation was at the heart of the plaintiffs' complaint against Uber in Boston.[112] In Quebec, "the Bureau du taxi of Montreal seized hundreds of vehicles from Uber drivers" in 2015 and 2016.[113] European regulators were even more aggressive in prohibiting Uber's unlawful conduct, enjoining its operations in their entirety.[114]

Uber did not present itself as a transportation company in litigation. Rather, "Uber bill[ed] itself as a 'technology company.'"[115] But some Uber executives always saw the company as a challenge to the cab industry. Garrett Camp, co-founder of Uber, "always thought [Uber] could become a more efficient cab system, particularly in San Francisco."[116] Accordingly, Camp's research into the San Francisco transportation market focused on questions such as "[w]hat is the average pickup time in minutes

109. Checker Cab Phila. v. Phila. Parking Auth., 306 F. Supp. 3d 710, 725 (E.D. Pa. 2018). TNCs would ultimately be regulated by Act 164. *See* Act of Nov. 4, 2016, 2016 Pa. Laws 1222.

110. Luz Lazo, *Uber and Lyft Are Now Legal in Virginia*, WASH. POST (Feb. 18, 2015, 12:34 PM), https://www.washingtonpost.com/news/dr-gridlock/wp/2015/02/18/uber-and-lyft-are-now-legal-in-virginia/ [https://perma.cc/H2S7-FJ8X].

111. Lori Aratani, *Virginia Officials Order Uber, Lyft to Stop Operating in the State*, WASH. POST (June 5, 2014, 6:03 PM), https://www.washingtonpost.com/news/dr-gridlock/wp/2014/06/05/virginia-officials-order-uber-lyft-to-stop-operating-in-the-state/?noredirect=ON&utm_term=.8b11b233283b [https://perma.cc/9BR8-7YJ4]. The cease-and-desist letters can be seen here: https://www.documentcloud.org/documents/1183526-lyft-cease-and-desist-letter-from-va-dmv.html [permalink unavailable] (Lyft), and here: https://www.documentcloud.org/documents/1183525-uber-cease-and-desist-letter-from-va-dmv.html [permalink unavailable] (Uber).

112. *See* Malden Transp., Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264, 273 (D. Mass. 2017).

113. Derek McKee, *Peer Platform Markets and Licensing Regimes, in* THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 27, 34 (2018).

114. Uber's ridersharing service, UberPop, was enjoined by a German district judge for using drivers who did not hold taxi permits. *See* Melissa Eddy, *Judge Rules Uber Drivers in Violation in Germany*, N.Y. TIMES, Mar. 19, 2015, at B6. So too in Belgium, the Netherlands, and Spain. *See* Mark Scott, *Uber Suspends Operations in Spain*, N.Y. TIMES: BITS (Dec. 31, 2014, 6:09 AM), http://bits.blogs.nytimes.com/2014/12/31/uber-suspends-operations-in-spain/?_r=0 [https://perma.cc/43H4-5A7Y]. The European Court of Justice affirmed a similar injunction against UberPop in France. *See* Ben Chapman, *Uber Ride-Sharing Ban in France Backed by EU's Top Court*, INDEPENDENT (Apr. 10, 2018, 4:32 PM), https://www.independent.co.uk/news/business/news/uber-france-ban-uberpop-ride-sharing-eu-court-justice-a8298126.html [https://perma.cc/4A8W-U4F6].

115. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015).

116. STONE, *supra* note 77, at 46.

when someone calls a cab," and "[h]ow many taxicab companies offer guaranteed pickup?"[117]

In the end, Uber's success devastated medallion holders.[118] In Chicago, the median transfer price of a medallion was over $300,000 in 2012.[119] In 2018, the sale prices ranged from $23,000 to $100,000.[120] Unsurprisingly, medallion holders brought Uber (and the cities that permitted it) to court.[121]

C. *The* Uber *Litigation*

Taxi medallion holders responded to the TNC disruption with litigation, both against Uber and against the cities that did not enforce taxi regulations against it. Those cases were, almost uniformly, losers. In almost every case, on almost every claim, courts found that there is no legal claim for relief that medallion holders could have brought to vindicate the injury to their medallions. In a case where Chicago-area medallion owners and a transportation trade association brought an action against a city ordinance that regulated "Transportation Network Providers" differently from taxicabs, Judge Posner's evaluation is representative: "All seven of the plaintiffs' claims are weak."[122]

Whether brought as takings and equal protection claims, unfair competition and tortious interference claims, or antitrust and consumer law claims, the plaintiffs' actions were generally dismissed for failure to state a claim. Three consistent aspects of the judicial treatment warrant mention: first, that the medallion holders did not have the necessary kind of property right;[123] second, that they lacked a cause of action;[124] and third, that

117. *Id.* at 47.

118. *See, e.g.*, Wyman, *Taxi Regulation*, *supra* note 23, at 77; Badger, *supra* note 24.

119. *See* CITY OF CHI.: BUS. AFFAIRS & CONSUMER PROT., MEDALLION TRANSFER PRICES FROM 1/1/12 TO 12/28/12, https://www.cityofchicago.org/content/dam/city/depts/bacp/publicvehicleinfo/medallionowners/taxicabmedalliontransferprices010313.pdf [https://perma.cc/GBD7-S9XT] (last updated Jan. 13, 2013).

120. *See* CITY OF CHI.: BUS. AFFAIRS & CONSUMER PROT., MEDALLION TRANSFERS 8/22/2007 TO PRESENT, https://www.chicago.gov/content/dam/city/depts/bacp/publicvehicleinfo/medallionowners/medalliontransfersfrom8222007to12312018b.pdf [https://perma.cc/5J8S-JRFY] (last updated Dec. 31, 2018).

121. Taxi drivers were also hit hard, and many blamed Uber. *See* Lori Aratani, *Competition from UberX, Lyft Has D.C. Taxis Crying Foul*, WASH. POST (May 11, 2014), http://www.washingtonpost.com/local/trafficandcommuting/competition-from-uberx-lyft-has-dc-taxis-crying-foul/2014/05/11/5920c866-d60a-11e3-8a78-8fe50322a72c_story.html [https://perma.cc/BVP4-6JJ2]. A cab driver and taxi commission member lamented, "[i]t's not getting better, it's getting worse . . . . We as cab drivers in this city are doomed." *Id.*

122. Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 596 (7th Cir. 2016).

123. *See, e.g.*, *id.*

124. *See, e.g.*, Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 218 F. Supp. 3d 389, 394–95 (E.D. Pa. 2016), *aff'd*, 886 F.3d 332 (3d Cir. 2018); *Greater Hous. Transp. Co.*, 2015 WL 1034254, at *20.

this was a good thing because it benefits consumers.[125] Courts held that businesses do not have a property right to exclude competition; that competition is a normal (and not unfair) part of business; and that this arrangement benefits the public.

Although courts did not delineate the contours of the medallion right, the takings claims make clear that courts did not consider it a franchise. Medallion holders asserted that TNC regulations that were overly favorable to Uber took their property for a public use without just compensation.[126] While acknowledging that a taking would have taken place had the city confiscated a medallion,[127] courts rejected the claim that a city took a property right for public use when it enacted TNC regulations because, in the words of Judge Posner, "'[p]roperty' does not include a right to be free from competition."[128] Phrased differently, owners of a taxi medallion did not possess a "right to exclude" competitors.[129]

Courts concluded that the absence of that right to exclude was demonstrated by two purported truths. First, the taxi medallion is not an exclusive right to operate because multiple taxi medallions are issued and one medallion holder may not restrain another medallion holder from competing with it in the market.[130] Second, a taxi medallion holder has no right to prevent a city from issuing more medallions.[131]

Next, the unfair competition claims failed[132] and revealed that the courts believed the medallion holders lacked a cause of action.[133] Most

125. *See, e.g.*, *Ill. Transp. Trade Ass'n*, 839 F.3d at 596 ("The imposition of such an impediment to competition and disservice to consumers would be absurd.").

126. *See, e.g.*, *id.* at 596; Bos. Taxi Owners Ass'n, Inc. v. City of Boston (*Bos. Taxi Owners Ass'n, Inc. II*), 180 F. Supp. 3d 108, 116–17 (D. Mass. 2016); Newark Cab Ass'n v. City of Newark, 235 F. Supp. 3d 638, 644 (D.N.J. 2017), *aff'd*, 901 F.3d 146 (3d Cir. 2018).

127. *See Ill. Transp. Trade Ass'n*, 839 F.3d at 596; Bos. Taxi Owners Ass'n, Inc. v. City of Boston (*Bos. Taxi Owners Ass'n, Inc. I*), 84 F. Supp. 3d 72, 79 (D. Mass. 2015).

128. *Ill. Transp. Trade Ass'n*, 839 F.3d at 596; *Newark Cab Ass'n*, 235 F. Supp. 3d at 645 (internal quotation marks omitted) (quoting *Ill. Transp. Trade Ass'n*, 839 F.3d at 596).

129. *See, e.g.*, *Ill. Transp. Trade Ass'n*, 839 F.3d at 597; *Newark Cab Ass'n*, 235 F. Supp. 3d at 645.

130. *Bos. Taxi Owners Ass'n, Inc. II*, 180 F. Supp. 3d at 117.

131. *Ill. Transp. Trade Ass'n*, 839 F.3d at 597; *Bos. Taxi Owners Ass'n, Inc. II*, 180 F. Supp. 3d at 117.

132. Certain unfair competition claims premised upon Uber's false advertising (on matters such as vehicle safety and insurance coverage) survived motions to dismiss. *See, e.g.*, Greater Hous. Transp. Co. v. Uber Techs., Inc., No. 4:14-0941, 2015 WL 1034254, at *20 (S.D. Tex. Mar. 10, 2015). *But see* L.A. Taxi Coop., Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 866–67 (N.D. Cal. 2015) (concluding "that because Plaintiffs do not plead their own reliance on Uber's allegedly false advertising, they lack standing to seek relief").

133. A small number of courts found that plaintiff medallion holders stated a claim for unfair competition against Uber for its failure to follow taxi rules. These states have deviated from the majority rule of unfair competition under the common law. At common law, unfair competition was limited to various deceptive

courts rejected unfair competition claims by taxi-medallion holders against Uber for operating an illegal taxi or livery business in violation of state and local law.[134] The reasoning varied. Some courts held that the taxi rules did not create a private right of action,[135] others that no cause of action could be implied from the taxi rules,[136] and other courts relied on the theory that violating taxi rules does not constitute unfair competition because it is neither criminal nor an independent tort.[137]

The only case to proceed to trial resulted in a verdict for Uber on plaintiffs' unfair competition claims and claims under the state consumer protection statute.[138] Under the Massachusetts consumer protection statute, unlawfully competing in a license-required market does not necessarily constitute an unfair trade practice.[139] But it *can* be actionable if "the challenged misconduct . . . rise[s] to the level of an 'extreme or egregious

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practices where one "passed off" one's goods or services as another's, *see, e.g.*, Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 539 (1895), or one committed an act that was considered *malum in se*. *See, e.g.*, Hutcherson v. Alexander, 70 Cal. Rptr. 366 (Cal. Ct. App. 1968). The "expansive scope of unfair competition" under Maryland law, by contrast, imposes no such limitations. *See* Yellow Cab Co. v. Uber Techs., Inc., No. RDB-14-2764, 2015 WL 4987653, at *6 (D. Md. Aug. 19, 2015). The Attorney General of Massachusetts has enacted regulations to the state's Consumer Protection Act, MASS. GEN. LAWS ch. 93A, § 2 (2020), that prohibits any act or practice that "'fails to comply with existing statutes, rules, regulations or laws' meant for the protection of the public's health, safety or welfare." Malden Transp., Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264, 276 (D. Mass. 2017) (quoting 940 MASS. CODE REGS. 3.16(3) (2021)). Maryland and Massachusetts are outliers in their expansive approach to unfair competition and consumer protection laws.

134. *See, e.g.*, Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 218 F. Supp. 3d 389, 394–95 (E.D. Pa. 2016), *aff'd*, 886 F.3d 332 (3d Cir. 2018); *Greater Hous. Transp. Co.*, 2015 WL 1034254, at *20.

135. *See, e.g.*, *Phila. Taxi Ass'n Inc.*, 218 F. Supp. 3d at 394–95.

136. *See, e.g.*, Coachtrans, Inc. v. Uber Techs., Inc., No. CV 16-88, 2016 WL 4417261, at *4 (E.D. Pa. Aug. 19, 2016).

137. *See, e.g.*, *Greater Hous. Transp. Co.*, 2015 WL 1034254, at *20.

138. Malden Transp., Inc. v. Uber Techs., Inc., 404 F. Supp. 3d 404 (D. Mass. 2019) (granting judgment for Uber on state Consumer Protection Act claim and state common law claim). The common law claim likely should not have proceeded to trial. At summary judgment, the court mistakenly relied on a statutory cause of action case for the proposition that unlicensed competition constitutes common law unfair competition, asserting that "unlicensed competition in violation of statutory licensing requirements provides a basis for liability." *See* Malden Transp., Inc. v. Uber Techs., Inc., 386 F. Supp. 3d 96, 103 (D. Mass. 2019) (citing A.B. & C. Motor Transp. Co. v. Dep't of Pub. Utils., 100 N.E.2d 560, 561 (Mass. 1951)). In *A.B. & C.*, a competing taxi company appealed the state public utilities department's approval of a transfer of three taxi certificates of convenience and necessity. *See A.B. & C.*, 100 N.E.2d at 560. The court did cite some unfranchised competitor doctrine cases, *see, e.g.*, *id.* at 551–52 (citing New York, N.H. & H.R. Co. v. Deister, 148 N.E. 590 (Mass. 1925)), for the proposition that the appealing party was "aggrieved" by the decision, and was therefor a permissible party under the statute, *id.* at 552. But neither that question of "statutory standing," nor the unfranchised competitor cases, address unfair competition.

139. *See Malden*, 404 F. Supp. 3d at 418.

business wrong, commercial extortion, or similar level of rascality that raises an eyebrow of someone inured to the rough and tumble of the world of commerce.' "[140]

The court, after a seven-day bench trial,[141] found that Uber and its drivers had been ticketed for violating Boston taxi ordinances.[142] Nonetheless, the plaintiff taxi companies "failed to prove that Uber, under the totality of the circumstances, committed an extreme or egregious wrong when they launched and continued to operate UberX . . . in Boston, Massachusetts throughout the conduct period."[143] The lynchpins of this conclusion were that (1) Uber was preceded in the ride share marketplace by Sidecar and Lyft, (2) the city did not inform Uber, upon Uber's inquiry, that its operations were unlawful, and (3) Uber kept the mayor abreast of its operations.[144] In other words, Uber acted unlawfully, but its actions were not bad enough to trigger liability under the Massachusetts Consumer Protection Act.[145]

Antitrust claims against Uber failed under the premise that competition benefits consumers.[146] Medallion plaintiffs brought antitrust claims, primarily under a theory of predatory pricing.[147] Courts rejected those theories, generally holding Uber's efficient business model provided a competitive advantage that did not constitute anticompetitive conduct,[148] that plaintiffs did not sufficiently allege intent to monopolize,[149] and most importantly, because consumers were not injured by Uber's conduct, the

140. *Id.* at 419 (quoting Peabody Essex Museum, Inc. v. U.S. Fire Ins. Co., 802 F.3d 39, 54 (1st Cir. 2015)).

141. *See id.* at 408.

142. *Id.* at 412–13.

143. *Id.* at 419.

144. *See id.* at 420; *see also id.* ("Accordingly, Uber's entry into the market was not 'unfair' or 'unscrupulous' when Uber 1) was not the first 'unlawful' entrant, 2) thereafter competed in response to changing marketplace conditions and 3) sought to inform regulators that it intended to enter the market.").

145. This is an under-studied area of law. "[I]t is notable that the burgeoning legal literature around the sharing economy has scarcely engaged with consumer protection law." Calo & Rosenblat, *supra* note 73, at 1631 (collecting examples). A framework for situations that are unlawful, but do not rise to the level of unfair competition, is another current gap in the literature. *See* Niamh Dunne, *Competition Law (and Its Limits) in the Sharing Economy*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 91 (2018) (concerning solely antitrust law without a mention of unfair competition).

146. *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))).

147. *See, e.g.*, Phila. Taxi Ass'n, Inc v. Uber Techs., Inc., 886 F.3d 332, 340 (3d Cir. 2018); Malden Transp., Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264, 279 (D. Mass. 2017).

148. *See, e.g.*, *Phila. Taxi Ass'n Inc.*, 886 F.3d at 340; *Malden Transp. Inc.*, 286 F. Supp. 3d at 279.

149. *See, e.g.*, *Phila. Taxi Ass'n, Inc.*, 886 F.3d at 341; MacCausland v. Uber Techs., Inc., 312 F. Supp. 3d 209, 214 (D. Mass. 2018).

medallion holders did not possess antitrust standing.[150] The medallion holders alleged an injury to their business, not to competition, and the antitrust laws provide remedy only for the latter.

Whether asserting takings and equal protection claims against cities, or unfair competition and antitrust claims against Uber, medallion holders, by and large, came up empty. Under the unfranchised competitor doctrine, however, unlawful market participation and financial injury suffice to prevail on a claim.[151] For the medallion holders, this distinction may have made all the difference.

II. THE UNFRANCHISED COMPETITOR DOCTRINE

Part I presented the factual background of Uber's entry into the taxi market and the litigation that followed. This Part explains the unfranchised competitor doctrine and the public franchise right.

A. *The Unfranchised Competitor Doctrine*

The franchised competitor enjoining the unfranchised competitor is a black letter doctrine of equity. Of course, the underlying *right* to be free from unauthorized competition was recognized both by courts of law and courts of equity.[152] But plaintiffs overwhelmingly preferred the prospective remedy of the injunction over the retrospective remedy of damages.

In its broadest sense, equity represents "the remedies and related doctrines that were initially developed in the Court of Chancery."[153] Courts of equity, not courts of law, traditionally restrained unlawful interference with property rights.[154] The most familiar application of this principle is nuisance. Blackstone's presentation is typical: "[I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it will be less offensive."[155] Unsurprisingly, most courts handle the unfranchised competitor doctrine as a type of nuisance.[156]

150. *See, e.g.*, *Phila. Taxi Ass'n, Inc.*, 886 F.3d at 345; *MacCausland*, 312 F. Supp. 3d at 214.

151. *See, e.g.*, Puget Sound Traction, Light & Power Co. v. Grassmeyer, 173 P. 504, 506–07 (Wash. 1918).

152. *See, e.g.*, *Charles River Bridge*, 36 U.S. (11 Pet.) at 614 (Story, J., dissenting).

153. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2016). Alternatively, equity can be "characterized as a model of decisionmaking that emphasizes case-specific judgment, moral reasoning, discretion, or anti-opportunism." *Id.*

154. Waite v. Holmes, 327 P.2d 399, 405 (Mont. 1958).

155. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, IN FOUR BOOKS *191 (Thomas M. Cooley ed., 1876).

156. *See infra* notes 200–01 and accompanying text.

Again, the same underlying right—the protected franchise—was at issue either at law or at equity. And just as nuisance could be actionable at law as well as equity, there are a (small) number of cases where an "action on the case" was recognized at law, with after-the-fact compensatory damages awarded for interference with a protected franchise.[157] But in the vast majority of cases, perhaps a twenty-to-one ratio, plaintiffs repaired to equity, not law, for protection. That plaintiffs would look to equity makes sense for going business concerns: a repeated interruption must be restrained before the business entity goes under, and competition is not a one-off occurrence like the typical breach of contract, which can be handled after the fact.[158] As one article from the early 1920s explained, "[t]he recognition of a property right which the law's remedies are inadequate to protect, but which equity is able to safeguard against interference, is one of the familiar aspects of the rapid development of the law in this new field."[159]

Unfair competition doctrine does not protect a franchisee against an unauthorized competitor. One broad umbrella of unfair competition claims involves theories of competitors deceiving consumers.[160] Another strand concerns intrinsically bad acts such as certain boycotts or purely malicious conduct.[161] As seen in the *Uber* litigation, the unfranchised competitor (such as Uber) neither deceives the customer nor engages in an intrinsically wrong act. This aligns with the traditional legal understanding: competition is not seen as a wrong, even when it injures another by driving them out of business.[162] Moreover, the traditional remedy for unfair competition would not benefit a franchisee. Instead of restraining the unauthorized competitor from operating, remedies for unfair competition are those that are "sufficient to prevent the passing off, but short of a prohibition on use."[163] Thus, a defendant is allowed to continue selling

157. *See, e.g.*, Townsend v. Blewett, 6 Miss. (5 Howard) 503, 512–13 (Miss. Err. & App. 1841) (holding that plaintiff toll bridge franchisee was entitled, in action on the case, to damages of lost custom against defendant who "erect[ed] another bridge over the same stream within the distance prohibited by the legislature"); *see also* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 621–22 (1837) (collecting cases from English courts). *Cf.* Stark ads. McGowen, 10 S.C.L. (1 Nott & McC.) 387, 396 (S.C. Const. App. 1818) (awarding the defendant's gains as damages because defendant blocked the road to plaintiff's ferry and obstructed its operation "by throwing in trees").

158. *See* Carroll v. Campbell, 17 S.W. 884, 885 (Mo. 1891).

159. David E. Lilienthal & Irwin S. Rosenbaum, *Motor Carrier Regulation by Certificates of Necessity and Convenience*, 36 YALE L.J. 163, 193–94 (1926).

160. *See* Mark P. McKenna, *Property and Equity in Trademark Law*, 23 MARQ. INTELL. PROP. L. REV. 117, 122 (2019).

161. *See* Tuttle v. Buck, 119 N.W. 946, 948 (Minn. 1909). *Cf.* Allen v. Flood [1898] AC 1 ("An act lawful in itself is not converted by a bad or malicious motive into an unlawful act so as to make the doer of the act liable to a civil action.").

162. *See* Holmes, *supra* note 1, at 3.

163. McKenna, *supra* note 160, at 121.

its product or service, but it must provide a disclaimer to prevent customer confusion.

The unfranchised competitor doctrine is better seen as an analogue of trademark law or nuisance than unfair competition. While traditional trademark doctrine provided that a plaintiff had a property interest in a trademark, unfair competition cases did not involve a property interest, but rather bad conduct from the defendant.[164] That is why, even today, unfair competition requires a heightened mental state in the defendant.[165] Similarly, trademark law entitled a plaintiff to exclude a competitor from using the mark entirely; unfair competition merely required the competitor to eliminate potential confusion.[166] The unfranchised competitor doctrine is grounded in protecting the property of the plaintiff (as in nuisance and trademark claims), not in punishing the bad acts of the defendants (as in unfair competition).

So what, doctrinally, *is* the unfranchised competitor doctrine? To prevail on a claim under the unfranchised competitor doctrine a plaintiff must demonstrate: (1) it possesses a valid protected franchise;[167] (2) it is currently capable of providing adequate service;[168] (3) the defendant is, or imminently will, compete with the franchisee without legal authorization;[169] and (4) the defendant's competition actually injures the franchise.[170]

The defendant may attempt to negative those elements, such as by demonstrating that the plaintiff did not comply with all conditions precedent to obtain the franchise, or showing that the plaintiff is not currently able to serve the public.[171] To obtain a permanent (or final) injunction, the plaintiff must demonstrate that relief is necessary to prevent the harm, and that there is no adequate remedy at law.[172] For a preliminary injunction, the plaintiff must demonstrate a substantial likelihood of success on the merits, irreparable injury, that the balance of harms is in its favor, and that the injunction is in the public interest.[173] The plaintiff may also be entitled to disgorgement of the defendant's ill-gotten profits if the defendant acted egregiously.[174] The plaintiff need not point to a statute ex-

164. *Id.* at 126.

165. *See supra* notes 138–45.

166. McKenna, *supra* note 160, at 132.

167. Walker v. Armstrong, 2 Kan. 198, 220 (1863).

168. *Id.*

169. *See* Patterson v. Wollmann, 67 N.W. 1040, 1042 (N.D. 1896).

170. *See* Carroll v. Campbell, 17 S.W. 884, 885 (Mo. 1891).

171. *See Walker*, 2 Kan. at 220.

172. Soja v. Factoryville Sportsmen's Club, 522 A.2d 1129, 1131 (Pa. Super. Ct. 1987).

173. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

174. Winifred Warren, Inc. v. Turner's Gowns, Ltd., 32 N.E.2d 793, 795 (N.Y. 1941). In an action at law, a plaintiff instead receives compensatory damages for lost custom. *See supra* note 157 and accompanying text.

pressly or impliedly providing the cause of action; equity supplies the cause of action.[175]

The franchise need not be *exclusive*. Multiple operators can be granted "non-exclusive" franchises in a location; those franchisees do not have the right to exclude each other, but they do possess the right to exclude any unauthorized competitor.[176] The same principle explains why the owner of a non-exclusive franchise has no right to restrain a city from authorizing new, *lawful* competition.[177]

The unfranchised competitor doctrine requires a lower mens rea than unfair competition. Whereas the latter requires either willful or knowing action,[178] or egregious behavior,[179] the unfranchised competitor doctrine operates under a strict liability regime.[180] A franchised operation can seek injunctive relief against an unfranchised competitor that negatively affects its business, so long as the franchisee satisfies the general factors for injunctive relief.

Justice Story explained the doctrine in his dissent in the *Charles River Bridge* case:

> [T]he grant carries with it an exclusive franchise, to a reasonable distance on the river; so that the ordinary travel to the bridge shall not be diverted by any new bridge, to the injury or ruin of the franchise. A new bridge, which would be a nuisance to the old bridge, would be within the reach of its exclusive right. The question would not be so much as to the fact of distance, as it would be as to the fact of nuisance. There is nothing new in such expositions of incorporeal rights; and nothing new in thus administering, upon this foundation, remedies in regard thereto. The doctrine is coeval with the common law itself.[181]

In other words, the government grant of a franchise, even if non-exclusive, confers a property right on the franchisee, which protects the franchisee against unauthorized competitors.[182]

175. Patterson v. Wollmann, 67 N.W. 1040, 1043 (N.D. 1896).

176. Town of Coushatta v. Valley Elec. Membership Corp., 139 So. 2d 822, 827 (La. Ct. App. 1961).

177. *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 422 (1837).

178. *See* Hoffman-LaRoche, Inc. v. Weissbard, 95 A.2d 398, 400 (N.J. 1953).

179. *See* Malden Transp., Inc. v. Uber Techs., Inc., 404 F. Supp. 3d 404, 419 (D. Mass. 2019).

180. This derives from the unfranchised competitor doctrine being a species of nuisance, "a canonical strict liability wrong." Greg C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L. 1, 3 (2011).

181. *Charles River Bridge*, 36 U.S. (11 Pet.) at 614 (Story, J., dissenting). *Cf.* Walker v. Armstrong, 2 Kan. 198, 202 (1863) (franchised ferry enjoins unlicensed ferry); Carson v. Woodram, 120 S.E. 512, 513 (W. Va. 1923) (franchised street railway operator enjoins unlicensed bus company).

182. *See, e.g.*, 3 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 16:4 (2016); 1 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS §§ 20,

Case law illustrates the doctrine. The most basic case involves an exclusive franchise. But the doctrine still obtains with a *non*-exclusive franchise. The cases reveal common threads—most importantly, that the franchise includes a right to restrain unlawful competition, and the franchise holder need not point to a cause of action other than equity. At its most basic form, the doctrine could be summarized in two elements: (1) the plaintiff has a franchise, and (2) the defendant is competing against the franchisee without lawful authorization.

The easiest case involves an exclusive franchise to perform a specific action over a designated location. In *Patterson v. Wollmann*,[183] the plaintiff possessed an exclusive legislative franchise from Emmons County to operate a ferry between Winona (in Emmons County) and Fort Yates (in Boreman County), North Dakota.[184] The Supreme Court of North Dakota noted that "the right to operate a ferry is not common to all citizens," and as "[i]t is a franchise emanating from the sovereign power . . . no one can lawfully maintain a ferry without authority from the state."[185] The court rejected the defendant's contention that the franchise violated the state constitution because, the court reasoned, there is no "right of the citizen to embark in the business of operating a public ferry."[186] It recognized the right of the franchised ferry to exclude unfranchised competition.[187] And it observed that the franchise holder was entitled "to relief in equity," notwithstanding the absence of a statutory cause of action.[188] The court found the injunction question exceedingly simple: "That an injunction will be awarded in such cases is recognized by all the adjudications,"[189] and "[t]here appears to be no controversy on this point."[190]

Patterson presents the doctrine in its cleanest form: an exclusive franchise is entitled in equity to enjoin an injurious unfranchised competitor.

The same result obtains when the franchise is non-exclusive. In a non-exclusive franchise arrangement, multiple entities are permitted to operate. Still, each non-exclusive franchisee "has the legal right to be free from the competition of one not having a valid franchise."[191] Such was the situation in *Puget Sound Traction, Light & Power Co. v. Grassmeyer*.[192] In *Puget Sound*, the franchised street railway operator sought injunctive relief

769 (4th ed. 1905); 2 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES §§ 583, 584 (1905).

183. 67 N.W. 1040 (N.D. 1896).

184. *Id.* at 1040.

185. *Id.*

186. *Id.* at 1043.

187. *See id.* at 1041.

188. *Id.*

189. *Id.*

190. *Id.* at 1042.

191. Town of Coushatta v. Valley Elec. Membership Corp., 139 So. 2d 822, 827 (La. Ct. App. 1961).

192. 173 P. 504 (Wash. 1918).

against unlicensed jitney drivers.[193] The trial court denied an injunction, reasoning that the bond provision the jitneys were violating was not enacted for the benefit of the franchise holder, but rather for the benefit of passengers who might be injured.[194] The Supreme Court of Washington reversed, explaining that the proper framing of the issue is whether a franchise may restrain a competitor who "engage[s] in the business of carrying passengers for hire in the same city in violation of both the ordinances of the city and the state statutes . . . [when] such operation is specially injurious to the plaintiff as it deprives it of revenues which it would otherwise receive."[195] The court acknowledged that the plaintiff's franchise was non-exclusive.[196] Yet the franchisee was still entitled to relief: the defendants' unauthorized market entry was unlawful,[197] and the plaintiff suffered a special injury to the value of its franchise in the form of lost profits, so the unlawful interference with the franchise was actionable.[198] Of course, non-exclusive franchisees possess neither the right to restrain other franchisees nor the right to prevent the government from lawfully granting future franchises.

Puget Sound elucidates the power of the public franchise right vis-à-vis other property rights. A restaurant owner cannot restrain a competing restaurant just because it is violating the health code or because a food truck has not obtained a health code license. But the possessor of a protected franchise does possess the right to exclude an unauthorized competitor. In *Puget Sound*, the statute did not provide the cause of action; equity did.[199] In the *Uber* litigation, because medallion holders did not assert their franchise right, they did not rely on the *Puget Sound* non-exclusive franchise situation. Of course, there is no indication that the medallion holders considered that the taxi medallions *were* franchises. In Section III.A, this Article shows how medallion holders could have made the plausible case that they were.

The *Puget Sound* court relied on a per se nuisance theory. *Walker v. Armstrong*[200] involved a private nuisance theory.[201] Other courts employed public nuisance doctrine.[202] And still other cases were resolved based on a statutory right to injunctive relief. But regardless of a public nuisance, private nuisance, or per se nuisance theory, black letter equity

193. *See id.* at 505 (describing city ordinance making it unlawful to engage in the business of jitney bus operation without obtaining a license and permit).

194. *Id.* at 506.

195. *Id.*

196. *See id.* at 507.

197. Specifically, the court considered the defendants' actions a nuisance per se. *Id.*

198. *Id.*

199. *Id.*

200. 2 Kan. 198 (1863).

201. *See id.* at 219–20.

202. *See, e.g.*, New York, N.H. & H.R. Co. v. Deister, 148 N.E. 590 (Mass. 1925).

provides that a court will restrain an unfranchised competitor to protect a franchise from unlawful interference.

B. *The Franchise*

Of course, the unfranchised competitor doctrine has no relevance unless a property owner possesses a protected franchise. This Section explains that right.

Generally speaking, a franchise is "[t]he government-conferred right or privilege to engage in a specific business or to exercise corporate powers."[203] When the right or privilege is more narrow, it can take the form of a "special franchise," that is, "[a] right conferred by the government, esp. one given to a public utility, to use property for a public use but for private profit."[204] The unfranchised competitor doctrine arises in cases where a special franchise is accompanied by legislative intent to protect the franchisee from competition.[205] This Article will refer to such franchises as "protected franchises."

Like the royal charter, franchises were traditionally the prerogative of the Crown. A charter was a grant by the sovereign to a private person to exercise a royal privilege, such as operating a public highway, ferry, or fair.[206] Not all franchises, however, were granted in the form of a charter. The franchise was well-known in Colonial America. Blackstone listed franchises as the seventh of ten species of incorporeal hereditaments, i.e., rights issuing out of a thing, which are not the corporate thing itself. He defined the franchise as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject."[207] He listed examples such as the right to "have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like."[208]

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203. *Franchise*, BLACK'S LAW DICTIONARY (10th ed. 2014); McPhee & McGinnity Co. v. Union Pac. R.R. Co., 158 F. 5, 10 (8th Cir. 1907).

204. *Special Franchise*, BLACK'S LAW DICTIONARY (10th ed. 2014).

205. *See* New Orleans, M. & T.R. Co. v. Ellerman, 105 U.S. 166, 173–74 (1881).

206. *See* California v. Cent. Pac. R.R. Co., 127 U.S. 1, 40–41 (1888). The granting of franchises by the English monarch has a long history. For a detailed analysis of King Edward I's use of the writ of quo warranto to evaluate and regulate existing franchises, see DONALD W. SUTHERLAND, QUO WARRANTO PROCEEDINGS IN THE REIGN OF KING EDWARD I, 1278–1294 (1963). In response to a writ of quo warranto, a party needed to produce evidence that its franchise had been legitimately granted by the sovereign. The quo warranto action of King Charles II against the City of London has been called the "most important case in English history." JENNIFER LEVIN, THE CHARTER CONTROVERSY IN THE CITY OF LONDON 1660–1688, AND ITS CONSEQUENCES 80 (1969) (internal quotation marks omitted). And Nikolas Bowie has placed two colonial quo warranto cases in his telling that the American constitution was written down because it grew out of government by charter. *See* Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1421, 1454 (2019).

207. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS *37 (Thomas M. Cooley ed., 1876).

208. *Id.* at *38.

The unique feature of the protected franchise is the right to exclude competition. Thus, a protected franchise requires legislative intent to protect the franchisee from competition.[209] In the context of the unfranchised competitor doctrine, where "the statutes are intended to protect the public through protection of the plaintiff-utility's competition position, courts have concluded that a nonexclusive franchise constitutes a sufficient property interest to merit equitable protection."[210]

Governmental franchises are typically obtained by "service-type, monopolistic businesses."[211] And the protected franchise is regularly used for public utilities, such as electric companies and telecommunication providers.[212] They are also common in transportation such as ferries,[213] toll bridges,[214] interstate railroads,[215] and street railways.[216]

The special franchise right permits a company to engage in conduct that the government would not permit without a grant of authority.[217] Utility companies, for instance, must use public land to transfer their product by wires supported by electric poles, cables laid in the ground, or pipes set under roads.[218] A public utility is a business "engaged in regularly supplying the public with some commodity or service which is of pub-

209. *See* Ellerman, 105 U.S. at 173–74. *Cf.* RESTATEMENT OF THE LAW, TORTS § 710 (1938).

210. *Developments in the Law: Competitive Torts*, *supra* note 20, at 971 (collecting cases). A similar sentiment, in a different context, can be found in Professor Jaffe's discussion of a business competitor stating a claim under common law. *See* Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 636 (1971) (citing RESTATEMENT OF TORTS § 710 (1938)) ("The typical case is an unlicensed competitor or competitor who in one way or another is violating the law. If the law was designed to protect competitors, *A* may sue. If it was not so designed, he may not sue."). *See generally* Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703, 752–54 (2019) (recounting the debate between Professor Jaffe and Professor Kenneth Culp Davis about standing to seek judicial review of agency action generated by Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)).

211. S.C. Elec. & Gas Co. v. Town of Awendaw, 596 S.E.2d 482, 485 (S.C. 2004).

212. City of Little Rock v. AT&T Commc'ns of the Sw., Inc., 888 S.W.2d 290, 292–93 (Ark. 1994).

213. Conway v. Taylor's Ex'r, 66 U.S. (1 Black) 603, 605 (1861); Patterson v. Wollmann, 67 N.W. 1040, 1040 (N.D. 1896).

214. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 420 (1837).

215. Raritan & D.B.R. Co. v. Del. & R. Canal Co., 18 N.J. Eq. 546, 549 (1867).

216. State v. Duluth St. Ry. Co., 150 N.W. 917, 917 (Minn. 1915); State v. Des Moines City Ry. Co., 140 N.W. 437, 439 (Iowa 1913).

217. *See* Bd. of Cty. Comm'rs of Garrett Cty. v. Bell Atl.-Md., Inc., 695 A.2d 171, 176 (Md. 1997); E. Ky. Res. v. Arnett, 934 S.W.2d 270, 275 (Ky. 1996) (outlining privileges granted to privately owned landfill). *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (holding that "permanent physical occupation of property" by franchisee cable company constituted a taking regardless of "whether the action achieves an important public benefit or has only minimal economic impact on the owner").

218. *See* S.C. Elec. & Gas Co. v. Town of Awendaw, 596 S.E.2d 482, 485 (S.C. 2004). Of course, they can also do this via private easements.

lic consequence and need, such as electricity, . . . transportation, or telephone or telegraph service."[219] It is thus not surprising that being a public utility can be an indicia of possessing a franchise.

The general and special privileges conferred on the franchisee are delegated from the public to the private entity with the requirement that it will be exercised for the public welfare and subject to public control.[220] For that reason, a franchised transportation provider can be liable for damages if they refuse the use of their service upon being paid the required fare.[221]

In sum, protected franchises tend to involve grants to service-type, common-carrier, limited-competition businesses, which grant the holder a right to engage in conduct that would otherwise be proscribed.

Still, the franchise right is not an all-powerful weapon to be deployed against any and all competitors. A franchise holder must scrupulously comply with the statutory requirements for obtaining the franchise. Thus, in *Walker v. Armstrong*, the Supreme Court of Kansas, in a suit in chancery, noted that the legislature had purportedly granted the plaintiff an exclusive ferry franchise.[222] The plaintiff, "owner in fee of the land on both sides of the river," sued an unfranchised ferry competitor.[223] Relief turned on the presence of a franchise: without a franchise, the complained-of acts would be "mere acts of trespass" against real estate, and there would be no "danger of irreparable injury . . . as to require the interference of the court by injunction."[224] If the plaintiff *did* possess a franchise, an injunction would issue. The court explained that "to be entitled to such remedy the plaintiff must have perfected his right by first filing all obligations imposed upon him by the act granting the franchise as conditions precedent to his right of exclusive ferriage."[225] That included being in a present state to provide ferry service. The plaintiff failed to allege that he had "prepared the means for transporting passengers and freight, and [was] offering his services to the public as ferryman, or in other words that he [had] established a ferry."[226] Because he had not satisfied the implied conditions precedent to receiving a franchise, the court reversed the district court's injunction against the unfranchised competitor.[227] This strict compliance follows the logic of the franchise right: it is the sovereign's grant to a private individual to serve a public

219. Aberdeen Cable TV Serv., Inc. v. City of Aberdeen, 176 N.W.2d 738, 741 (S.D. 1970) (quoting BLACK'S LAW DICTIONARY (4th ed. 1968)).

220. *Town of Awendaw*, 596 S.E.2d at 485 (citing 12 MCQUILLIN MUN. CORP. 34.01 (3d ed. 1995)).

221. People's Pass. R.R. Co. of Memphis v. Memphis City R.R. Co., 77 U.S. (1 Wall.) 38, 51 (1869).

222. Walker v. Armstrong, 2 Kan. 198, 219 (1863).

223. *Id.*

224. *Id.*

225. *Id.* at 220.

226. *Id.*

227. *Id.* at 226.

purpose. If the purported franchisee cannot effectuate that purpose, the franchisee cannot hold the property right.

There are also limits on what kind of government grants constitute franchises. If the right to operate does not exist for the purpose of limiting supply and protecting existing businesses, the unfranchised competitor doctrine will not be countenanced. Thus, in *Kinder v. Looney*,[228] a licensed bus operator sought an injunction against competitor bus drivers. The defendants' employer, which operated its line in 1925, sought a certificate of convenience and necessity for the year 1926 and met the necessary and sufficient conditions for obtaining the certificate.[229] Certificates were not limited and were given to any party that had "complied with the provisions of the statute and the reasonable rules and regulations of the commission."[230] Due to the crowded administrative docket, the Arkansas railroad commission informed the defendants' employer that it would not hear his application until March 1926.[231] The defendants operated the bus line in the meantime, and the plaintiff company sued to enjoin the defendants because they were operating without a license.[232] The court denied the injunction, stating that the plaintiff had no right unless and until the commission heard and denied the pending application.[233] Because the regulatory commission would grant the certificate if doing so would benefit the public, the plaintiff could not demonstrate that the grant was intended to protect against that competition.[234] In other words, the plaintiff did not possess a protected franchise.

C. *Franchise Or "Mere License?"*

Not every legislative grant that allows one to engage in otherwise proscribed conduct constitutes a franchise.[235] Some grants are licenses. This distinction carries great weight: a franchised operator can avail itself of the unfranchised competitor doctrine; an operator with a "mere" license cannot.[236] The "exact line of demarcation between franchises and licenses may not be clearly drawn."[237] Instead, courts look to a number of factors to determine whether an interest is a regulatory license (such as an occu-

228. 283 S.W. 9 (Ark. 1926).

229. *Id.* at 12.

230. *Id.* at 11.

231. *Id.* at 12.

232. *Id.*

233. *Id.*

234. *Id.*

235. State/Operating Contractors ABS Emissions, Inc. v. Operating Contractors/State, 985 S.W.2d 646, 653 (Tex. Ct. App. 1999).

236. *See, e.g.*, White Top Cab Co. v. City of Houston, 440 S.W.2d 732, 734 (Tex. Civ. App. 1969).

237. McPhee & McGinnity Co. v. Union Pac. R.R. Co., 158 F. 5, 10 (8th Cir. 1907).

pational license to practice law) or a protected franchise (such as the exclusive right to operate a ferry at a certain location).[238]

While different factors have predominated at different times, some requirements have remained stable. A public franchise must (obviously) come from the sovereign, not private individuals. A franchise privilege must be "essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone."[239] A private citizen has no natural right to erect a bridge or operate a ferry over a public waterway and charge a toll.[240] So too with railroads, street railways, and municipal water and gas utilities.[241] If a private individual could confer the privilege, such as an easement or right of way over a short stretch of road, that privilege could not constitute a protected franchise.[242]

Other factors have waned in importance. Under the traditional analysis predominant until the mid-twentieth century, courts could draw a clear distinction based on whether the legislative grant was "property": franchises were, licenses were not.[243] Because franchises become contracts when accepted, the grant "is irrevocable, unless the right to revoke is expressly reserved."[244]

If the right can be revoked at will, the right is necessarily a mere license. The franchise granted the franchisee a "vested right," which could then be deprived only through judicial process—legislative and executive process was not enough.[245] Thus, then-Judge Cardozo could distinguish a franchise to operate a street railroad from that corporation's mere license to lay tracks for private company use because when a borough president "revoked the permit," "[t]he force of the license [was] spent." [246] And this rule still holds to a certain extent—*if* a right is revocable, *then* it cannot be a franchise. For instance, some water utilities receive a monopoly privilege

238. *See, e.g.*, *id.* (focusing on privilege's conferral by the sovereign, revocability, and duration); White Top Cab Co. v. City of Houston, 440 S.W.2d 732, 734 (Tex. Civ. App. 1969) (focusing on privilege's transferability, impact on the public interest, and regulatory purpose).

239. *McPhee*, 158 F.3d at 10; Cmty. Tele-Commc'ns, Inc. v. Heather Corp., 677 P.2d 330, 336–37 (Colo. 1984) (quoting *McPhee*, 158 F.3d at 10).

240. Conway v. Taylor's Ex'r, 66 U.S. (1 Black) 603, 634, 635 (1861) (noting that "[since] before the Constitution had its birth, the States have exercised the power to establish and regulate ferries").

241. *McPhee*, 158 F. at 10.

242. *See id.*

243. *See* Puget Sound Traction, Light & Power Co. v. Grassmeyer, 173 P. 504, 507 (Wash. 1918) ("This franchise is property, and any unlawful interference therewith is actionable.").

244. Trs. of Freeholders & Commonalty of Town of Southampton v. Jessup, 56 N.E. 538, 539 (N.Y. 1900).

245. *See* Nelson, *supra* note 4; Lippencott v. Allander, 25 Iowa 445, 446–47 (1868).

246. Brooklyn Hgts. R.R. Co. v. Steers, 106 N.E. 919, 920 (N.Y. 1914).

over particular service areas. But because the certificates conferring that monopoly can be revoked without cause, they are mere licenses.[247]

The converse no longer holds, however. Under the traditional rule, *if* a right was a license, *then* it was revocable at the will of the sovereign. Thus, one court defined a license as "a personal, revocable, and non-assignable privilege."[248] But with the growth and importance of occupational licensing in the mid-twentieth century, the "New Property" paradigm recognized protected property interests in occupational licenses, with accompanying due process rights (generally, at least notice and a hearing).[249] With the evaporation of the clear demarcation between completely revocable licenses and irrevocable franchises, courts turned their focus to different factors.

In the contemporary analysis predominant since the emergence of the New Property, courts distinguishing a franchise from a mere license focus on other recognized attributes of property, such as whether the right was assignable, taxable, or transmissible.[250] Restrictions on transfer, such as required consent of an administrative agency with discretion to veto the transfer, are indicative of a license rather than a franchise.[251] This distinction helps to explain why occupational licenses[252] should not be confused with franchises—an attorney cannot sell her bar membership, nor can her children inherit it.

To establish a protected franchise, and thereby invoke the right against unauthorized competition, a purported franchisee must demonstrate legislative intent to protect the franchisee from competition.[253] If the franchise is non-exclusive by its terms, then "plaintiff cannot complain" "[i]f, by the competition of rival companies to whom [another franchise] has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract . . . except at a financial loss

247. *See* TEX. WATER CODE ANN. § 13.2541 (West 2019); Green Valley Special Util. Dist. v. City of Schertz, 969 F.3d 460, 492 (5th Cir. 2020) (en banc) (Jones, J., concurring) (describing Texas's regime of for-cause and without cause utility decertifications).

248. *See Jessup*, 56 N.E. at 539.

249. *See* Charles Reich, *The New Property*, 73 YALE L.J. 733, 741 (1964).

250. *See* United States v. Turoff, 701 F. Supp. 981, 987 (E.D.N.Y. 1988).

251. *See* Bahta v. Eqube, No. 12AP-680, 2013 WL 1303521, at *2 (Ohio Ct. App. Mar. 29, 2013). *Cf.* Deggender v. Seattle Brewing & Malting Co., 83 P. 898, 899 (Wash. 1906) (holding that liquor licenses are property because unlike "statutes which do not permit transfers of the license from one person to another," the Washington regime recognized "the right of transfer from one to another" and that right was "a valuable right, capable of being surrendered and reduced to money").

252. *See generally* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209 (2016).

253. *See* New Orleans, Mobile & Tex. R.R. Co. v. Ellerman, 105 U.S. 166, 173–74 (1881).

to it."[254] The franchisee "must be held to have contemplated such condition might arise and to have agreed thereto, when it accepted the franchise."[255] By contrast, the same "cannot be said of the defendant who unlawfully occupies the streets and public grounds of the city in competition with plaintiff."[256] But the fact that operation by another is unlawful is not enough—licensing regimes regulate the safety or quality of a service by conditioning lawful operation on the possession of a license.[257] To establish a *protected* franchise, one must demonstrate that the state renders unauthorized competition unlawful *because* it wanted to protect the property right of the franchisee.[258] If the state requires that operators possess licenses because the state wants to protect consumers from shoddy service, no such intent exists. Perhaps the easiest example to understand is the license to practice law. The number of bar licenses is not quantitatively limited—states issue as many licenses as there are attorneys fit to practice—and this is to protect the public from malpractice, not to protect the property rights of the existing attorneys.[259]

Although the determination is more art than science, general principles are discernible. The court is trying to determine whether the legislature intended to create a property right—hence the investigation into whether the interests require tight government restrictions on transfer, and whether the interest is revocable at will. And to distinguish the protected franchise—which contains the right to exclude unauthorized competition—from other property interests, courts seek to discern if the legislature intended to protect the recipient from competition.

III. UNFRANCHISED COMPETITION TODAY

Part II presented the legal background of the public franchise right and the unfranchised competitor doctrine. This Part uses the *Uber* litigation to show how relief under the unfranchised competitor doctrine may have been different from the unsuccessful theories of unfair competition, antitrust, and takings.

254. Bartlesville Elec. Light & Power Co. v. Bartlesville Interurban Ry. Co., 109 P. 228, 229 (Okla. 1910).

255. *Id.*

256. *Id.*

257. *See* Washington-St. Tammany Elec. Coop., Inc. v. St. Tammany Par. Police Jury, 612 So. 2d 773, 777 (La. Ct. App. 1992).

258. *Bartlesville*, 109 P. at 229.

259. There are also more general factors involved. The license is usually less extensive in duration and scope. *See, e.g.*, Greenway Parks Home Owners Ass'n v. City of Dallas, 312 S.W.2d 235, 237 (Tex. 1958). In some states, a license can become irrevocable upon considerable expenditure by the licensee. *See, e.g.*, Trs. of Freeholders & Commonalty of Town of Southampton v. Jessup, 56 N.E. 538, 539 (N.Y. 1900). And the franchise, in addition to the property right, creates a contract that cannot be impaired. Grand Trunk W. Ry. Co. v. City of South Bend, 227 U.S. 544, 552–53 (1913). For a comprehensive treatment of the intersection of public franchise rights with the Constitution's Contracts Clause, see Nelson, *supra* note 4.

A. *Occupational Licenses and Public Franchises*

It is worth separating two kinds of entry restrictions. The first category concerns laws that limit access to certain highly regulated industries such as electrical power generation, the communications media, railroads, and formerly interstate trucking and the airline business, on the basis of general or consumer welfare.[260] The second category, commonly referred to as occupational licensing laws, requires an individual obtain a license from the government to enter a line of work. These occupations range from physicians, attorneys, or accountants, to animal breeders, florists, tree trimmers and fortune tellers.[261] The taxi *medallion* concerns the former category, while the taxi driver *license* that permits an individual to drive a taxi represents the latter.

Unlike the franchise, the occupational or professional license has not been protected in equity (or at law) from unlicensed competition.[262] Even where a statute prohibits an act for the benefit of an occupational class, courts will not step in because the prohibition does not confer an individual right.[263] Similarly, occupational licenses lack the property-like aspects of the franchise. Unlike a franchise, you cannot sell your state bar license, and your child cannot inherit it. Nor is there a cap on the number of law licenses (or other occupational licenses) that a state will issue. Indeed, industries often lobby state legislatures to increase the hours of instruction required to obtain a professional license; each additional hour of instruction benefits the licensed instructors who provides it.[264]

With the distinction between the taxi *medallion* (granting a business the right to operate) and the taxi driver *license* (permitting an individual the right to engage in the occupation of driving a taxi) laid out, the next Section analyzes whether today's taxi medallions constitute franchises.

B. *The Taxi Medallion as Franchise*

To invoke the unfranchised competitor doctrine, the medallion holders would need to establish that they possessed franchises to carry passen-

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260. *See* Michael J. Phillips, *Conservative Constitutional Deontology: A Review Essay of the Return of George Sutherland: Restoring a Jurisprudence of Natural Rights*, 34 AM. BUS. L.J. 73, 92–93 (1996).

261. *See id.* at 216–18.

262. *See* Note, *Enjoining the Violation of a Penal Statute as Being an Unfair Method of Competition*, 42 HARV. L. REV. 693, 695 n.19 (1929) (noting that "[i]n respect to professional licenses, no cases have been found involving suits by professional men against unlicensed colleagues").

263. *See* Smith v. Lockwood & Wood, 13 Barb. 209, 217 (N.Y. Gen. Term 1852).

264. *See* Larkin, Jr., *supra* note 252, at 217 n.31 (describing 1,500 hours of study to become a barber); *id.* at 233 n.122 (describing incident where "Oregon increased the number of training hours required to become a cosmetologist at the behest of that industry").

gers for hire on the streets of the city, not a mere license to operate.[265] This would be the most challenging part of their case.

As discussed in Section II.C, the line between franchises and licenses has not been completely stable over the centuries. Traditionally, courts distinguished "revocable" licenses from "vested" franchises—then, the growth of occupational licensing led courts to look to different property indicia such as transferability.[266] Meanwhile, while transferability is at the center of the license–franchise distinction today, it was not always so; under the general franchise of incorporation, charters of incorporation were not transferable without express legislation permission.[267] Because this Section concerns arguments available to medallion holders under current doctrine, a modern approach will be used.

Medallion holders would argue that the taxi industry has long been regulated in a manner consistent with the protected franchise right. The medallion allows its owner to (1) perform an activity the general public may not, and (2) be free from excess competition. To show that the medallion is a protected franchise and not a mere license, they would argue that the legal landscape has changed over the last 100 years: by the 2010s, taxi medallions in some jurisdictions included the property indicia (such as transferability for valuable consideration) and legislative intent to protect against competition (through the market restriction of the cap on the number of available medallions) that indicates a protected franchise.

The taxi medallion looks more like a franchise when contrasted with the occupational license most familiar to judges: the license to practice law. The taxi medallion may be transferred to another for consideration; the bar license may not. Medallions were competitively auctioned for tens of thousands of dollars; prospective attorneys do not outbid each other for the privilege of practicing law. The number of medallions in a market is artificially limited; no state imposes a quantitative cap on how many attorneys may practice. True, neither a medallion nor a bar license may be revoked at will. But here, a different contrast to the medallion as franchise appears; water and sewer utilities can have their certificate of convenience and necessity revoked without cause,[268] demonstrating again that the medallion is closer in resemblance to a franchise than a license.

But the medallion has not always resembled a franchise; in inception, it was clearly a regulatory license. The number of taxi medallions was originally limited to reduce traffic congestion.[269] There was no legislative intent to vest a property right, much less to confer the right to exclude competition. By the post-World War II period, "owner-drivers [had] established a position that they were independent businessmen with a franchise

265. *See infra* note 275 and accompanying text.

266. *See supra* Section II.C.

267. *See* WILLIAM LAWRENCE CLARK & WILLIAM LAWRENCE MARSHALL, MARSHALL ON PRIVATE CORPORATIONS § 178 (1902).

268. *See, e.g.*, TEX. WATER CODE ANN. § 13.2541 (West 2019).

269. *See supra* Section I.A.

granted by the city."[270] Decades later, medallion holders used the political process to retain the cap and create artificially scarce supply.[271]

Medallion holders may wish to minimize Depression-era scholarship that indicated that cities did not intend to create a monopoly when they restricted entry. The definitive article on the certificate of necessity and convenience[272] observed that

> [t]he object of a certificate does not seem to be to grant a legal monopoly, nor is its effect in practice the same as a franchise monopoly; for, if the need for additional service justifies, it is the duty of the commission to grant additional certificates to other qualified applicants.[273]

Indeed, some states explicitly provided that such certificates did not grant a monopoly.[274] Yet, those early commentators also observed that courts regularly *did* treat the certificate of convenience and necessity as granting some sort of exclusive right to certificate holders.[275] And as the taxi regulations evolved throughout the twentieth century, cities and states did not increase restrictive caps on the number of taxi medallions to match the increase in demand.[276]

Medallion holders could argue that, had the medallion system been unchanged since those Depression-era regulatory licenses, they would not possess a franchise. But, they would argue, it has not been unchanged.

270. HODGES, *supra* note 61, at 85. For instance, "[t]he owner-drivers argued that to prevent the resale of 'the going equipment is to destroy the value of the equipment itself, for normally there is little market in the vehicle unless it can be leased as a taxicab.'" *Id.* This accords with the common law principle that

> the powers and privileges which constitute the franchises of a corporation, while in a just sense property, are yet distinct and separate from the corporeal property which, by the use of such franchises, the corporation may acquire and hold; that is to say, the general property, real and personal, acquired and held by the corporation is not, in any sense, a franchise, and is not embraced within that term, and it is not so regarded by the law, nor by common acceptation.

Cooper v. Utah Light & Ry. Co., 102 P. 202, 208 (Utah 1909).

271. *See, e.g.*, Robert O. Boorstin, *Increase in Cab Fares Delayed Pending Action on Medallions*, N.Y. TIMES, Oct. 10, 1986, at A1.

272. Some states still employ a certificate of convenience and necessity model for their taxicab industries. *See, e.g.*, Abramyan v. State, 800 S.E.2d 366, 367 (Ga. 2017).

273. Lilienthal & Rosenbaum, *supra* note 159, at 168.

274. *See id.*

275. Lilienthal and Rosenbaum observe that the Illinois "non-monopoly" provision "seems utterly without meaning in view of such a case as *Egyptian Transportation System v. Louisville & N. R. R.*, 321 Ill. 580, 152 N. E. 510 (1926)." *Id.* at 168 n.15. In *Egyptian*, the Supreme Court of Illinois set aside the granting of a certificate of convenience and necessity to a motor bus operator, reasoning that the plaintiff railroad company had a right to introduce evidence demonstrating that it would adequately serve the relevant city areas, thus, obviating the need for a certificate to be provided to the bus operator. *See Egyptian*, 152 N.E. at 589–90.

276. *See* Lilienthal & Rosenbaum, *supra* note 159, at 168.

While the medallion slowly came to possess regular attributes of property, later developments made those aspects undeniable. Thus, one can accept that the medallions created by the Haas Act[277] were not franchises while acknowledging the property status, including an intent to exclude competition, of later issued medallions. One can accept both that medallions *used to* be licenses and that *now* they are franchises.

When taxi medallions were first introduced in the 1930s, they constituted regulatory licenses. But medallion holders could argue that the history of taxi regulation transformed those licenses into non-exclusive franchises. The keys to this would be: (1) the historical status of taxi operation as requiring permission from the sovereign; (2) the fact that medallions were privately transferable for significant consideration, with almost no transfer restrictions; (3) the re-regulation of taxi markets in the 1980s and 1990s, during which formerly deregulated cities reinstated the entry restriction of the taxi medallion; and (4) the medallion auctions of the 1990s and 2000s which sold limited numbers of medallions for tens or hundreds of thousands of dollars. By clearly intending to create a valuable property right, and by demonstrating clear legislative intent to protect medallion holders from competition, the medallion holders would argue that they are the possessors of non-exclusive, special protected franchises. These franchises would be non-exclusive in that there are multiple *authorized* competitors, while each authorized operator possesses the right to exclude unauthorized competition.

1. *Taxi Operation as Common Right*

To demonstrate that their privilege is a franchise, medallion owners must show that the activity in question is not a common right. Franchise-granted activities required a grant from the sovereign. Consider the definition of franchises as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right."[278] Medallion holders could easily demonstrate that the right to operate a taxi is not, and has never been, a matter of common right.

For hundreds of years, operation of a taxi has required the approval of the sovereign. In 1634, King Charles I attempted to suppress London's hackney market by prohibiting intra-city hackney transportation and granting a public franchise to Sir Saunders Duncomb to rent out "sedan chairs."[279] Later, in 1654, Parliament capped the number of hackney li-

277. *See supra* notes 60–62 for a general discussion of the Haas Act.

278. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 595 (1839); *see also* Nelson, *supra* note 4 (manuscript at 42–47) (outlining "'Franchises' in the English Legal Tradition and in Nineteenth-Century America").

279. *See* GILBERT & SAMUELS, *supra* note 44, at 11, 15. Those chairs, which were popular on the European continent, struggled to catch on in London as their carriage on the shoulders of laborers connoted slave labor. *Id.* at 11–12.

censes at 300 in 1654, a limit that King Charles II increased to 400 in 1661, and William and Mary increased to 700 in 1694.[280]

Throughout the twentieth century, taxi operation was never seen as a "common right." Courts have defined the relevant activity as "operat[ing] motor vehicles on the public streets of a municipality for the conduct of a strictly private business."[281] And they have held that this activity "is not an inherent right but is a mere privilege."[282] This definition sweeps in broader activities, such as commercial trucking or modern parcel delivery services. But relevant to the taxi industry, "[a] municipality may require that permission or license be obtained for the transportation of passengers for hire upon its streets."[283]

In the "*Lochner* Era," the Supreme Court used the "common right" distinction to identify areas where governments could *not* grant protected franchises. Thus, in *New State Ice Co. v. Liebmann*, the Supreme Court held that states could not require a certificate of convenience and necessity to operate an ice-making company.[284] The Court explained that "a regulation which has the effect of denying or unreasonably curtailing *the common right to engage in a lawful private business*, such as that under review, cannot be upheld consistent with the Fourteenth Amendment."[285] Even during this era, no court held that taxi regulations violated the Fourteenth Amendment.

Today, *New State Ice Co.* would likely be limited to its facts.[286] One can find a handful of *New State Ice Co.* analogues. The Supreme Court of Texas held that the state's cosmetology licensing scheme violated the state constitution's substantive due process guarantee as applied to commercial eyebrow threaders,[287] and the Fifth Circuit held that a statute requiring sellers of caskets to also operate a funeral home was unconstitutional because it was not rationally related to a legitimate government interest.[288] In contrast to those more unusual regulations, there would be no dispute that states may condition taxi operation on the possession of a govern-

280. *See* Rogoff, *supra* note 60, at 53 (citing G. N. GEORGANO, THE HISTORY OF THE LONDON TAXICAB 18 (1973)); KING WILLIAM III & QUEEN MARY II, AN ACT FOR THE LYCENSEING AND REGULATEING HACKNEY-COACHES AND STAGE-COACHES ch. XXII, § II, *in* STATUTES OF THE REALM 502–05 (John Raithby ed., 1694), http://www.british-history.ac.uk/statutes-realm/vol6/pp502-505 [https://perma.cc/QDD7-Z9BQ].

281. Yellow Cab Co. v. Ingalls, 104 So. 2d 844, 847 (Fla. Dist. Ct. App. 1958).

282. *Id.*; *accord* Courtesy Cab Co. v. Johnson, 103 N.W.2d 17, 21 (Wis. 1960).

283. *Ingalls*, 104 So. 2d at 847.

284. New State Ice Co. v. Liebmann, 285 U.S. 262, 271 (1932).

285. *Id.* at 278 (emphasis added).

286. *See, e.g.*, Wolverine Fireworks Display v. Towne, No. 12-10426, 2012 WL 2063608, at *17–18 (E.D. Mich. June 7, 2012) (recognizing that *New State Ice Co.* has been eclipsed by the deferential rational-basis standard for economic regulations).

287. *See* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 73 (Tex. 2015).

288. St. Joseph Abbey v. Castille, 712 F.3d 215, 217 (5th Cir. 2013).

ment grant. Medallion holders would have little trouble demonstrating that taxi operation is not a matter of common right.

2. *Re-regulation*

In jurisdictions that deregulated the taxi industry (by eliminating medallion caps) and then re-regulated the industry (by reinstating those medallion caps), medallion holders would point to a clear legislative intent to protect medallion holders from competition.

Railroads, airlines, and trucking companies were successfully deregulated in the 1970s through the 1990s. [289] But the deregulation of the taxi industry that occurred during the same time was considered a failure. Almost every city that deregulated (including, most importantly, the elimination of the cap on the number of medallions issued) later re-regulated and re-instituted the limit on issued medallions. In fact, "[o]f the twenty-one cities which deregulated prior to 1993, the experience with deregulation was so poor that only four of the smallest cities in the group . . . retained a fully unregulated system."[290] The experiment with deregulation was disastrous. It resulted in:

1. A significant increase in new entry;
2. A decline in operational efficiency and productivity;
3. An increase in highway congestion, energy consumption and environmental pollution;
4. An increase in rates;
5. A decline in driver income;
6. A deterioration in service; and
7. Little or no improvement in administrative costs.[291]

Most of those cities reinstated their medallion caps. In such jurisdictions, medallion holders would emphasize states limited market entry to protect medallion holders from competition, indicating that the government grant was a franchise.[292]

3. *Medallion Auctions*

Medallion owners would point to the medallion auctions of the 1990s and 2000s as clearly indicating a non-exclusive franchise right. For in-

289. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998). The article focuses on six regulated industries—railroads, airlines, trucks, telecommunications, electricity, and natural gas—but my focus is on the three transportation sectors, which are most analogous to the taxi industry. In particular, the transportation industries, like taxis, were treated as an "oligopoly right . . . to a defined service territory" unlike the monopoly rights granted to electricity, gas, and telecommunications providers. *Id.* at 1350.

290. Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 115–16 (1996).

291. *Id.* at 102.

292. *See supra* Section II.B.

stance, in New York City, Mayor Rudolf Giuliani auctioned off 400 new medallions in 1996–1997, and Mayor Michael Bloomberg auctioned 1,050 more between 2004 and 2008.[293] The medallions were auctioned—not given away, or dispersed through lottery—and the 400 medallions sold in 1996–1997 raised "about $85 million" for the city, i.e., about $200,000 per medallion.[294] This does not at all resemble how, for instance, occupational licenses for attorneys or barbers are granted. Under this approach, New York—at least at the moment of the auction—"re-incorporated" the Haas Act as a franchise agreement, making all medallions—not just those newly auctioned—a vested property right intended to exclude competition.[295]

These auctions were not limited to New York. Boston "re-incorporated" licenses into franchises when it auctioned medallions in the late 1990s, raising the number of medallions from 1,525 to 1,825 while selling the medallions for a minimum bidding price of $95,000.[296] So too in Chicago, when the city auctioned 50 new medallions for $77,250 to $81,002 in a sealed-bid auction.[297]

The touchstones of the protected franchise are (1) legislative intent to vest a valuable property right, which (2) allows a franchisee to engage in an activity that is not permitted by common right, and (3) is intended to protect the franchisee from competition.[298] Medallion holders would point to the adding of more medallions for a substantial price in a market that is consciously limiting supply as manifesting the intent to protect the limited number of medallions from excess competition.

4. *Transferability*

Medallion holders would note that in many jurisdictions, medallions are heritable and transferable. In New York, there is little discretion involved in transfers, but the rise and fall of the taxi medallion markets is a

293. For a more detailed description of those auctions, see Wyman, *Problematic Private Property*, *supra* note 60, at 177–79.

294. Andy Newman, *Investing in a Taxi Permit Looks Riskier*, N.Y. TIMES, June 1, 1998, at B3.

295. This is not to say that a "re-incorporation" is the only way that a franchise property right could come to be. One could imagine the aspects of property that Wyman identifies—a right to exclude others from their medallion, the exclusive right to pick up hails, the right to transfer (including leasing), their status as assets in bankruptcy, and their treatment as property by financial actors that "buy, sell, lease, finance, and lend against them," *see* Wyman, *Problematic Private Property*, *supra* note 60, at 135–41—hardening to such a point as justifying the existence of a vested property right. But it is not clear that such a hardening could create a franchise right with the right to exclude unlawful competition. That right depends on legislative intent to protect the franchisee from competition.

296. *See* Laura Brown, *Hopeful Cabbies Get in Line; City Set to Auction 73 Medallions*, BOS. HERALD, Dec. 8, 1998.

297. *See* Press Release, Chi. Dep't of Consumer Servs., Department of Consumer Services Auctions 50 Taxicab Medallions for $3.9 Million (Dec. 28, 2006).

298. *See supra* Section II.B.

frequent topic of general interest journalism.[299] In New York, private parties can transfer medallions by "(i) Purchase, (ii) Gift, (iii) Bequest, or (iv) Operation of law."[300] The conditions on transfer are clear, and the Taxi and Limousine Commission lacks discretion to deny a transfer that complies with those requirements.[301]

The transferability of the medallion can distinguish it from "mere license" cases. For instance, in the 1960s, taxi medallion holders in Houston sought judicial review of an administrative order increasing the number of taxi medallions in the city.[302] The court concluded that the medallions were not franchises.[303] Medallion holders could note that this holding makes sense: the medallions lacked a fundamental aspect of the franchise because they could "not be transferred except upon a finding that public convenience and necessity require such transfer."[304] Through severely curtailing (and almost eliminating) the right to alienate the medallion, Houston had clearly indicated that it was not vesting a property right.

If a regulatory regime intentionally deprives one of the three fundamental property "sticks" (the right to use, exclude, and transfer),[305] it is easy to see why the grant did not confer a franchise. In San Francisco, for instance, medallions are not transferable at all.[306] But medallion holders

299. *See, e.g.*, Michael M. Grynbaum, *2 Taxi Medallions Sell for $1 Million Each*, CITY ROOM (BLOG) N.Y. TIMES (Oct. 20, 2011, 7:01 AM), https://cityroom.blogs.nytimes.com/2011/10/20/2-taxi-medallions-sell-for-1-million-each/ [https://perma.cc/KM8X-SD5Y]; Joe Nocera, *The Taxicab Bubble Couldn't Last Forever*, BLOOMBERG OPINION (June 19, 2018, 1:15 PM), https://www.bloomberg.com/opinion/articles/2018-06-19/uber-taxi-medallions-and-new-york-city-s-cab-bubble [https://perma.cc/NVN6-XVBU]; Reich, *supra* note 249, at 735 n.7 ("A New York Taxi Medallion is a piece of tin worth 300 times its weight in gold.").

300. 35 R.C.N.Y. § 58-43(a)(1) (West 2012); *see also* N.Y.C. ADMIN. CODE §§ 19-504(h) (providing for the transfer of taxi medallions), 19-512(a) (2011) (providing for transfer of taxi medallions issued prior to July 16, 1971); N.Y.C. CHARTER § 2303(b)(3) (specifying that revoked and suspended medallions remain "transferable according to law"). *See generally* Wyman, *Problematic Private Property*, *supra* note 60, at 137.

301. *See* 35 R.C.N.Y. § 58-43(b)(1–7).

302. *See* White Top Cab Co. v. City of Houston, 440 S.W.2d 732, 734 (Tex. Civ. App. 1969).

303. *Id.*

304. *Id.*

305. *See, e.g.*, Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1465 (1996).

306. The City of San Francisco presents an interesting history. Until 1978, medallions could be "inherited, sold, assigned and transferred." Yesson v. S.F. Mun. Transp. Agency, 168 Cal. Rptr. 3d 212, 214 (2014). But in 1978 San Franciscans passed an ordinance barring inheritance, sale, assignment, and transfer of medallions and providing that "all taxi medallions belonged to the City, had to be held by working drivers, and were distributed as they became available to individuals on the medallion waiting list." *Id.* The impetus was to make the medallions more "accessible to working cab drivers, who are actually driving their own taxis, and not simply leasing out the permits for profit." Slone v. Taxi Comm'n, No. C 07-03335 JSW, 2008 WL 2632101, at *5 (N.D. Cal. June 30, 2008). Having removed

would argue San Francisco's standard only reinforces the principle that where medallions *are* transferable, the government has made a conscious decision to vest a valuable property right. In jurisdictions where the right to alienate is robust and lightly regulated, the franchise designation is more appropriate.

5. *Other Factors*

Given that the franchise–license distinction can be a difficult line to draw, medallion holders would also note the general similarities between the taxi industry and other industries where franchises are typical.

For instance, medallion holders would note that taxis historically have been[307] (and in some states still are)[308] designated public utilities. Further, the operation of motor vehicles on public streets for private gain is not an inherent right but a privilege that a state or municipality can grant or refuse.[309]

Some of the general factors may seem to cut in favor of medallions being licenses. For instance, in one early-twentieth-century case, a taxicab company sued Dallas for its ordinance permitting jitney operation.[310] The city charter provided that:

> The city of Dallas shall have the power . . . by ordinance to confer upon any person or corporation the franchise or right to use the property of the city . . . for the purpose of furnishing to the public any general public service, including . . . the carriage of passengers or freight within the said city and its suburbs, over the streets, highways and property of said city . . . .[311]

The court held that the jitney permits were "never contemplated by the lawmakers" to constitute a franchise because

> they in no wise [permit operators] to appropriate any part of the streets to their exclusive use. Street railways, telephone and telegraph, and gas companies, etc., appropriate certain parts of the street for the laying of tracks, placing poles, and placing wires,

the essential property characteristics, there is no argument that a San Francisco medallion constitutes a franchise. For a defense of the San Francisco regime because it "facilitate[s] equality of opportunity," see David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 599 (2014). In New York, medallions are regularly inherited. *See, e.g.*, Piccinetti v. Hirsch, 259 N.Y.S.2d 363 (N.Y. App. Div. 1965).

307. *See* Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 253 (1916).

308. *See* Bucks Cty. Servs., Inc. v. Phila. Parking Auth., 195 A.3d 218, 232 (Pa. 2018).

309. Yellow Cab Co. v. Ingalls, 104 So. 2d 844, 847 (Fla. Dist. Ct. App. 1958); Courtesy Cab Co. v. Johnson, 103 N.W.2d 17, 21 (Wis. 1960).

310. *See* City of Dallas v. Gill, 199 S.W. 1144, 1145 (Tex. Civ. App. 1917).

311. *Id.*

> and for said purposes the term "franchise" applies to them and like enterprises.[312]

But medallion holders could respond that a court should not collapse the multifactor, franchise–license analysis into the sole question of physical location. There was no question that intercity bus or trucking routes constituted franchises, even though those goings did not permanently occupy public property.[313] Moreover, the value of the franchise right is greater than the ability to occupy public property—it includes the right to exclude unauthorized competition. The ferry operator's franchise is not merely the real property of the landing on either side of the river and the vessel; the value comes from the exclusive right to transport passengers.[314]

Taxi cabs, designated as common carriers in most jurisdictions, "must take all comers."[315] Although taxi medallions are time-limited, renewal is usually a pro forma exercise.[316] And they generally cannot be removed "except for cause or with just compensation."[317] Medallion holders would note that medallions are not revocable at will, and are therefore unlike paradigmatic licenses.

Thus, they would argue, the taxi medallion as it exists today does not merely serve a regulatory purpose; it also serves as an intentional market restriction that serves to benefit medallion holders. It represents a non-exclusive special protected franchise to perform the privilege of operating a ride-hail business in the public streets.

6. *The Alternative—Medallion as Franchise*

Comparing the medallion-as-franchise approach to what actually happened in the *Uber* litigation, three lessons emerge, which show how the courts' license conception may have been incomplete.

First, the courts concluded that the bundle of property rights associated with a taxi medallion does not include the right to exclude others from the market.[318] This is why the *Uber* cases purport that there is no right to be free from competition.[319] But, as this Article demonstrates, the

312. *Id.*

313. *See, e.g.*, Reo Bus Lines Co. v. S. Bus Line Co., 272 S.W. 18, 19 (Ky. 1925).

314. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS *192–93 (Thomas M. Cooley ed., 1876) ("If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one.").

315. Callahan v. City of Chicago, 813 F.3d 658, 661 (7th Cir. 2016); *see also* Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 253 (1916).

316. For instance, in New York, medallions "must be renewed every two years, but the renewal process usually is a purely administrative matter." Wyman, *Problematic Private Property*, *supra* note 60, at 137 (citing 35 R.C.N.Y. §§ 58-06, 58-08 (West 2012)).

317. Boonstra v. City of Chicago, 574 N.E.2d 689, 694 (Ill. App. Ct. 1991).

318. *See generally* Malden Transp., Inc. v. Uber Techs., Inc., 286 F.Supp.3d 264 (2017); People v. Uber Techs., Inc., 56 Cal. App. 5th 266 (2020).

319. *See supra* note 128.

broad statement that property does not include the right to be free from competition sweeps too far. The protected franchise *does* include that right. And even if a franchise is non-exclusive because the state can grant the privilege to another, it *is* exclusive against those without that privilege: "[The franchise] is exclusive against any one who assumes to exercise the privilege of carrying passengers in the absence of authority or in defiance of the laws regulating the privilege."[320]

Second, as proof of the point that the taxi medallion does not include a right to exclude competition, courts noted that medallion holders (1) cannot restrain other licensed medallion holders, and (2) have no right to prevent a city from granting additional medallions.[321] The *Uber* cases considered this proof that there was no right to exclude. But history counsels otherwise. As the *Charles River Bridge* case shows, a nonexclusive franchisee still has the rights to exclude unfranchised competitors[322] even if the legislature may grant additional franchises to lawful operators.[323]

Third, medallion holders were told that they lacked a cause of action against Uber.[324] But *equity* itself provides the cause of action to restrain, and the common law provides an action on the case at law. Courts concluded that the taxi rules do not provide a source of relief to taxi medallions because (1) violation of those rules is not itself tortious, and (2) the ordinances do not create a private right of action for medallion holders. The franchise approach shows why those statements are incomplete. The grant of a protected franchise gave the franchisee a private right to be free from unauthorized competitors. Courts traditionally protected the franchisee from the nuisance of an unauthorized competitor disturbing that right.[325] And although some franchise-creating statutes did include an explicit cause of action,[326] the loss of revenue to a franchised operator was found to be a sufficient "special injury" to warrant injunctive relief, even

320. Puget Sound Traction, Light & Power Co. v. Grassmeyer, 173 P. 504, 507 (Wash. 1918).

321. *Ill. Transp. Trade Ass'n*, 839 F.3d at 597; *Bos. Taxi Owners Ass'n, Inc. II*, 180 F. Supp. 3d at 117.

322. *See, e.g.*, Patterson v. Wollmann, 67 N.W. 1040, 1040–42 (N.D. 1896) ("As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another. There appears to be no controversy on this point.").

323. *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 435–36 (1837). And in fact, under the most robust franchise regimes, franchises did possess a right to prevent even lawful newcomers from entering the market. *See, e.g.*, Choate v. Ill. Commerce Comm'n, 141 N.E. 12, 15–16 (Ill. 1923) (setting aside as "without substantial foundation in the evidence" decision of Illinois Commerce Commission granting certificate of convenience and necessity to bus line because of potential damage done to franchised railway).

324. *Malden*, 286 F. Supp. 3d at 282.

325. Bos. & L.R. Corp. v. Salem & L.R. Co., 68 Mass. (1 Gray) 1, 27–28 (1854).

326. *See, e.g.*, MASS. GEN. LAWS ch. 280, § 3 (2020).

without the presence of an explicit statutory provision.[327] It is not the regulatory aspects (such as requirements to carry insurance or setting a mandatory fare) that create the property right. Rather, it is the intentional limitation of the number of taxi medallions for the purpose of protecting medallions from excessive competition that defines a property right that equity will protect.

If the medallions holders convinced the court that they possessed a valid franchise, then they would invoke the unfranchised competitor doctrine.

C. *The Taxi Medallion and the Unfranchised Competitor Doctrine*

Medallion holders would rely on the unfranchised competitor doctrine for their cause of action. Uber operated without legal authorization, they would argue, even though Uber's actions did not rise to the level of egregiousness required by common law unfair competition.[328] The medallion holders would seek either an injunction against continuing conduct or disgorgement of the ill-gotten profits Uber obtained through its unauthorized operation, or both.

Such a case would not be unprecedented. In 1963, an annotation in the *American Law Reports* observed that in "the few cases wherein the question has been raised the courts have all upheld the right of a company or person operating taxicabs in compliance with the applicable statute or ordinance to enjoin others from operating competing taxicabs in violation of the law."[329] The most straightforward of those cases is *Moore v. Cox*.[330] In that case, Cox, who operated a cab company in compliance with city ordinances and expended $20,000 on the company, sought to restrain Moore, who was unlawfully operating taxicabs and causing "irreparable damage" to Cox's "business in the sum of $25 daily."[331] The Texas Court of Civil Appeals affirmed the District Court's injunction against Moore.[332] Moore raised two relevant arguments: first, that because Cox possessed "an adequate remedy at law to enforce said city ordinance by and through its penal provisions," no equitable remedy was appropriate, "and second, that since [Cox's] authority to operate is not exclusive, he does not have property rights sufficient to sustain an injunction."[333] The court rejected both arguments, explaining that "[o]ur courts have many times determined both of these propositions against appellant's contentions."[334] Interest-

327. *See, e.g.*, *Puget Sound*, 173 P. at 506–07; Memphis St. Ry. Co. v. Rapid Transit Co., 179 S.W. 635, 638 (Tenn. 1915).

328. *See supra* note 138 and accompanying text.

329. H.C. Lind, *Right to Enjoin Business Competitor from Unlicensed or Otherwise Illegal Acts or Practices*, 90 A.L.R.2d 7, § 6[b] (1963).

330. 215 S.W.2d 666 (Tex. Civ. App. 1948).

331. *Id.* at 667.

332. *Id.*

333. *Id.*

334. *Id.*

ingly, those exact points were raised in the *Uber* litigation, and courts tended to find that those arguments demonstrated that taxicabs were *unable* to received relief against the company.[335]

Compensatory damages (or "lost custom") are historically recoverable at law,[336] but equity recognizes disgorgement of ill-gotten gains.[337] As one court explained, "equity will treat the wrongdoer as a trustee for the plaintiff so far as the former has realized profits from its acts."[338] Under that remedy, the plaintiff would not even need to demonstrate lost profits; it would be entitled to an accounting of the profits made from defendant's unlawful sales.[339]

Professors Lemley and McKenna, in developing a schema for "unfair disruption," remark that "making 'unlawful' acts unlawful seems a tad redundant."[340] Yet the *Malden* case demonstrates that this is not so: just because an act is unlawful vis-à-vis the public authority does not mean it is unlawful vis-à-vis a private party. This distinction is the difference between the result of the *Malden* plaintiffs under an unfair competition theory (where they fail) and the unfranchised competitor theory (where they may have succeeded).

Of course, these theories are now mere hindsight. Once states authorized Uber and Lyft—typically through TNC statutes—those companies were no longer unauthorized competition.[341] An authorized competitor cannot constitute a nuisance against a nonexclusive, public franchise.[342] Similarly, in the *Malden* litigation, the district court concluded (and the plaintiff medallion holders conceded) that the allegedly unfair "activity in dispute in this action [was] limited to that which took place prior to August 5, 2016 [the day Massachusetts enacted its TNC

335. *See, e.g.*, Bos. Taxi Owners Ass'n, Inc. v. City of Boston (*Bos. Taxi Owners Ass'n, Inc. II*), 180 F. Supp. 3d 108, 117 (D. Mass. 2016).

336. *See* Glock v. Howard & Wilson Colony Co., 55 P. 713, 715 (Cal. 1898).

337. *See* Winifred Warren, Inc., v. Turner's Gowns, 32 N.E.2d 793, 795 (N.Y. 1941).

338. *Id.*

339. *See id.*

340. Lemley & McKenna, *supra* note 21, at 115. The authors mention the *Malden* litigation, but it appears that the article was published before the trial evidence was made known. In any event, the article largely accepts Uber's theory that it did not engage in unlawful activity.

341. MASS. GEN. LAWS ch. 159A1/2 (2016) (granting TNC status through state legislation); 625 ILL. COMP. STAT. 57/32 (2015) (same); *see also* Douglas Hanks, *Uber and Lyft are Now Legal in Miami-Dade, and Taxi Owners Vow to Fight Back*, MIAMI HERALD (May 3, 2016, 7:38 PM), https://www.miamiherald.com/news/local/community/miami-dade/article75436467.html [permalink unavailable] (granting TNC status through municipal ordinance); Decision Adopting Rules & Regulations to Protect Public Safety While Allowing New Entrants to the Transp. Indus., Cal. Pub. Utils Comm'n, Decision 13–09–045 (Sept. 19, 2013) (granting TNC status through state agency rulemaking).

342. *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 568–69 (1837).

Act]."[343] Nor could medallion holders sit by for too long, hoping to receive damages for many years of lost custom. Statutes of limitations are relatively brief for private nuisances (consider the three-year period allowed in Massachusetts).[344] And the doctrine of laches operates as an affirmative defense when a plaintiff's "unreasonable" delay in bringing an action "prejudices" a defendant.[345]

IV. IMPLICATIONS

Part III used the *Uber* litigation to show how the unfranchised competitor doctrine provides rights and remedies unavailable to franchisees under antitrust, unfair competition, and takings law. This Part presents some of the practical and theoretical implications of reviving the doctrine.

A. *Beyond the Consumer-Welfare Paradigm*

Perhaps the most interesting theoretical impact of the unfranchised competitor doctrine is its departure from the focus on improving consumer welfare that animates important areas of contemporary competition law. The *Uber* litigation is an example of how many current legal doctrines are dominated by a focus on benefit to consumers. For instance, courts dismissed antitrust claims against Uber on antitrust standing grounds, stating that medallion holders could not demonstrate consumer injury.[346] The Supreme Court has embraced the consumer welfare model of antitrust law, proclaiming that congressional floor debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[347] Similarly, takings claims failed because, in the words of Judge Posner, "'[p]roperty' does not include a right to be free from competition."[348] That competition, it is said, serves the public welfare, because "competition benefits consumers."[349] Likewise, courts concluded that medallion holders had no cause of action against Uber because there is no right to exclude competition.[350]

Recently, however, scholars have considered whether competition laws ought to serve interests beyond consumer welfare. In an influential

343. Malden Transp. Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264, 273 (D. Mass. 2017).

344. *See* MASS. GEN. LAWS ch. 260, § 2A (2020).

345. 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 103 (2d ed. 1993).

346. *See supra* notes 146–50.

347. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)).

348. Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 596 (7th Cir. 2016); Newark Cab Ass'n v. City of Newark, 235 F. Supp. 3d 638, 645 (D.N.J. 2017) (quoting *Ill. Transp. Trade Ass'n*, 839 F. 3d at 596).

349. *See* David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 755 (2001).

350. *See supra* notes 126–29.

note, Lina Khan argues that the consumer-welfare paradigm of antitrust law is unable to address the problems of market power involving network effects and platform markets.[351] She further argues that competition law ought to incorporate the political economic interests of "workers, producers, entrepreneurs, and citizens."[352] Similarly rejecting the consumer-welfare paradigm, but from the conservative perspective, is the national conservativism movement spearheaded by Oren Cass and associated with politicians such as Senators Marco Rubio and Josh Hawley.[353] That movement "emphasizes the importance of family, community, and industry to the nation's liberty and prosperity."[354] It advocates for placing other interests equal to, or above, the interest in consumer welfare.

There are also more radical, contemporary political ideologies that reject the consumer welfare model. Roman Catholic integralism, associated most prominently with Professor Adrian Vermeule,[355] advocates that property, like every other aspect of society, must be ordered towards the common good. The common good is the "well-ordered harmony among men, which obtains when each one is given his due."[356] Agonistic politics, associated most closely with Chantal Mouffe, insists that there is no technocratic "best" policy result, and that "the democratic contest can and should go all the way down to include the principles and procedures that are supposed to regulate political life."[357]

America's competition law has not always employed the consumer-welfare paradigm. In a striking passage from the 1920s, the Supreme Court of Illinois proclaimed that "[t]he savings of hundreds of thousands of investors have been massed to build our great network of railroads, and these transportation systems are entitled to protection from irresponsible competition."[358] The franchise designation confers certain property rights, but it is also "a right, privilege or power of *public concern*, which ought not to be exercised by private individuals at their mere will and pleasure," but instead must serve "the public interest."[359] It is common to read that the franchise is "granted by the public for the public good."[360]

351. *See* Khan, *supra* note 21, at 796–802.

352. *Id.* at 737.

353. *See* Oren Cass, *The Communal Power of a Real Job*, N.Y. TIMES (Aug. 3, 2019), https://www.nytimes.com/2019/08/03/opinion/sunday/workers-conservatives.html [https://perma.cc/SQF2-X7V9].

354. *About*, AM. COMPASS, https://americancompass.org/about/ [https://perma.cc/BNQ7-QAG9] (last visited Mar. 20, 2021).

355. *See* Edmund Waldstein, *What is Integralism Today?*, CHURCH LIFE J. (Oct. 31, 2018), https://churchlifejournal.nd.edu/articles/what-is-integralism-today/ [https://perma.cc/3XJZ-2F7H].

356. 3 HENRI GRENIER, THOMISTIC PHILOSOPHY 356 (1949).

357. ANDREW SCHAAP, *Introduction*, *in* LAW AND AGONISTIC POLITICS 1 (Andrew Schaap ed., 2009).

358. Choate v. Ill. Commerce Comm'n, 141 N.E. 12, 15 (Ill. 1923).

359. California v. Cent. Pac. R.R. Co., 127 U.S. 1, 40 (1888) (emphasis added).

360. Covington Drawbridge Co. v. Shepherd, 62 U.S. 112, 116 (1858).

That more capacious view of the goals of the law—that franchises serve the "public interest"—allows interests other than consumer welfare to guide business operations. This aligns with Lina Khan's proposal to treat tech monopolies in a way that "promote[s] a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens."[361] It also accords with a push to replace shareholder value theory with an investment ideology that also expressly values "the well-being of individual workers and their families."[362] Or consider the perspective of the Catholic Church, which holds that, in choosing between property arrangements, society should order property with respect to the environment, poverty, unemployment, discrimination, labor, families, and other substantive ends.[363]

Current competition law—in its antitrust, unfair competition, and consumer protection approaches—prioritizes consumer welfare. And consumer welfare is certainly a part of the public interest. Indeed, the success of California's 2020 ballot initiative classifying app-based drivers as independent contractors instead of employees makes clear that consumer welfare is an important interest to the citizenry.[364] Nor would one expect the unfranchised competitor doctrine, or the proposal to grant Amazon, Uber, or Facebook public franchises, to be a part of any political movement's TV ads. Still, should political winds shift, the unfranchised competitor doctrine provides a means to leverage other substantive ends in addition to consumer welfare.

B. *Private Enforcement*

So long as governments restrict entry to an industry, those limits need to be enforced. The question is: Who should enforce them? Or put differently, is it better for enforcement to be from a public actor (such as a taxi commission or police department) or a private one (such as Uber or Lyft)?

Some of the benefits of private enforcement are uncontroversial.[365] Private actors, spurred by the profit motive, have more incentives than government employees.[366] Private actors do not need to worry about leg-

361. Khan, *supra* note 21, at 737.

362. SENATOR MARCO RUBIO, AMERICAN INVESTMENT IN THE 21ST CENTURY 35 (2019), https://www.rubio.senate.gov/public/_cache/files/9f25139a-6039-465a-9cf1-feb5567aebb7/4526E9620A9A7DB74267ABEA5881022F.5.15.2019.-final-project-report-american-investment.pdf [https://perma.cc/ZBX4-QTX7].

363. *See, e.g.*, Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* (2009).

364. *See Uber, Lyft Win in California's Most Expensive Ballot Measure Ever*, AL JAZEERA (Nov. 4, 2020), https://www.aljazeera.com/economy/2020/11/4/uber-lyft-win-in-californias-most-expensive-ever-ballot-measure [https://perma.cc/5JAG-ANGX].

365. *See generally* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 29–47 (2019).

366. *See* E.S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 111–112 (2000).

islative funding for sometimes unpopular enforcement budgets: they can rely on private capital.[367] It is hard to imagine, in a city like Boston, the political capital to reassign resources from the city's homicide department to its taxi division. The medallion holders had no such political games to play. At the same time, the fact that actors have *more* incentive does not mean they have *better* incentives.[368]

States have already begun shifting traditionally public functions to TNCs. For instance, under Massachusetts's TNC law, Uber (and not the Commonwealth) is responsible for licensing TNC drivers. In fact, Uber literally issues the certificates.[369] The Commonwealth has thus "taken control of the private licensing regime, but then formally delegated control of this regime back to the platform, in a manner that parallels older systems of professional licensing."[370] The franchise designation permits (although it does not require) governments to turn enforcement of market barriers over to private actors. It remains to be seen whether the current shift to private enforcement is permanent, whether it will expand, or whether it will be scaled back.

C. *Transition Relief*

The unfranchised competitor doctrine also opens a new possibility on the debate about transition relief for the taxi industry. Transition relief entails governmental benefits for losers in the form of compensation and non-monetary mechanisms such as grandfathering or delayed implementation that are "analytically equivalent to direct compensation."[371] Transition relief scholarship rarely engages with the impact of *unlawful* behavior—it has played almost no role in the analyses of Uber on medallion holders. There is already a good deal of scholarship on the appropriate transition relief for medallion holders.[372]

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367. *See* PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 101 (2014) (summarizing research).

368. I thank Professor Caleb Nelson for the analogy of government prosecutors who may keep whatever fines or civil penalties are assessed against criminal defendants or the defendants in a civil enforcement action.

369. *See* MASS. GEN. LAWS ch. 159A1/2, § 4(a) (2016).

370. McKee, *supra* note 113, at 40–41.

371. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 582 (1986); *see also* Wyman, *Taxi Regulation*, *supra* note 23, at 77 n.235 (following Kaplow and noting that "the term 'transition relief' comes from literature on 'changes in tax policy'" (quoting Bruce R. Huber, *Transition Policy in Environmental Law*, 35 HARV. ENVTL. L. REV. 91, 92 n.2 (2011))).

372. *Compare* Suska, *supra* note 23, at 205 (employing "a normative framework that prioritizes only efficient regulatory incentives and outcomes" to conclude that medallion holders should be compensated), *with* Wyman, *Taxi Regulation*, *supra* note 23, at 86–87, 95–96 (rejecting Suska's argument from an economic perspective because it incentivizes socially inefficient policymaking, while entertaining (but rejecting on pragmatic grounds) compensating unsophisticated investors based on distributional and fairness grounds), *and* Biber et al., *supra* note 22, at 1565, 1569, 1623 (providing a comprehensive framework for "regulating business innovation as policy disruption" that, given the authors' labeling of Uber as an

A full analysis of transition relief from the perspective of equity would require its own full article. And the taxi industry poses some unusual problems for transition relief. Taxi *drivers* tend to be far more sympathetic than taxi medallion *owners*, notwithstanding the many owner-operators (especially in New York City) who have been ruined by Uber's market entry.[373] Looking at Boston, for instance, Ed Tutunjian—Boston's "Taxi King"—was the biggest holder of medallions in the city.[374] His drivers complained that they had to pay petty bribes to get keys to the cabs they were paying to lease, and that they were forced to pay higher prices for gasoline in his garages.[375] Tutunjian ultimately pleaded guilty to tax evasion, aiding and abetting tax evasion, employing unauthorized aliens, and willful failure to comply with the Fair Labor Standards Act.[376]

The unfranchised competitor doctrine may seem an unappealing form of transition relief. By offering the possibility of permanent injunctive relief, it would not appear to be "transitional" at all. Perhaps, however, the drastic changes that Uber has brought to the realm of regulatory change would lessen that impact.

In New York, Uber responded to a proposed bill from the Taxi and Limousine Commission with an ad blitz and public messaging machine mirroring a political campaign.[377] "Uber's campaign included mailings, robo-calls, a rally of drivers in Queens, and a pair of brutally effective television ads that ran widely that month in the New York area."[378] David Plouffe, the campaign manager for President Barack Obama's successful 2008 campaign, and later Uber's government relations head, appeared on TV, met with newspaper editorial boards, and held "a press conference with African American community leaders at Sylvia's, an iconic soul food restaurant in Harlem."[379] Uber paired this traditional campaign with a piece of Silicon Valley flair: a new feature added to its app called "De

"end-run" disruption and remark that medallion holders had to pay a significant sum to enter the market, would seem to support some sort of "buy out" or one-time cash payment to medallion holders).

373. For an in-depth investigation into the financial and consumer protection aspects of the New York City medallion leasing system, see Brian M. Rosenthal, *'They Were Conned': How Reckless Loans Devastated a Generation of Taxi Drivers*, N.Y. TIMES (May 19, 2019), https://www.nytimes.com/2019/05/19/nyregion/nyc-taxis-medallions-suicides.html [https://perma.cc/7QS5-5L6N]; Brian M. Rosenthal, *As Thousands of Taxi Drivers Were Trapped in Loans, Top Officials Counted the Money*, N.Y. TIMES (May 19, 2019), https://www.nytimes.com/2019/05/19/nyregion/taxi-medallions.html [https://perma.cc/25TT-5YDA].

374. *See* Jonathan Saltzman, *Owner of Cab Firm to Serve 18 Months; US Judge Sentences Tutunjian to Term in Halfway House*, BOS. GLOBE METRO, Dec. 14, 2016, at B1, B4.

375. *Id*

376. *See* Judgment in a Criminal Case, United States v. Tutunjian, No. 16-cr-10225-01-DPW (D. Mass. Dec. 23, 2016), ECF No. 36.

377. STONE, *supra* note 77, at 313.

378. *Id.*

379. *Id.* at 313–14.

Blasio's Uber" portrayed lengthy wait times and heavy prices in a New York that banned Uber.[380] The app then encouraged users to contact City Hall. Uber prevailed. After successfully winning Governor Andrew Cuomo over to its side, Mayor de Blasio suspended the bill.[381]

In Miami, Uber deployed a more bottom-up approach. In October 2013, the company scheduled a "workation," where 400 employees worked, trained, dined, and relaxed at an upscale hotel in South Beach.[382] In between, employees flyered the city streets with postcards and stuck Uber stickers to light poles.[383] "The company's campaign to drum up popular support to legalize ride-sharing in South Florida had a website, an Instagram page, and a Twitter hash tag: #MiamiNeedsUber."[384] Six months after that workation, Uber launched in violation of local taxi rules.[385] In May 2016, the county relented, passing a TNC ordinance in a 9–2 vote.[386]

And in California, 2020 saw the culmination of Uber's efforts to have state labor and employment law classify their drivers as independent contractors. In 2019, the Supreme Court of California adopted the "ABC test" for distinguishing employees from independent contractors, under which a worker is only an independent contractor if the employer demonstrates that she was (a) free from the employer's control, (b) performed work outside the hiring entity's business, and (c) was engaged in the same trade as the work being performed.[387] The state legislature responded by codifying the ABC test into the state's labor code.[388] A California appeals court applied the ABC test to Uber and Lyft, concluding that drivers were employees under state law.[389] And less than one month after that decision, after app-based companies spent over $200 million promoting the measure, the people of California enacted Proposition 22, ensuring that drivers would be classified as independent contractors.[390]

Uber's entry into new markets was based on the idea that even if it was operating unlawfully, citizens would be so impressed with the service that

380. *Id.* at 314.

381. *Id.* at 314–15. Stone describes the fight as "another victory for Uber, total and sweeping." *Id.* at 315.

382. *See id.* at 248.

383. *Id.*

384. *Id.*

385. *See* Tim Elfrink, *UberX Will Launch in Miami Today, Defying Miami-Dade's Taxi Laws*, MIAMI NEW TIMES (June 4, 2014, 8:06 AM), https://www.miaminewtimes.com/news/uberx-will-launch-in-miami-today-defying-miami-dades-taxi-laws-6533024 [permalink unavailable]. Lyft preceded Uber's entry by two weeks. *Id.*

386. *See* Hanks, *supra* note 341.

387. Dynamex Operations W. v. Superior Court, 416 P.3d 1, 34–35 (Cal. 2018).

388. *See* 2019 CAL. LEGIS. SERV. Ch. 296, § 1 (West).

389. People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 313 (Cal. Ct. App. 2020).

390. *See Uber, Lyft Win*, *supra* note 364.

they would pressure local and state governments to legalize Uber's conduct. Stone summarizes this principle, known as "Travis's Law" (after Travis Kalanick) like this:

> Our product is so superior to the status quo that if we give people the opportunity to see it or try it, in any place in the world where government has to be at least somewhat responsive to the people, they will demand it and defend its right to exist.[391]

In other words, Uber was willing to break the law for a short period of time to effectuate policy change for the long run. Unlawful operations and the concomitant fines and legal troubles were part of the cost of doing business. Combine this mindset, reminiscent of the "efficient breach,"[392] with the sophisticated techniques Uber deployed for promoting favorable legislation, and it may be that Uber has made regulatory change significantly more efficient. Were the unfranchised competitor doctrine to result in a permanent injunction against the company's operations in a given city, there is little doubt that the company would put on another full-court press to change the law, whether through municipal ordinance (Miami), state statute (Massachusetts), or ballot initiative (California). Of course, those changes are not cheap (over $200 million in California), and it is unclear whether it is socially optimal for arguably beneficial change to be so expensive.

In any event, the history of public franchises in this country provides interesting and fruitful terrain for analyzing past disruptions. The idea of a one-time "buy out"[393] of the disrupted industry is not new. Numerous cases from the early nineteenth century present a situation where a franchised ferry or toll bridge was given a lump sum legislative "buy out" as a second franchise was issued. The *Charles River Bridge* decision discusses a case where a legislature which gave a franchised toll bridge the choice between receiving a money payment determined by a commission, or pursuing an action at law against the competitor bridge.[394] The war between jitneys and street railways resulted in a modified form of a "block,"[395] by which the railways (successfully) pushed cities and states to pass anti-jitney

391. STONE, *supra* note 77, at 195.

392. *See* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970).

393. *Cf.* Biber et al., *supra* note 22, at 1606 ("A classic strategy to address such interests would be through side payments, a strategy we call *Buy Out*. The case for a *Buy Out* is arguably strongest if the innovator gets a *Free Pass*, as this regulatory choice is likely to be most prejudicial to an incumbent.").

394. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 567–68 (1837) (citing Chadwick v. Proprietors of the Haverhill Bridge, 2 DANE'S ABR. 683).

395. Biber et al., *supra* note 22, at 1605 tbl.2 (defining the "block" strategy as "[i]nterpret[ing] legal rules to block the new form of business and preserve existing regulatory and business structures"). The street railways deployed a "modified" block because they did not just interpret existing legal rules, but created new ones.

laws.[396] And the *Charles River Bridge* case itself presented a "free pass,"[397] where the newly franchised bridge was simply allowed to destroy the older toll bridge.

This Article does not purport to settle the transition relief debate. But by bringing the history of disruption and public franchises to light, it hopes to inform the discussion.[398]

CONCLUSION

Discussions over winners and losers in the economy are a frequent topic of conversation. Political movements as disparate as a progressive "New" New Deal,[399] national conservatism,[400] Roman Catholic Integralism,[401] and agonistic politics[402] concern themselves with questions of distribution. Today, that often involves deciding what to do with existing businesses when new disruptive competitors emerge. But these concerns are not new—this is the same problem at the heart of the dispute between Chief Justice Taney and Justice Story in the *Charles River Bridge* case.[403] The unfranchised competitor doctrine provides an established, if forgotten, tool for approaching those disputes.

396. GILBERT & SAMUELS, *supra* note 44, at 63 ("[The anti-jitney] laws and the relative inexperience of jitney operators in business matters combined to wipe out nearly all the jitneys by 1920.").

397. Biber et al., *supra* note 22, at 1605 tbl.2 (defining "free pass" as "[a]llow[ing] the business innovation to proceed without changing the regulatory structure, potentially consigning the previous business model and its associated regulatory structure to extinction").

398. The strongest objection to the unfranchised competitor doctrine is its threat to ossifying beneficial business and police change. The unfranchised competitor doctrine incentivizes unlawful market entrants to internalize the costs of their unlawful actions vis-à-vis franchisees. But I thank Caleb Nelson for the helpful point that the government is not forced to internalize the costs of the damage to consumer welfare that could be caused by granting a franchise in the first place. The remedy also poses some problems. If a permanent injunction issues, then perhaps "Travis's Law" can never go into effect, because consumers can never be introduced to the superior product. On the other hand, it seems so far that Uber has an essentially undefeated record in America on enacting its favored legislation. If lost custom compensatory damages are the remedy, then the odd result might obtain that *because* the established player was reaping socially inefficient supracompetitive cartel profits, new players are *disincentivized* from entering the market. And disgorgement of profits is generally available only where the unauthorized competitor acts egregiously—and in that case, common law unfair competition may already provide a remedy.

399. *See* Brian Beutler, *How Democrats Can Wage War on Monopolies—and Win*, NEW REPUBLIC (Sept. 16, 2017), https://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win [https://perma.cc/W5ED-KLFU].

400. *See* Cass, *supra* note 353.

401. *See* Waldstein, *supra* note 355.

402. *See* SCHAAP, *supra* note 357.

403. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 435–36 (1837).

Recognition and understanding of the unfranchised competitor doctrine has further implications for scholars. It expands discussions of transition relief from economic disputes over technological disruption to analyses that center unlawful actions and their consequences. Taking Uber as an example, both Suska[404] and Wyman[405] approach Uber's entry as a lawful competitor. Biber, Light, Ruhl, and Salzman[406] acknowledge that Uber "arguably violat[ed] local regulations," but by classifying Uber as an "End-run" which "exploit[ed] ambiguous laws," they make clear that they accept Uber's self-narrative, which was belied by the factual findings in *Malden*.[407] Yet if it is true that Uber violated lawful market entry restrictions, and thereby invaded a protected franchise, then the inquiry shifts away from the "*Deregulatory Takings*" debate[408] and even the *Charles River Bridge* majority opinion (which concerned the *lawful* grant of a second franchise to a new competitor, not the *unlawful* entry of that competitor without a franchise). It thus adds the question of the legality of disruptors' actions when franchises are involved. In doing so, it moves beyond the unfair competition lens currently prevalent among commentators (focused on defendant's malice or the wrongfulness of its acts)[409] to a lens that centers the property rights of the plaintiff.[410]

In addition, the revival of the unfair competitor doctrine has serious implications for property theory, particularly the debate over "Property as the Law of Things."[411] To take one example, Christopher Essert argues against the "law of things" account by using a taxi license and a thought experiment to purportedly show that property rights boil down to "the right to determine how, by whom, and to what extent certain privileges will be exercised."[412] Essert relies on the fact that a medallion owner does not have a claim against an unlicensed operator to show that a license is property that does not include the right to exclude.[413] Yet if this Article is

404. *See* Suska, *supra* note 23.

405. *See* Wyman, *Problematic Private Property*, *supra* note 60.

406. *See* Biber et al., *supra* note 22, at 1569.

407. *See id.* at 1565, 1569; *supra* notes 141–42 and accompanying text.

408. *See, e.g.*, J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996); William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037 (1997); Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435 (2000).

409. *See, e.g.*, Lemley & McKenna, *supra* note 21.

410. *Cf.* McKenna, *supra* note 160 (describing how contemporary trademark law fails to distinguish between property questions and questions of ill-intent).

411. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012). *Cf.* Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017) (calling scholars of the property-as-things schools the "new essentialists").

412. Christopher Essert, *Property in Licenses and the Law of Things*, 59 MCGILL L.J. 559, 578 (2014).

413. *See id.* at 571 ("And if X infringes on that right by riding the bike, X has wronged A, and A has a claim against X in tort. Licences tend not to work like that: if you drive around in an unlicensed cab, it's not at all clear that the owners

correct, there *is* such a right (through the unfranchised competitor doctrine).[414] The franchise is an incorporeal right, but it is one that includes the right to exclude *and* is easily cognizable in the law of things approach. Tracing the taxi medallion back to the ferry or the right to operate a fair makes the right fit much more easily into Henry Smith's idea that "[f]or information-cost reasons, property is, after all, a law of things."[415] If it is truly "time for property theorists to think of intangible property as the paradigmatic form of property,"[416] the public franchise right will be a useful edge case in that discussion.

Finally, a better understanding of the public franchise right can inform other areas of the law, especially intellectual property. The Supreme Court has recently grounded its analysis of patent law in the idea that "[p]atents convey only a specific form of property right—a public franchise."[417] Professor Caleb Nelson has called for reconsideration of what that means for the separation of powers—specifically, whether an executive agency can extinguish a public franchise right, or whether only the judicial power can do so.[418] In turn, recognition of the unfranchised competitor doctrine as applied to ferries and toll bridges illuminates how one stick in the "bundle of rights" of a special protected franchise is the right to exclude unauthorized competitors; that right fits in naturally with contemporary understanding of patents. Similarly, the analogy between strict liability injunctive relief and heightened mens rea for unfair competition is also reflected in trademark law's similar shift from formerly centering property rights to currently prioritizing the bad acts of the defendants.[419] In sum, a better understanding of the public franchise right can inform intellectual property debates today.

The deserving widow does not have the right to exclude the man who sets up shop in a village that only has room for one.[420] But the protected franchisee has the right to restrain unlawful competition. The franchise right and the unfranchised competitor doctrine deserve closer attention.

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of the valid medallions have a claim against you (in fact it's rather clear that they do not).").

414. The term franchise does not appear in Essert's article.

415. *See* Smith, *supra* note 411, at 1691. This framing also makes the concept that "the mediation of a thing . . . helps give property its in rem character" much more intuitive in the medallion context. *Id.*

416. *See* Katrina M. Wyman, *Property as Intangible Property*, *in* 1 OXFORD STUDIES IN PRIVATE LAW THEORY 82 (2021).

417. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1375 (2018).

418. *See* Nelson, *supra* note 4, at 1–2.

419. *See* McKenna, *supra* note 160, at 122.

420. *See* Holmes, Jr., *supra* note 1, at 3.