

# Problematic Private Property: The Case of New York Taxicab Medallions

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*Yellow taxicabs are an iconic symbol of New York City. Almost as well-known as the City's yellow taxis are the valuable licenses that vehicles must have in order to be used as taxis. Often called medallions, these licenses constitute a form of private property. They are routinely bought and sold, leased, used as collateral for loans, and count as assets in bankruptcy.*

*This Article emphasizes the political character of property rights in the modern state through a case study of why New York taxi medallions continue to exist.*

*Prominent explanations of the evolution of property rights imply that they are a distinct category of rights that emerge organically within society because their benefits exceed their costs. This Article takes a decidedly more regulatory view of property rights as top-down creations of the state. As instruments of the state, property rights arise and persist from political decision-making processes influenced by interest group pressures. This avowedly regulatory conception of property rights suggests that we likely have both efficient and inefficient property rights because there is no necessary correspondence between what is cost-beneficial for society as a whole and the outcomes of political decision-making processes. This Article argues that New York taxicab licenses are an instance of inefficient private property rights sustained by political decision-making processes subject to pressures from powerful interest groups.*

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*The Article makes two main contributions. First, it contributes to property theory by emphasizing that property, especially in modern times, is an instrument of state regulation that should be analyzed using the same tools commonly used to study other regulatory instruments. In the contemporary world property rights are not separate and apart from the state, and they are prone to the same distorting influences as other forms of state regulation. Second, and more concretely, the article draws attention to the manner in which taxis are regulated in New York and elsewhere using problematic property rights.*

I. Introduction .....	126
II. New York Taxicab Licenses in Context.....	130
<i>A. Overview of the New York Taxi Industry and Its Regulation .....</i>	130
1. Yellow Medallion Taxis .....	131
2. For-hire Vehicles .....	133
3. Proposed Reforms.....	134
<i>B. New York City Taxicab Licenses as Property .....</i>	135
III. Theories of the Evolution of Property.....	140
<i>A. Demsetzian Theories .....</i>	141
<i>B. Political Economy Theories .....</i>	146
IV. Rejecting the Demsetzian Hypotheses.....	147
<i>A. Externalities .....</i>	148
<i>B. Enforcement Costs .....</i>	152
V. Political Economy Hypothesis for Taxicab Licenses.....	156
<i>A. A Demand-Side Hypothesis .....</i>	156
1. Stakes.....	156
2. Organizational Costs.....	163
<i>B. A Note About the Supply-Side .....</i>	165
VI. Evidence from New York Taxi History.....	167
<i>A. The Birth of Medallions in 1937 .....</i>	168
<i>B. The “Gypsy Cabs” .....</i>	170
<i>C. Mayor Edward Koch’s Unsuccessful Reform Efforts .....</i>	173
<i>D. New Medallion Auctions.....</i>	177
<i>E. Mayor Bloomberg’s Five Borough Taxi Plan.....</i>	179
VII. Conclusion.....	185

## I. Introduction

Yellow taxis are an iconic symbol of New York City.<sup>1</sup> Many New Yorkers use them to get around because they do not own cars.<sup>2</sup> Taxis also

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1. Phil Patton, *The Taxi as Icon*, TAXI OF TOMORROW, [http://www.nyc.gov/html/media/totweb/taxioftomorrow\\_taxiasicon.html](http://www.nyc.gov/html/media/totweb/taxioftomorrow_taxiasicon.html).

transport tourists.<sup>3</sup> Taxis routinely figure in movies and television shows about New York. They also are the subject of frequent griping, trinkets that tourists buy, and jokes on late-night talk shows.

Almost as well-known as New York's yellow taxicabs are the City's valuable taxicab licenses, often called medallions.<sup>4</sup> In New York and many other cities in the U.S. and around the world, the number of taxicabs is limited and a taxi driver must have a license to operate a vehicle as a taxi, in addition to an individual taxicab driver's license.<sup>5</sup> These numerically limited taxicab licenses often are bought and sold much like conventional property rights in tangible things such as houses. Indeed, since the fall of 2011, corporate New York taxi medallions have been selling for one million dollars or more each.<sup>6</sup> Since 1980, New York taxi medallions have been a better investment than U.S. housing and gold.<sup>7</sup> Elsewhere in the U.S. and abroad, taxi licenses also are valuable.<sup>8</sup>

2. HENNINGSON, DURHAM & RICHARDSON ARCHITECTURE & ENG'G, P.C., TAXI MEDALLION INCREASE: DRAFT ENVIRONMENTAL IMPACT STATEMENT ES-3 (May 2012) [hereinafter HENNINGSON DRAFT EIS] (prepared for the NYC Taxi & Limousine Comm'n), [http://www.nyc.gov/html/tlc/downloads/pdf/taxi\\_medallion\\_increase.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/taxi_medallion_increase.pdf) ("Fifty-four percent of New York City households do not own a car."). In the borough of Manhattan, "only 24% of households own a car." *Id.*

3. Residents of Manhattan are by far the main consumers of yellow taxi trips in New York, with 71 percent of taxi trips carrying Manhattanites. SCHALLER CONSULTING, THE NEW YORK CITY TAXICAB FACT BOOK 6 (Mar. 2006) [hereinafter SCHALLER CONSULTING], <http://www.schallerconsult.com/taxi/taxifb.pdf>. "Outer-borough residents, suburbanites, U.S. residents from outside the New York area, and foreign visitors each account for between 5% and 10% of all [taxi] trips." *Id.*

4. This Article uses the terms license and medallion interchangeably.

5. ORG. FOR ECON. CO-OPERATION & DEV., POLICY ROUNDTABLES, TAXI SERVICES: COMPETITION AND REGULATION 2007, 21, 200 (2008) [hereinafter OECD]; *see also* 35 R.C.N.Y. § 58-12(a), (d) (West 2012) (requiring a medallion to operate a taxicab in New York).

6. Michael M. Grynbaum, *2 Taxi Medallions Sell for \$1 Million Each*, N.Y. TIMES CITY ROOM (Oct. 20, 2011), <http://cityroom.blogs.nytimes.com/2011/10/20/2-taxi-medallions-sell-for-1-million-each/>; NYC TAXI & LIMOUSINE COMM'N, *2011 Monthly Medallion "Accessible" Sales – Average Prices & Number of Transfers* (Dec. 2011), [http://www.nyc.gov/html/tlc/downloads/pdf/avg\\_med\\_price\\_2k11\\_december.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/avg_med_price_2k11_december.pdf); NYC TAXI & LIMOUSINE COMM'N, *2012 Monthly Medallion "Non-Accessible" Sales – Average Prices & Number of Transfers*, [http://www.nyc.gov/html/tlc/downloads/pdf/avg\\_med\\_price\\_2012\\_september.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/avg_med_price_2012_september.pdf). For a description of corporate taxi medallions, see *infra* notes 36–40 and accompanying text.

7. Ilan Kolet, *New York City Cab Medallions Worth More Than Gold: Chart of the Day*, BLOOMBERG (Aug. 31, 2011), <http://www.bloomberg.com/news/2011-08-31/ny-cab-medallions-worth-more-than-gold-chart-of-the-day.html>. According to the chart, medallion prices have increased over 1,000 percent since 1980, compared with 216 percent for housing and 181 percent for gold. *See also* Dan Cumming, *Why has the Price of Taxi Medallions Increased So Dramatically? An Analysis of the Taxi Medallion Market*, 17 THE PARK PLACE ECONOMIST 12, *available at* <http://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1313&context=parkplace> (analyzing increase); Felix Salmon, *Why Taxi Medallions Cost \$1 Million*, REUTERS (Oct. 21, 2011), <http://blogs.reuters.com/felix-salmon/2011/10/21/why-taxi-medallions-cost-1-million/> (analyzing why medallions are valuable).

8. *See, e.g.*, OECD, *supra* note 5, at 208–09 (indicating that licenses in Paris are valued at €125,000, in Brisbane at A\$405,000, and in Hong Kong at HK\$3,000,000); MEDALLION FIN. CORP. 2010 ANN. REP. TO SHAREHOLDERS 7 (2010), *available at* [www.annualreports.com/HostedData/AnnualReports/PDFArchive/taxi2010.pdf](http://www.annualreports.com/HostedData/AnnualReports/PDFArchive/taxi2010.pdf) (last visited Nov. 21, 2012).

This Article analyzes the puzzling persistence of valuable taxicab licenses in New York and in doing so emphasizes the political character of property rights in the modern state. For decades, the general view among economists has been that there is no public interest justification for limiting the number of taxicab licenses.<sup>9</sup> Since the late 1970s, valuable monopoly rights similar to taxicab licenses have been eliminated in other transportation industries such as airlines and trucking, as regulatory barriers to entering these industries have been dismantled.<sup>10</sup> Valuable taxicab licenses often are distributively unjust. They make it difficult for individuals with limited skills to work in an industry that has few natural barriers to entry, because drivers must either own or lease a costly medallion to drive a taxi.<sup>11</sup> By inflating fares and limiting the availability of taxis, expensive licenses likely harm taxi consumers who in many places include low-income earners who do not own cars.<sup>12</sup> Why then do valuable taxicab licenses persist in New York and elsewhere?

Starting from the position that New York taxicab licenses now effectively constitute private property, this Article analyzes their endurance as an example of private property persisting over time. An influential strand of scholarship suggests that property rights are a distinct category of rights that emerge organically within society. Theorists have argued that property rights exist because they are efficient in that the overall benefits of property rights, such as lower externalities and enforcement costs, outweigh their costs, including the costs of establishing and monitoring them.<sup>13</sup>

This Article adopts a decidedly more regulatory view of property rights as top-down creations of the state. According to this view, property rights are just one of a number of regulatory instruments used by the state to structure incentives; taxes and legislative commands are others. As instruments of the state, property rights arise and persist due to political decision-making processes influenced by transaction costs, such as information and organization

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9. See sources cited *infra* note 121 (discussing relevant economic literature).

10. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1323 (1998). Route certificates were the equivalent to taxicab licenses when interstate airlines were highly regulated. Michael E. Levine, Note, *Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416, 1422 (1965) (describing a route certificate as “potentially a valuable property”). Operating certificates were the equivalent in regulated interstate trucking. DOROTHY ROBYN, BRAKING THE SPECIAL INTERESTS: TRUCKING DEREGULATION AND THE POLITICS OF POLICY REFORM 22 (1987) (discussing estimates that “placed the total value of operating certificates prior to deregulation at several billion dollars”).

11. On the barriers to employment that limiting entry creates, see *infra* note 173. On the extent to which medallions are leased and the significance of leasing fees as a share of driver expenses, see *infra* note 33 and accompanying text.

12. OECD, *supra* note 5, at 8. On the impact of medallions on fares, see *infra* notes 178-79 and accompanying text. On the impact of medallions on service, see *infra* notes 174-177 and accompanying text. On the demographics of taxi consumers generally and specifically in New York, see *infra* note 183 and accompanying text.

13. See Section III.A.

costs.<sup>14</sup> This avowedly regulatory conception of property rights suggests that we likely have both efficient and inefficient property rights because there is no necessary correspondence between what is cost-beneficial for society as a whole and the outcomes of political decision-making processes.<sup>15</sup> This Article argues that New York taxicab licenses are an instance of inefficient private property rights sustained by political decision-making processes subject to pressures from powerful interest groups.<sup>16</sup>

The Article proceeds as follows. Part II provides background on the New York taxi industry and explains why New York medallions are private property under the prevailing legal understanding of property. Part III analyzes and emphasizes the limits of prominent explanations of the evolution of property rights, and outlines the political economy theory of property rights as a regulatory tool that animates the Article's analysis of the persistence of taxi licenses. Part IV turns to the concrete question of why valuable taxi medallions persist in New York. It argues that New York's current medallion system cannot be rationalized in the cost-benefit terms that modern property theory often uses to explain and justify property. Part V offers a political economy explanation for the persistence of New York taxi medallions. Part VI offers evidence for this explanation drawing on primary and secondary sources on the history of taxi regulation in New York. The Article concludes by emphasizing several of the implications of the story of New York taxi medallions for property theory.

This Article makes two main contributions. First, it contributes to property theory by emphasizing that property, especially in modern times, is an instrument of state regulation that should be analyzed using the same tools commonly used to study other regulatory instruments. Second, and more concretely, the Article draws attention to the manner in which taxis are regulated in New York and elsewhere using problematic property rights.<sup>17</sup>

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14. See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF PROPERTY RIGHTS* 30, 61 (2001).

15. For similar views, see Abraham Bell & Gideon Parchomovsky, *The Evolution of Private and Open Access Property*, 10 *THEORETICAL INQUIRIES L.* 77, 85 n.21 (2009); Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3:3 *REV. L. & ECON.* 649 (2007); Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 *U. CHI. L. REV.* 181 (2003); and Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 *J. LEGAL STUD.* S421 (2002).

16. See also OECD, *supra* note 5, at 7, 9, 17 (arguing generically based on international experience that taxicab licenses are inefficient and sustained by pressure from interest groups); Jeff Horwitz & Chris Cumming, *Taken for a Ride: The Taxi Medallion System in New York and Other Cities Raises Fares, Impoverishes Drivers, and Hurts Passengers. So Why Can't We Get Rid of It?*, *SLATE* (June 6, 2012, 6:30 AM), [http://www.slate.com/articles/business/moneybox/2012/06/taxi\\_medallions\\_how\\_new\\_york\\_s\\_terrible\\_taxi\\_system\\_makes\\_fares\\_higher\\_and\\_drivers\\_poorer\\_.html](http://www.slate.com/articles/business/moneybox/2012/06/taxi_medallions_how_new_york_s_terrible_taxi_system_makes_fares_higher_and_drivers_poorer_.html) (arguing that taxi medallion systems are difficult to eliminate partly because the benefits are concentrated in medallion owners and lenders and the costs are widely dispersed across New York City).

17. Other legal academics have been attracted to taxi regulation in the U.S. as a topic. Classic articles include Ross D. Eckert, *The Los Angeles Taxi Monopoly: An Economic Inquiry*, 43 *S. CAL. L. REV.* 407 (1970); Edmund W. Kitch et al., *The Regulation of Taxicabs in Chicago*, 14 *J. L. & ECON.* 285 (1971); and Paul R. Verkuil, *The Economic Regulation of Taxicabs*, 24 *RUTGERS L. REV.* 672 (1970).

There are bound to be other examples of such rights given the state's pervasive role in the formation and the maintenance of private property in modern times. Indeed, some intellectual property scholars argue that copyright and patent rights are inefficient.<sup>18</sup> Also, many criticisms of modern land use regulation imply that real property rights are inefficient in many circumstances.<sup>19</sup>

## II. New York Taxicab Licenses in Context

In a famous 1964 Article, Charles Reich argued that many forms of government largess, such as licenses, franchises, benefits and contracts, should be recognized as “new property.”<sup>20</sup> Among the types of largess he identified as warranting this label were New York taxi medallions,<sup>21</sup> which he noted were worth “\$21,000 to \$23,000” in 1961.<sup>22</sup> Almost five decades later, New York medallion prices have increased roughly six-fold in real terms.<sup>23</sup>

To set the stage for analyzing the persistence of New York taxicab licenses, this Part provides an overview of the New York taxi industry and the way it is regulated, and explains why New York taxi medallions are a form of private property.

### *A. Overview of the New York Taxi Industry and Its Regulation*

In New York, taxis generally are regulated by the City Council, and on a day-to-day basis by the Taxi and Limousine Commission (TLC). Created in 1971, the TLC has nine commissioners “appointed by the Mayor with the advice and consent of the council.”<sup>24</sup> The City Council has particular influence over the appointment of five commissioners, each of whom must reside in one of the City's five boroughs and have the support of the majority of the council members from the borough before appointment by the mayor.<sup>25</sup> The remaining

18. See, e.g., JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATION AT RISK* (2008); Frischmann, *supra* note 15.

19. See, e.g., KOMESAR, *supra* note 14, at 57.

20. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

21. *Id.* at 735.

22. *Id.* at 735 n.7 (citing Joseph C. Ingraham, *Taxi Medallions Going Up in Price*, N.Y. TIMES, Dec. 5, 1961, at 46). In 2012 dollars, that is equivalent to \$159,196.15 to \$174,357.69. Real values were calculated using the CPI Inflation Calculator. *CPI Inflation Calculator*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Oct. 11, 2012).

23. For clarity, the prices being compared are the prices of corporate medallions. See Ingraham, *supra* note 22; Grynbaum, *supra* note 6. On the different types of medallions, see *infra* notes 36-40 and accompanying text.

24. N.Y.C. CHARTER § 2301(a). The TLC had a staff of more than 400 and a budget of \$32 million in 2012. *About TLC*, NYC TAXI & LIMOUSINE COMM'N, [www.nyc.gov/html/tlc/html/about/about.shtml](http://www.nyc.gov/html/tlc/html/about/about.shtml) (last visited Oct. 11, 2012) (number of employees); *Hearing on Executive Budget for Fiscal Year 2012 Before the City Council Transportation and Finance Committees* (June 2, 2011) (testimony of David Yassky, NYC Taxi & Limousine Comm'r/Chair), available at [http://www.nyc.gov/html/tlc/downloads/pdf/testimony\\_06\\_02\\_11.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/testimony_06_02_11.pdf) (2012).

25. N.Y.C. CHARTER § 2301(a).

four commissioners are nominated by the mayor, who also chooses the TLC chair from among commission members.<sup>26</sup> As discussed below, the council's role in appointing TLC commissioners historically has provided a means for the taxi industry to influence the TLC to protect taxi medallions.<sup>27</sup>

Together, the TLC and the council have created a regulatory regime that segments New York taxis into two sectors: (1) yellow medallion taxis and (2) for-hire vehicles (FHV).

### 1. Yellow Medallion Taxis

Yellow medallion taxis are the taxis that roam city streets, must be painted yellow, and have one of the limited number of medallions that are the focus of this Article.<sup>28</sup> The number of medallions currently is restricted by law to 13,237.<sup>29</sup> Requiring that cabs bear a medallion to operate limits the overall number of taxis in the City.<sup>30</sup> Literally the piece of silver metal affixed to the right hood of a yellow taxi, a medallion is the visible symbol that a taxi is licensed to be on city streets.<sup>31</sup> Medallions may be owned or leased.<sup>32</sup> Perhaps

26. N.Y.C. CHARTER § 2301(c). The chair runs the TLC on a day-to-day basis and is the only paid commissioner. *Id.*

27. The number of commissioners and the mechanisms by which they are appointed were negotiated by Mayor John Lindsay and the City Council when the TLC was created. Lindsay, who championed the creation of the TLC, gave up discretion in the appointment of commissioners to get enough council support for the establishment of the TLC. Maurice Carroll, *Proposal for City Taxi Commission Gains in Council*, N.Y. TIMES, Jan. 23, 1971, at 16.

28. N.Y.C. ADMIN. CODE § 19-514(a), (f) (2011); 35 R.C.N.Y. § 67-07 (West 2012); 35 R.C.N.Y. § 58-12(a) (West 2012).

29. NYC TAXI & LIMOUSINE COMM'N, ANN. REP. 2009, at 9.

30. MARK W. FRANKENA & PAUL A. PAULTER, FED. TRADE COMM'N, AN ECON. ANALYSIS OF TAXICAB REG. 16 (Bureau of Economics Staff Report, May 1984); Jon-Terje Bekken, *Experiences With (De-)Regulation in the European Taxi Industry*, in (DE)REGULATION OF THE TAXI INDUSTRY ROUND TABLE No. 133, at 31, 40-41 (European Conference of Ministers of Transport ed., 2007) [hereinafter (DE)REGULATION ROUND TABLE]; Kenneth M. Gwilliam, *Regulation of Taxi Markets in Developing Countries: Issues and Options*, TRANSPORT NOTE No. TRN-3, 3 (World Bank, Feb. 2005); Catherine Liston-Heyes & Anthony Heyes, *Regulation of the Taxi Industry: Some Economic Background*, in (DE)REGULATION ROUND TABLE 91, 102; see also PRICEWATERHOUSE, ANALYSIS OF TAXICAB DEREGULATION & RE-REGULATION 2 (1993) (prepared for the International Taxicab Foundation) (citing URBAN MASS TRANSP. ADMIN., 1 TAXICAB REG. IN US CITIES (FINAL REP.) (1983)) (defining 6 types of entry policies).

31. 35 R.C.N.Y. § 51-03 (West 2012); N.Y.C. ADMIN. CODE § 19-514(f) (2011). New York City taxicab licenses are considered intangibles, even though the medallion is a physical object. See *Golden v. Winjohn Taxi Corp.*, 311 F.3d 513, 517 (2d Cir. 2002) (“Despite its tangible nature, a medallion is essentially a license that authorizes its owner to operate a so-called ‘medallion taxicab’ or ‘yellow taxicab.’”); *Matter of Prop. Clerk, v. Rosea*, 472 N.Y.S. 2d 657, 658 (1984) (“The medallion is of no value as physical property; its great value is as evidence that the owner has a license to use the vehicle as a taxicab; this license is an intangible right and is not physical property.”), *aff'd*, 63 N.Y. 2d 961 (1984).

32. 35 R.C.N.Y. § 58-21 (West 2012). The TLC legalized medallion leasing in 1979 under pressure from fleets. METRO. TAXICAB BD. OF TRADE, REPORT OF LEASING COMM. (May 12, 1978 & Oct. 23, 1979) (on file with author); Anna Quindlen, *Fleets Call Cab Leasing a Boon to the Public*, N.Y. TIMES, Feb. 18, 1979, at E6.

eighty percent of the taxis on New York streets are operated using leased medallions.<sup>33</sup>

Taxis are authorized to pick up passengers only through street hails. Currently, medallion taxis have a monopoly throughout the City's five boroughs on picking up passengers in this "'walk-up' market."<sup>34</sup> Before 1987, yellow medallion taxis were allowed to pick up passengers through prearranged bookings by phone as well as street hails. In the 1980s the TLC and the taxi industry engineered a segmentation of taxi services in the City due to concerns about the growing numbers of medallion cabs providing call-ahead service in Manhattan and the attendant reduction in the number of cabs available for street hails.<sup>35</sup>

There are two main categories of New York medallions: corporate (or fleet) and independent (or individual) medallions.<sup>36</sup> Corporate medallions must

33. See SCHALLER CONSULTING, *supra* note 3, at 32 fig.18 (by implication). See also Horwitz & Cumming, *supra* note 16 (stating that "[o]nly around 18 percent of cabs are owner-operated, putting most medallions in the hands of big taxi fleets or brokers who simply rent them out").

Leasing fees for medallions significantly cut into driver incomes. When a driver leases a medallion, he pays "a flat per-shift fee and keep[s] fares and tips above the lease fee and cost of gasoline." SCHALLER CONSULTING, *supra* note 3, at 25. Thus the effect of the lease is to transfer much of the risk of driving a taxi to the driver, since the owner gets paid his leasing fee regardless of how much the driver collects in fares. BLU MATHEW, TAXI! CABS AND CAPITALISM IN NEW YORK CITY 70 (2005). Before the recent fare increase, the New York Taxi Workers Alliance estimated that leasing fees consumed almost 40 percent of a driver's daily gross bookings. New York Taxi Workers Alliance, *15% Fare Raise Now Under Review*, RAISE THE FARE/FREEZE THE LEASE (2011), <http://www.nytw.org/campaigns/raisefarefreezeleases> (last visited Oct. 8, 2012).

Fees for leasing a medallion are capped by regulation. 35 R.C.N.Y. § 58-21(c) (West 2012). Anecdotal evidence suggests that these lease caps effectively set the price for leasing, although fleets and agents may be illegally overcharging drivers above the lease caps. RON MILLER, THE IMPACT OF NEW NYC TAXI MEDALLIONS AND A NEW CLASS OF LICENSES FOR OUTER-BOROUGH STREET HAIL PICKUPS, 6 (2012) (Ex. B: Aff. of Ronald Ian Miller In Supp. of Pls.' Appl. By Order to Show Cause For TRO and Prelim. Inj., Taxicab Serv. Ass'n v. State, No. 102553 (N.Y. Sup. Ct. May 16, 2012)) [hereinafter MILLER]; New York Taxi Workers Alliance, STOP GARAGE/BROKER OVERCHARGES, <http://www.nytw.org/campaigns/stopovercharges> (last visited Oct. 8, 2012).

34. N.Y.C. ADMIN. CODE § 19-504(a)(1) (2011). Bruce Schaller, *Entry Controls in Taxi Regulation: Regulatory Policy Implications of U.S. and Canadian Experience*, 14 TRANSPORT POL'Y 490, 492 (2007) (using the term "'walk-up' market" to encompass street hails and taxi stand pickups).

35. Starting in 1982 the TLC offered medallion radio cabs an incentive to take out their radios and return to picking up hails full-time. If a medallion cab owner took out the radio, the owner would be allowed to insert it into a newly licensed (but non-medallion) cab, and still keep the medallion cab. This would leave the owner with two cabs rather than one: the newly licensed cab with the radio that could pick up passengers only through prearrangement, and the now radio-less medallion cab that henceforth could pick up only street hails. *500 Cabs Are Converted to Street Hail Duty*, N.Y. TIMES, Nov. 7, 1982, at 59. The newly licensed radio cabs grew into today's black car industry.

36. The division into corporate and independent medallions dates to the establishment of limited entry and the introduction of medallions in 1937 and has ensured that no single firm or individual has ever monopolized the taxi industry. See *infra* notes 224-225 and accompanying text (discussing the history).

When the City auctioned new medallions in the 2000s, it created new sub-categories of corporate and independent medallions known as accessible medallions and alternative fuel medallions. New York City, N.Y. Code § 19-532(b). An accessible medallion must be attached to a taxicab accessible to persons with disabilities. 35 R.C.N.Y. § 51-03 (West 2012) (definition of Accessible Medallion and Accessible Taxicab). An alternative fuel medallion must be attached to "a vehicle powered by



be owned in lots of at least two medallions, and they must be attached to vehicles that are operated as taxis for at least 18 hours a day each.<sup>37</sup> Independent medallions must be owned by an owner who owns only one medallion.<sup>38</sup> Also, the owner of an independent medallion acquired after January 1990 is required to drive the vehicle to which the medallion is attached for a minimum number of shifts per year.<sup>39</sup> Currently, corporate medallions are worth more than independent medallions, probably because the requirement that owners drive independent medallions a minimum number of shifts holds down the value of these medallions.<sup>40</sup>

Yellow medallion taxis are the most heavily regulated sector of the New York taxi industry. Not only is the quantity of medallion taxis restricted through the requirement to operate with one of the limited number of medallions, but the fares charged by yellow taxis also are prescribed through uniform fare regulation.<sup>41</sup> In addition, medallion taxis face extensive health, safety and service regulation.<sup>42</sup>

## 2. For-hire Vehicles

There are approximately 35,340 for-hire vehicles in New York, or almost three times as many for-hire vehicles as yellow taxis.<sup>43</sup> The for-hire sector has two main parts: the upmarket black car segment that serves primarily a business clientele (8,883 vehicles) and the livery services that service upper Manhattan

compressed natural gas or a hybrid electric vehicle.” 35 R.C.N.Y. § 51-03 (West 2012) (definition of Alternative Fuel Medallion).

37. 35 R.C.N.Y. § 51-03 (West 2012) (definition of Minifleet Medallion); 35 R.C.N.Y. § 58-20(a)(1) (West 2012) (double shift requirement for fleets and minifleets). A minifleet medallion is a corporate medallion. Minifleets emerged when larger fleets sold off medallions starting in the late 1960s due to high operating costs. Minifleets were corporations specially created to allow individuals to buy two corporate medallions and operate them as independent drivers. GRAHAM RUSSELL GAO HODGES, TAXI! A SOCIAL HISTORY OF THE NEW YORK CITY CABDRIVER 135-37, 140-41, 150 (2007); CHARLES VIDICH, THE NEW YORK CAB DRIVER AND HIS FARE 164 (1976); COMM. ON TAXI REGULATORY ISSUES, MAYOR’S COMMITTEE ON TAXI REGULATORY ISSUES: PRELIMINARY ISSUES PAPER 30 (1981) [hereinafter MAYOR’S COMMITTEE ON TAXI REGULATORY ISSUES] (on file with author); Edward G. Rogoff, Theories of Economic Regulation Tested on the Case of the New York City Taxicab Industry 152-59 (1980) (unpublished Ph.D. thesis, Columbia University) (on file with author).

38. 35 R.C.N.Y. § 51-03 (West 2012) (definition of independent medallion).

39. 35 R.C.N.Y. § 58-20(a)(2) (West 2012).

40. HENNINGSON DRAFT EIS, *supra* note 2, at 4-32, n.15.

41. 35 R.C.N.Y. § 58-26 (West 2012). The TLC also regulates the distribution of revenue between taxi medallion owners and medallion lessees by establishing caps on the leasing fees that owners can charge lessees. 35 R.C.N.Y. § 58-21(c) (West 2012).

42. *See, e.g.*, 35 R.C.N.Y. § 67-05.1 (West 2012) (vehicle specifications); 35 R.C.N.Y. § 67-05.2 (West 2012) (specifications for accessible vehicles); 35 R.C.N.Y. § 67-05 (West 2012) (specifications for hybrid vehicles); 35 R.C.N.Y. § 67-18 (West 2012) (retirement dates); 35 R.C.N.Y. § 67-19 (West 2012) (retirement date exceptions); 35 R.C.N.Y. § 54-22 (West 2012) (vehicle operation and condition).

43. *Understanding the For-Hire Vehicle Industry*, NYC TAXI & LIMOUSINE COMM’N, [http://www.nyc.gov/html/tlc/downloads/pdf/fhv\\_base\\_fact\\_sheet.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/fhv_base_fact_sheet.pdf).

(i.e., above 96th Street on the east side and 110th Street on the west side) and the four outer boroughs (21,227 vehicles).<sup>44</sup>

Currently, for-hire vehicles are legally authorized to pick up only passengers who have arranged ahead of time for service, for example by calling ahead.<sup>45</sup> Nonetheless, they often pick up street hails. Indeed, since yellow taxis rarely travel to upper Manhattan and the outer boroughs, for-hire vehicles are the main providers of walk-up service in these areas, where for-hire vehicles illegally pick up “approximately 100,000 street hail trips per day” according to the TLC.<sup>46</sup>

The for-hire sector is less heavily regulated than yellow medallion taxis.<sup>47</sup> The number of for-hire vehicles is not limited and there thus is no requirement to purchase or lease one of a limited number of licenses to operate a for-hire vehicle. But entry into the for-hire sector is not completely unregulated. Drivers and their vehicles must be licensed, and for-hire vehicles must be associated with a licensed for-hire vehicle base.<sup>48</sup> The number of bases is not limited, but there are requirements for acquiring and maintaining a base license.<sup>49</sup> There is no uniform fare regulation of the for-hire sector but bases must file with the TLC rates charged to passengers by affiliated vehicles.<sup>50</sup> Health and safety regulation is also generally less onerous for for-hire vehicles.<sup>51</sup>

### 3. Proposed Reforms

As mentioned above, yellow taxis currently have a legal monopoly on picking up passengers via street hails throughout New York’s five boroughs, but in practice they concentrate on Manhattan’s central business district and the airports. As a consequence, the bulk of the City’s population in upper Manhattan and outer boroughs must rely on illegal pickups by community

44. *Id.*; HENNINGSON DRAFT EIS, *supra* note 2, at 4-17. Limousines are a third category of for-hire vehicles. There currently are 5,230 limousines. NYC TAXI & LIMOUSINE COMM’N, *supra* note 43.

45. N.Y.C. ADMIN. CODE §§ 19-504(a)(1), 19-507(a)(4), 19-516(a) (2011); 35 R.C.N.Y. § 55-19(a) (West 2012).

46. *Aff. of David Yassky at 4, Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 7, 2012) [hereinafter Yassky Affidavit] (on file with author).

47. Miller, *supra* note 33, at 5 (“Medallion taxis and FHV’s are regulated very differently, with medallion taxis facing a generally heavier regulatory burden.”).

48. 35 R.C.N.Y. § 55-11 (West 2012). An important distinction between black cars and liveries is that “[m]ore than ninety percent (90%) of . . . [a black car vehicle base’s] business . . . [must be] on a payment basis other than direct cash payment by a [p]assenger.” 35 R.C.N.Y. § 59A-03(c)(3).

49. N.Y.C. ADMIN. CODE § 19-511 to 511.1 (2011); 35 R.C.N.Y. § 59B (West 2012). There are 485 community car service, 180 limousine, and 77 black car bases. NYC TAXI & LIMOUSINE COMM’N, ANNUAL REPORT 2009, *supra* note 29, at 9.

50. 35 R.C.N.Y. § 59B-21(a) (West 2012).

51. For example, medallion taxi vehicles generally must be replaced every three or five years. 35 R.C.N.Y. § 67-18 (retirement dates) & § 67-19 (retirement date exceptions). There are no regulatory requirements that livery vehicles be replaced after a certain number of years of use. The TLC recently decided that, effective January 2015, black cars generally must be replaced every five years. 35 R.C.N.Y. § 59A-28(d) (West 2012) (retirement dates for black cars).

liveries for street hail service.<sup>52</sup> The problem of inadequate yellow taxi service in outer boroughs and upper Manhattan has been an issue in New York politics for decades, going back at least to the 1960s.<sup>53</sup>

In 2011 and 2012, in response to an initiative launched by New York Mayor Michael Bloomberg, New York State enacted legislation authorizing the City to legalize street pickups by non-medallion taxis in upper Manhattan and the outer boroughs.<sup>54</sup> In the summer of 2012, a New York State trial judge blocked the implementation of the Street Hail Livery Law in litigation brought principally by medallion owners and lenders.<sup>55</sup> As discussed in Part VI, the Street Hail Livery Law and the debate about it provide support for this Article's hypothesis that New York taxi medallions persist because of interest group pressures, principally from medallion owners and the actors that service them, such as the lenders that finance medallion purchases.

### *B. New York City Taxicab Licenses as Property*

I now turn to why New York medallions are a form of private property that can be analyzed using theories about the evolution of property.

There is a widespread sense among legal academics that there is no longer a unified concept of property in law and scholarship.<sup>56</sup> However, courts and academics nonetheless have a standard way of defining property: property is widely regarded as a bundle of rights.<sup>57</sup> Under this view, property is “an infinitely variable collection of rights, powers, and duties.”<sup>58</sup> Among the rights

52. Andy Soltis, *Mayor Bloomberg Wants To Legalize Livery Cab Pickups in Outer Boroughs*, N.Y. POST (Jan. 18, 2011, 3:56 PM), [http://www.nypost.com/p/news/local/mayor\\_bloomberg\\_wants\\_boroughs\\_legalize\\_p1Xh4SftpAbHV0gPOKnplI](http://www.nypost.com/p/news/local/mayor_bloomberg_wants_boroughs_legalize_p1Xh4SftpAbHV0gPOKnplI).

53. See discussion *infra* Section VI.B.

54. 2012 N.Y. Sess. Laws 9 (McKinney) (amending 2011 N.Y. Laws 602). I adopt the term “Street Hail Livery Law” to refer to the legislation from New York City’s legal materials defending the law against various legal challenges. See, e.g., Defs.’ Mem. of Law in Supp. of their Mot. for Summ. J. at 1, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 7, 2012).

55. The plaintiffs initially obtained a temporary restraining order blocking the implementation of the legislation. *Taxicab Service Ass’n v. New York*, No. 102553, NYLJ 1202557349629, at \*1 (N.Y. Sup. Ct. June 1, 2012). The court then granted summary judgment to the plaintiffs on three grounds, while the defendants prevailed on three grounds. *Taxicab Service Ass’n v. New York*, No. 102553-2012 (N.Y. Sup. Ct. August 17, 2012). The defendants have asked the New York Court of Appeals to hear an appeal directly, without a prior decision from an intermediate appellate court. As of November 9, 2012, the parties are awaiting the decision of the Court of Appeals on whether to hear the appeal directly.

56. On the confusion about the concept, see Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 145-67 (1992); Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

57. E.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *United States v. Gen. Motors Corp.* 323 U.S. 373, 377-78 (1945); Merrill & Smith, *supra* note 56, at 365.

58. Merrill & Smith, *supra* note 56, at 365.

often included in the property bundle is “the right to exclude, to use, to transfer, or to inherit.”<sup>59</sup>

New York taxicab medallions have many of the standard sticks in the bundle. Individual license holders enjoy a right “to exclude others from using” their medallions to drive taxis.<sup>60</sup> Thus medallion owners are able to control who uses their medallions, subject to satisfying any applicable TLC requirements.<sup>61</sup>

Collectively, license holders enjoy the exclusive right to pick up passengers on the street throughout the City.<sup>62</sup> While the City may increase the number of licenses enjoying that exclusive right, there are hurdles to increasing the number of medallions that protect license holders from the dilution of medallion values. Under the City Charter, City Council approval is required to add additional licenses.<sup>63</sup> In addition, auctioning medallions requires the approval of the New York State legislature.<sup>64</sup> No additional licenses were added between their establishment in 1937 and 1996. The City auctioned 400 new medallions in 1996-1997,<sup>65</sup> 1,050 medallions in 2004-2008,<sup>66</sup> and as described below, there are now plans to auction an additional 2,000 medallions. Nonetheless, as of November 2012 there are fewer medallions than there were in 1937 when medallions were established.<sup>67</sup>

59. *Id.*

60. *Members of Peanut Quota Holders Ass’n v. United States*, 421 F.3d 1323, 1333 (Fed. Cir. 2005) (referring to “a fisherman’s ability to exclude others from using his fishing license”).

61. For example, the owner may lease the medallion, but only to a “Licensed Taxicab Driver.” 35 R.C.N.Y. § 58-21(a).

62. N.Y.C. ADMIN. CODE § 19-504(a)(1) (2011).

63. N.Y.C. CHARTER § 2303(b)(4) (2000). The requirement for City Council approval to increase the number of medallions may reflect the concerns of medallion owners and the taxi drivers union in 1971 that the newly created TLC would increase the number of medallion taxis. *See* Rogoff, *supra* note 37, at 172.

64. The approval of the State legislature is required because auctioning medallions involves selling them “for more than administrative costs” and “the excess [is] . . . considered a tax,” which must be authorized by the State. *Taxicab Serv. Ass’n v. New York*, No. 102553-2012 at 20 (N.Y. Sup. Ct. Aug. 17, 2012); *see also* Am. Compl. at 11, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 18, 2012) (on file with author).

65. 1995 New York State Laws ch. 359 (authorizing New York City to authorize the TLC to sell up to 400 licenses); N.Y.C. ADMIN. CODE § 19-531 (2011) (authorizing sale of up to 400 licenses); Andy Newman, *Investing in a Taxi Permit Looks Riskier*, N.Y. TIMES, June 1, 1998, at B3 (referring to May 1996 auctions as “the first of three auctions that put a total of 400 more [medallions] on the market”).

66. NYC TAXI & LIMOUSINE COMM’N, ANNUAL REPORT 2008, at 21, *available at* [http://www.nyc.gov/html/tlc/downloads/pdf/annual\\_report\\_2008.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/annual_report_2008.pdf). The sale of 900 new licenses was authorized by 2003 New York State Laws ch. 63, Part I and N.Y.C. Local Law No. 51 (2003), which authorized the sale of new taxicab licenses in accordance with state law. The sale of an additional 150 new licenses was authorized by 2006 New York State Laws ch. 535 and N.Y.C. Local Law No. 18 (2006). The two local laws authorizing the sales are reflected in N.Y.C. ADMIN. CODE § 19-532.

67. There were 13,595 medallions in 1937 compared with 13,237 today. Edward Rogoff, *The Limitation of New York City Taxicab Medallions: Economic Theory and Political Reality of the Haas Law*, 64:4 J. TRANSP. L., LOGISTICS & POL’Y 462, 470-71 (1997). The reason that there are fewer medallions than in 1937 is that the number dropped in the first decade after medallions were created in 1937 as owners did not “renew” the medallions, presumably because owners judged that the “medallions were [not] worth the \$10 yearly renewal fee.” *Id.* at 471, 462; *see also* Rogoff, *supra* note 37, at 91-93.

In addition to the right to exclude, another standard incident of private property is the right to transfer.<sup>68</sup> New York taxicab licenses are transferable “by . . . [p]urchase, . . . [g]ift, . . . [b]equest, or . . . [o]peration of law.”<sup>69</sup> While the approval of the TLC is required for transfer, the criteria for approval are well-specified.<sup>70</sup> As mentioned earlier, there is an active secondary market in which medallions are bought and sold.<sup>71</sup>

Taxicab licenses may be leased and many medallion owners lease their medallions to taxi drivers.<sup>72</sup> Medallions also may be pledged as collateral for loans.<sup>73</sup> Indeed there is an industry financing the purchase of medallions that takes them as collateral.<sup>74</sup> Some New York bail bondsmen regard taxi medallions as acceptable collateral for bail.<sup>75</sup> Medallions are considered marital property to be divided between spouses upon divorce.<sup>76</sup> Medallions also are considered assets in bankruptcy.<sup>77</sup>

Taxicab licenses must be renewed every two years, but the renewal process usually is a purely administrative matter.<sup>78</sup> Taxicab licenses may be revoked but apparently only on certain grounds, such as “nonuse” for a minimum period of time<sup>79</sup> or “for good cause.”<sup>80</sup>

As a constitutional matter, New York taxicab licenses almost certainly are property protected by the Due Process Clause.<sup>81</sup> An interesting question is

The City held the medallions that were returned in reserve and did not re-issue them, with one exception. After World War II, 183 individual owner medallions were re-issued to war veterans who had returned them to serve in the military. These “G.I. medallions” initially were made nontransferable when they were returned. However, in 1962 the City Council passed legislation making them transferable. Charles G. Bennett, *Aid to 141 Cabbies Voted by Council*, N.Y. TIMES, May 16, 1962, at 43.

Of course, the total number of taxis in New York City has increased since 1937 with the addition of thousands of for-hire vehicles. See *supra* notes 43-44 and accompanying text (discussing the number of for-hire vehicles). However, medallion taxis remain the only vehicles licensed to pick up street hails. As a result, there are fewer vehicles licensed today to pick up street hails than there were in 1937.

68. *Members of Peanut Quota Holders Ass’n v. United States*, 421 F.3d 1323, 1332 (Fed. Cir. 2005).

69. 35 R.C.N.Y. § 58-43(a)(1) (West 2012); see also N.Y.C. ADMIN. CODE §§ 19-504(h), 19-512(a) (2011); N.Y.C. CHARTER § 2303(b)(3).

70. 35 R.C.N.Y. § 58-43 to 58-48 (West 2012).

71. See *supra* note 6 and accompanying text.

72. 35 R.C.N.Y. § 58-21.

73. NYC TAXI & LIMOUSINE COMM’N, 2005 ANNUAL REPORT TO THE NEW YORK CITY COUNCIL 5.

74. See *infra* notes 158–164 and accompanying text.

75. Telephone interviews with bail bondsmen (Feb. 23, 2012) (on file with author); e-mail from Jonathan Horne to author (July 16, 2007, 1:50 PM) (on file with author).

76. *Lipan v. Lipan*, 554 N.Y.S. 2d 7 (N.Y. App. Div. 1990).

77. *In re Ciavarella*, 28 B.R. 823, 824 (Bankr. S.D.N.Y. 1983).

78. 35 R.C.N.Y. § 58-06, 58-08 (West 2012).

79. N.Y.C. ADMIN. CODE § 19-504(g) (2011).

80. N.Y.C. ADMIN. CODE § 19-512.1 (2011); see also N.Y.C. ADMIN. CODE § 19-506(a) (2011).

81. In a leading article on the meaning of property for constitutional purposes, Thomas Merrill argues that property has different meanings for procedural and substantive due process, and that the range of interests protected as property for procedural due process is narrower than the range protected

whether they are also protected by the Takings Clause, which safeguards a narrower range of interests.<sup>82</sup> There does not seem to be any case law squarely holding that New York licenses are or are not private property under the Takings Clause. The most extensive discussion that I have found of the status of the licenses under the Takings Clause is in the 2012 trial court level decision blocking the implementation of Mayor Bloomberg's reform efforts.<sup>83</sup> But even

as property for substantive due process. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 959-60, 982 (2000). However, judicial decisions provide little guidance on the range of interests protected as property for substantive due process, "no doubt . . . because substantive due process protection of property has been modest throughout the post-World War II era." *Id.* at 888. *See also id.* at 894, 958-59.

I cannot find a case that squarely holds that New York taxicab licenses are property under the Due Process Clause. It is settled law that a New York taxi *driver's* license, which is personal to the driver, is property for procedural due process purposes. *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011); *Hecht v. Monaghan*, 121 N.E. 2d 421 (1954). It is also possible to invoke substantive due process to protect a taxi *driver's* license, although the chances of prevailing on a substantive due process claim likely are slim. *Padberg v. McGrath McKechnie*, 203 F. Supp. 2d 261 (E.D.N.Y. 2002), *aff'd*, 60 Fed. Appx. 861 (2d Cir. 2003) (analyzing substantive due process challenges to TLC suspension and revocation policy but rejecting the challenges). There is a strong basis for considering a New York taxicab licenses property for procedural and substantive due process given the protection afforded a taxi *driver's* license, and because a New York taxicab license has more of the standard characteristics of property than taxi *driver's* license, such as transferability. Indeed, *United States v. Turoff*, 701 F. Supp. 981 (E.D.N.Y. 1988) suggests that due process applies to New York taxicab licenses, citing two cases about drivers' licenses. *Id.* at 987. It holds that New York taxicab licenses are property under the mail fraud statute. In analyzing the legal character of the licenses, the court states that "[i]t would not be seriously disputed that a taxicab 'license' is, accurately speaking, a special franchise which is not revocable at will and may not be taken away except by due process." *Id.* at 987. While this does not cast doubt on Turoff's statement in passing about the applicability of due process to medallions, Turoff's principal holding that medallions are property under the mail fraud statute is no longer considered good law. Brette M. Tannebaum, *Reframing the Right: Using Theories of Intangible Property To Target Honest Services Fraud After Skilling*, 112 COLUM. L. REV. 359, 379 (2012).

Further supporting the proposition that New York taxicab licenses are property for the Due Process Clause is that other cities' taxicab licenses and incidents of them have been held to be property for procedural and substantive due process. *South Florida Taxicab Ass'n v. Miami-Dade County*, No. 00-1366-CIV-GOLD, 00-1366-CIV-SIMONTON, 2004 WL 958073 (S.D. Fla. Oct. 24, 2006) (holding that Miami-Dade County taxicab licenses are property for substantive due process); *M & Z Cab Corp. v. City of Chicago*, 18 F. Supp. 2d 941 (N.D. Ill. 1998) (holding that Chicago taxicab licenses and the right to transfer them are property for procedural due process); *Standard Acceptance Co. v. Lewis Cab Co.*, 1996 WL 450811 (N.D. Ill. Aug. 6, 1996) (holding that Chicago taxicab licenses are property for procedural due process); *FlowerCab Co. v. Petite*, 658 F. Supp. 1170 (N.D. Ill. 1987) (holding that Chicago taxicab licenses and the right to transfer them are property rights under the Fourteenth Amendment, and moratorium on considering transfer applications violated procedural and substantive due process); *Boonstra v. City of Chicago*, 214 Ill. App. 3d 379 (1991) (holding that Chicago taxicab licenses and the right to transfer them are property rights for Fourteenth Amendment and ordinance banning transfer violated due process). There are, however, cases holding that other cities' taxicab licenses are not protected by due process. *E.g.*, *O'Connor v. San Francisco*, 90 Cal. App. 3d 107 (1979) (holding that San Francisco taxicab permits are not vested property rights for due process); *Luxor Cab Co. v. Cahill*, 21 Cal. App. 3d 551, 558 (1971) ("The use of streets by taxicabs is a privilege that may be granted or withheld without violating either due process or equal protection.").

82. Merrill, *supra* note 81, at 956-59, 982.

83. *Taxicab Service Ass'n v. New York*, No. 102553 (N.Y. Sup. Ct. Aug. 17, 2012). The only other judicial decision that I have found that might be regarded as addressing the status of the licenses under the Takings Clause is *Alexandre v. N.Y.C. Taxi & Limousine Comm'n*, No. 07 Civ. 8175 (RMB), 2007 WL 2826952 (S.D.N.Y. Sept. 28, 2007). The court denied a motion to preliminarily enjoin TLC rules requiring the installation of new technology in yellow taxis on the basis that the plaintiffs are unlikely to succeed on the merits of their claims, which include a takings claim. The court refers in

this decision assumes that the licenses are property for takings purposes without deciding the question, in the context of rejecting the plaintiffs' claims that the reform efforts constitute a taking.<sup>84</sup> Courts generally have held that other cities' taxicab licenses are not private property under the Takings Clause,<sup>85</sup> although there is case law suggesting that Chicago taxicab licenses are private property for takings purposes.<sup>86</sup>

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passing to “[p]laintiffs’ property rights in their taxi medallions and vehicles” but does not further discuss whether they are private property for takings purposes and in any event holds that plaintiffs are unlikely to succeed in their takings claim. *Id.* at \*8.

84. *Taxicab Service Ass’n v. New York*, No. 102553, at 30 (N.Y. Sup. Ct. August 17, 2012) (“Plaintiffs claim . . . that medallions are ‘more than mere licenses. Because they create consistent streams of income, have lasting residual value, and are freely transferable, they have long been understood to be valuable property.’ Let us assume that this is so. They are still ‘intangible’ property. Plaintiffs intangible rights are not being ‘taken,’ they are being shared.”).

85. Steve Oxenhandler, *Taxicab Licenses: In Search of a Fifth Amendment Compensable Property Interest*, 27 *TRANSP. L.J.* 113, 132 (2000) (“[T]he vast majority of states do not consider a taxicab license a Fifth Amendment compensable property interest.”). For a case from New York State, see *Gluck v. City of Syracuse*, 244 A.D. 2d 873 (N.Y. App. Div. 1997 (holding that Syracuse airport taxicab medallions are not property under the Takings Clause)). *Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis*, 572 F.3d 502 (8th Cir. 2009) is a recent case from a U.S. Court of Appeals that considers not whether a taxicab license is property under the Takings Clause, but the related issue of whether the market value of numerically limited taxicab licenses is protected by the Takings Clause. The decision holds that the interest that Minneapolis taxicab license holders had in the market value of their licenses was not property protected by the Takings Clause. The case arose after Minneapolis decided to issue an unlimited number of taxicab licenses, a move that would eliminate the value of the existing limited number of licenses.

86. *M & Z Cab*, 18 F. Supp. 2d at 946 (holding that “plaintiffs have a constitutionally protected property interest in . . . taxicab medallions” for procedural due process and later reviewing plaintiffs’ takings claim without analyzing whether plaintiffs have a property right for takings purposes (citing *Boonstra*, 214 Ill. App. 3d at 386-87 and *Flower Cab Co.*, 658 F. Supp. at 1176)); *Boonstra*, 214 Ill. App. 3d at 387, (holding that Chicago “taxicab license and its assignability is constitutionally protected property interest pursuant to the Fourteenth Amendment” and that ordinance banning transfer of medallions “constituted a taking of property without due process and without just compensation”). *Boonstra* and *M & Z Cab* are problematic because they treat Chicago taxicab licenses as property for due process and takings purposes, without separately considering whether they are private property under the Takings Clause. While the Supreme Court has not articulated a test for “private property” under the Takings Clause, it is clear that the Takings Clause protects a narrower range of interests than the Due Process Clause. Merrill, *supra* note 81, at 956-59, 982. *Boonstra* and *M & Z Cab* are therefore questionable in using the same concept of property for due process and takings purposes. Notably, the Eighth Circuit recently refused to follow *Boonstra* in *Minneapolis Taxi Owners*, 572 F.3d at 507 n.4, although not because the Takings Clause safeguards a narrower range of interests than the Due Process Clause.

Case law from the Federal Circuit provides a possible framework for analyzing whether “intangible property such as government issued permits and licenses” like New York taxicab licenses are private property under the Takings Clause. *Members of Peanut Quota Holders Ass’n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005); see also Mark Fina & Tyson Kade, *Legal and Policy Implications of the Property Right Status of Catch Shares*, *WASH. J. ENV’T L. & POL’Y* (forthcoming) (on file with author) (applying Federal Circuit case law to fishery catch shares). As explained in *Members of Peanut Quota Holders Association*, “a compensable interest is indicated by the absence of express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude.” 421 F.3d at 1331. To my knowledge there is no statement in the City Charter, Administrative Code, or Rules precluding the formation of property rights in New York medallions. Existing case law provides a guide to the language that might be held to preclude the formation of a cognizable property right. *United States v. Fuller*, 409 U.S. 488, 489, 494 (1973); *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004); *Conti v. United States*, 291 F.3d 1334, 1342 (Fed. Cir. 2002). As mentioned above, taxi medallions are

Even though New York taxicab medallions might not be protected as private property under the Takings Clause, it is important to remember that they function like private property. They not only have many of the standard incidents of private property, but they are regarded by many observers and referred to in common parlance as property.<sup>87</sup> Seventy-five years after medallions were established, entities with a web of interests use, buy, sell, lease, finance, and lend against them on the assumption that medallions are property. The uses to which medallions routinely are put illustrates that whether an item is classified as private property for takings purposes is not as relevant as legal observers may be tempted to assume. The evolution of medallions underscores the potential for items to come to be regarded and treated as property absent the benefit of a clear constitutional guarantee against governmental expropriation without just compensation.

### III. Theories of the Evolution of Property

Having established in Part II that New York medallions are a form of private property, this Part analyzes well-known explanations of why property emerges and develops, and outlines the theory of the evolution of property that

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transferable. *See supra* note 69. The Federal Circuit interprets the right to exclude in relation to licenses as follows: “So long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive . . . . [An existing licensee cannot] exclude later licensees from entering the market, increasing competition, and thereby diminishing the value of his license.” *Members of Peanut Quota Holders Ass’n*, 421 F.3d at 1334. Medallions likely would not entail a sufficiently robust right to exclude under this understanding to constitute private property because the City Council retains the authority to increase the number of medallions.

For another approach to assessing whether taxicab licenses are private property, see Oxenhandler, *supra* note 85, which argues that the key factors are various aspects of the nature of the regulatory system and the industry’s expectations. *See also* David Seth Zlotlow, Note, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 CAL. L. REV. 885 (2004) (applying Oxenhandler’s framework to broadcast licenses).

Even if medallions were deemed private property protected by the Takings Clause, medallion owners still might not gain much judicial protection against government regulation. Assuming that the alleged taking of licenses would not fall under a categorical rule and would be classified as a regulatory taking, the framework established in *Penn Central Transportation Company v. City of New York* would be used to determine whether compensation was due. 438 U.S. 104, 123-24 (1978). A central issue likely would be whether the challenged government action deprived the license holders of reasonable investment-backed expectations, one of the *Penn Central* factors. *Id.* at 124. The Supreme Court and lower courts have held that actors in highly regulated industries bear the risk of shifts in regulation because the significant degree of pre-existing regulation means that industry participants have no reasonable expectation that the regulatory context will not change. Zlotlow, *supra*, at 902; *see also* Fina & Kade, *supra*, at 23-24 (discussing the Federal Circuit’s approach to investment-backed expectations). In 1997 a New York State intermediate appellate court denied a takings claim brought by Syracuse airport taxicab license holders after the City abandoned the licensing scheme partly on the basis that they did not have “‘investment-backed expectations’ that had to be compensated” because the ordinance authorizing their licenses granted “the Chief of Police . . . full discretion to determine the number of medallions.” Gluck, 244 A.D. 2d at 874; *see also* *M & Z Cab*, 18 F. Supp. 2d at 952 (rejecting plaintiffs’ takings claim partly because they had “notice of the conditions under which their medallions may be revoked”).

87. *See, e.g.*, Editorial, *Take 1,800 More Taxis and Run*, N.Y. TIMES, Feb. 23, 1987, at A18 (“[T]axi owners long ago persuaded the city to treat medallions as personal property.”).



undergirds the Article's analysis of the persistence of New York taxi medallions.

### *A. Demsetzian Theories*

There is no shortage of theories of why private property exists.<sup>88</sup> However, reflecting the rise of law-and-economics in legal scholarship, the dominant explanations for the existence of private property in legal academia are economic ones.

In a highly influential 1967 article, Harold Demsetz offered a broad formulation of the economic explanation of private property, arguing that it arises because its benefits exceed its costs from a societal perspective.<sup>89</sup> The costs of private property usually are assumed to include the cost of measuring the object that is to be the subject of private property, such as surveying the land or water, and the cost of distributing the rights, such as the cost of titling the property owners. Theorists working in the Demsetzian framework attribute different benefits to private property.

Demsetz argues that private property exists because it has the benefit of internalizing externalities, such as environmental externalities.<sup>90</sup> He identifies two ways that private property performs this function. First, it concentrates in the owner the benefits and costs of resource use.<sup>91</sup> Without private property, individuals have little incentive to take care of resources because they are not certain that they will reap the benefits of their stewardship. By granting owners the ability to exclude others, private property assures owners that they will benefit from their stewardship. Owners also pay a price for poor resource use, which causes property values to decline.

88. Some offer Lockean explanations according to which individual labor gives rise to entitlements recognized in private property. For two very different contemporary invocations of Locke, see Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667 (1986); and Eric R. Claeys, *Locke Unlocked: Productive Use in Trespass, Adverse Possession, and Labor Theory* (Feb. 21, 2012) (unpublished working paper) (on file with George Mason University Law & Economics Research Paper Series), available at <http://ssrn.com/abstract=1759551>. Others point to Hegelian considerations, emphasizing that individuals require property in order to fully develop as persons. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

89. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) (“[T]he emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities.”). On the impact of Demsetz’s 1967 article, see, for example, ITAI SENED, *THE POLITICAL INSTITUTION OF PRIVATE PROPERTY* 34 (1997); Bell & Parchomovosky, *supra* note 15, at 83; James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009); and Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S331 (2002). A counterpoint to the general embrace of Demsetz’s framework is Daniel Fitzpatrick’s argument about the limits of explaining the evolution of property rights in cost-benefit terms, which draws on examples from the Third World. Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996 (2006).

90. Demsetz, *supra* note 89, at 348, 350.

91. *Id.* at 355. See also Krier, *supra* note 89, at 141 (outlining Krier’s explanation of this argument).

The second way that Demsetz suggests that private property internalizes externalities is by facilitating negotiations to contain externalities that are not internalized because of the scale of the asset that is owned.<sup>92</sup> Divvying up assets among owners will not completely internalize externalities because owners may use their assets in ways that affect other owners. Demsetz again offers an environmental example, a landowner who builds a dam on his land that reduces the amount of water available to his downstream neighbor.<sup>93</sup> Private property facilitates addressing this sort of remaining externality because private property reduces the number of persons with whom the affected neighbor must negotiate to limit the effects of the dam.<sup>94</sup> Under open access, the affected landowner would have to negotiate with any of the individuals who might build or operate the dam because there would no owner who could exclude anyone from the area.<sup>95</sup> Indeed, the dam might not be built in the first place under open access because no one would have an incentive to invest in building the dam given the inability to exclude others from reaping its benefits.<sup>96</sup>

As argued in Part IV, the persistence of New York taxi medallions in theory might be explained as an effort to internalize environmental externalities, although not through either of the ways that Demsetz delineates. Taxis generate air pollution and contribute to congestion.<sup>97</sup> In theory, the number of medallions could be set at a level that reflects a socially optimal level of pollution and congestion from taxicabs. Requiring that taxis have a medallion to operate could be considered a way of forcing taxi drivers to bear a cost for the pollution and congestion that they generate, since drivers must either buy or lease a medallion to put a taxi on the road. The medallion system might be analogized to the cap-and-trade programs sometimes used to control air pollution.<sup>98</sup> These programs involve the distribution of a limited number of permits that are tradable like taxi medallions. Polluters are required to hold

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92. Demsetz, *supra* note 89, at 356-57. Krier argues that this second argument about how private property internalizes externalities is “Demsetz’s distinctive contribution.” Krier, *supra* note 89, at 141. Demsetz’s argument is further elaborated in Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322-32, 1334-35 (1993), which distinguishes small, medium and large events, and refers to Demsetz’s example of the building of a dam as a medium event.

93. Demsetz, *supra* note 89, at 356.

94. *Id.* at 356-57. Demsetz explicitly compares private property to “communal property,” but in using the term communal property, he seems to have in mind an open access situation where the number of users of a resource cannot be limited. *See id.* at 354. As Krier argues, Demsetz ignores the possibility of what Carol Rose calls a limited common property regime under which a group excludes outsiders from the resource while allowing its members to use the resource. Krier, *supra* note 89, at 144; Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folktales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998).

95. Demsetz, *supra* note 89, at 357.

96. *Id.* at 356.

97. *See infra* note 123 and accompanying text.

98. *See* Matt Thoman & Ike Brannon, *Taxi Medallions Coming to a City Near You*, REG. 4 (Spring 2012) (comparing taxi medallion system proposed for Washington, D.C. to “a cap-and-trade program for taxis, but with no high-minded public purpose”).

permits to emit, much like taxi drivers must have medallions to operate. The requirement to hold permits to pollute imposes a cost on polluters, similar to the cost taxi drivers incur in a medallion system. In emissions trading programs, polluters either pay outright to buy the permits, or if polluters acquire the permits for free in the initial government-run distribution they pay an implicit price by holding onto the permits and forfeiting the profits that they might receive from selling them.

Another benefit that Demsetz and others have attributed to private property is lower costs of enforcing obligations.<sup>99</sup> Demsetz points out that private property reduces “policing costs” because, compared with an open access situation, it reduces the number of people whose behavior must be monitored.<sup>100</sup> As Robert Ellickson observes, “self-control by one person . . . by means of his own central nervous system is much simpler than the multiperson coordination entailed in intragroup monitoring.”<sup>101</sup> Private property still requires an owner to monitor to ensure that no one trespasses upon and upends the management of the resource he now owns.<sup>102</sup> But the owner likely has a greater incentive to monitor for compliance than the members of a large group because the owner stands to reap the entire benefits of his stewardship of the resource while each group member would enjoy only a share of the benefits.<sup>103</sup> Furthermore, the owner must only monitor for incursions by outsiders, which are simpler to observe than the breaches in behavior that the members of a large group have to watch for to enforce an agreement.<sup>104</sup>

In addition to reducing the number of people whose behavior must be monitored, property may lower enforcement costs by acting as a bond that promotes compliance.<sup>105</sup> A person with property may have a greater incentive to fulfill his obligations to others, including complying with government regulations, than someone without property because the property owner faces

99. See Demsetz, *supra* note 89, at 356. Other scholars, including Ellickson, *supra* note 92, have further elaborated the point. See generally KOMESAR, *supra* note 14, at 127-29 (arguing that Demsetz’s and Ellickson’s economic theories justify private property and predict that it will develop because it entails lower monitoring costs than common property).

100. Demsetz, *supra* note 89, at 355.

101. Ellickson, *supra* note 92, at 1327.

102. *Id.* at 1327 (suggesting that “Demsetz incautiously implied that an individual landowner is entirely free of the burden of monitoring others’ behavior within the borders of his parcel”).

103. *Id.* at 1328 n.43 (citing personal correspondence with Demsetz).

104. *Id.* at 1327. See also Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 20 (arguing that it is less costly to monitor for the presence of trespassers than to monitor for compliance with standards of conduct).

105. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 54-56 (2000). On the function of bonds, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392-97 (1990); Ronald J. Mann, *Verification Institutions in Financing Transactions*, 87 GEO. L.J. 2225, 2229-37 (1999); and Oliver E. Williamson, *Credible Commitments: Using Hostages To Support Exchange*, 73 AM. ECON. REV. 519 (1983). See also Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029 (2012) (arguing that formal property rights make owners more vulnerable to state-imposed burdens).

the potential loss of his property for non-fulfillment. As Hernando de Soto explains, formal property rights make owners accountable by giving them “property to lose.”<sup>106</sup>

As discussed in Part IV, the persistence of New York taxi medallions theoretically might be explained on the basis that they reduce enforcement costs for reasons similar to the two just described. The medallion system limits the number of taxis and therefore the number of vehicles that the City must ensure comply with fare, health and safety regulations. Medallions also may reduce enforcement costs by providing a group of actors in the taxi industry—medallion owners—with incentives to ensure that taxi vehicles comply with these regulations. Medallion owners could be fined and potentially lose their medallions if they fail to ensure that their medallions are used in conformity with government requirements.

Part IV argues that the persistence of New York taxi medallions cannot be explained in Demsetzian terms as an effort to internalize externalities or reduce enforcement costs and Part V offers a political economy explanation instead.<sup>107</sup> Aside from their deficiencies in explaining taxi medallions, it is worth underscoring a general weakness of Demsetzian explanations that further justifies resorting to a political economy explanation. Notwithstanding their prevalence, it is widely recognized that the Demsetzian explanations for private property are better regarded as justifications for private property, rather than explanations of the mechanisms by which private property comes into existence or persists. That is because these explanations do not actually explain the way private property comes into being, evolves, or remains in place. Rather, they identify the potential benefits of private property.<sup>108</sup>

In attempting to identify a mechanism by which private property evolves, some have argued that property develops organically within society and have used game theory to buttress their arguments.<sup>109</sup> Demsetz implied that property

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106. DE SOTO, *supra* note 105, at 56.

107. It is interesting to note that Demsetz discusses taxi medallions as a barrier to entry in analyzing the difficulties with various economic definitions of barriers to entry. Harold Demsetz, *Barriers to Entry*, 72:1 AM. ECON. REV. 47, 48 (March 1982).

108. See, e.g., Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 121 n.5 (2005) (citing sources referring to the lack of discussion in Demsetz, *supra* note 89, about the mechanism by which private property evolves). Demsetz himself has suggested that his 1967 article was not intended to explain the mechanism by which property evolves, but rather to explain why private property exists. Harold Demsetz, *Frischmann's View of "Toward a Theory of Property Rights"*, 4:1 REV. L. & ECON. 127, 127 (2008) (“My general intent when writing ‘Toward a Theory ...’ was to *explain* the emergence of private property rights.”); *id.* at 129 (“I did avoid the different, difficult problem of how property right adjustments are actually made. I would still be working on the article were I to have undertaken this task.”). Krier discusses Demsetz’s clarification of his purpose in his 1967 article in Krier, *supra* note 89, at 143, n.16 and accompanying text.

109. Wyman, *supra* note 108, at 122. For an insightful analysis of “invisible-hand” explanations of the emergence of private property that traces the use of game theory to buttress these explanations, see Krier, *supra* note 89, at 150-57. Krier distinguishes “intentional” and “unintended-consequences (invisible-hand)” explanations of the emergence of private property. *Id.* at 147.

emerges spontaneously within society without central coordination, although he did not use game theory to bolster the idea that property might be able to emerge through an invisible hand.<sup>110</sup> Ellickson has used game theory to suggest that “land rules within a close-knit group evolve so as to minimize its members’ costs”<sup>111</sup> without “a conscious collective decision.”<sup>112</sup> Ellickson is careful to emphasize that his prediction about property law evolving organically toward efficiency applies only to land rules generated by close-knit groups, and not like Demsetz’s argument to land law in general.<sup>113</sup>

A serious difficulty with arguing that private property is the product of an invisible hand is that this type of explanation downplays the fundamental role of the state in intentionally creating and maintaining private property.<sup>114</sup> The state’s role is especially evident in the case of the “new property” established by the administrative and regulatory state in the twentieth century, such as taxicab licenses. But the state also historically has played an important role in the development of older forms of private property, such as real property. For example, the origins of many real property rights in the United States lie in colonization of the country by foreign powers, and the displacement of Native Americans by these powers and successive American governments.<sup>115</sup> Today, the state continues to play an important role in shaping real property rights by establishing the kinds of rights that can be held in land through legislation and regulation, most prominently land use planning and zoning.

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110. See, e.g., Demsetz, *supra* note 89, at 350 (“It is my thesis in this part of the paper that the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities.”); *id.* (“[A]djustments in property rights . . . have arisen in Western societies largely as a result of gradual changes in social mores and in common law precedents. At each step of this adjustment process, it is unlikely that externalities per se were consciously related to the issue being resolved. These legal and moral experiments may be hit-and-miss procedures to some extent . . .”). There are places where Demsetz could be interpreted as suggesting that private property might emerge through conscious societal decisions. *Id.* (“I do not mean to assert or to deny that the adjustments in property rights which take place need to be the result of a conscious endeavor to cope with new externality problems.”). See also Krier, *supra* note 89, at 147 (discussing the ambiguity in Demsetz’s article about whether property arises spontaneously or by design). However, Demsetz seems to be more commonly interpreted as offering an invisible hand type explanation for the emergence of private property. E.g., Adrian Vermeule, Essay, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1422 (2010) (characterizing Demsetz as offering an invisible-hand justification/explanation for property rights).

111. Ellickson, *supra* note 92, at 1320 (emphasis omitted).

112. *Id.* at 1366. For Ellickson’s invocation of game theory, see *id.* at 1365-66.

113. *Id.* at 1320. Ellickson defines a close-knit group as “a social entity within which power is broadly dispersed and members have continuing face-to-face interactions with one another.” *Id.*

114. Wyman, *supra* note 108, at 122.

115. See Reich, *supra* note 20, at 778-79 (stressing that old property, like new property, was created by states, in arguing that new property should be protected like old property); see also Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 766 (2011) (“[T]he title to almost every parcel of land in the United States” begins with “conquest.”).

*B. Political Economy Theories*

Recognizing the state's role in the evolution of private property is only the first step in more fully understanding the mechanisms by which property evolves and is sustained. The next step is using positive political theory to better understand the forces that shape the way that the state operates. As positive political theory suggests, and a growing body of property scholarship recognizes, the state is a vehicle through which individuals and groups act to create, maintain and transform property rights.<sup>116</sup> Moreover, which individuals and groups ultimately are able to achieve their objectives through state action is influenced by demand- and supply-side factors.<sup>117</sup>

Key considerations influencing the demand for state action include the size and the distribution of the benefits that state action stands to confer on different groups. Groups standing to gain or maintain significant benefits likely will be more intensely motivated to participate in the political process to obtain or preserve these benefits. Another important demand-side consideration is the organizational and informational costs that individuals and groups face in attempting to obtain state action. Groups that can easily and cheaply mobilize their members are more likely to succeed in the political process.

The institutions through which the state supplies policies also impose decision-making costs that may influence policy outcomes.<sup>118</sup> For example, private property may be harder to establish, or to change, when the state institutions responsible for it include multiple decision-makers than when decision-making is concentrated in a single individual or a hierarchically organized agency. The time and effort required to reach a decision likely will be greater when the approval of more actors is required, especially when the actors have different preferences.<sup>119</sup>

Like Demsetzian explanations for private property, then, positive political theory explanations focus on the costs and benefits of private property. The two

116. For property scholarship recognizing the importance of the state and interest groups in the evolution of property, see generally, for example, GARY LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* (1989); Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359 (2002); Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S1515 (2002); Levmore, *Property's Uneasy Path*, *supra* note 15; Levmore, *Two Stories*, *supra* note 15; and Wyman, *supra* note 108. See also Wyman, *supra* note 108, at 122-23 n.10 for additional examples of scholarship about the evolution of property that analyzes the evolution as a political process.

117. For a helpful overview of the factors influencing government decision-making on which I draw in the following discussion, see KOMESAR, *supra* note 14, at 30, 60-67, 70, 114. Komesar also distinguishes between "demand" and "supply" considerations. See, e.g., *id.* at 3-10 (chapter titled "Supply and Demand"); *id.* at 26 (referring to "demand-side analyses" and "the supply side of the law—the courts").

118. Buchanan and Tullock define decision-making costs as "only the estimated costs of participating in decisions when two or more individuals are required to reach *agreement*." JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 45-46 (1962). I explore the implications of political institutions for the development of private property in Wyman, *supra* note 108, at 129-35, 176-90.

119. Wyman, *supra* note 108, at 134-35 n.39 and accompanying text.

kinds of explanations differ principally in the relevant unit of analysis. Demsetzian explanations suggest that private property exists because it is cost-beneficial for society as a whole. Positive political theory suggests that it exists because it is cost-beneficial for certain individuals or groups.

Part V offers a demand-side political economy explanation for New York taxi medallions that characterizes them as an example of inefficient private property rights that have been sustained by powerful interest groups. We probably should not think of taxicab licenses as unique. Given the state's role in the formation and the maintenance of private property, there are bound to be other examples of problematic private property rights.

#### IV. Rejecting the Demsetzian Hypotheses

There are a number of arguments commonly invoked for limiting entry into the taxi industry through requirements that taxicabs have one of a limited number of taxicab licenses to operate. Below, this Article rejects two arguments for limiting entry that echo the standard Demsetzian explanations for private property analyzed in Part III.<sup>120</sup> I argue that the persistence of New York taxicab licenses cannot be justified on the basis that they internalize externalities or lower enforcement costs. My arguments in this Part draw on standard economic analyses of taxi regulation, which generally are hostile to limiting entry to the taxi industry through mechanisms such as limited numbers of licenses.<sup>121</sup>

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120. For a useful survey of many of the arguments for limiting entry into the taxicab industry, see OECD, *supra* note 5, at 21-25.

One often mentioned argument for limiting entry that I do not analyze as an explanation for New York medallions is that limiting entry into the taxi industry is necessary to bolster taxi driver incomes. Historically this argument was invoked as a reason for establishing limited entry in New York. See Rogoff, *supra* note 37, at 90. I do not assess this argument because it is a distributional rather than an efficiency argument.

For limited entry to boost driver incomes drivers would have to be sharing in the monopoly rents generated by limited entry, which they may not be given the costs they incur to secure medallions, such as leasing fees. For instance, the OECD reports that there is no evidence that limited entry boosts driver incomes compared with what they would be in a competitive market. OECD, *supra* note 5, at 8. See *infra* notes 165-172 and accompanying text (discussing incomes of New York taxi drivers and the extent to which the drivers share in the rents from limited entry). There also are questions about whether it would be normatively desirable on distributive justice grounds to boost driver incomes in the first place by limiting entry given that limited entry likely results in fewer jobs for lower-skilled workers in the taxi industry, and hurts consumers, who may be low-income persons, by boosting fares and reducing service. See *infra* note 183 (discussing the incomes of taxi passengers).

121. Economists generally argue that it is inefficient and unjust to limit entry into the taxi industry through limited numbers of taxicab licenses like New York medallions. *E.g.*, FRANKENA & PAULTER, *supra* note 30, at 37-66. See also OECD, *supra* note 5, at 7; OFFICE OF FAIR TRADING, THE REGULATION OF LICENSED TAXI AND PHV SERVICES IN THE UK 2-3 (2003) [hereinafter OFFICE OF FAIR TRADING]; Richard B. Coffman, *The Economic Reasons for Price and Entry Regulation of Taxicabs: A Comment*, J. TRANSPORT ECON. & POL'Y 288 (1977); Andreas Kopp, *Summary of Discussions*, in (DE)REGULATION ROUND TABLE, *supra* note 30, at 155; Liston-Heyes & Heyes, *supra* note 30, at 105; Adrian T. Moore & Ted Balaker, *Do Economists Reach a Conclusion on Taxi Deregulation?*, 3 ECON. J. WATCH 109, 117 (2006); Edward G. Rogoff, *Regulation of the New York City Taxicab Industry*, 15 CITY ALMANAC 1, 18-19 (Aug. 1980); David. J. Williams, *The Economic Reasons for Price and Entry*

### A. Externalities

Just as one of the standard justifications for private property is its ability to internalize externalities, so one of the standard justifications for limiting the number of taxis is that they generate negative externalities. The idea is intuitive: taxis generate air pollution and congestion. But taxi drivers do not have an incentive to fully take into account the air pollution and congestion that they produce because most of these social costs are borne by others. To contain

*Regulation of Taxicabs: A Comment*, 15 J. TRANSPORT ECON. & POL'Y 105 (1980); Darryl Biggar, *Why and How Should We Regulate Taxis?* 3, available at [http://www.taxiindustryinquiry.vic.gov.au/\\_data/assets/pdf\\_file/0007/57733/Darryl-Biggar-roundtable-paper.pdf](http://www.taxiindustryinquiry.vic.gov.au/_data/assets/pdf_file/0007/57733/Darryl-Biggar-roundtable-paper.pdf); PRODUCTIVITY COMM'N, REGULATION OF THE TAXI INDUSTRY ix (1999); Memorandum from Fitzroy Lee, Deputy CFO, Office of Revenue Analysis, and Chief Economist, Taxi Medallion Systems, to Neil O. Albert, City Administrator, Government of the District of Columbia (Jan. 4, 2010) [hereinafter Lee]. Legal scholarship endorsing similar views includes Verkuil, *supra* note 17, at 690; and Lee A. Harris, Note, *Taxicab Economics: The Freedom To Contract for a Ride*, 1 GEO. J.L. & PUB. POL'Y 195, 197, 207, 217 (2002).

Opinion is not unanimous, though. Some economists as well as legal and other academics favor regulating entry into the taxi industry, at least in certain contexts. GORMAN GILBERT & ROBERT E. SAMUELS, *THE TAXICAB: AN URBAN TRANSPORTATION SURVIVOR* 155 (1982); Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: the Paradox of Market Failure*, 24 TRANSP. L.J. 73, 116-20 (1996); Schaller, *supra* note 34; Chanoch Shreiber, *The Economic Reasons for Price and Entry Regulation of Taxicabs*, 9 J. TRANSPORT ECON. & POL'Y 268 (1975).

There have been efforts to deregulate or liberalize the regulation of the taxi industry in the U.S. and elsewhere. Over twenty U.S. cities experimented with deregulating or liberalizing entry and/or fares in the late 1970s and early 1980s, during the period of the deregulation of major federally regulated transportation industries such as airlines. Most of the U.S. jurisdictions that deregulated or liberalized their taxi industries subsequently re-introduced regulation. This is anomalous since the major transportation industries that were deregulated in the same period generally have not been re-regulated. There are negative and positive assessments of the U.S. experiments with taxi deregulation/liberalization. For more critical assessments, see, for example, DEBRA LAM ET AL., *THE SAN FRANCISCO TAXICAB INDUSTRY: AN EQUITY ANALYSIS* 8 (2006); PRICEWATERHOUSE, *supra* note 30, at 1, 8; Schaller, *supra* note 34, at 494; and Roger F. Teal & Mary Berglund, *The Impacts of Taxicab Deregulation in the USA*, 21 J. TRANSPORT ECON. & POL'Y 37, 42 (1987). For a more positive assessment, see, for example, OECD, *supra* note 5, at 35. One lesson of the U.S. experiments, which often increased the number of taxis on city streets but also produced higher fares, may be that there is a strong justification for regulating the amount of taxi fares, even when there is no regulatory cap on the number of taxis. Kopp, *supra*, at 161; OECD, *supra* note 5, at 9, 20, 43-45.

Ireland and New Zealand have had positive experiences with taxi deregulation. In Ireland, entry but not fare restrictions were removed in 2000 and many new taxis appeared on city streets. Sean D. Barrett, *Regulatory Capture, Property Rights and Taxi Deregulation—A Case Study*, in (DE)REGULATION OF THE TAXI INDUSTRY ROUND TABLE 133, 148 (Organisation For Economic Co-operation and Development, European Conference of Ministers of Transport, Transport Research Centre 2007) [hereinafter Barrett, *Regulatory Capture*]; OECD, *supra* note 5, at 35; Sean D. Barrett, *The Sustained Impacts of Taxi Deregulation*, 30:1 ECON. AFF. 61 (2010). New Zealand significantly relaxed entry and fare restrictions in 1989 and experienced greater availability of service and fare reductions. OFFICE OF FAIR TRADING, *supra*, at 68; OECD, *supra* note 5, at 36. Experiences in the Netherlands, Norway and Sweden are portrayed in mixed terms. OECD, *supra* note 5, at 36 (discussing the Netherlands and Sweden); OFFICE OF FAIR TRADING, *supra*, at 37 (discussing Sweden); *id.* at 68 (discussing the Netherlands and Norway); OFFICE OF FAIR TRADING, IMPACT OF TAXI MARKET REGULATION—AN INTERNATIONAL COMPARISON, ANNEXE J 1, 92 (2003) [hereinafter OFFICE OF FAIR TRADING ANNEXE J] (discussing Sweden); Peter Bakker, *Deregulation of the Taxi Industry: Experiences in the Netherlands*, in (DE)REGULATION ROUND TABLE, *supra* note 30, at 59 (discussing the Netherlands). On the UK's experience, see OFFICE OF FAIR TRADING, *supra*, at 4; OFFICE OF FAIR TRADING, IMPACT OF REGULATION ON TAXI MARKETS—CASE STUDY ANALYSIS, ANNEXE D (2003); and Matteo Aquilina, *Quantity De-restriction in the Taxi Market: Results from English Case Studies*, 45:2 J. TRANSP. ECON. & POL'Y 179 (2011).



these negative externalities from taxi driving, it is necessary to cap the overall number of vehicles on the roads through a medallion system.<sup>122</sup> The cap on the number of medallions also imposes a cost on taxi drivers because they must either purchase or lease the medallion and this cost theoretically could be regarded as a price for polluting and contributing to congestion.

There is no doubt that cabs contribute to congestion and pollution in the central business district in Manhattan. According to one estimate, “[t]axicabs comprise up to 60 percent of all vehicles in motion on Midtown avenues.”<sup>123</sup> Congestion and pollution also have been invoked as grounds for restricting the number of taxis. The congestion that taxicabs caused in New York’s Depression-era streets was one of the arguments given for introducing a limited number of medallions in New York in 1937.<sup>124</sup> In the 1980s, then-Mayor Ed Koch abandoned a proposal to add 1,800 new medallions partly because of the projected increase in air pollution from the additional cabs.<sup>125</sup>

However, as a normative matter there is little basis for restricting entry to the taxi industry based on the air pollution and congestion that taxis contribute. Air pollution and congestion are caused by vehicles in general, not just taxis. Rather than singling out taxis through a numerical cap, governments should be establishing targets for the allowable amounts of air pollution and congestion in general, and regulatory programs that motivate operators of all types of vehicles to adjust their behavior to help achieve these targets. These programs could take the form of either pricing mechanisms (such as emission or congestion charges), or quantity controls (which could require that any vehicle, not just taxis, have one of a number of licenses to operate).<sup>126</sup>

122. See, e.g., Shreiber, *supra* note 121, at 274-75, *id.* at 279 (“In New York City, where taxicabs are the largest contributors to congestion and air pollution in downtown areas, elimination of the present restrictions on entry is bound to increase the number of cabs there and therefore to bring about further deterioration in the already heavy traffic congestion and high levels of air pollution.”).

123. URBITRAN ASSOCIATES INC., FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED ISSUANCE OF ADDITIONAL TAXICAB MEDALLIONS 36 (Feb. 2004) (prepared for the New York City Taxi & Limousine Comm’n), [http://www.nyc.gov/html/tlc/downloads/pdf/env\\_impact\\_statement.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/env_impact_statement.pdf) (citing SHALLER CONSULTING, *The New York City Taxicabs Fact Book* (3d ed.)); see also Michael M. Grynbaum, *Deadliest for Walkers: Male Drivers, Left Turns*, N.Y. TIMES, Aug. 16, 2010, at A1 (“[A]t some times of day, [taxis] can make up nearly half of Manhattan’s traffic, according to some estimates.”); Charles Komanoff, *2,000 New Medallion Taxis: A Paper in Support of “More Taxis Mean More Traffic”* (Jan. 23, 2012), available at [http://www.komanoff.net/cars\\_II/Komanoff\\_Taxi\\_Analysis.pdf](http://www.komanoff.net/cars_II/Komanoff_Taxi_Analysis.pdf) (noting that medallion taxis comprise “more than two-fifths of” traffic in Manhattan’s central business district).

124. Kitch et al., *supra* note 17, at 324; Rogoff, *supra* note 37, at 90.

125. Kirk Johnson, *Environmental Study Urges Limiting Rise in Cabs to 400*, N.Y. TIMES, Oct. 7, 1988, at B1. According to a 1976 book, “half of all mobile-source air pollution in midtown Manhattan” was due to taxis. VIDICH, *supra* note 37, at 129.

126. FRANKENA & PAULTER, *supra* note 30, at 43 (discussing pollution arguments); Coffman, *supra* note 121, at 295 (“Economic efficiency requires that any given target level of air quality or traffic congestion be achieved in the least-cost way, which means comparing the marginal costs of externality reduction from each source, rather than arbitrarily singling out one source for special treatment.”). The argument leaves open the possibility that in some contexts it might be economically justifiable to attempt to reduce air pollution or congestion by limiting the number of taxis because limiting them is the cheapest way of addressing these problems.

Moreover, regardless of whether the number of taxis should be capped to deal with congestion and air pollution, it is clear that New York's medallion system for limiting entry does not exist because it manages congestion and air pollution from taxis or vehicles in general. New York's medallion system is too over-inclusive to be explained in this way because, in its current form, it restricts the number of taxis that can pick up street hails throughout the City's five boroughs and at all times of the day—not just in the parts of the City (such as midtown Manhattan) and at the times of the day that are most congested and polluted. The medallion system also is too under-inclusive to be explained as a program for managing congestion and air pollution. The medallion system does not limit the overall number of taxis in New York. Only the number of taxis picking up street hails is capped while there is no limit on the number of for-hire vehicles.

Furthermore, there is no basis for thinking that the current number of medallions achieves the optimal level of congestion or air pollution from just the taxis picking up street hails.<sup>127</sup> The current number of taxis is the product of a series of ad hoc decisions made over more than seven decades with little regard for the optimal number of taxis given societal interests in minimizing congestion and air pollution from taxis or all sources. The numerical limit established in 1937 when medallions were created was the number of licensed taxicabs operating when the ordinance was passed in 1937.<sup>128</sup> The City's decisions in the mid-1990s to auction 400 medallions<sup>129</sup> and in the early 2000s to sell another 900 medallions apparently were driven in large measure by the desire to raise revenues for the City.<sup>130</sup> The decision in the mid-2000s to auction an additional 150 medallions seems to have been the product of efforts

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127. See Shreiber, *supra* note 121, at 278 (claiming that the “number of medallions” in New York was not “determined on the basis of what was needed to achieve economic efficiency in city transport”); OECD, *supra* note 5, at 25-29 (discussing whether it is possible to theoretically define and practically implement an optimal number of taxis using limited entry policies).

128. N.Y.C., N.Y., ORDINANCES, in *Proceedings of the Board of Aldermen and Municipal Assembly of the City of New York From January 4, to June 29, 1937*, vol. 1 545 (Mar. 1, 1937).

129. Richard Perez-Pena, *For 53, the Promise of America Fits on a Taxicab*, N.Y. TIMES, May 11, 1996, <http://www.nytimes.com/1996/05/11/nyregion/for-53-the-promise-of-america-fits-on-a-taxicab.html>. The Giuliani Administration probably also chose to auction 400 medallions in 1996-1997 because an environmental impact statement from the Koch era had analyzed the addition of 400 new medallions, and concluded that this number would have “[n]o significant adverse air quality impacts” although there would be adverse traffic impacts that could not be mitigated. PARSONS BRINCKERHOFF QUADE & DOUGLAS, INC., FINAL ENVIRONMENTAL IMPACT STATEMENT, ADDITIONAL TAXICAB LICENSES 1-8, 1-7, 1-10 (June 1989) (submitted to the NYC Taxi & Limousine Comm’n) (on file with author). See also David Firestone, *Giuliani’s Spending Plan: Revenue; Plans for Park Ads and More Taxis Draw Fire*, N.Y. TIMES, February 15, 1995, at 4 (noting that the TLC chairman Fidel F. Del Valle “said officials chose to add 400 medallions because an earlier environmental impact study showed that 400 new cabs would not significantly harm air quality”).

130. Eric Lipton, *Finding the Intersection of Supply and Demand; Already Facing Demands for Higher Fares, City Considers Adding 900 Taxis*, N.Y. TIMES, Nov. 23, 2003, at 131.

to increase the accessibility of the taxi fleet to people with mobility disabilities.<sup>131</sup>

Sometimes it is argued that the number of taxis should be capped as a second-best solution in a world where there is no general policy to deal with air pollution and congestion from vehicles to encourage people to use more environmentally friendly mass transit.<sup>132</sup> But there are other ways of addressing this substitution effect. For example, mass transit service could be improved and made cheaper through greater subsidies.<sup>133</sup> Moreover, taxis sometimes complement rather than compete with mass transit by carrying passengers between mass transit hubs, and homes and offices.<sup>134</sup>

In addition, attempting to reduce air pollution and congestion by capping the number of cabs may counterproductively encourage greater use of private

131. 2006 Laws of New York, ch. 535; N.Y.C. Local Law No. 18 (2006); Jeremy Olshan, *Taxi Boost For Disabled*, N.Y. POST, May 24, 2006, at 2; City Council, City of New York, The Transcript of the Minutes of the Committee on Transportation, May 24, 2006, at 7 (comments of Council Member Oliver Koppell), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=445937&GUID=7B982A89-1E54-4F69-9782-0D6C9CB87FFF>; City Council, City of New York, The Transcript of the Minutes of the Stated Council Meeting, May 24, 2006, at 29-30 (comments of Council Speaker Christine Quinn), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=445937&GUID=7B982A89-1E54-4F69-9782-0D6C9CB87FFF>. The 2003 local law authorizing the sale of 900 new medallions had taken modest steps to improve the accessibility of the taxi fleet by requiring that a small share of the 900 medallions be for accessible taxicabs. N.Y.C. Local Law No. 51 (2003).

The recent plan to add 2,000 medallions apparently originated in a proposal from the yellow taxi industry to add new medallions to address Mayor Bloomberg's goal of improving street hail service in the outer boroughs. Reply Aff. of David Yassky in Further Supp. of the City's Mot. for Summ. J. and in Opp'n to Pls.' Cross-Mot. for Summ. J. at 3-4, *Taxicab Serv. Ass'n v. New York*, No. 102553 (N.Y. Sup. Ct. June 15, 2012) (on file with author) [hereinafter *Yassky Reply Affidavit*]. The proposal for the City to auction additional medallions remained part of the reform package even though medallion owners do not support the package—presumably because the sale of medallions became an attractive way to raise revenue for the City. See David Yassky, *The City's Getting Taken for a Ride*, N.Y. DAILY NEWS, June 20, 2012 (“So the legislators split the Taxi and Limousine Commission-fleet compromise in two: They authorized new yellow medallions for revenue and gave local livery drivers responsibility for the borough service”); MILLER, *supra* note 33, at 6 (“It appears that the [2,000] number was determined based on revenue projections from the sale of these new medallions that are intended to close a gap in the City's budget.”). The City currently is depending on medallion sales to address a City budget gap. Dana Rubinstein, *After Helping Blow a Hole in Bloomberg's Taxi Plan, de Blasio Suggests Repairs*, CAPITAL (June 7, 2012, 3:55 PM), <http://www.capitalnewyork.com/article/politics/2012/06/6007233/after-helping-blow-hole-bloombergs-taxi-plan-de-blasio-suggests-rep>.

If the City adds 2,000 medallions, traffic congestion would increase. According to the draft environmental impact statement produced for the City, adding the 2,000 new medallions would have “significant adverse traffic impacts” and these impacts could not be completely mitigated. HENNINGSON DRAFT EIS, *supra* note 2, at ES-12-13. The new medallions would “not result in a significant adverse impact to air quality,” although greenhouse gas emissions would increase. *Id.* at ES-15.

132. Shreiber, *supra* note 121, at 274.

133. See Coffman, *supra* note 121, at 296 (urging focus on “the regulated transit industry”).

134. OFFICE OF FAIR TRADING, *supra* note 121, at 40 (“Since taxis are often used in conjunction with other public transport (for example at the start and end of train journeys) or at times when other public transport is not available, restricting taxis could even decrease other public transport use.”). In New York, taxis are especially likely to complement mass transit outside of Manhattan, where the distances between subway stations and home may be significant. Noah Kazis, *Overhaul of NYC Livery Cab System Now Awaits Cuomo's Signature*, STREETS BLOG.ORG (June 27, 2011), <http://www.streetsblog.org/2011/06/27/overhaul-of-nyc-livery-cab-system-now-awaits-cuomos-signature/>.

cars, a key competitor for mass transit. Each taxi on the road generates a positive externality—a reduction in waiting time that benefits taxi riders generally.<sup>135</sup> When the number of cabs is artificially constrained through a cap, waiting times likely rise above the levels that would exist if the number of cabs was uncapped. In turn, higher waiting times may induce people who otherwise would take taxis to buy and use their own private cars. Having bought cars because taxis were hard to get, car owners then may reduce their use of mass transit as well as taxis. Thus the effect of capping the number of taxis could be reduced levels of air pollution and congestion from taxis, but higher levels overall because of greater use of private cars.<sup>136</sup>

Again, though, regardless of whether limits on the number of taxis could be justified to boost the use of mass transit, it is difficult to explain medallion systems such as New York's as efforts to increase mass transit usage. I am not aware of any evidence that the number of medallion taxis has been established to increase mass transit usage.<sup>137</sup> Indeed, for most of their histories, taxis and mass transit have been regulated in an uncoordinated manner by separate bureaucracies.<sup>138</sup>

### *B. Enforcement Costs*

A second justification sometimes offered for limited entry is that it facilitates the enforcement of health, safety and fare regulations justified on other grounds, such as information costs. When a consumer enters a taxi, he probably would like to know that the vehicle is safe, that the driver is reliable

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135. See FRANKENA & PAULTER, *supra* note 30, at 57-58; Liston-Heyes & Heyes, *supra* note 30, at 100; see also Kopp, *supra* note 121, at 157-58 (discussing the possibility that governments should subsidize entry into the taxicab industry given the positive externality a greater supply of taxis generates in the form of reduced waiting times).

136. FRANKENA & PAULTER, *supra* note 30, at 40; OFFICE OF FAIR TRADING, *supra* note 121, at 40; Richard Darbéra, *When the Regulator Acknowledges the Existence of Two Distinct Markets for Taxi Services*, in (DE)REGULATION ROUND TABLE, *supra* note 30, at 117, 127; Eckert, *supra* note 17, at 434; Kitch et al., *supra* note 17, at 325, 347-48. There is evidence suggesting that taxis help to keep down car ownership in New York City. "A 2007 survey of yellow taxi passengers revealed that 66% of riders believed that taxis helped them live without a car." CITY OF N.Y., PLANYC UPDATE APRIL 2011: A GREENER, GREATER NEW YORK 93 (2011), available at [http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc\\_2011\\_planyc\\_full\\_report.pdf](http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_2011_planyc_full_report.pdf).

137. If the City adds 2,000 medallions as currently proposed, it will be putting additional taxis on City streets notwithstanding predictions that the additional number of cabs will increase taxi use at the expense of other modes of travel such as mass transit. The recent environmental impact analysis commissioned by the City of adding 2,000 medallions predicts an increase in taxi usage due to the reduction in average waiting times from adding more taxis. HENNINGSON DRAFT EIS, *supra* note 2, at 4-29; see also *id.* App. B: Technical Memorandum on Socioeconomic Impacts of 2,000 Additional Medallions, at 28-35.

138. Except for a period between 1940 and 1953 when mass transit was controlled by New York City through the Board of Transportation, New York State always has had a hand in the regulation and operation of mass transit in the City. VINCENT J. CANNATO, *THE UNGOVERNABLE CITY: JOHN LINDSAY AND HIS STRUGGLE TO SAVE NEW YORK* 99, 106-07, 196, 535 (2001); see generally CLIFTON HOOD, *722 MILES: THE BUILDING OF THE SUBWAYS AND HOW THEY TRANSFORMED NEW YORK* (1993).

and that there is insurance in case of an accident, but it is costly for the consumer to verify this information.<sup>139</sup> The consumer also may be poorly positioned relative to the driver to negotiate a fare, because the driver, given his occupation, likely will have superior information about what constitutes a reasonable fare.<sup>140</sup> New York has had at least rudimentary fare and vehicular regulation for taxis for decades, since before entry was limited in 1937.<sup>141</sup>

Limited entry may reduce the costs of enforcing health, safety and fare regulations in two ways. First, limiting the number of taxis may make it easier for regulators because it lowers the number of vehicles and drivers that must be monitored.<sup>142</sup> The idea that enforcement costs are lower if the number of taxis is limited echoes the explanation of private property as a mechanism for lowering policing costs.

Second, reminiscent of de Soto's argument that property promotes accountability by giving owners something to lose, medallions may lower

139. FRANKENA & PAULTER, *supra* note 30, at 56-57; OFFICE OF FAIR TRADING, *supra* note 121, at 45; Kopp, *supra* note 121, at 158; Liston-Heyes & Heyes, *supra* note 30, at 101; Rogoff, *supra* note 37, at 72-73, 77-79. In contrast, taxis usually have been regulated by the City with minimal state involvement.

140. There are different types of fare regulation and various rationales for fare regulation. *See, e.g.,* FRANKENA & PAULTER, *supra* note 30, at 46-52, 57-63; Edward C. Gallick & David E. Sisk, *A Reconsideration of Taxi Regulation*, 3 J. L., ECON. & ORG. 117, 117-18 (1987); Gwilliam, *supra* note 30, at 2-3; OECD, *supra* note 5, at 20-21; Williams, *supra* note 121, at 106.

The case for regulating the amount of fares would seem to be particularly strong in the walk-up market. OFFICE OF FAIR TRADING, *supra* note 121, at 60, 64-65; Gwilliam, *supra* note 30, at 2, 5; Kopp, *supra* note 121, at 156; Liston-Heyes & Heyes, *supra* note 30, at 98-99; Shreiber, *supra* note 121, at 271-74. However, it is possible that new technology may be undermining the case for regulating the amount of fares even in the walk-up market. For example, fare regulation might not be necessary if a consumer seeking to hail a cab on the street could use a smartphone to contact a central dispatch service that would identify the cheapest available taxi closest to the consumer, and direct the taxi to the consumer. Christian Seibert, *Taxi Deregulation and Transaction Costs*, 26 ECON. AFF. 71 (2006). *See also* Harris, *supra* note 121, at 204-05, 207 (rejecting price regulation, even for street hail pickups).

There is a weaker argument for regulating the amount of fares in the prearranged market because consumers can more easily price shop when they are calling a cab or booking on the Internet than when they are picking up a cab on the street. OFFICE OF FAIR TRADING, *supra* note 121, at 60, 65; Coffman, *supra* note 121, at 290; Gwilliam, *supra* note 30, at 2; Kitch et al., *supra* note 17, at 308-09; Schaller, *supra* note 34 at 492.

141. New York established maximum fares as early as 1909, and had uniform fares by 1934. Rogoff, *supra* note 37, at 58; Rogoff, *supra* note 121, at 1, 2, 18; Rogoff, *supra* note 67, at 471. Enforcement of early fare regulations apparently "was lax." Heather Haddon, *Can You Hack It? History of the New York City Taxi Driver*, N.Y. POST (Jan. 2, 2011, 10:15 AM), [http://www.nypost.com/p/news/opinion/opedcolumnists/can\\_you\\_hack\\_taxi\\_history\\_driver\\_nBUq1rv26mNPnYmwJKu45J](http://www.nypost.com/p/news/opinion/opedcolumnists/can_you_hack_taxi_history_driver_nBUq1rv26mNPnYmwJKu45J). City ordinances required that cabs be licensed as early as 1909 and by 1913 that cabs conform to certain specifications. N.Y.C., N.Y., ORDINANCES ch. 14, art. 8 (as amended to the close of the year 1931); Rogoff, *supra* note 121, at 1 (noting that 1909 "ordinances called for the Bureau of Licenses to inspect meters and to license taxicabs").

142. FRANKENA & PAULTER, *supra* note 30, at 65 (implying that restricting the number of taxi firms would reduce enforcement costs); Eckert, *supra* note 17, at 441-53 (arguing that monopoly franchise rights for taxi services developed in Los Angeles because monopoly makes it easier for regulators to regulate the taxi industry and serve franchisee's interests but emphasizing that there is no economic justification for monopoly rights); Lee, *supra* note 121, at 9 (referring to, but not endorsing, the argument for limited entry that "[r]egulators might . . . have a more manageable workload when they implement quality regulations for taxicabs across a smaller market.").

enforcement costs by acting as a bond that promotes compliance with regulations. Medallions might provide their owners with a strong incentive to ensure that their cabs comply with government regulations because the owners could have their medallions suspended or even revoked as a penalty for non-compliance.<sup>143</sup> As an economic analysis prepared for New York medallion lenders recently explained: “Valuable medallions provide an economic mechanism for strong enforcement of regulations. A medallion owner will not simply walk away from his medallion if faced by fines or other sanctions because he would be losing a highly valuable asset if he were to do so.”<sup>144</sup>

As a normative matter, it is doubtful that lowering the costs of enforcing other regulations justifies limiting the number of taxicabs. To justify limiting entry to reduce enforcement costs, the savings generated by lower enforcement costs would have to exceed the costs of limiting entry, such as poorer service and higher fares.<sup>145</sup> There also are alternatives to limited entry that could reduce the costs of enforcing health, safety and fare regulations. For example, regulators could require taxi vehicle owners and drivers to be associated with organizations of vehicle drivers and owners, and these associations could be penalized if their members fail to comply with health, safety or fare regulations. In other words, these regulations might be enforced to some extent through a form of collective sanction.<sup>146</sup>

Regardless of whether medallions can be justified as lowering enforcement costs, it is difficult to attribute their durability to any savings

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143. Gallick & Sisk, *supra* note 140, at 127 (arguing that medallions may effectively enforce average pricing rules, and indicating that “[t]he medallion system is very similar to bonding” with the difference that the medallion generates “an increased average fare” rather than interest); *see also* FRANKENA & PAULTER, *supra* note 30, at 63-64 (stating but rejecting the argument that medallions might be justified because they may lower enforcement costs); Lee, *supra* note 121, at 9 (stating, but not endorsing, the argument that medallions might lower enforcement costs by providing firms with an incentive to comply “to avoid losing their medallion[s]”); Liston-Heyes & Heyes, *supra* note 30, at 103-04 (referring to the argument that medallions act as a “*de facto* bond” promoting regulatory compliance but also referring to sources rejecting the argument).

144. MILLER, *supra* note 33, at 3; *see also* Golden v. Winjohn Taxi Corp., 311 F.3d 513, 518-20 (2d Cir. 2002) (discussing liability of medallion owners for compliance with regulatory requirements); MILLER, *supra* note 33 at 4 n.7 (“The medallion owner is often not the actual driver of the taxi . . . . However, the owner of the taxi is responsible for many fines, including some (such as improper use of the cab) that may be the fault of the driver. Thus medallion owners have strong incentives to guarantee that drivers abide by the rules.”). The economic analysis quoted above was prepared by Ron Miller, a vice president at NERA Economic Consulting, at the request of the Taxicab Service Association to assess the implications of the Street Hail Livery Law. The Taxicab Service Association “is an association of credit union lenders, which finance New York City taxi medallion purchases by individuals, small businesses and other corporate entities.” *Compl. at 6*, Taxicab Serv. Ass’n v. New York, No. 102553 (N.Y. Sup. Ct. Apr. 27, 2012).

145. FRANKENA & PAULTER, *supra* note 30, at 64.

146. In New Zealand, where entry is deregulated, taxi drivers must belong to an association. Drivers and the associations receive demerit points when regulations are breached. The requirement to belong to an association facilitates enforcement, albeit at the cost of somewhat restricting entry. OFFICE OF FAIR TRADING ANNEXE J, *supra* note 121, at 59-60. On collective sanctions, see Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003). On other alternatives to limited entry that would reduce enforcement costs, see FRANKENA & PAULTER, *supra* note 30, at 64-65.

medallions may generate in enforcement costs. The TLC does not publish the number of revocations or suspensions of medallions.<sup>147</sup> However through a Freedom of Information Law request, I obtained data from the TLC about the number of medallion revocations and suspensions. The data indicate that medallions are very rarely revoked, although suspensions are more common.<sup>148</sup> The data about revocations is especially relevant because revocation entails the permanent loss of the medallion, while suspension is only temporary.

The rarity of revocations reduces the likelihood that medallions promote compliance. If there is little probability of revocation then there is little reason to comply to avoid losing a medallion. Further undermining the idea that medallions might be inducing compliance is that when the TLC revokes a medallion, it allows the owner to sell the medallion and retain the proceeds from the sale.<sup>149</sup> The TLC's practice of allowing divestiture softens the

147. Telephone Interview with Greg Gordon, External Affairs Analyst, NYC Taxi & Limousine Comm'n (Aug. 1, 2012).

148. I requested information going back as far as TLC records permit on the number of medallion revocations and suspensions. E-mail from author to Jason Gonzalez, Assistant Gen. Counsel, NYC Taxi & Limousine Comm'n (Aug. 1, 2012) (on file with author). The TLC provided data indicating that medallions were revoked only 23 times between 1998 and September 2012. E-mail from Jason Gonzalez, Assistant Gen. Counsel, NYC Taxi & Limousine Comm'n, to author (Sept. 25, 2012) (on file with author). The TLC data indicates that there were 45,115 medallion suspensions between 1995 and October 2012. E-mail from Jason Gonzalez, Assistant Gen. Counsel, NYC Taxi & Limousine Comm'n, to author (Oct. 5, 2012) (on file with author).

Other information suggests that revocations also were rare before 1998. For example in 1987 the *New York Times* reported that "for the first time in its 16-year history, the commission recently had 'revoked' two medallions." Richard Levine, *New York Cabbies Win Right to Ban Passenger Smoking*, N.Y. TIMES, Aug. 20, 1987 at B1. Then-TLC Chair Gorman Gilbert is quoted in the article as stating, in reference to revoking medallions, "If we've done it before I don't know about it." *Id.* A 1981 issues paper suggests that the TLC may have revoked medallions before 1987 but that revocations were extremely rare. MAYOR'S COMMITTEE ON TAXI REGULATORY ISSUES, *supra* note 37, at 84 (noting that "[w]hile the TLC appears in recent years to have been considerably more vigorous in suspending and revoking medallions for violations, the violator has generally been permitted to sell his medallion when exiting the business.>").

149. For discussion of the TLC's approach to revocations, for example, Oxenhandler, *supra* note 85, at 155 n.191 (when New York City "revokes a taxicab license, the owner must divest himself of any interest in the license; however, the City never regains possession of the license" (citing *Boiadjian v. N.Y.C. Taxi & Limousine Comm'n*, 663 N.Y.S. 2d 176 (N.Y. App. Div. 1997); *King Victor Taxi Corp. v. N.Y.C. Taxi & Limousine Comm'n*, 654 N.Y.S. 2d 358 (N.Y. App. Div. 1997); *Mystic Cab Corp. v. N.Y.C. Taxi & Limousine Comm'n*, 663 N.Y.S. 2d 539 (N.Y. App. Div. 1997))); *John v. N.Y.C. Taxi & Limousine Comm'n*, 1995 WL 470341, at \*1 (S.D.N.Y. Aug. 9, 1995) (noting that after the TLC revoked a medallion, it rescinded revocation after learning secured creditors foreclosed on the medallion and allowed creditors to sell medallion to pay the owner's debts); and Levine, *supra* note 148 (reporting that the revocation of the first two medallions revoked by the TLC "was delayed for 60 days . . . to allow" the lender that financed their purchase "to sell them and recover its investment"). The TLC also may impose a fine when it revokes a medallion. *See, e.g., Taxi & Limousine Comm'n v. Virtual Cab Corp.*, OATH Index No. 1280/09 (Jan. 13, 2009); Letter from Matthew W. Daus, Comm'r/Chair, to Virtual Cab Corp. (March 13, 2009) (on file with author) (noting that two medallions were revoked with a \$1,000 fine imposed for failure to satisfy inspection requirements).

It is not clear why the TLC allows divestiture when it revokes a medallion. A 1986 memorandum from TLC chairman Gorman Gilbert to Mayor Edward Koch suggests that at least at that time the TLC may have ordered divestiture because it was uncertain that it had the legal authority to "revoke a medallion without allowing an owner to sell it." Memorandum from Gorman Gilbert, Chairman, New York City Taxi & Limousine Comm'n, to Honorable Edward I. Koch, Mayor I (Sept. 15, 1986) (on file

financial consequences of revocation, and to the extent that it is known among medallion owners, reduces the threat that revocation entails.<sup>150</sup>

## V. Political Economy Hypothesis for Taxicab Licenses

Part IV demonstrates that it is difficult to explain New York taxi medallions in Demsetzian terms as a public interested measure to regulate externalities or lower monitoring costs. This Part offers a political economy hypothesis for New York's medallions, a demand-side explanation that attributes medallions to pressures from the taxi industry and the interests that service it.

### A. A Demand-Side Hypothesis

#### 1. Stakes

The starting point for the political economy hypothesis for the persistence of medallions is the identity of those who win and lose under a medallion system, and the relative stakes of these two groups in preserving and eliminating medallions.

The most obvious beneficiaries of the persistence of medallions are medallion owners. The best positioned among them are owners who trace their ownership to the early years of the medallion system.<sup>151</sup> New York newspapers periodically carry stories about large fleet owners whose families have owned medallions since the late 1930s and 1940s.<sup>152</sup> These longstanding owners

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with author). Koch had written to Gilbert urging him to investigate whether the TLC could revoke "a medallion upon a finding that its holder has defrauded the city of income taxes which should have been paid on revenues from the cab." Memorandum from Edward I. Koch, The City of New York, Office of the Mayor, to Gorman Gilbert (Aug. 28, 1986) (on file with author). Gilbert indicated that the question of whether the TLC can "revoke a medallion without allowing an owner to sell it . . . does not have a clear legal answer." Memorandum from Gorman Gilbert, *supra*, at 1. The TLC currently has the legal authority to re-issue a medallion that it has revoked if the medallion owner has "not sold" the medallion before revocation occurs. 35 R.C.N.Y. § 65-14(a) (West 2012).

150. "Softens" is used advisedly because allowing the owner to divest the medallion and retain the surplus proceeds does not mean that revocation imposes no costs on the medallion owner. For example, medallion owners forced to divest would lose any unpriced future appreciation in the value of medallions. In addition, the owners of independent medallions who drive their medallions would lose their ability to drive a taxi as independent businesspeople.

151. See generally Lee, *supra* note 121, at 5 ("Those who receive medallions in the initial round of distribution are the greatest beneficiaries. Any gains in the value of the medallions, as may arise from an increase in demand due to market growth, accrue almost exclusively to the first owners.").

152. Corey Kilgannon, *Want a Cab? He Owns the Keys*, N.Y. TIMES, Mar. 23, 2012 (reporting that a fleet owned by Stanley Wissak includes 140 medallion cabs; Mr. Wissak's father's purchased "his first medallions in 1938"); Bill Sanderson, *Tycoon's Color of Money: Yellow*, N.Y. POST, May 18, 1998 (Midtown Operating Corp. runs a "215-car fleet" with 169 of the 215 medallions owned by Sherman. Sherman's "family got into the taxi business in the 1940s when Sherman's grandfather . . . and some friends invested in some medallions and a garage in Queens."); Jeremy Smerd, *All Hail King Cab!*, CRAIN'S N.Y. BUSINESS (June 17, 2012, 5:59 AM), <http://www.crainsnewyork.com/article/20120617/TRANSPORTATION/306179971> (noting that Ron Sherman owns "nearly 200 taxi medallions" and



benefit from the fact that they acquired medallions cheaply, especially compared to owners who entered the industry by buying medallions recently through the City's auctions or the secondary market.<sup>153</sup>

Limited entry makes taxi operations more profitable than they would be in an open market because restricting the supply of taxis increases taxis' "live-time," or the proportion of the driver's shift that is spent with a paying passenger in the car.<sup>154</sup> In addition, limited entry may increase profitability because regulated fares may be higher than they would be under unlimited entry. Where entry is limited, regulatory decisions about fare levels may take into account the costs that portions of the taxi industry incur to comply with the requirement to have a medallion to operate a taxi, such as the costs of buying and leasing medallions.<sup>155</sup> Medallion values reflect "the capitalized value of the expected future profit flows associated with protection from free market entry."<sup>156</sup> On an ongoing basis medallion owners likely extract many of the rents that limited entry creates through the leasing fees that owners charge taxi drivers.<sup>157</sup> Owners also are able to borrow against, sell, and bequeath their medallions.

In addition to the medallion owners, other key beneficiaries of the medallion system are industries that service medallion owners, such as the agents that arrange medallion leases, the brokers that arrange medallion sales, and the lenders that finance medallion purchases.<sup>158</sup> According to one source,

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"[h]is grandfather, with some high-school friends, bought six medallions in the 1940s". See also Tim Gray, *Investing: A Lender Hopes to Profit from the New Taxi Math*, N.Y. TIMES, Jan. 25, 2004, at 38 (profiling Andrew Murstein, President of Medallion Financial, "which traces its roots to taxis his immigrant grandfather bought nearly 70 years ago"); Michael Powell, *Their Meters Keep Running, but the Fares Barely Make Ends Meet*, N.Y. TIMES, July 9, 2012 ("A few families have owned thousands of cabs since the Great Depression, or shortly thereafter.").

153. MAYOR'S TAXI STUDY PANEL, RECOMMENDATIONS TO JOHN V. LINDSAY, MAYOR OF THE CITY OF NEW YORK 11 (Dec. 1966) [hereinafter MAYOR'S TAXI STUDY PANEL] ("Until 1952, a license cost \$10, plus \$10 annually for renewal."). For the idea that there are three categories of medallion owners, see Am. Compl., *Metro Taxicab Bd. of Trade v. Bloomberg*, *supra* note 64, at 12 ("Purchasers of taxicab medallions include individuals and businesses that have owned their medallions for a considerable period of time, others who purchased their medallions from existing owners at a fair price as determined by the parties, and more than 1,000 owners who have purchased their medallions directly from the City of New York since 1996.").

154. See Rogoff, *supra* note 121, at 6 (defining "live time").

155. See *infra* notes 178-179 and accompanying text (discussing the possible implications of limited entry for regulated fare levels).

156. Gwilliam, *supra* note 30, at 3.

157. See *supra* note 33. Recall that perhaps over eighty percent of taxis are operating with leased medallions. See *supra* note 33 and accompanying text. Independent medallions acquired since 1990 must be driven by their owners a minimum number of shifts a year but even independent medallions may be leased. See also MILLER, *supra* note 33, at 4 n.7 ("The medallion owner is often not the actual driver of the taxi—even for individually owned medallions, many shifts are generally driven by other drivers.").

158. See also Horwitz & Cumming, *supra* note 16 (describing how medallion systems create "a powerful investor class, medallion owners and financiers").

We also might think of regulators as beneficiaries since limiting entry probably makes it easier for them to deal with the taxi industry, and may provide subsequent private sector career opportunities as lobbyists. Eckert, *supra* note 17; Dana Rubinstein, *Cuomo's Summit on Bloomberg's Taxi Bill Yields*

“[m]any and probably most medallions are financed with credit.”<sup>159</sup> Lending against medallions is a big business and “[a]t present, the medallion lending industry services approximately \$5.2 billion in medallion-purchase loans.”<sup>160</sup> There is a Nasdaq-listed firm, Medallion Financial, that specializes in financing the purchase of medallions in New York and other cities.<sup>161</sup> Reputedly “the largest taxi lender,”<sup>162</sup> Medallion Financial “says it has \$1 billion in assets.”<sup>163</sup> Other lenders include credit unions, four of which currently “hold more than \$2 billion” in medallion-purchase loans.<sup>164</sup>

Taxi drivers benefit from the medallion system to the extent that they are able to share with the owners the rents that limited entry creates.<sup>165</sup> From the mid-1960s until the late 1970s or the early 1980s, New York taxi drivers were unionized.<sup>166</sup> The union seems to have supported limited entry, which likely

*the Promise of Maybe More Talks, At Least*, CAPITAL (Nov. 4, 2011, 5:50 PM), <http://www.capitalnewyork.com/article/politics/2011/11/4019245/cuomos-summit-bloombergs-taxi-bill-yields-promise-maybe-more-talks-> (noting that former TLC chairs represent a bank that finances medallion purchases and medallion owners).

In addition, mass transit operators might be considered beneficiaries since controlling the supply of taxis may increase demand for mass transit. Indeed, mass transit operators lobbied for limits on the number of taxis in a number of cities in the early twentieth century. Kitch et al., *supra* note 17, at 316-18; AMERICAN ELECTRIC RAILWAY ASSOCIATION, A.E.R.A. BULLETIN NO. 389: A NATION-WIDE SURVEY OF TAXICAB REGULATION 2-3 (Apr. 1, 1932) (on file with author). But mass transit authorities probably are not major winners from limits on the number of taxis today. As mentioned above, taxis complement as well as compete with mass transit. Moreover, limits on the number of taxis may increase the numbers of private cars, mass transit’s main competitor. *See supra* notes 134-136 and accompanying text.

159. MILLER, *supra* note 33, at 12. *See also* Am. Compl., *supra* note 64, at 29 (“[T]he majority of medallion owners have outstanding loans.”).

160. Aff. of Richard Kay in Supp. of Pls.’ Appl. by Order to Show Cause for TRO and Prelim. Inj. at 2, *Taxicab Serv. Ass’n v. New York*, No. 102553 (N.Y. Sup. Ct. May 16, 2012) [hereinafter *Kay Affidavit*] (on file with author).

161. *For Investors*, MEDALLION FINANCIAL GROUP, <http://www.medallionfinancial.com/investors.htm> (“The common stock of Medallion Financial Corp. began publicly trading on the NASDAQ National Market on May 23, 1996 under the symbol TAXI.”) (last visited Nov. 23, 2012); Form 10-Q for Medallion Financial Corp (Nov. 7, 2012), <http://biz.yahoo.com/e/121107/taxi10-q.html> (referring to medallion loans in New York, Chicago, Newark, Boston, and Cambridge) (last visited Nov. 23, 2012).

162. Andrew Grossman, *Medallion Owners Fear Speed Bump*, WALL ST. J., Jan. 20, 2011, at A19.

163. Michael M. Grynbaum, *On Taxi Measure, Father’s Industry Role May Create a Conflict for Cuomo*, N.Y. TIMES, June 23, 2011, at A22. *See also* Form 10-Q, *supra* note 161 (identifying total assets under management).

164. *Kay Affidavit*, *supra* note 160, at 2. The four credit unions are Lomto FCU, Melrose Credit Union, Montauk Credit Union, and Progressive Credit Union.

165. Before the recent fare increase, the TLC estimated that taxi drivers were earning \$30,000 to \$40,000 annually. E-mail from Greg Gordon, External Affairs Analyst, NYC Taxi & Limousine Comm’n, to author (Aug. 2, 2012) (on file with author).

166. Damon Stetson, *Taxi Union Wins Vote in 28 Fleets*, N.Y. TIMES, Dec. 22, 1965, at 32; Damon Stetson, *Union of Cabbies Backed By Mayor*, N.Y. TIMES, Sept. 15, 1964, at 27. The union represented not only the drivers working for fleet owners, but also “2,100 of the city’s 2,900 independent owner-drivers.” Emanuel Perlmutter, *Owners Call 15c Increase in Taxi Fares Insufficient*, N.Y. TIMES, Jan. 1, 1968, at 1. It helped the independents organize after the union organized the fleet drivers. *Cab Union Formed By Independents*, N.Y. TIMES, Jan. 17, 1967, at 20. The union negotiated collective agreements with the Metropolitan Taxicab Board of Trade. By the mid-1980s, the union was

enabled the union to extract higher wages and benefits from the fleet owners than the drivers would have obtained on the free market.<sup>167</sup> Today, in the absence of a union, the main organization representing drivers is the New York Taxi Workers Alliance (NYTWA).<sup>168</sup> The main mechanism through which the NYTWA and drivers can ensure they obtain a share of the rents created by limited entry is through the caps on leasing fees that the TLC sets that limit the amounts that medallion owners can charge for leasing medallions.<sup>169</sup> The lease caps function like a mini-collective agreement, allocating the rents of limited entry between medallion owners and taxi drivers who lease medallions, especially when as now the lease caps are “binding” and determine leasing fees.<sup>170</sup> Recently, the NYTWA scored a significant victory when the TLC voted to increase taxi fares and to allocate the fare increase largely to drivers, by granting the medallion owners only a tiny increase in the lease cap.<sup>171</sup> Drivers have not done as well in past fare increases, which have been accompanied by increases in the lease caps benefitting medallion owners.<sup>172</sup>

Consumers bear significant costs from limited entry.<sup>173</sup> New York has many of the problems with taxi service that commonly afflict cities that limit

no longer a force in the industry although it continued to collect dues from fleet drivers until 1998. HODGES, *supra* note 37, at 137-40, 148; MATHEW, *supra* note 33, at 25, 207 n.2.

167. The union and the fleet owners opposed Mayor John Lindsay’s proposals in the late 1960s and early 1970s to increase the number of medallions by re-issuing medallions that the Police Department held in reserve. *Cab Union Formed By Independents*, *supra* note 166; Peter Millones, *Finding a Cab Is Still Hard*, N.Y. TIMES, Nov. 10, 1967, at 49; Rogoff, *supra* note 37, at 172. They also defended the medallion monopoly against threats from the “gypsy cabs.” *Gypsy Cabs: Why the Men Who Drive Yellows Are Seeing Red*, N.Y. TIMES, Sept. 5, 1971, at E4; Maurice Carroll, *Union Leaders, at City Hall, Oppose a Taxi Agency*, N.Y. TIMES, Jan. 8, 1971, at 1; Frank J. Prial, *Van Arsdale Fights Licensing of Gypsy Cabs*, N.Y. TIMES, Feb. 1, 1972, at 74.

168. MATHEW, *supra* note 33 (discussing the history of the NYTWA). “Technically an association of independent contractors,” the NYTWA recently “was recognized by the AFL-CIO.” Editorial, *Hailing a Monopoly*, N.Y. POST (May 29, 2012, 12:24 AM), [http://www.nypost.com/p/news/opinion/editorials/hailing\\_monopoly\\_ddrwYy5WJbWHepLe0ShoPI](http://www.nypost.com/p/news/opinion/editorials/hailing_monopoly_ddrwYy5WJbWHepLe0ShoPI).

169. New York Taxi Workers Alliance, *supra* note 33.

170. MILLER, *supra* note 33, at 5. See also *supra* note 33 (discussing lease caps).

171. Matt Flegenheimer & Michael M. Grynbaum, *Taxi Commission Approves 17% Fare Increase*, N.Y. TIMES, July 13, 2012, at A16; Dana Rubinstein, *New York Taxi Drivers Win Big, Finally, With a Fare Hike and Limits on Agent Fees*, CAPITAL (June 12, 2012, 1:50 PM), <http://www.capitalnewyork.com/article/politics/2012/07/6185736/new-york-taxi-drivers-win-big-finally-fare-hike-and-limits-agent-fe>.

172. Horwitz & Cumming, *supra* note 16. The Metropolitan Taxicab Board of Trade, the trade organization representing most of the taxi fleets, criticized the proposal to allocate most of the recent fare increase to taxi drivers as “retaliating against the taxi leasing companies’ for their legal challenges to the [Street Hail Livery Law].” Matt Flegenheimer, *Taxi Commission to Vote on 17% Increase in Fares*, N.Y. TIMES, July 9, 2012, <http://www.nytimes.com/2012/07/10/nyregion/nyc-taxi-panel-to-vote-on-17-rise-in-fares.html>

173. Another group that pays the costs of limited entry are persons who might be taxi drivers but for the limited number of taxis allowed on New York streets. See, e.g., Lee, *supra* note 121, at 6. On the barriers to employment that limited entry creates, see, for example, FRANKENA & PAULTER, *supra* note 30, at 104; and Harris, *supra* note 121, at 213. Since taxi drivers in many U.S. urban areas, including New York City, often are immigrants, the employment burden of limiting entry may disproportionately harm immigrants. HODGES, *supra* note 37, at 12, 15-16, 30, 158-61; SCHALLER CONSULTING, *supra* note 3, at 53. While opening entry by eliminating medallion requirements may

the number of taxis.<sup>174</sup> There have been complaints for decades that the number of taxis is insufficient to meet consumer demand for taxi service.<sup>175</sup> Yellow taxis concentrate in the dense Manhattan core, leaving most of the other four boroughs and upper Manhattan without legal street hail service and giving rise to illegal street hail pickups by for-hire vehicles.<sup>176</sup> Even within the Manhattan core it is difficult to get a cab in the afternoon rush hour when taxi drivers change shifts.<sup>177</sup> There also are reasons for thinking that taxi fares in the City are higher than they would be without medallions.<sup>178</sup> The regulated fare set by the TLC probably implicitly reflects the high cost of leasing and buying medallions because the TLC considers industry costs in setting fares.<sup>179</sup>

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increase opportunities to work as a taxi driver, driver incomes might fall under open entry if taxi drivers were sharing in the monopoly rents under limited entry. The extent to which taxi drivers share in the monopoly rents in New York is unclear, given the fees many pay to lease medallions. FRANKENA & PAULTER, *supra* note 30, at 104; OECD, *supra* note 5, at 8; OFFICE OF FAIR TRADING ANNEX J, *supra* note 121, at 63-64. On leasing fees in New York, see *supra* note 33.

174. On the impact of limiting entry on service, see Barrett, *Regulatory Capture*, *supra* note 121; OECD, *supra* note 5, at 8; OFFICE OF FAIR TRADING, *supra* note 121, at 4-5, 24, 26-33; and Schaller, *supra* note 34, at 500-01.

175. See, e.g., HENNINGSON DRAFT EIS, *supra* note 2, at 4-12; MAYOR'S COMMITTEE ON TAXI REGULATORY ISSUES, *supra* note 37, at 68; MAYOR'S TAXI STUDY PANEL, *supra* note 153, at 11-12. In theory, regulators could reduce demand by increasing taxi fares.

176. Yassky Affidavit, *supra* note 46, at 4.

177. The *New York Times* periodically reports on the difficulty of getting a cab around 4:00 or 5:00PM due to driver shift changes, a phenomenon that also was discussed in a 1966 report for Mayor Lindsay. Michael M. Grynbaum, *Where Do All the Cabs Go in the Late Afternoon?*, N.Y. TIMES, Jan. 11, 2011; Randy Kennedy, *As Workers Go Off Duty, So Do Cabbies. How Odd*, N.Y. TIMES, Feb. 23, 2000; MAYOR'S TAXI STUDY PANEL, *supra* note 153, at 29-30.

178. See Lee, *supra* note 121, at 7 ("Studies comparing taxicab fares in limited entry and free entry or deregulated taxi markets conclude that effective control of entry is likely to increase the fares. The fares in limited markets were up to 25 percent above free market rates because of restricted entry and price controls."). However, it is worth noting that the simultaneous removal of the medallion requirement and the deregulation of taxi fares might not produce lower fares. Several U.S. cities that deregulated fares and entry in the late 1970s and early 1980s experienced higher taxi fares and greater numbers of taxis. Teal & Berglund, *supra* note 121, at 42; PRICEWATERHOUSE, *supra* note 30, at 1, 8. Fares may have increased because the pre-deregulation regulated fares were too low relative to the free market equilibrium. OFFICE OF FAIR TRADING ANNEKE J, *supra* note 121, at 102; OECD, *supra* note 5, at 8-9. Information problems, such as the information asymmetry between drivers and consumers about what constitutes a reasonable fare, also may have contributed to the increase in fares. Kopp, *supra* note 121, at 161; OECD, *supra* note 5, at 43-45. Apart from their impact on fares, medallion requirements may harm consumers by increasing inflation. Tamer Çetin & Kadir Yasin Eryigit, *Estimating the Effects of Entry Regulation in the Istanbul Taxicab Market*, 45 TRANSP. RES. Part A 476 (2011).

179. See OECD, *supra* note 5, at 33 & n.17 (arguing generically, without referring to New York, that the costs of buying or leasing medallions "inevitably result in higher prices for taxi services" because the "price is invariably regulated and is, in essence, set by reference to average costs in most cases").

The public discussion surrounding the TLC's recent decision to increase New York taxi fares provides evidence for the proposition that the regulated fare is influenced by the costs of medallion requirements. It is clear from this discussion that the taxi fare is set at least partially in reference to industry costs. The principal argument that the TLC Chair gave for increasing taxi fares was the need to boost the incomes of taxi drivers, which the TLC staff emphasized had fallen since the last fare increase in 2006 due to higher expenses for gas, credit card processing fees, and "other cost increases." *Hearing on Fare and Lease Cap and an Opportunity to Comment on Proposed Rules Before the New York City Taxi and Limousine Commission* 29, (July 9, 2012), available at [http://www.nyc.gov/html/tlc/downloads/pdf/transcript\\_07\\_09\\_12.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/transcript_07_09_12.pdf). Although the costs attributable to medallions were not

However, most consumers have much lower stakes in eliminating taxi medallions than license holders have in maintaining them.<sup>180</sup> Reliable data about consumer spending on taxis is not readily available. Based on information about the average number of taxi trips that Manhattan adults take a year and average fares, Manhattan adults may spend on average roughly \$1,034 year on taxis.<sup>181</sup> This perhaps surprisingly high estimate of consumer expenditures on taxis needs to be kept in perspective. Even if consumers are spending this amount on a yearly basis, they probably are unaware of it because they are spending it in small increments over the course of a number of taxi trips. Furthermore, 76 percent of Manhattan—and 54 percent of New York City—households do not have a car and therefore avoid many of the expenditures on cars that families elsewhere incur.<sup>182</sup> Also, many taxi riders are high-income earners, which likely further reduces the significance to them of their spending on taxis.<sup>183</sup>

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mentioned, these are significant for drivers. For example, before the recent fare increase, the New York Taxi Workers Alliance estimated that fees for leasing medallions consume almost 40 percent of a driver's daily gross bookings. New York Taxi Workers Alliance, *supra* note 33.

180. See generally Rogoff, *supra* note 37, at 148 (“The public, on a per capita basis, has a small financial stake in the outcome of the fare increase applications, but their awareness, while often substantial, cannot compare with the groups that participate directly in the industry.”).

181. SCHALLER CONSULTING, *supra* note 3, at 6, 16 (an adult residing in Manhattan hails a cab 100 a times a year on average, and the average fare is \$10.34).

TLC data suggests that New Yorkers who take taxis may spend an average of roughly \$1,925 a year on taxicabs. From January through April 2012, there were 27,859 responses to a TLC survey of taxi riders using the passenger information monitor in the back seat of New York taxis. Of respondents, 38% indicated that they took a cab daily, 12% once or twice a month, 31% once or twice a week, and 19% rarely. The weighted average of the responses indicates that taxi riders take a cab an average of 156 times a year, assuming that daily means once a day, once or twice means once, and rarely means never. The TLC indicates that before the recent fare increase, the average base fare was \$10.63, and the average fare including tip, Metropolitan Transportation Authority tax, and tolls was \$12.34. Since we are seeking an estimate of spending on taxis, which includes tips, taxes and tolls, we multiply the higher average fare (\$12.34) by the average number of rides a year (156), yielding an estimate of \$1,925.04. The estimate is very rough and may overstate annual spending on taxis, even for taxi riders, for example because frequent taxi riders may have been more likely to respond to the TLC survey. Also, the same person could have responded multiple times to the survey. It also should be kept in mind that the estimate is an estimate of annual average spending on taxis by taxi riders, not annual average spending on taxis by New Yorkers in general, because the TLC survey included responses only from taxi riders since it was done in the back seat of taxicabs. Thanks to Greg Gordon, External Affairs Analyst, NYC Taxi & Limousine Comm'n for providing me with the data, explaining the setting for the survey, and emphasizing that the sample is unscientific. Emails from Greg Gordon to author (Aug. 2 & 9, 2012) (on file with author); telephone interview with Greg Gordon (Aug. 1, 2012). Thanks to Michael J. Wyman for the weighted average.

182. HENNINGSON DRAFT EIS, *supra* note 2, at ES-3.

183. *Id.* at 30-31 App.B (in a survey of taxi customers, 50.5% reported household incomes exceeding \$100,000, 22% reported household incomes between \$50,000 and \$100,000, and 27.5% had household incomes under \$50,000).

In cities other than New York, taxi consumers may be more likely to be low income earners or business persons. On the demographics of taxi consumers generally, see GILBERT & SAMUELS, *supra* note 121, at 111-12; FRANKENA & PAULTER, *supra* note 30, at 102-03; Liston-Heyes & Heyes, *supra* note 30, at 104; OECD, *supra* note 5, at 8; and OFFICE OF FAIR TRADING, *supra*, at 121. Research conducted elsewhere on the number of taxi trips that consumers take implies that consumers in places other than New York have even smaller stakes in taxi fares and service. OFFICE OF FAIR TRADING, *supra* note 121, at 12; Teal & Berglund, *supra* note 121, at 50.

There are reasons for thinking that medallions persist partly because consumers have low stakes in reducing taxi fares and improving service, while medallion holders have high stakes in preserving their valuable medallions. The relative insignificance of taxi travel for consumers means that they generally have little incentive to organize to reduce fares or improve service.<sup>184</sup> My review of several decades of coverage of taxi issues in the *New York Times* revealed no reference to anything like an organized interest group of New York taxi riders seeking better service or fighting fare increases.<sup>185</sup>

The relative insignificance of taxis for most consumers implies not only that consumers generally have little incentive to organize on taxi issues, but also that entrepreneurial politicians have little incentive to champion consumer interests in lower fares and improved service. In New York, mayors, not council members, have tended to be the main proponents of improving taxi service, reflecting perhaps their political need to appeal to a broad, city-wide constituency and their greater access to resources and information.<sup>186</sup> However,

184. See generally Liston-Heyes & Heyes, *supra* note 30, at 104 (“Taxi consumers are mainly low-income (with no cars) and business people on paid company accounts. Both these groups are unlikely to lobby for lower fares to municipal authorities.” (nor referring specifically to New York)).

185. On the contrary, there are references to the absence of a consumer group focusing on taxis. *Q&A: Commissioner Gorman Gilbert; Taxi Agency Needs More Than a Tune-Up*, N.Y. TIMES, June 29, 1986, at 424 (reporting that a questioner asked the TLC Chair if he thinks that “a consumers’ advocacy group would help”); Editorial, *They Are Taxis, Not Limos*, N.Y. TIMES, May 26, 2012, at 20 (“Taxi passengers don’t seem to be organized enough to fight these fare increases. A commission hearing next week will almost certainly draw drivers and fleet owners. But nobody expects much noise from the back seat.”).

The closest thing that I have come across to a broad based consumer group taking an interest in taxi regulation is the interest that Citizens Union, a liberal good government group in New York, took in taxi regulation in the 1960s. For example, it expressed concern about a taxi strike in 1965. In 1965 and 1967 it advocated that a commission be created to regulate the taxi industry, which was done in 1971 when the TLC was established. It also objected to a fare increase in 1968. Rogoff, *supra* note 37, at 160, 170-72, 177.

Recently, persons with disabilities have organized to press the case for a yellow taxicab fleet that is more accessible to persons with mobility disabilities, with some success as suggested by provisions of the Street Hail Livery Law. The Law requires that the 2,000 new medallions be for accessible yellow taxis. Twenty percent of HAIL licenses for for-hire vehicles will have to be for accessible vehicles, at least in the first issuance of HAIL licenses. None of the 2,000 medallions can be auctioned until the City makes available the HAIL licenses. The TLC also must develop a disability accessibility plan for taxis and for-hire vehicles that must be approved by the State before the City can auction more than 400 of the 2,000 new medallions. 2012 N.Y. Sess. Laws 9, §§ 5(b), 8, 10 (McKinney).

Persons with disabilities have relatively larger stakes in improving the accessibility of the yellow taxicabs, only 1.8 percent of which currently are accessible, than consumers in general have in better service and lower fares. *Noel v. N.Y.C. Taxi & Limousine Comm’n*, 837 F. Supp. 2d 268, (S.D.N.Y. 2011), *rev’d*, 687 F.3d 63 (2d Cir. 2012). The transportation options of persons with mobility disabilities are more limited than the options of consumers generally due to the inaccessibility of most of the City’s subway system, cutbacks in bus routes, and difficulties with using other forms of transport. *Class Action Compl. For Discrimination Injunctive and Declaratory Relief* at 11, *Noel v. N.Y.C. Taxi & Limousine Comm’n*, 837 F. Supp. 2d 268 (S.D.N.Y. 2011), *rev’d*, 687 F.3d 63 (2d Cir. 2012) (“Medallion taxis are particularly important for wheelchair-users because these residents and visitors have the most limited access to other transportation options such as the subway, private automobiles and bus systems.”).

186. For example, the Taxi and Limousine Commission was created in 1971 at the insistence of Mayor Lindsay. Edward C. Burks, *Mayor Prods Councilmen to Form Taxi Commission*, N.Y. TIMES, Jan. 4, 1971, at 1; Maurice Carroll, *Taxi-Bill Vote Due Tomorrow Despite Uncertainty in Council*, N.Y.

except in a few instances, mayors have not seemed willing to devote much political capital to improving taxi service. Perhaps New York mayors have intuited that most voters have only limited interest given the relatively insignificant share of consumer budgets spent on taxis. Mayoral incentives to reform the medallion system also may be muted by the financial benefits that city government now derives from the existence of valuable medallions. Since 1980 the City has collected a transfer tax on the sale of medallions.<sup>187</sup> As mentioned above, the periodic auctions of new medallions since 1996 also have been a source of revenue for the City.<sup>188</sup>

## 2. Organizational Costs

Limited entry likely persists not only because of the high stakes of medallion owners compared to the relatively lower stakes of consumers in their elimination, but also because medallion owners and the interests serving them have lower organizational costs than consumers, for two reasons.

First, license holders can readily identify each other while consumers cannot easily identify each other. License holders are identifiable to each other (and to others) because they each hold a license. Facilitating identification, the TLC currently posts lists of existing medallion holders and licensed agents and brokers on the Internet.<sup>189</sup>

A second reason that license holders likely face lower organizational costs than consumers is that there are many fewer license holders than consumers. Hundreds of thousands, and perhaps millions, of people take taxis each year in New York.<sup>190</sup> Within this large diffuse group there is a subset of taxi consumers that might be expected to take a special interest in taxi service: the roughly 53,600 residents of Manhattan who use taxis to commute to work, and thereby generate perhaps over “10 percent of all taxicab usage.”<sup>191</sup> But even this subset of taxi users is much larger than the total number of medallions (13,237).

TIMES, Jan. 27, 1971; Maurice Carroll, *Veto on Taxi Fare Hinted by Aurelio*, N.Y. TIMES, Jan. 6, 1971, at 1; Peter Millones, *Mayor Signs Bill Raising Cab Fare*, N.Y. TIMES, Jan. 27, 1968, at 1. As discussed below, Mayors Koch, Dinkins, Giuliani and Bloomberg also have advocated changes to taxi regulation.

187. Business and Excise Taxes, *Taxicab License Transfer Tax*, NYC FINANCE, [http://www.nyc.gov/html/dof/html/business/business\\_tax\\_taxicab.shtml](http://www.nyc.gov/html/dof/html/business/business_tax_taxicab.shtml) (last visited Nov. 23, 2012). The tax is five percent of the price paid for the medallion.

188. See *supra* notes 129 and 130 and accompanying text.

189. *Current Licensees*, NYC TAXI & LIMOUSINE COMM’N, [http://www.nyc.gov/html/tlc/html/industry/current\\_licensees.shtml](http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml) (last visited Oct. 9, 2012).

190. HENNINGSON DRAFT EIS, *supra* note 2, at ES-1-5 to 1-6. (“New York City taxis provide approximately 500,000 trips each day.”)

191. DESIGN TRUST FOR PUB. SPACE & NYC TAXI & LIMOUSINE COMM’N, TAXI 07: ROADS FORWARD 79 (2007) (using 2000 Census data). According to the 2008-2010 American Community Survey, 31,027 Manhattanites commute to work by taxi, motorcycle or other means. E-mail from Greg Gordon, External Affairs Analyst, NYC Taxi & Limousine Comm’n, to author (Aug. 2, 2012) (on file with author).

Moreover, the number of medallion owners is smaller than the total number of medallions.

Medallion ownership and control are concentrated to a degree. Perhaps “25 to 30 percent” of medallions are owned by roughly 22 fleets.<sup>192</sup> As a group, the roughly 60 plus licensed leasing agents in the City may control almost fifty percent of medallions, either because they lease out medallions owned by others, because they own medallions outright, or through a combination of lease and ownership arrangements.<sup>193</sup> In 2006, the largest leasing agent controlled over six percent of medallions (812 medallions).<sup>194</sup>

The fleet owners, the leasing agents, and the lenders that finance medallion purchases might be regarded as catalytic subgroups<sup>195</sup> within the population of medallion interests.<sup>196</sup> Catalytic subgroups form within large populations to represent the interests of the population as a whole. The members of the subgroups band together because they have higher stakes than players in the population in general, and consequently are willing to assume the cost of organizing, even if others will not contribute. In New York’s taxi industry, the catalytic subgroups are made up of actors that have large stakes in medallions and the resources to organize because they own large numbers of medallions, or derive substantial income from renting them or financing their purchase.

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192. MATHEW, *supra* note 33, at 93 (as of the mid-1990s). According to another source, taxi fleets control roughly “35 percent of all taxicabs in New York” today. Petition for Writ of Certiorari, *City of N.Y. v. Metro. Taxicab Bd. of Trade*, 2010 WL 4494142, \*15 (No. 10-618). Still another source indicates that “[t]oday, five families have an ownership interest in 17.4% of the medallions owned by corporations, according to city records reviewed by *Crain’s*. And 22 individuals own a third of all corporate medallions.” Smerd, *supra* note 152.

The trade organizations for the fleets are another source of data on the number of fleets and fleet-controlled medallions. The Metropolitan Taxicab Board of Trade indicates that it “is the largest taxi fleet association in the United States with 33 member fleets and approximately 3,500 yellow medallion taxis—approximately half of all corporate medallions.” Am. Compl., *supra* note 64, at 5, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 18, 2012). The Greater New York Taxi Association, another organization representing fleets, indicates that it has “7 member fleets and approximately 1,500 yellow medallion taxis; representing almost twenty percent of all corporate medallions.” Compl. at 7, *Greater N.Y. Taxi Ass’n v. New York*, No. 102783 (N.Y. Sup. Ct. May 24, 2012).

193. MATHEW, *supra* note 33, at 92-93; MANUEL BU, NYC TAXI & LIMOUSINE COMM’N, INDUSTRY PROFILE #3: ROLE OF MEDALLION BROKERS IN THE TAXI INDUSTRY (Jan. 1988); *Current Licensees, Current Medallion Agents—Sorted by Agent Number*, NYC TAXI & LIMOUSINE COMM’N, [http://www.nyc.gov/html/tlc/html/industry/current\\_licensees.shtml](http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml) (last visited Oct. 9, 2012).

194. SCHALLER CONSULTING, *supra* note 3, at 32.

195. The term “catalytic subgroup” is borrowed from Neil Komesar, who uses it to refer to smaller groups within larger groups who have greater stakes than the members of the larger group more generally. KOMESAR, *supra* note 14, at 62-63.

196. See Michael M. Grynbaum, *Legislature Approves Bloomberg Plan To Allow Street Hails of Livery Cabs*, N.Y. TIMES, June 24, 2011 (noting that the Metropolitan Taxicab Board of Trade, the main industry organization representing fleet owners, is “considered the most powerful taxi lobby”).



*B. A Note About the Supply-Side*

My hypothesis for the persistence of taxicab licenses is a demand-side one that focuses on the relative stakes and organizational costs of medallion owners and the interests serving them and consumers. I do not attribute the persistence of New York medallions to the fact that it is a municipal government that is supplying these licenses. There are two reasons why I do not emphasize the supply side.<sup>197</sup>

The first is that public choice theory provides no basis for that line of thought. As a general matter, decision-making costs likely are lower at the local than the state or federal levels. That is because local governments usually are less complex than state and federal governments, as they are less likely to fragment power among many different institutions.<sup>198</sup> Moreover, local decision-making institutions usually have fewer decision-makers than comparable decision-making institutions at the state and national levels. This makes it easier for interested persons to reach out to enough local decision-makers to have an impact, and likely reduces decision-making costs at the local level since fewer individuals have to agree to effect change.

The lower decision-making costs at the local level make it cheaper for both small groups like medallion owners and large groups like taxi consumers to have an impact on policy than if taxis were regulated by the state and/or federal governments. However, the lower decision-making costs at the local level are likely to be particularly beneficial for large groups such as taxi consumers. Recall that the members of large groups are likely to have a harder time raising resources to make their voices heard than the members of smaller groups, because large-group members usually have smaller stakes in policy outcomes than small-group members. Since they have a harder time organizing to start with, large groups such as taxi consumers likely have somewhat better chances of succeeding at the local level, where fewer resources are required to have an impact than at the state and federal levels.<sup>199</sup> Given the relative advantage that public choice theory suggests that large groups enjoy at the local rather than at higher levels, then, there is no theoretical basis for thinking that

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197. In contrast, drawing on international experience, the OECD offers a possible supply-side explanation for the persistence of limited entry, arguing that delegating the authority to regulate the taxi industry to a specialized agency may facilitate regulatory capture. OECD, *supra* note 5, at 29. However, the regulatory landscape in New York does not exactly match the scenario that the OECD has in mind because the City Council plays a role in taxi regulation in New York, directly and indirectly through its role in appointing TLC members.

198. See, e.g., Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 161 (1992) (referring to the rarity of bicameralism at the local level and attributing this to the ability of citizens to exit if they are dissatisfied).

199. Thus some public choice theorists suggest that local governments are vulnerable to capture by majorities, and higher levels of government to capture by small groups. See, e.g., KOMESAR, *supra* note 14, at 70, 75.

medallions have persisted because taxis usually are regulated by local governments.

The supply-side cannot explain the persistence of New York's medallion system for a second reason: the number of taxi licenses is limited in many different cities around the world as a result of many different decision-making processes. If we were to focus solely on the New York experience, we might be tempted to attribute the persistence of limited entry to a defect in the political process at the municipal level given the municipality's dominance of taxi regulation. Furthermore, we might think that the federal government is more open to deregulation than lower levels of government such as New York City because the federal government deregulated important transportation industries such as interstate airlines and trucking in the late 1970s and early 1980s.

However, U.S. experience provides reasons for doubting that limited entry is due to municipal political process malfunctions, or municipal as opposed to federal regulation of taxis. As mentioned above, over twenty U.S. cities actually experimented with deregulating entry and/or fares in the taxi industry in the late 1970s and early 1980s, suggesting that municipalities also are capable of deregulation.<sup>200</sup> Moreover, there is no obvious correlation between the level of jurisdiction regulating and the propensity to deregulate entry in transportation industries in the U.S. in general. Long before the federal government deregulated interstate air travel, intrastate air travel was unregulated by the state of California, at least until 1965.<sup>201</sup> Intrastate trucking was partially or wholly unregulated in some states while interstate trucking was federally regulated.<sup>202</sup>

Experience outside the U.S. provides an additional ground for doubting that political malfunctions at the municipal level help to explain why entry to the taxi business remains regulated. In Europe there is some degree of national involvement in taxi regulation in a number of countries.<sup>203</sup> The European countries that decide at the national level whether entry should be regulated do not follow a consistent approach, with some favoring limited entry and others

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200. See *supra* note 121 (describing the experiments with deregulation and referring to sources analyzing the impact of the deregulatory experiments).

201. Levine, *supra* note 10, at 1431-32 n.63.

202. See, e.g., ROBYN, *supra* note 10, at 22 (discussing economic analyses of unregulated intrastate trucking in New Jersey and unregulated "household-goods moving" in Maryland).

203. A 2007 survey of 13 European countries reported that in ten countries national legislation determines whether entry to the taxi industry should be regulated or not, while in three countries local authorities determine whether entry should be limited. The countries that determine at the national level that entry should be regulated "often delegated" decisions about the number of allowable taxis "to regional or local authorities." Bekken, *supra* note 30, at 40. Fares also are regulated by some European national governments. *Id.* at 45.

Gwilliam implies that the level of government that regulates taxis is correlated with whether the country is a federal or non-federal country. He indicates that "[i]n federal countries, such as the U.S., taxi regulation may be a state prerogative" while "[i]n non-federal countries, taxi regulation is usually the subject of national laws administered at the local, county and municipality levels." Gwilliam, *supra* note 30, at 2.

favoring unlimited entry.<sup>204</sup> The variation in policy choices provides additional evidence that there is no obvious correlation between the level of government responsible for taxi regulation and the decision to limit entry.

## VI. Evidence from New York Taxi History

The best test of any hypothesis is whether it provides an apt description of reality. This Part starts by recounting the history of the creation of New York taxi medallions in 1937. It then attempts to illustrate the extent to which the interest groups created by the introduction of the medallion system—medallion owners and the actors servicing them—are responsible for perpetuating the medallion system by analyzing three episodes in the history of New York taxi regulation and the contemporary reform efforts of Mayor Bloomberg.

In the three historical episodes, as well as in the contemporary reform effort, the medallion monopoly is challenged by street competitors, by political proposals to create a new class of competitors, or by proposals to issue additional medallions. This Part emphasizes that the three historical episodes were resolved consistent with the interests of medallion owners and the actors serving them. To the extent possible, this Part also highlights the role of medallion interests in influencing the resolution of these episodes, and the channels through which medallion interests exerted their influence such as the City Council. The outcome of Mayor Bloomberg's reform effort currently remains unclear as the City is appealing a judicial decision, in a case brought principally by medallion owners and lenders, that has blocked the reforms.<sup>205</sup> Nonetheless, the saga surrounding the reform proposals illustrates the continuing influence of medallion interests and the channels through which it is exercised, which once again seem to include the City Council. Thus in combination, the three historical episodes and the current debate provide evidence for the political economy hypothesis attributing the persistence of medallions to pressures from medallion owners and the interests that service them.<sup>206</sup>

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204. Bekken identifies five European countries where national legislation limits entry into the taxi business, five European countries where national legislation prescribes unlimited entry, and as mentioned above, three where municipalities decide if entry should be limited. Bekken, *supra* note 30, at 40.

205. See *supra* note 55 and accompanying text.

206. I was inspired by Edward Rogoff's work on taxi regulation to provide informal evidence for my hypothesis by examining selected episodes in the history of New York taxi regulation. In his 1980 Ph.D. thesis, he tested the validity of various economic theories of regulation by applying them to 18 episodes in New York City taxi regulation. Rogoff, *supra* note 37. I am interested in a narrower set of episodes than Rogoff, specifically only those in which the medallion monopoly was challenged. Also, I examine episodes from after as well as before 1980.

*A. The Birth of Medallions in 1937*

New York medallions are a creation of a 1937 New York City ordinance.<sup>207</sup> Known as the Haas Act after Alderman Lew Haas who introduced it, the 1937 ordinance capped the number of taxis at the number then licensed to drive on the City's streets.<sup>208</sup> All existing license holders were allowed to retain their taxicab licenses, subject to an annual renewal fee.<sup>209</sup> Henceforth, new taxicab licenses would be issued by the Police Department, which regulated taxis until 1971, only if its Hack Bureau determined that additional taxis were required for "public convenience, welfare and necessity."<sup>210</sup>

The Haas Act was not, as might be assumed, an under-the-table giveaway to powerful interests in the taxi industry. By 1937 there had been considerable public discussion of limiting the number of cabs and there was considerable support for doing so.<sup>211</sup> Over 13,000 cabs roamed New York's streets that year.<sup>212</sup> Cabs contributed significantly to congestion in midtown Manhattan.<sup>213</sup> There was a widespread perception that an excessive number of cabs chasing too few passengers was depressing taxi driver earnings, leading drivers to drive aggressively and cause accidents.<sup>214</sup> Mayor Fiorello LaGuardia had favored

207. N.Y.C., N.Y., ORDINANCES, in *Proceedings of the Board of Aldermen and Municipal Assembly of the City of New York From January 4, to June 29, 1937*, vol. I 545 (Mar. 1, 1937).

208. *Id.* art. I, § 1 (explaining that "the present number of taxicabs licensed and operated in the city of New York is adequate to meet the public need and demand").

209. *Id.* art. III, § 6(a) (renewal of existing licenses as a "matter of right"); *id.* art. III, § 4 (fees).

210. *Id.* art. III, § 11(a).

211. Three committees investigated the New York City taxi business between 1930 and 1936, two of which recommended limiting the number of cabs. REPORT OF THE MAYOR'S COMMISSION ON TAXICABS (Sept. 23, 1930, Frank P. Walsh, Chairman) [hereinafter WALSH COMMISSION] (recommending certificate of public convenience and necessity for new cabs and eventually franchising taxi service to single provider); MAYOR'S COMM. ON TAXICAB SURVEY, REPORT OF THE MAYOR'S COMMITTEE ON TAXICAB SURVEY 4 (June 28, 1934) [hereinafter MAYOR'S TAXICAB SURVEY REPORT] (rejecting limiting number of cabs and proposing alternative ways of stabilizing industry); STATE OF N.Y., REPORT OF THE J. LEGIS. COMM. ON TAXICAB OPERATION & FARES No. 83, at 27 (1936) [hereinafter STATE OF N.Y.] (recommending limiting number of cabs at current number and certificate of public convenience and necessity for new cabs). The background to the Haas Act is reviewed in *Rudack v. Valentine*, 296 N.Y.S. 976, 979-80 (Supreme Court, New York County, New York, 1937), *aff'd* 274 N.Y. 615, (N.Y. App. Div., 1937), which upheld the Haas Act against a constitutional challenge.

212. Rogoff, *supra* note 37, at 91-92. While a substantial number, this was down from 21,000 in the peak year of 1931, presumably because the Depression reduced demand for taxis. *Id.* at 92.

213. STATE OF N.Y., *supra* note 211, at 19.

214. Diana Rice, *Order Sought in Taxi Business*, N.Y. TIMES, Apr. 24, 1932, at 6; Letter from Maurice Hotchner, *Difficulties of Regulating the Taxi Industry Explained*, N.Y. TIMES, Sept. 18, 1932, at E2 [hereinafter Hotchner]; State of N.Y., *supra* note 211, at 13-14; *see also* WALSH COMMISSION, *supra* note 211, at 28-29 ("question[ing] the validity of the frequently raised contention that low rates, by creating a pressure on the driver to speed, are responsible for a high accident rate for taxicab operations"). Another concern was that individuals injured by cabs often had difficulty recovering from taxi owners who were either under- or un-insured, or insured by companies that were going under in the Depression. STATE OF N.Y., *supra* note 211, at 16-17; Rice, *supra*; Hotchner, *supra*. In addition, there had been a violent strike by drivers in 1934 that contributed to a perception that the industry needed tighter control. HODGES, *supra* note 37, at 65-66; Rogoff, *supra* note 67, at 468-69.

limiting the number of cabs as far back as 1920.<sup>215</sup> Capping the number of cabs was supported in the 1930s by newspapers such as the *New York Times*<sup>216</sup> and organizations such as the 5th Avenue Association.<sup>217</sup> There is no evidence that in capping the number of taxis the Haas Act's drafters intended to create a valuable property right in the right to drive a cab on the City's streets.<sup>218</sup> Seen in its historical context, the establishment of medallions was aligned with other Depression-era legislative efforts to stabilize economic sectors thought to be suffering from too much competition.<sup>219</sup>

Nonetheless, the creation of medallions corresponds with positive political theory because the actors that stood to benefit from medallions supported their establishment. Like large taxicab owners in other cities, the large fleets in New York that stood to benefit from excluding new entrants supported capping the number of cabs.<sup>220</sup> Some independents who owned only their cabs also supported limiting the number of cabs,<sup>221</sup> although many probably feared that doing so would allow the large fleets to buy up the limited number of licenses and drive independents out of the business.<sup>222</sup> Also consistent with positive political theory, none of the incumbent players in the industry was displaced by the establishment of medallions as the number of medallions was fixed at the number of players in the industry.<sup>223</sup> In addition, the division of the industry in 1937 into fleet-owned taxis (58 percent of taxis) and independent owner-driver taxis (42 percent) was perpetuated by requiring that fleet-owned medallions be sold only to fleets and that medallions owned by independents be sold only to independents who own only a single taxi.<sup>224</sup> Freezing the structure of the

215. *Taxi Limit Law Signed*, N.Y. TIMES, Mar. 10, 1937, at 25.

216. Editorial, *Cut-Rate Taxicabs*, N.Y. TIMES, July 20, 1935, at 12.

217. STATE OF N.Y., *supra* note 211, at 20-22.

218. One drafter recalled decades later that the emergence of valuable medallions “‘was a fluke; no one ever foresaw that these licenses would ever be valuable.’” Rogoff, *supra* note 37, at 90 (citing interview with Oscar Katz, Aug. 23, 1979).

219. STEPHEN BREYER, REGULATION AND ITS REFORM 29-30, 199, 226 (1982); FRANKENA & PAULTER, *supra* note 30, at 75; MAYOR'S TAXICAB SURVEY REPORT, *supra* note 211; Kitch et al., *supra* note 17, at 321; Benedikt Koehler, *Licence Values in Taxi Markets*, ECON. AFF. 51, 53 (June 2005). But not everyone supported limiting the number of cabs. In 1934, the majority of a Committee appointed by Mayor LaGuardia to recommend how to stabilize the taxi industry specifically refused to recommend limiting the number of cabs. MAYOR'S TAXICAB SURVEY REPORT, *supra* note 211, at 4-9.

220. HODGES, *supra* note 37, at 66; Kitch et al., *supra* note 17, at 317-18; MAYOR'S TAXICAB SURVEY REPORT, *supra* note 211 (dissent of Harold Riegelman, representative of fleet owners on the LaGuardia Committee). In 1929, the Convention of the National Association of Taxicab Owners adopted a resolution supporting limiting the number of cabs by requiring that they be licensed only if “‘the requirement of a certificate of public convenience and necessity” was satisfied. WALSH COMMISSION, *supra* note 211, at 14.

221. Rogoff, *supra* note 37, at 88-89 (noting that in 1936, the largest organization of owner-drivers supported limiting entry).

222. *Independents Open Fight on Taxi Limit*, N.Y. TIMES, May 16, 1935, at 8; MAYOR'S TAXICAB SURVEY REPORT, *supra* note 211 (minority report of Daniel Levine, representative of independents).

223. N.Y.C., N.Y., ORDINANCES art. III (Mar. 1, 1937); Rogoff, *supra* note 67, at 462, 470.

224. Rogoff, *supra* note 67, at 471-72 (noting that 42 percent of taxis “‘were individually owned”); Rogoff, *supra* note 37, at 95 (same); *see also* N.Y.C., N.Y., ORDINANCES art. III, § 7 (Mar. 1,

industry in this way also can be viewed as consistent with the interests of the incumbents in the industry, or at least of the independent owner-operators concerned about being driven out of the business by larger fleets.<sup>225</sup>

Ironically, the establishment of medallions had little effect on the taxicab industry in the first decade or so after 1937. The number of cabs actually fell below the legislated cap as drivers “failed to renew their licenses,”<sup>226</sup> presumably because they judged that the annual \$10 renewal fee was not “worth” the benefits.<sup>227</sup> It was only after World War II that the legislated cap on the number of taxis started to bite. By 1947 there already was enough demand from individuals seeking to provide taxi services to meet the rising demand for taxis for medallions to have a “positive value.”<sup>228</sup> That year the *New York Times* reported that taxicab owners were receiving bonuses averaging \$1,500 or \$2,500 for their medallions when they sold them with used cabs.<sup>229</sup> Medallions came to be sold independent of cabs and a standalone market in medallions developed. By the early 1960s, the *New York Times* was reporting that there was a “brisk, if limited” market in medallions.<sup>230</sup>

### B. The “Gypsy Cabs”

In the early 1960s, the same scarcity that gave rise to the medallion market after World War II led to the appearance of illegal “gypsy cabs” in New York. The first real competitive threat to medallion taxis, consistent with

1937) (discussing transferability). The Haas Act required that the proportions of fleet and independent medallions to the overall number also be maintained if additional medallions were created. N.Y.C., N.Y., ORDINANCES art. III, § 11 (Mar. 1, 1937). Even today, independent medallions can be sold only to owners who will own only a single medallion, and the proportions of independent and corporate medallions must remain the same as in 1937. N.Y.C. ADMIN. CODE, § 19-504(i) (2011); 35 R.C.N.Y. § 51-03 (definition of independent medallion), § 58-44(d)(1) (West 2012).

225. In 1934 there was support among the large fleets for freezing the structure of the industry in conjunction with limiting entry. MAYOR’S TAXICAB SURVEY REPORT, *supra* note 211 (dissent of Harold Riegelman, representative of fleet owners on the LaGuardia Committee). To a degree, the division of the medallions into two types also might be regarded as a public-interested anti-monopoly measure. In 1930, then-New York Mayor James Walker had announced his intention of selling the right to operate all of the City’s cabs to a single entity. However, Walker resigned in 1932 after it came out that he had taken bonds from a backer of a large taxi fleet that stood to gain from the award of a monopoly franchise. HODGES, *supra* note 37, at 47, 49; Rogoff, *supra* note 67, at 462, 465-67, 470-72; Rogoff, *supra* note 37, at 89, 94-95.

226. Rogoff, *supra* note 67, at 471.

227. *Id.* at 462; *see also id.* at 470-71; Rogoff, *supra* note 37, at 91-93.

228. Rogoff, *supra* note 67, at 474; *see also id.* at 462 (“In 1947, when there were 11,787 medallions, the number of outstanding medallions stopped falling. Around that time, medallion owners first realized that they owned a scarce and valuable asset, and medallions began to be traded for about \$1,000 each.”).

229. *Taxi Group Backs Sale of Licenses*, N.Y. TIMES, Feb. 24, 1947, at 21; *Backs Profit on Sales*, N.Y. TIMES, Feb. 25, 1947, at 35 (“It has been said that cabs have been sold at \$2,500 and more above their intrinsic worth because of the medallion . . . [B]ut taxicab drivers at the union headquarters . . . said the average was about \$1,500.”). In 2012 dollars, \$1,500 is \$15,246 and \$2,500 is \$25,410.

230. Ingraham, *supra* note 22, at 46.

positive political theory, the “gypsies” were eventually brought within the City’s regulatory system on terms that protected the medallion monopoly.

One of the most common consequences of limits on the number of taxis is inadequate service, as caps prevent the supply of taxis from expanding to meet growing demand for service.<sup>231</sup> As a result of the cap, taxis often concentrate in high-traffic areas where it is easy to pick up fares and ignore outlying areas, which leaves those areas under-served.<sup>232</sup> This is exactly what has happened in New York: taxis have increasingly concentrated on lower and central Manhattan and the airports, ignoring upper Manhattan and the outer boroughs.<sup>233</sup> As a result, one of the perennial issues in New York politics for decades has been the inadequacy of taxi service in these outlying areas.

Starting in the early 1960s, many so-called “gypsy cabs” began appearing on New York streets to satisfy the demand that medallion taxis were leaving unmet. Some of the “gypsy cabs” were vehicles licensed to pick up passengers who had telephoned for service, but that also illegally picked up people on the street. Others were completely unlicensed vehicles. Although the “gypsy cabs” focused on underserved areas, they also posed a threat to medallion taxis, challenging their legal monopoly on picking up people on the street. Initially numbering in the hundreds, the number of “gypsies” may have been as high as 40,000 in the late 1970s.<sup>234</sup>

There was an important racial dimension to the emergence of the “gypsies.” In the 1960s, many of the areas that medallion drivers were forsaking were populated by African-Americans and Puerto Ricans,<sup>235</sup> and many of the “gypsy cab” drivers were African-American and Puerto Rican.<sup>236</sup> Prominent “gypsy cab” operators portrayed their work as a civil rights issue.<sup>237</sup> The head of the City’s Commission on Human Rights seemed to concur,

231. An important reason that demand outstrips supply is that taxi fares are regulated in most cities, which prevents fares from rising when demand outstrips supply. 35 R.C.N.Y. §§ 58-21(c), 58-26 (West 2012) (fare and revenue distribution regulation in New York); FRANKENA & PAULTER, *supra* note 30, at 22-24 (discussing fare regulation in U.S. cities).

232. OFFICE OF FAIR TRADING, *supra* note 121, at 4-5, 24, 26-33; Schaller, *supra* note 34, at 500; Kitch et al., *supra* note 17, at 291-92.

233. See, e.g., Yassky Affidavit, *supra* note 46, at 2-3.

234. HODGES, *supra* note 37, at 132; Rogoff, *supra* note 121, at 18; see also MAYOR’S TAXI STUDY PANEL, *supra* note 153, at 16-18 (discussing private livery); MAYOR’S COMMITTEE ON TAXI REGULATORY ISSUES, *supra* note 37, at 11, 31-35, 68 (discussing non-medallion car services, including “gypsies”); URBITRAN ASSOC., INC., DRAFT ENVTL. IMPACT STATEMENT: PROPOSED CHANGES TO NEW YORK CITY TAXI REGULATIONS 1.5-1.7, 4.3-4.7 (1984) (prepared for the NYC Taxi & Limousine Comm’n) (discussing non-medallion taxis); *Gypsy Cabs Cruise City—and Thrive—Illegally*, N.Y. TIMES, Nov. 23, 1964, at 39 (describing “gypsy cab” operations).

235. James Randall, *King of the Gypsies*, N.Y. MAG., June 22, 1970, at 44; William E. Farrell, *Owner-Drivers Vote a Taxi Halt on Dec. 11 to Protest ‘Gypsies,’* N.Y. TIMES, Dec. 3, 1968; see also HODGES, *supra* note 37, at 131 (suggesting that in the 1960s, “[m]edallion cab drivers became notorious for racism toward African Americans and Hispanics”).

236. HODGES, *supra* note 37, at 132; see also Walter E. Williams, *Taxes, Taxis and the Poor*, N.Y. TIMES, Jan. 8, 1983, at 123 (“Charles Vidich, in a 1976 book, ‘The New York Cab Driver and His Fare,’ estimated that nearly 95 percent of all livery drivers were black or Puerto Rican.”).

237. See, e.g., Randall, *supra* note 235.

arguing “that the city should license the gypsy cabs in African American neighborhoods, because medallion cabdrivers were not doing their job.”<sup>238</sup> But the “gypsy cabs” were a mixed blessing for the passengers that they served. While the “gypsies” provided badly needed taxi services, some charged higher fares than the medallion taxis (and some lower), the vehicles often were unsafe, and many drivers were uninsured.<sup>239</sup>

By the late 1970s, a truce developed between the yellow taxis and the “gypsies”: the medallion taxis focused on central Manhattan and the airports, and the “gypsies” concentrated on upper Manhattan and the outer boroughs.<sup>240</sup> Finally, in the late 1980s, the TLC was able to bring the “gypsies” within its jurisdiction after the City and the State amended their laws to clearly authorize the agency to regulate the illegal cabs.<sup>241</sup>

Consistent with the expectations of public choice theory, the framework under which the “gypsies” were legalized was favorable to the medallion taxi industry. The TLC allowed medallion taxis to retain their legal monopoly on street hails throughout New York. “Gypsy cabs” were licensed by the TLC to pick up people only in response to telephone calls. The “gypsy cabs” were never granted the legal right that many had sought to pick up people on the streets, even in the outer boroughs where few medallion taxis travel.<sup>242</sup> Subsequently, the “gypsy cabs” largely evolved into today’s community car services serving upper Manhattan and the outer boroughs that stand to benefit from the Street Hail Livery Law if it is implemented.<sup>243</sup>

238. HODGES, *supra* note 37, at 132; *see also* Emanuel Perlmutter, *Tempers Flare at Taxi Hearing*, N.Y. TIMES, May 4, 196, at 49 (reporting on the position of the chairman of the City Commission on Human Rights).

239. MAYOR’S COMMITTEE ON TAXI REGULATORY ISSUES, *supra* note 37, at 34-35, 68.

240. *Id.* at 68 (referring to “current detente” between medallion and non-medallion operators).

241. N.Y.C. Local Law No. 76 (1986); *see also* David W. Dunlap, *Cuomo Signs Bill to Let the City Regulate Its 35,000 Gypsy Cabs*, N.Y. TIMES, Jan. 2, 1984, at 1; Kirk Johnson, *Gypsy Cabs Move Deeper Underground*, N.Y. TIMES, May 1, 1988, at E7; Richard Levine, *New Taxi Regulations Bring First Summonses*, N.Y. TIMES, July 14, 1987, at B3.

242. *See, e.g., Livery Cabs Make an Offer to City*, N.Y. NEWSDAY, Aug. 13, 1986, at 23 (Representatives of unlicensed taxis indicated “that their association members want the freedom to cruise streets and airports and respond to hails” and “[i]n exchange” they “would submit to medallion cab fees and regulation.” The proposal was opposed by representatives of owners of fleet and independent medallions); Frank J. Prial, *Drivers Jeer and Applaud at Hearing on Gypsy Cabs*, N.Y. TIMES, Jan. 25, 1972, at 70 (reporting on demonstration by gypsy cabs seeking “the right to pick up passengers on the street” and a City Council hearing where representatives of gypsies supported legislation that would allow gypsies to be licensed but not allow them to accept street hails; “[p]rivately, the nonmedallion-industry leaders said they wanted most of all the legitimacy afforded by city licensing. They said they would hope to obtain cruising rights later.”).

243. However, vehicles continue to provide unlicensed taxi service in New York. Christine Haughney, *In Crackdown on Unlicensed Taxis, City Runs Out of Room*, N.Y. TIMES, March 20, 2012, at A23.



*C. Mayor Edward Koch's Unsuccessful Reform Efforts*

Starting in the 1960s and continuing until the early 1990s, several New York mayors unsuccessfully attempted to improve taxi service in the City by increasing the number of medallions, or creating new classes of taxis for the outer boroughs. The fate of Mayor Edward Koch's taxi reform proposals illustrates the power of medallion interests to protect the medallion monopoly and the role of the City Council as a voice for medallion interests.<sup>244</sup>

During the 1980s Mayor Koch and his administration advanced several proposals to overhaul taxi service that embodied two ideas intended to increase the number of taxis on city streets. First, the Koch Administration proposed creating a new type of taxi—in addition to the existing medallion taxis—that would serve only upper Manhattan and the four outer boroughs except for the airports, much like the HAIL-licensed liveries in the recent Street Hail Livery Law.<sup>245</sup> These new taxis would have been able to pick up street hails and provide prearranged service within the areas they served. Second, the Koch Administration proposed increasing the number of existing medallion taxis by issuing new medallions, foreshadowing yet another component of the Street Hail Livery Law, which would add 2,000 new medallions. At various times, Mayor Koch advocated doubling the number of medallions by giving each medallion owner a second one,<sup>246</sup> auctioning 1,200 new medallions,<sup>247</sup> and giving away 1,800<sup>248</sup> or 400<sup>249</sup> in a lottery. Both of these ideas generated

244. Before Mayor Koch's proposals, Mayor John Lindsay had proposed selling 1,794 medallions in 1967. Peter Millones, *Mayor For Cab Fare Rise Averaging 15 Cents a Ride*, N.Y. TIMES, Dec. 30, 1967, at 1. In 1992, Koch's successor Mayor David Dinkins unsuccessfully proposed to increase taxi service outside Manhattan by allowing for-hire vehicles "to pick up people who hail them on the street and to wait for riders at hack stands in all parts of the city except for Manhattan below 96th Street." Alan Finder, *Dinkins Plan Would Alter Taxi Industry*, N.Y. TIMES, Jan. 27, 1992, at B1. After this proposal, Dinkins offered a more modest proposal to increase service in the outer boroughs by allowing "liveries to make pickups . . . at designated hack stands." James Dao, *Taxis, Liveries and the New Plan to Shake Them Up*, N.Y. TIMES, Oct. 16, 1992, at B1.

245. Under the first iteration of this idea the new taxis would have been known as "green-stripe" taxis because they would have had a green stripe on them. MAYOR'S COMM. ON TAXI REGULATORY ISSUES, RECOMMENDATIONS 4-5, 7-8 & App. I (Mar. 29, 1982); Clifford D. May, *The Taxi System: City Seeks Ways to Improve Quality of Service*, N.Y. TIMES, Mar. 7, 1983, at B1. In April 1985, Koch proposed a modified version of the idea that would have allowed nonmedallion cabs to pick up passengers north of 96th Street in Manhattan and in the outer boroughs but prohibited these cabs from entering the rest of Manhattan for any reason, including dropping off a passenger. Medallion owners opposed this modified proposal. Suzanne Daley, *New Plan To Add Medallion Cabs Offered by Koch*, N.Y. TIMES, Apr. 12, 1985, at A1. Echoing the Koch-era proposal for green-stripe taxis, the vehicles that under the Street Hail Livery Law would be allowed to pick up street hails and provide prearranged service in upper Manhattan and the outer boroughs would be painted apple green. Kate Taylor, *New Taxicabs Are Green, Literally*, N.Y. TIMES, Apr. 30, 2012, at 21. See *infra* note 294 (defining HAIL).

246. Jesus Rangel, *Koch Offers a Plan To Double the Number of Taxi Medallions*, N.Y. TIMES, Jan. 16, 1985, at A1.

247. Daley, *supra* note 245, at A1.

248. Robert O. Boorstin, *City Council Considers Rise in Medallions*, N.Y. TIMES, Dec. 2, 1986, at B1.

concerns about increased air pollution and traffic congestion.<sup>250</sup> Both ideas also were opposed by the owners of existing medallions.<sup>251</sup> Creating additional medallions might have diluted the value of existing ones by increasing competition for riders. Licensing the new taxis would have undercut the medallion taxis' monopoly on picking up street hails throughout the City.

Medallion owners successfully resisted Koch's efforts to increase the number of taxis, apparently relying in part on their allies in City Council. The campaign contributions that medallion owners reportedly made in municipal elections may have contributed to the positions of some City Council members.<sup>252</sup> Taxi drivers and medallion owners also may have constituted significant constituencies for some Council members.<sup>253</sup> But a more important reason for the medallion owners' influence in the Council in the Koch era may have been that the fleets hired Stanley Friedman as the lobbyist for their trade

249. David E. Pitt, *Commission Urges 400 New Cab Medallions*, N.Y. TIMES, June 23, 1989, at B3. The Koch-era proposals might have resulted in the addition of medallions with different characteristics than standard medallions. For example, the additional medallions might not have been transferable. Boorstin, *supra* note 248; Pitt, *supra*; Editorial, *supra* note 87.

250. See, e.g., Suzanne Daley, *Study Finds Problems in a Plan for New Taxis*, N.Y. TIMES, Aug. 7, 1984, at B3 (study by Urbitran Associates for the Office of the Mayor on the proposal to create green-stripe taxis for the outer boroughs indicated that they "would 'significantly' increase air pollution while slowing traffic"); Johnson, *supra* note 125 (reporting on draft environmental impact study of adding medallions); David E. Pitt, *Agency Delays Vote on a Plan To Add Taxis*, N.Y. TIMES, Aug. 31, 1989, at B5 (reporting that the TLC Chair delayed the vote on adding 400 medallions "because members of the commission had raised concerns about the impact of the vehicles on the environment and our ability to enforce the proposal"); Ron Stoppelmann, Letter to the Editor, *More Cabs Won't Mean Better Service*, N.Y. TIMES, Apr. 27, 1985, at 122 (Letter from the President of the Metropolitan Taxicab Board of Trade) ("[M]ore cabs in midtown will absolutely slow traffic (if that is even possible) and worsen pollution.").

251. See, e.g., Susan Heller Anderson & David W. Dunlap, *New York Day By Day; Unhappy Cabdrivers*, N.Y. TIMES, May 3, 1985, at B3; Robert O. Boorstin, *Increase in Cab Fares Delayed Pending Action on Medallions*, N.Y. TIMES, Oct. 10, 1986, at A1; Daley, *supra* note 245; Daley, *supra* note 250; *Improving Taxi Service Throughout the City: An Agenda for the New Year*, N.Y. TIMES, Jan. 2, 1986, at B1; Pitt, *Agency Delays*, *supra* note 250; Rangel, *supra* note 246; Stoppelmann, *supra* note 250.

252. Margaret Gordy, *Taxi Bill Boosted by Vallone*, NEWSDAY, Oct. 24, 1986, at 4 (quoting an unhappy fleet owner who indicated that he had given campaign contributions to the City Council Majority Leader); Kirk Johnson, *The Region; Taking the Big Business Out of the Taxi Business*, N.Y. TIMES, June 26, 1988, at 428 (referring to "medallion owners" as "dependable sources of campaign contributions in city elections over the years"). Medallion owners also contributed to Mayor Koch's campaigns. Josh Barbanel, *City To Overhaul Inquiries System*, N.Y. TIMES, Apr. 28, 1986, at A1; Alan Finder, *Koch's Campaign Violated Election Law, Official Says*, N.Y. TIMES, Aug. 21, 1986, at B3; *Koch Says He Is Not Upset Over Contributions Inquiry*, N.Y. TIMES, Apr. 21, 1986, at B4.

253. Richard J. Meislin, *Koch Says Friedman Has Power To Kill Bills in Council on Taxis*, N.Y. TIMES, Jan. 30, 1986, at A1 (reporting that Jay Turoff, then TLC chairman, "said that taxi drivers were important constituents to several Council members in the boroughs outside Manhattan, where much of the cab service comes from radio-dispatched, non-medallion taxis"); Gordy, *supra* note 252 (reporting on demonstration outside City Hall by "[h]undreds of taxi owners and drivers, most of whom operate out of [City Council Majority Leader] Vallone's district in Astoria and Long Island City"); James Brooke, *Koch To Tie Cab Fare Rise to More Medallions*, N.Y. TIMES, Jan. 28, 1986, at A1 ("Stanley Friedman represents the fleets, and the independents have a very active lobbying organization, and there are Council members who represent areas with a fair amount of owners.") (quoting Deputy Mayor Stanley Brezenoff).

association, the Metropolitan Taxicab Board of Trade.<sup>254</sup> The deputy mayor responsible for patronage under Koch's predecessor, Abraham Beame, in the early 1970s,<sup>255</sup> Friedman was the Bronx Democratic Party leader for most of the Koch era.<sup>256</sup> Some called Friedman "the political boss of the Bronx,"<sup>257</sup> and true to form he apparently was "an aficionado of private meetings and well-modulated telephone calls."<sup>258</sup>

According to the *New York Times* in January 1986, "Council members and aides" regarded Friedman as having "considerable influence over some of the 35 members of the Council, notably those of the 6-member Bronx delegation, which include[d] the head of the Council's Transportation Committee, June M. Eisland."<sup>259</sup> Ties to Eisland would have been useful because the Transportation Committee oversaw taxi regulation,<sup>260</sup> and council support was necessary to increase the number of taxis on city streets.<sup>261</sup> In early 1986, the mayor publicly blamed Friedman for the difficulties he had persuading the Council to increase the number of taxis.<sup>262</sup>

254. TEMP. COMM'N OF INVESTIGATION OF THE STATE OF N.Y., AN INVESTIGATION OF THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION: FINDINGS AND RECOMMENDATIONS 61 (1986) [hereinafter TRAGER COMM'N] (David G. Trager, Chairman) (on file with author) (observing that the Metropolitan Taxicab Board of Trade "has often been represented legally by Stanley Friedman, the former Chairman of the Bronx Democratic Party Committee"); Brooke, *supra* note 253 ("City officials say earlier proposals for a medallion increase were blocked by the taxi industry's powerful lobby, headed by Stanley M. Friedman."); Allan Finder & Mary Connelly, *The Region: Cabs, Koch and New York's City Council*, N.Y. TIMES, Feb. 2, 1986 ("For the first time, Mr. Koch publicly blamed the taxi owners and one of their most powerful representatives, Stanley M. Friedman, the Bronx Democratic leader, for exercising a virtual veto power over city legislation seeking to change the industry.").

255. M.A. Farber, *Democratic Chief of Bronx Indicted on Bribe Charges*, N.Y. TIMES, Mar. 28, 1986, at A1 (reporting that Friedman "was deputy mayor in the administration of Abraham D. Beame and was known as an important dispenser of patronage for Mayor Beame"); Selwyn Raab, *Jay Turoff: A Classic Success Story Leads to Dual Portrait of Ex-Taxi Chief*, N.Y. TIMES, May 4, 1986, at 142 ("Mr. Friedman . . . as a deputy mayor was in charge of patronage for Mr. Beame and cleared all major appointments.").

256. Farber, *supra* note 255 (reporting, in 1986, that Friedman has been "Democratic leader of the Bronx . . . since 1978"); TRAGER COMM'N, *supra* note 254, at 61 (referring, in December 1986, to Friedman as "the former Chairman of the Bronx Democratic Party Committee").

257. *Don't Bribe the Taxi Monopolists*, N.Y. TIMES, Jan. 29, 1986, at A22.

258. Meislin, *supra* note 253, at B4.

259. *Id.* The same article reported that June Eisland denied that Friedman had "'veto power'" over the Council, and that "[s]everal Council members said the lack of action on a measure to deal with the problems of New York City taxi transportation resulted from a lack of decisiveness in the Koch administration." *Id.* Like Koch himself, his Deputy Mayor Stanley Brezenoff blamed the failure of Koch's proposals to increase the number of medallions to advance at least partly on Stanley Friedman, telling the *New York Times* that "Stanley Friedman represents the fleets, and the independents have a very active lobbying organization, and there are Council members who represent areas with a fair amount of owners." Brooke, *supra* note 253.

260. See, e.g., Joyce Purnick, *Compromise Would Add 1,800 Cabs*, N.Y. TIMES, Feb. 27, 1987, at B1 (reporting that Transportation Committee "is expected to vote on the new version of the [taxi] legislation today, according to its chairwoman, June M. Eisland, Democrat of the Bronx").

261. See *supra* note 63 (noting that Council support is necessary to increase the number of taxi medallions).

262. Meislin, *supra* note 253; Connelly & Finder, *supra* note 254.

Friedman's influence also extended beyond the council into the executive branch. In 1985, Friedman boasted that "'no one has more knowledge of how government functions and operates, no one has more access to the process in the bureaucracy, than I do.'"<sup>263</sup> Fortuitously, as deputy mayor under Beame, Friedman had played a role in appointing the TLC chair for most of the Koch era, Jay Turoff, to his chairmanship.<sup>264</sup> Turoff had no obvious experience qualifying him to be TLC chair when he was appointed.<sup>265</sup> But as public choice theory would predict, he became close to the taxi industry as chair. In 1986 he was embroiled in a municipal corruption scandal that included allegations that Turoff had granted "free taxi medallions"<sup>266</sup> to a large fleet owner for a "bogus"<sup>267</sup> experiment "testing diesel-powered taxicabs."<sup>268</sup> Looking at the TLC after Turoff resigned, the New York State Commission of Investigation concluded that the agency was "unduly subject to the influence of the industry it oversees."<sup>269</sup>

Testifying to Friedman's influence, the only time that Koch came close to increasing the number of medallions was after Friedman disappeared from the political scene.<sup>270</sup> In March 1986, Friedman was indicted for bribery in connection with a contract let by the City's Parking Violations Bureau.<sup>271</sup> A year later, after Friedman was convicted,<sup>272</sup> the City Council passed legislation under which the TLC was to examine the environmental impact of adding up to 1,800 new non-transferable medallions, and to make a recommendation to the Council on the number of new medallions to create. "If the Council fail[ed] to act in 60 days, the commission's recommendation would go into effect."<sup>273</sup>

As it turned out, the TLC never recommended the creation of any new medallions. Shortly after Koch lost the mayoral primary to David Dinkins in

263. Farber, *supra* note 255 (quoting Stanley Friedman).

264. Raab, *supra* note 255. TLC chair from December 1977 to March 1986, Turoff was appointed chair on "Beame's last working day as Mayor" and retained by Koch. *Id.*; see also TRAGER COMM'N, *supra* note 254, at 1.

265. Raab, *supra* note 255.

266. *Id.*

267. TRAGER COMM'N, *supra* note 254, at 2.

268. *Id.* at 2; see also James Barron, *Tangled Strands: Anatomy of the New York City Scandal*, N.Y. TIMES, March 23, 1987, at B4 (identifying investigations, cases and allegations in the corruption scandal); Thomas Morgan, *Turoff and Cab Owner Plead Guilty in Scheme for Extra Medallions*, N.Y. TIMES, Feb. 7, 1989 (reporting that Turoff and a large fleet owner "each pleaded guilty yesterday to participating in a scheme to misappropriate 23 taxicab medallions and more than \$500,000 in taxicab revenues"); Raab, *supra* note 255 (discussing allegations involving Turoff).

269. TRAGER COMM'N, *supra* note 254, at 5.

270. Purnick, *supra* note 260. See also N.Y.C. Local Law No. 14 (1987) (authorizing the creation of up to 1,800 nontransferable medallions pending environmental review, and TLC and Council approval).

271. Farber, *supra* note 255.

272. Purnick, *supra* note 260.

273. *Id.*; see also *City Council Backs Increase in Number of Taxi Medallions*, N.Y. TIMES, Mar. 25, 1987, at B4; *Metro Datelines; Council Panel Backs Move for More Taxis*, N.Y. TIMES, Feb. 28, 1987, at 134.

September 1989, the TLC voted 5-2 not to recommend adding the 400 medallions that the environmental impact analysis suggested could be created.<sup>274</sup> The vote presumably satisfied the fleets and independent medallion owners who were “widely opposed” to the proposal.<sup>275</sup>

Only months before his final proposal to increase the number of medallions was defeated, Koch had come out in favor of eliminating the TLC and shifting taxi regulation to “an executive agency.”<sup>276</sup> The *New York Times* reported that Koch had “told the Charter Revision Commission in a letter made public at City Hall that it was hard to obtain a consensus on the [TLC] . . . because of the five Council-appointed members,”<sup>277</sup> who, Koch explained, “tend to see their function on the commission as representing parochial concerns, not the development of a comprehensive transportation policy.”<sup>278</sup>

#### *D. New Medallion Auctions*

In the mid-1990s, Mayor Rudolph Giuliani achieved the goal that had eluded Mayor Koch of adding new medallions, auctioning 400 new medallions in 1996-1997.<sup>279</sup> In 2004-2008, Mayor Bloomberg followed up by auctioning an additional 1,050 medallions.<sup>280</sup>

Why were Mayors Giuliani and Bloomberg able to add new medallions when other mayors were unsuccessful in their efforts? One factor that likely contributed to their success was the support that Mayors Giuliani and Bloomberg were able to obtain from at least some medallion owners for creating additional medallions. After years of opposing increasing the number of medallions, the fleets supported Giuliani’s addition of 400 new medallions in 1996.<sup>281</sup> Bloomberg’s creation of additional medallions in the mid-2000s seems to have had even broader support among medallion owners.<sup>282</sup>

There are a number of likely explanations for the industry support of the addition of new medallions. One is that neither mayor proposed to increase the number of medallions as part of an attack on the medallion monopoly, but

274. David E. Pitt, *Taxi Panel Rejects Plan for 400 New Medallions*, N.Y. TIMES, Sept. 28, 1989, at B3.

275. *Id.* See also Pitt, *supra* note 250, at B5 (suggesting there was opposition to the proposal to add 400 new medallions from “many taxi owners and drivers”).

276. Pitt, *supra* note 249, at B3.

277. *Id.*

278. *Id.* (quoting letter written by Koch).

279. See *supra* notes 65, 129, and accompanying text.

280. See *supra* notes 66, 130-131, and accompanying text.

281. Garry Pierre-Pierre, *Panel Clears Plan To Enlarge Taxicab Fleet*, N.Y. TIMES, Jan. 27, 1996 (reporting that large fleet owners support adding 400 medallions although small operators are opposed).

282. Lipton, *supra* note 130 (noting that the taxi industry did not oppose the sale of 900 new medallions). As explained earlier, the City initially decided to sell 900 new medallions and then decided in 2006 to auction an additional 150 medallions. See *supra* note 66.

rather in good measure to raise revenue for the City.<sup>283</sup> A second is that both mayors paired increases in the number of medallions with sizeable fare increases that may have more than offset the effect of adding more medallions on medallion values.<sup>284</sup> One economist estimates that medallion values increased by 19 percent as a result of the 1996 fare increase even after taking into account the effect of adding 400 new medallions in 1996-1997.<sup>285</sup>

The decision to auction medallions as opposed to giving them away or allocating them administratively also helps to explain the industry support for increasing the number of medallions. The use of auctions benefited existing medallion owners by reinforcing the idea that medallions are a valuable commodity.<sup>286</sup> The auctions also created new business opportunities for lenders such as Medallion Financial to finance the purchase of medallions.<sup>287</sup> Furthermore, the timing and the conduct of the auctions supported medallion values to the benefit of existing medallion owners and medallion lenders. The auctions were spaced out,<sup>288</sup> which avoided flooding the market with new medallions that might have depressed the prices of existing ones and reduced the revenue collected by the City through the auctions. The TLC also established minimum bids for each sealed-bid auction based on the sale prices of medallions in the active secondary medallion market.<sup>289</sup> Overall, it is worth recalling that the addition of a total of 1,450 medallions between 1996 and 2008 increased the number of medallions by only about 12 percent and that

283. See *supra* notes 129-131 and accompanying text (discussing the motivations for the medallion auctions).

284. For evidence that the coupling of fare increases and medallion auctions assuaged medallion owners see, for example, Tim Gray, *Investing: A Lender Hopes To Profit From the New Taxi Math*, N.Y. TIMES, Jan. 25, 2004, at 38; Lipton, *supra* note 130; and Pierre-Pierre, *supra* note 281. See also Compl., *supra* note 144, at 9, *Taxicab Serv. Ass'n v. New York*, No. 102553 (N.Y. Sup. Ct. Apr. 27, 2012) (“During the medallion issuance that began in 2004 . . . [t]he City also increased the statutory fare to make medallions more financially attractive—further solidifying expectations and confirming the bargain in which the City gave something of value in exchange for the industry’s support for, and investment in, a relatively small number of medallions.”). Taxi ridership in New York usually declines initially following a fare increase but then rebounds in short order. As a result, a fare increase usually is a money-maker for the taxi industry. Rogoff, *supra* note 37, at 49 (noting that every fare increase in New York during the study increased the revenue of taxi operators).

285. Ricardo Lagos, *An Analysis of the Market for Taxicab Rides in New York City*, 44:2 INT’L ECON. REV. 423, 424 (2003).

286. The value of the commodity was evident from the sums that the City raised from the auctions. Newman, *supra* note 65, at B3 (reporting that City earned “about \$85 million” from auctions of 400 medallions in 1996 and 1997); NYC TAXI & LIMOUSINE COMM’N, 2008 ANNUAL REPORT, *supra* note 66, at 21 (noting that the 2004-2008 auctions of 1,050 medallions generated “over \$400 million” for the City).

287. Gray, *supra* note 284.

288. See, e.g., Perez-Pena, *supra* note 129 (discussing timing of 1996-1997 auctions); NYC TAXI & LIMOUSINE COMM’N, 2004 ANNUAL REPORT 12, *available at* [www.nyc.gov/html/tlc/downloads/pdf/2004\\_annual\\_report.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/2004_annual_report.pdf) (discussing timing of 2004 auctions).

289. NYC TAXI & LIMOUSINE COMM’N, 2004 ANNUAL REPORT, *supra* note 288, at 11; see also Perez-Pena, *supra* note 129 (referring to “minimum bids” established by the TLC for the auctioned medallions).

medallions still remain scarce, with the number of medallions today lower than the number issued in 1937.<sup>290</sup>

*E. Mayor Bloomberg's Five Borough Taxi Plan*

In January 2011, Mayor Bloomberg made an announcement in his State of the City Address that recalled the efforts of Mayors Koch and Dinkins to improve taxi service in the outer boroughs that medallion taxis long ago largely abandoned. Bloomberg asked: “[W]hy shouldn’t someone in the Bronx, Brooklyn, Queens, or Staten Island be able to hail a legal cab on the street? 97 percent of yellow cab pick-ups happen in Manhattan or at the airports— even though eighty percent of New Yorkers live outside of Manhattan.”<sup>291</sup> He then promised that “[t]his year, we’ll establish a new category of livery cars that can make on-street pickups outside of Manhattan.”<sup>292</sup> It did not take the medallion industry long to recognize that the mayor was proposing to reduce the geographic scope of its monopoly in the walk-up market.

In the ensuing months, various options for implementing Bloomberg’s commitment were discussed in meetings involving taxi and livery stakeholders, the TLC and state officials.<sup>293</sup> The package that passed the state legislature would legalize street hail pickups in the outer boroughs and upper Manhattan by community liveries, the incumbents widely regarded as providing the service illegally at the moment. The Street Hail Livery Law establishes a distinct, numerically limited class of 18,000 HAIL licenses that livery car drivers and owners can purchase for a fee from the TLC that will entitle them

290. A Deputy Mayor under Giuliani describes the 1996 auctions as follows: “The 1996 Issuance was the product of local democratic processes, coming only at the end of substantial negotiations at the City level, which included the input of constituents from the medallion lending industry. In the end, out of concern for the livelihoods of medallion taxi owners and drivers, as well as for the lenders who finance medallion purchases, the City Council called for a limited and economically sustainable number of new medallions to be issued.” Affirmation of Randy M. Mastro, In Supp. of Pls.’ Appl. By Order to Show Cause For TRO and Prelim. Inj. at 3 (May 16, 2012). Randy Mastro currently is a partner in the law firm representing the plaintiff lenders. *Id.* at 1-2.

291. Michael Bloomberg, Mayor, New York City, 2011 State of the City Address: Progress at Work (Jan. 19, 2011) (transcript available at <http://www.mikebloomberg.com/index.cfm?objectid=A009AFB6-C29C-7CA2-F7A8A2515C60BCC2>). Elsewhere, TLC Chair David Yassky indicates that, “[a]ccording to recent GPS data collected by TLC, approximately 95% of all yellow taxi street hail pickups are in the Manhattan Central Business District . . . , defined for this purpose as Manhattan below East 96th Street and West 110<sup>th</sup> Street or at La Guardia and JFK airports.” Yassky Affidavit, *supra* note 46, at 2.

292. Bloomberg, *supra* note 291.

293. Andrew Grossman, *City Steers New Taxi Option; Proposal Would Create Livery-Cab Stands To Boost Service Outside Manhattan*, WALL ST. J., June 8, 2011. For a city insider’s account of the discussions leading up to the Street Hail Livery Law, see Yassky Reply Affidavit, *supra* note 131. For a yellow cab industry perspective, see, for example, Comp. at 11, *Taxicab Serv. Ass’n v. New York*, No. 102553 (N.Y. Sup. Ct. Apr. 27, 2012) (on file with author). For a perspective from the portion of the livery industry that supports the Street Hail Livery Law, see, for example, Aff. of Jose Altamirano in Opp’n to Pls.’ Mot. for Prelim. Inj. and in Supp. of the City Defs.’ Mot. Summ. J. at 9-12, *Taxicab Serv. Ass’n v. New York*, No. 102553 (N.Y. Sup. Ct. June 15, 2012).

to legally pickup street hails in the outer boroughs and upper Manhattan.<sup>294</sup> Like yellow medallions, the HAIL licenses would be transferable by their owners, creating the possibility that a secondary market might arise similar to the yellow taxicab medallion market.<sup>295</sup> However, the value of HAIL licenses would be restricted because they can be transferred only to for-hire drivers or for-hire vehicle owners, and an owner would be allowed to own only a single HAIL license, which will prevent the creation of fleets.<sup>296</sup> Twenty percent of the HAIL licenses likely would be attached to vehicles accessible to persons with disabilities.<sup>297</sup> As part of the reform package, the City could auction an additional 2,000 accessible yellow medallions.<sup>298</sup>

Mayor Bloomberg's proposal to legalize street hail pickups in the outer boroughs by non-medallion taxis has been opposed by medallion owners and the interests that service them.<sup>299</sup> The yellow taxi industry seems to fear that legalizing street hails by non-medallion taxis will reduce medallion values for several reasons. Yellow taxi operators seem concerned about competing for fares in the outer boroughs and upper Manhattan, although these areas are not central to the yellows' business.<sup>300</sup> More importantly, yellow taxi interests fear that the reforms will lead to greater illegal fare poaching by for-hire vehicles of street hails in the Manhattan central business district and the airports.<sup>301</sup> The City dismisses the medallion industry's concerns. It emphasizes that the legislation would not disturb the yellows' core business because it reserves

294. 2012 N.Y. Sess. Laws 9, § 5(b)-(c) (McKinney). The requirement to issue HAIL licenses to for-hire vehicles owners and drivers applies only “[w]ithin the first three years of the first issuance” and there is an exception for accessible HAIL licenses. *Id.* § 5(b). HAIL is an acronym for “Hail Accessible Inter-Borough License.” 2012 N.Y. Sess. Laws 9, § 4(b) (McKinney).

295. 2012 N.Y. Sess. Laws 9, § 7 (McKinney); *see also* Am. Compl., *supra* note 64, at 25-26, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 18, 2012).

296. 2012 N.Y. Sess. Laws 9, §§ 5(c), 7 (McKinney).

297. *Id.* § 5(b).

298. *Id.* § 8. *See supra* note 36 (defining accessible medallion).

299. Yassky Reply Affidavit, *supra* note 131, at 3; David Seifman, *Livery Street Pickups May Roll Up*, N.Y. POST (Jan. 19, 2011, 4:07 AM), [http://www.nypost.com/p/news/local/mike\\_has\\_one\\_hail\\_of\\_plan\\_1xUE9TNIrZIUH97AXs47PAL](http://www.nypost.com/p/news/local/mike_has_one_hail_of_plan_1xUE9TNIrZIUH97AXs47PAL). It is possible that the yellow taxi industry might support legalizing street hail pickups by non-medallion taxis in the outer boroughs and upper Manhattan if yellow medallion owners were allowed to own the outer borough licenses and create fleets of outer-borough taxis. In 2011, the yellow taxi industry and the TLC apparently agreed to a plan that would have allowed the industry to own many outer borough licenses, but state legislators from the under-served area balked, fearing that the livery industry that has traditionally served these areas would be cut out. Yassky Reply Affidavit, *supra* note 131, at 4, 6. The Street Hail Livery Law would protect these areas for the current players in the livery industry. Yellow medallion owners would be excluded from obtaining HAIL licenses in the first issuance, when they will be cheap, by the requirement that the licenses be issued only to existing for-hire drivers and vehicle owners for the first three years. The limitations on the transferability of licenses will prevent the creation of fleets. Am. Compl., *supra* note 64, at 24-27, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 18, 2012).

300. Am. Compl., *supra* note 64, at 28, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 18, 2012); MILLER, *supra* note 33, at 16.

301. Am. Compl., *supra* note 64, at 28, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. May 18, 2012); Compl., *supra* note 144, at 19, *Taxicab Serv. Ass'n v. State*, No. 102553 (N.Y. Sup. Ct. Apr. 27, 2012).



street hails in the Manhattan core and at the airports to yellows.<sup>302</sup> It also emphasizes its commitment to policing the core to prevent fare poaching, and argues that it will use GPS technology unavailable in the past to do so remotely, in addition to traditional enforcement techniques.<sup>303</sup> The City also has argued that the medallion market has remained unaffected by the discussion and passage of the reform measures, notwithstanding the concerns of the yellow taxi industry.<sup>304</sup>

The medallion industry has spent a considerable amount of time and resources in 2011 and 2012 opposing Mayor Bloomberg's proposals to limit its monopoly. Consistent with the demand-side hypothesis, the catalytic subgroups that seem to have taken the lead in opposing the mayor's efforts to legalize liveries' street hail pickups are the representatives of the fleets that own medallions, principally the Metropolitan Taxicab Board of Trade and the Greater New York Taxi Association,<sup>305</sup> the lenders that finance the purchase of

302. See, e.g., Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. at 28, Metro. Taxicab Bd. of Trade v. Bloomberg, No. 102472 (N.Y. Sup. Ct. May 7, 2012). See also *infra* note 318 and accompanying text.

303. See, e.g., City Defs.' Mem. of Law in Opp'n to Pls.' Respective Motions for a Prelim. Inj. at 32, Metro. Taxicab Bd. of Trade v. Bloomberg, No. 102472 (N.Y. Sup. Ct. May 30, 2012); Aff. of Ashwini Chhabra, Deputy Comm'r for Policy & Planning, NYC Taxi & Limousine Comm'n at 3-4, Metro. Taxicab Bd. of Trade v. Bloomberg, No. 102472 (N.Y. Sup. Ct. May 29, 2012) (on file with author) (referring to technology that HAIL vehicles will have to install to prevent the meter from coming on when the vehicle enters the excluded Manhattan core and technology that will provide the TLC with locational data). For another description of the technology proposed for enforcement, see HENNINGSON DRAFT EIS, *supra* note 2, at 4-20, 4-23 to 4-24.

304. Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. at 29-30, Metro. Taxicab Bd. of Trade v. Bloomberg, No. 102472 (N.Y. Sup. Ct. May 7, 2012) (noting that medallion prices "continued to rise in the three months since the HAIL program was first authorized by state law").

It is difficult to determine whether the medallion market has been affected by the Street Hail Livery Law. In favor of the City's position that the market remains unaffected, medallion values reached record levels in 2011 as the mayor's plans were debated in the City and ultimately the state legislature, and appear to have continued to be stable or rise slightly in 2012. Jennifer Fermino, *705G for Cab Medallions*, N.Y. POST (Aug. 8, 2011, 11:31 AM), [http://www.nypost.com/p/news/local/for\\_cab\\_medallions\\_P2WKINwnDia0zlgYlaKI3N](http://www.nypost.com/p/news/local/for_cab_medallions_P2WKINwnDia0zlgYlaKI3N); *supra* note 6 and accompanying text.

However, an economic analysis done for medallion lenders emphasizes that the absence of a price decline does not mean the market has been unaffected. The analysis argues "[t]hat prices have not dropped may well be the result of expectations . . . that some regulatory compromise will be reached, as has been the case in the past, so that medallion owners will not be harmed. It could also be the result of expectations that the legislation will not ultimately come into force, as a result of legal challenges or political pressure." MILLER, *supra* note 33, at 11.

There are indications that lenders have acted to protect themselves but also that lending against medallions continues to be attractive. At least one credit union responded to the passage of an earlier version of the taxi reforms by reducing the share of the medallion purchase price it would lend. Other lenders reportedly increased the interest rates they charge for medallion loans. Dana Rubinstein, *Bloomberg's Radical Proposal To Solve New York City's Taxi Problem, Stalled*, CAPITAL (Oct. 5, 2011), <http://www.capitalnewyork.com/article/culture/2011/10/3623967/bloombergs-radical-proposal-solve-new-york-citys-taxi-problem-stalle>. However Medallion Financial recently purchased a medallion loan portfolio. News Release, Medallion Financial Announces Acquisition of Medallion Loan Portfolio of over \$10,000,000 (June 25, 2012), available at <http://www.medallionfinancial.com/news-release-6-25-12.htm>.

305. The Metropolitan Taxicab Board of Trade and the Greater New York Taxi Association are plaintiffs in *Taxicab Service Ass'n v. New York*, No. 102553-2012 (N.Y. Sup. Ct. August 17, 2012).

medallions such as Medallion Financial and the credit unions organized into the Taxicab Service Association,<sup>306</sup> and the agents that lease medallions represented by the Committee for Taxi Safety.<sup>307</sup>

As of November 2012, the medallion industry is winning in its efforts to block the legalization of street hails by non-medallion taxis in the outer boroughs and upper Manhattan. In litigation brought principally by the Metropolitan Taxicab Board of Trade, the Taxicab Service Association and the Greater New York Taxi Association, a New York State trial judge issued a decision in the summer of 2012 holding that the Street Hail Livery Law is

*See also* Grynbaum, *supra* note 196 (discussing the opposition of the Metropolitan Taxicab Board of Trade).

306. The Taxicab Service Association, which represents credit unions financing medallions, also is a plaintiff in *Taxicab Service Ass'n v. New York*, No. 102553-2012 (N.Y. Sup. Ct. August 17, 2012). Medallion Financial is not a plaintiff in the litigation but its president has worked against the Bloomberg reforms. Grynbaum, *supra* note 163 (reporting on the efforts of the president of Medallion Financial to avoid the passage of an earlier version of the Bloomberg reforms).

307. Christine Haughney, *Cuomo, Under Pressure, Is Still Silent on Intentions for Bill To Expand Taxi Service*, N.Y. TIMES, July 18, 2011, <http://www.nytimes.com/2011/07/18/nyregion/cuomo-still-silent-on-expansion-of-taxi-service.html> (quoting the executive director of the Committee for Taxi Safety); Rubinstein, *supra* note 304 (referring to money spent by the Committee on Taxi Safety on a lobbying firm).

The positions of disability advocates, the NYTWA, and the livery industry also are worth noting. After the state legislature passed an initial version of the Street Hail Livery Law in 2011, the medallion interests were joined in opposing the legislation by advocates for improving the accessibility of the City's taxi and for-hire vehicles to persons with mobility disabilities in an odd alliance that was new to New York taxi politics, which as described above rarely has included the involvement of consumer representatives. Dana Rubinstein, *How Medallion Owners Adopted the Handicapped Issue to Fight Bloomberg's Borough-Taxi Plan*, CAPITAL (Oct. 20, 2011, 10:21 AM), <http://www.capitalnewyork.com/article/politics/2011/10/3817535/how-medallion-owners-adopted-handicapped-issue-fight-bloombergs-bor>. The final version of the Street Hail Livery Law passed in 2012 addressed the need to improve access to persons with disabilities through several requirements and disability advocates have not intervened on the side of the medallion industry in the ongoing litigation challenging the Law. *See supra* note 185.

After initially opposing legalizing street hail pickups, the NYTWA ultimately supported the mayor's initiative to boost service in upper Manhattan and the outer boroughs in exchange for the TLC taking a number of initiatives. Trevor Kapp et al., *Cabbies Slam Brakes on City Hall Proposal Allowing Livery Pickups in Manhattan*, N.Y. DAILY NEWS (June 21, 2011), [http://articles.nydailynews.com/2011-06-21/local/29704345\\_1\\_livery-pickups-livery-drivers-bhairavi-desai](http://articles.nydailynews.com/2011-06-21/local/29704345_1_livery-pickups-livery-drivers-bhairavi-desai). As mentioned above, the TLC recently approved a fare increase, and voted to ensure that most of it will go to taxi drivers, in spite of the objections of taxi fleet owners, who considered the move to be penalizing them for their litigation against the Street Hail Livery Law. *See supra* note 172.

The Street Hail Livery Law has split the livery industry. Some members of the industry have intervened in the litigation on the side of plaintiff medallion owners and lenders, while others have intervened on the side of the City in defense of the law. Dana Rubinstein, *Bloomberg Commissioner Calls de Blasio's Taxi Stance 'Nonsense,' as Carmel and Dial 7 Join Lawsuit*, CAPITAL (June 20, 2012, 10:30 AM), <http://www.capitalnewyork.com/article/politics/2012/06/6024991/bloomberg-commissioner-calls-de-blasios-taxi-stance-nonsense-carmel>. A possible explanation for the split is that the livery supporters of the Law may be traditional community livery services whose drivers, to varying degrees, already pick up street hails illegally, and stand to benefit from legalization. The livery opponents may be operators of large car services providing prearranged service to the airports and the Manhattan core. Reply Aff. of Jose Altamiro in Resp. to Intervenor-Pls. and in Further Opp'n to Pls.' Mot. for a Prelim. Inj. and in Further Supp. of the City Defs.' Mot. for Summ. J. at 7-8, *Metro. Taxicab Bd. of Trade v. Bloomberg*, No. 102472 (N.Y. Sup. Ct. June 27, 2012).

unconstitutional under the New York State Constitution on three grounds.<sup>308</sup> The City is appealing.<sup>309</sup>

A principal ground on which the trial judge found for the plaintiffs is that the State's passage of the Street Hail Livery Law violates protections for municipal home rule.<sup>310</sup> The medallion owners' legal victory on home rule grounds ultimately would seem to rest in good measure on their political influence in the City Council. The Law could have been upheld in the face of the home rule challenge on the basis that it satisfied the home rule provisions in the State constitution, or a "judicially-created 'substantial State interest' exception."<sup>311</sup> *Taxicab Service Association* holds that the Law does not fit within the exception.<sup>312</sup> It also holds that it does not satisfy the State constitutional provisions because there was no home rule message from the City Council requesting the Law.<sup>313</sup> The Bloomberg administration denies that it went to the State legislature without approval from the City Council in an "end run."<sup>314</sup> But the fact remains that the administration never obtained a home rule message from the Council before the State Law was passed, presumably because the administration did not think that it had the votes on the Council.<sup>315</sup> As mentioned earlier, the City Council was an important channel through which the medallion industry worked to block Mayor Koch's efforts to improve taxi service. There also seems to have been opposition to Mayor

308. The decision held that the State Hail Livery Law violates the Home Rule, Double Enactment, and Privileges and Immunities Clauses of the New York State Constitution. *Taxicab Service Ass'n v. New York*, No. 102553, at 33 (N.Y. Sup. Ct. Aug. 17, 2012).

309. See *supra* note 55 (describing the status of the litigation).

310. The discussion of the home rule issues takes up 13 of the 33 pages of the decision. *Taxicab Service Ass'n v. New York*, No. 102553, at 13-26 (N.Y. Sup. Ct. Aug. 17, 2012).

311. *Taxicab Service Ass'n v. New York*, No. 102553, at 14 (N.Y. Sup. Ct. Aug. 17, 2012).

312. *Id.* at 14-26.

313. *Id.* at 14.

314. Yassky Reply Affidavit, *supra* note 131, at 1-2 (denying that there was an attempted end run); Yassky, *supra* note 131 (same). The Bloomberg administration reportedly had legal advice that a home rule message would be unnecessary. Michael M. Grynbaum & Christine Haughney, *Bloomberg Move Exploits Taxi Industry's Limited Reach*, N.Y. TIMES, June 21, 2011, <http://www.nytimes.com/2011/06/22/nyregion/bloomberg-move-exploits-taxi-industrys-short-reach.html>.

315. The trial judge seems to think that the administration "bypassed" the City Council because there was not enough support for the Law at the Council. *Taxicab Service Ass'n v. New York*, No. 102553, at 20 (N.Y. Sup. Ct. Aug. 17, 2012). For journalistic references to the medallion industry's influence at the Council, Council opposition to the Law, and explanations of the Bloomberg administration's decision to seek state legislation, see Grynbaum, *supra* note 196; Grynbaum & Haughney, *supra* note 314; and Clyde Haberman, *Local Taxi Issues Take a Ride to Albany*, N.Y. TIMES CITY ROOM (June 22, 2011, 8:30 AM), <http://cityroom.blogs.nytimes.com/2011/06/22/local-taxi-issues-take-a-ride-to-albany>.

There was at least some support among City Council members for legalizing street hails by liveries. For example, the Council's Black, Latino and Asian Caucus endorsed state legislation legalizing street hails by liveries. Aff. of Jose Altamirano in Opp'n to Pls.' Mot. Prelim. Inj. and in Supp. of City Defs.' Mot. Summ. J., Ex. B & C, *Taxicab Serv. Ass'n v. New York*, No. 102553 (N.Y. Sup. Ct. June 15, 2012).

Bloomberg's reform proposals at the Council.<sup>316</sup> In recent years there also have been reports of campaign contributions from medallion owners to City Council members and other local officials, and the use of lobbyists by the medallion industry.<sup>317</sup> The apparent political influence of medallion interests with the Council would seem to have bolstered their legal case, by discouraging the Bloomberg administration from seeking the home rule message that might have helped insulate the Street Hail Livery Law from attack on home rule grounds.

If the City ultimately prevails on appeal and the Street Hail Livery Law is implemented, the Law will still have a number of features consistent with the interests of the medallion industry. To start, the legislation would preserve the medallions' monopoly on their core areas of business, Manhattan's central business district and the airports. Mayor Bloomberg and TLC Chair David Yassky repeatedly have emphasized that the legislation carves out the core area of business from competition, as if they were implicitly acknowledging the industry's influence.<sup>318</sup> The total number of HAIL licenses that the legislation authorizes also reflects input from the yellow taxi industry. A bill passed by the state legislature in June 2011 authorized the issuance of 30,000 licenses. Apparently in response to input from the yellow taxi industry, the final bill reduced the maximum number of licenses to 18,000, close to the current number of liveries.<sup>319</sup>

There also are aspects of the reforms that offer opportunities for components of the medallion industry, in particular the issuance of additional yellow taxi medallions. The idea of auctioning additional medallions was not in the Mayor's original January 2011 proposal. It apparently originated from the

316. Grynbaum, *supra* note 196; Grynbaum & Haughney, *supra* note 314; Haberman, *supra* note 315.

317. Michael M. Grynbaum, *Taxi Industry Opens Wallet for de Blasio, a Chief Ally*, N.Y. TIMES, July 17, 2012; Grynbaum & Haughney, *supra* note 314; Powell, *supra* note 152; David Seifman, *Maul at City Hall as Mike Rips Critics*, N.Y. POST (June 2, 2012, 7:07 AM), [http://www.nypost.com/p/news/local/maul\\_at\\_city\\_hall\\_as\\_mike\\_rips\\_critics\\_GkHVQKkQOw5muisBKBOcDK](http://www.nypost.com/p/news/local/maul_at_city_hall_as_mike_rips_critics_GkHVQKkQOw5muisBKBOcDK). The medallion industry also made campaign contributions to state officials in the debate over the Street Hail Livery Law, and hired lobbyists to lobby at the state level. Jennifer Fermino, *Taxis in Hail Storm*, N.Y. POST (Oct. 3, 2011, 7:55 AM), [http://www.nypost.com/p/news/local/taxis\\_in\\_hail\\_torm\\_NpjXDDjfm9PvADaoaClmM](http://www.nypost.com/p/news/local/taxis_in_hail_torm_NpjXDDjfm9PvADaoaClmM); Kenneth Lovett, *Gov. Cuomo Fares Well as Yellow Cabs Fight To Knock Out Livery Bill*, N.Y. DAILY NEWS, Sept. 21, 2011; Jeremy Smerd, *Taxi Plan Breaks Through in Albany*, CRAIN'S N.Y. BUSINESS (June 24, 2011, 12:05 PM), <http://www.crainsnewyork.com/article/20110624/FREE/110629916>.

318. Stephen Goldsmith & David Yassky, *Create a New Taxi Fleet for Street Hails in Brooklyn, Queens, the Bronx and Staten Island*, N.Y. DAILY NEWS, Feb. 25, 2011; David Seifman & Fredric U. Dicker, *Open Road for Boro-Only Cabs*, N.Y. POST (June 25, 2011, 7:08 AM), [http://www.nypost.com/p/news/local/open\\_road\\_for\\_boro\\_only\\_cabs\\_8tH4OXiaYMG2AXQmkr4eJP](http://www.nypost.com/p/news/local/open_road_for_boro_only_cabs_8tH4OXiaYMG2AXQmkr4eJP); David Yassky & Stephen Goldsmith, *Better Taxi Service for All*, N.Y. POST (June 22, 2011, 12:17 AM), [http://www.nypost.com/p/news/opinion/opedcolumnists/better\\_taxi\\_service\\_for\\_all\\_YnTaH4NWJPzsd3qEWyXDLO](http://www.nypost.com/p/news/opinion/opedcolumnists/better_taxi_service_for_all_YnTaH4NWJPzsd3qEWyXDLO); Yassky Affidavit, *supra* note 46, at 8.

319. Dana Rubinstein, *Assembly Leaders Plan to Force Cuomo's Hand on the Bloomberg Taxi Bill*, CAPITAL (Dec. 7, 2011, 5:03 PM), <http://www.capitalnewyork.com/article/politics/2011/12/4539887/assembly-leaders-plan-force-cuomos-hand-bloomberg-taxi-bill>; *see also* MILLER, *supra* note 33, at 13.

yellow industry, which proposed it as a way of improving taxi service in the outer boroughs.<sup>320</sup> The fleets now appear to oppose the issuance of additional medallions.<sup>321</sup> Regardless of the position of the fleets, for medallion lenders, the auctions of new medallions will offer an opportunity to finance the purchase of additional medallions.<sup>322</sup> As with the earlier auctions in 1996-1997 and 2004-2008, the City will auction the medallions gradually over time.<sup>323</sup> Spreading out the auctions should maximize the revenues that the City will reap and limit the impact of the new issuances on the secondary market price of medallions.<sup>324</sup>

In historical terms, the Bloomberg's administration efforts to legalize street hail pickups by for-hire vehicles in the outer boroughs is significant. The "gypsy cabs" and Mayors Koch and Dinkins sought and never obtained the legalization of for-hire vehicles picking up street hails in upper Manhattan and the outer boroughs that the Bloomberg administration is seeking.<sup>325</sup> But even if the Bloomberg administration prevails, the medallion industry's monopoly likely will remain on street pickups in lucrative central Manhattan and the airports.

## VII. Conclusion

New York taxi medallions are an example of a modern form of property right. Created only 75 years ago, they have evolved into a commodity that is bought, sold, leased and used as collateral much like conventional property. The short history of New York medallions enables us to know more about the development of New York medallions and why they have persisted over time than we easily can learn about older forms of property such as property in land.<sup>326</sup> In theory, New York taxi medallions might be justified in Demsetzian

320. Yassky Reply Affidavit, *supra* note 131, at 3. *See also* Compl., *supra* note 144, at 11, Taxicab Serv. Ass'n v. New York, No. 102553 (N.Y. Sup. Ct. Apr. 27, 2012).

321. In their complaints, the Metropolitan Taxicab Board of Trade and the Greater New York Taxi Association indicate that the Street Hail Livery Law "dilutes the value of medallions by issuing 2,000 new accessible medallions." Am. Compl., *supra* note 64, at 30, Metro. Taxicab Bd. of Trade v. Bloomberg, No. 102472 (N.Y. Sup. Ct. May 18, 2012); *see* Compl., *supra* note 192, at 26, Greater N.Y. Taxi Ass'n v. New York, No. 102783 (N.Y. Sup. Ct. May 24, 2012).

322. Smerd, *supra* note 317. The lender plaintiffs do not emphasize the issuance of an additional 2,000 medallions in describing the "crushing blow" that the Street Hail Livery Law will impose on the medallion taxi industry. Compl., *supra* note 144, at 18, Taxicab Serv. Ass'n v. New York, No. 102553 (N.Y. Sup. Ct. Apr. 27, 2012).

323. HENNINGSON DRAFT EIS, *supra* note 2, at 15-1 (noting that TLC expects to auction medallions over three years starting in 2012).

324. Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. at 29, Metro. Taxicab Bd. of Trade v. Bloomberg, No. 102472 (N.Y. Sup. Ct. May 7, 2012).

325. Michael M. Grynbaum, *Taxi-Industry Battle Continues, with Echoes of 1971*, N.Y. TIMES CITY ROOM (Aug. 1, 2011, 5:58 PM), <http://cityroom.blogs.nytimes.com/2011/08/01/a-taxi-industry-battle-continues-with-echoes-of-1971>.

326. *See also* Graham Lake, *Demsetz Underground: Busking Regulation and the Formation of Property Rights*, 87 N.Y.U. L. REV. 1100, 1111 (2012) (noting that the "recentness" of the Music Under

terms, especially on the basis that they are a useful tool for internalizing onto taxi operators the congestion and pollution externalities attributable to taxis. But upon closer examination, it is hard to explain the persistence of medallions as the internalization of externalities, or in other Demsetzian terms. There are too many aspects of the history of medallions that seem more attributable to the political clout of the medallion industry than to public-interested economic logic.

The history of New York taxi medallions has a number of implications for property theory. First, the history underscores the political nature of property rights in the modern state. The story of medallions suggests that, like other creatures of political decision-making, contemporary property rights may be influenced by the stakes and organization and information costs that different interest groups face.

Second, the history suggests that we should be cautious about attempts to rationalize the existence of property in economic terms as cost-beneficial from a societal perspective. As Demsetz and others influenced by him have argued, property may arise and persist because it is efficient from a societal perspective. But like medallions, property may evolve even if inefficient from a societal perspective because of the political process governing property rights, especially in modern times. There is no necessary correspondence between what is cost-beneficial for society as a whole and the outcomes of political decision-making processes.<sup>327</sup>

A third implication of the history of New York taxi medallions is that the persistence of problematic property rights may impose costs not only in the present but also going forward. In intellectual property, scholars have observed that property rights may inhibit innovation, even though they often are touted as necessary to create an incentive to innovate.<sup>328</sup> Taxicab licenses similarly may be inhibiting innovation.<sup>329</sup> In the New York taxi industry, recent reform proposals such as the effort to legalize street hails generally seem to have come from city government, rather than the industry itself.<sup>330</sup> It is almost as if the taxi industry—yellow medallion taxis as well as for-hire vehicles—has become too content with the status quo to push for changes that would benefit

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New York permit system “gives us a better opportunity to evaluate the how behind the formation of property rights” than Demsetz’s hunting territories example).

327. See also Bell & Parchomovsky, *supra* note 15, at 85 n.21; Frischmann, *supra* note 15; Levmore, *Property’s Uneasy Path*, *supra* note 15; Levmore, *Two Stories*, *supra* note 15.

328. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (May 1988).

329. OECD, *supra* note 5, at 30; Koehler, *supra* note 219, at 54.

330. Consistent with the idea that the industry itself has not been very innovative, a company from outside the taxi industry was the first to introduce into New York an app allowing consumers to obtain a taxi by smartphone, a development that could erode the boundaries between yellow medallion taxis and for-hire vehicles. Matt Flegenheimer, *Taxi-Hailing App Pulls out of New York After 6 Weeks*, N.Y. TIMES, Oct. 16, 2012; Matt Flegenheimer, *City E-Mails Outline Policy Debate on Street-Hail Apps*, N.Y. TIMES, Oct. 17, 2012.

consumers.<sup>331</sup> Problematic property rights should not only be regarded as burdensome in the present but also potentially burdensome in the future.

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331. See also Haberman, *supra* note 315 (arguing that “for decades” the taxi “industry has been a model of resistance to innovation”).

