
FROM JITNEYS TO APP-BASED RIDESHARING: CALIFORNIA’S “THIRD WAY” APPROACH TO RIDE-FOR-HIRE REGULATION

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Ever since the [California Public Utilities Commission] gave Lyft, Sidecar and Uber free passes to grossly expand their businesses a plethora of illegal cars and taxis (including cars with fake pink mustaches) have hit the streets A cab driver I know has developed his own app and just can't wait for ridesharing to be given the official thumbs up so he can buy a junk car and start making some extra money.

And why not?

—Ed Healy, San Francisco Taxicab Driver¹

I. INTRODUCTION

A new breed of “app-based” ride-for-hire providers has caused a stir in California, helped rewrite the state’s rules governing ridesharing, and stoked tensions among taxicab drivers, state and local regulators, and the technology companies behind the new apps. UberX, Lyft, and Sidecar are among the most well-known of the new app-based rideshare services, which allow customers to hail a ride using smartphone applications by connecting them with drivers who also use the apps. Critically, the drivers

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1. Revised Opening Final Comments Filed on Behalf of Ed Healy, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n June 4, 2013), *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M076/K996/76996093.PDF>.

need not be professionals; rather, they merely need to have downloaded a ridesharing app and been cleared by the app provider to drive.² For a time, the app-based rideshare companies pointed to these novel aspects of their services to flout regulation entirely. New laws and rules in California, however, provide for the regulation of the nascent industry under a statewide scheme mandating insurance coverage, driver background checks, and other safety-based requirements. In substance, the new rules signal the state's tacit approval of the development of app-based ridesharing services.³ Users of these app-based services, which are currently available only in major metropolitan areas like Los Angeles, have been impressed by the apps' lower prices and perceived higher quality of service.⁴

Supporters of those cities' taxicab industries are less impressed, however. Indeed, the public comment introducing this Note indicates the intense level of frustration that the app-based interlopers have inspired, even among ordinary citizens. According to taxicab representatives who protested the state's new rules and who have continued to denigrate app-based rideshare services, the apps represent not only a transgression of an industry that deserves better protection, but also a major threat to public safety. A large part of the early debate over app-based ridesharing centered on whether the California Public Utilities Commission ("CPUC") even had jurisdiction to authorize the new services, given their similarities to taxicabs and the fact that the taxicab industry has long been the domain of city and local regulatory authorities.⁵ Since then, taxicab advocates have claimed that app-based ridesharing puts both the public and rideshare drivers themselves at serious risk of harm.⁶

Both the emergence of app-based ridesharing and the taxicab

2. *E.g.*, *Become a Lyft Driver*, LYFT, <https://www.lyft.com/help/article/1003522> (last visited Apr. 17, 2015).

3. Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry 22, Decision 13-09-045, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm'n Sept. 19, 2013) [hereinafter CPUC Decision], available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF> ("[A] 'donation' for passenger transportation service is equivalent to direct compensation for the service provided, which falls under the jurisdiction of this Commission.").

4. *See, e.g.*, Rebecca Grant, *Lyft Doubles Rides per Week as Founders Gear Up for International Expansion*, VENTUREBEAT (Sept. 9, 2013, 11:00 AM), <http://venturebeat.com/2013/09/09/lyft-doubles-rides-per-week-founders-gear-up-for-international-expansion/> (describing the explosive popularity of ridesharing).

5. *See* CPUC Decision, *supra* note 3, at 7–21 (describing the various arguments for and against giving the CPUC jurisdiction over ridesharing services).

6. *Id.* at 35–39.

industry's response toward it are reminiscent of a curiously similar and somewhat overlooked episode in California's—and the country's—early automotive history. Between 1914 and 1917, first in Los Angeles and then elsewhere throughout the United States, underemployed drivers offered rides to anyone willing to pay a five-cent fee. Called *jitneys*, these makeshift ride-for-hire services were explosively popular, and as with app-based rideshares today, they soon drew the ire of the established players in the transportation industry. In the early twentieth century, however, these were not cab drivers, but rather railway companies. Despite the apparent willingness of local regulators in Los Angeles to allow the jitney industry to develop, the railway operators in Los Angeles eventually succeeded in compelling them to shut it down via extremely restrictive—and economically unjustified—regulations.

The jitney experience in Los Angeles offers a number of insights into the current regulatory debate over app-based ridesharing, especially given that CPUC regulations have apparently done little to resolve the debate at the local level. In particular, a review of the struggle over jitneys highlights the ways in which an entrenched participant in a regulated industry might wield the threat of regulation as a sword against newcomers, thus consolidating its powerful position in the industry. This in turn suggests the importance of considering why regulation of a particular industry, or a particular participant in that industry, is ever justified, as well as what the exact nature of such regulation ought to be. These considerations are particularly important in the context of app-based ridesharing not only because the jitneys and app-based rideshares are formally and technically similar, but also because both services reflect the entry of an innovative newcomer into a regulated industry, raising the question of whether the newcomer is so disruptive as to defy the existing justifications for regulation. The lessons of the jitney era in Los Angeles thus offer important lessons for regulators and commentators considering the appropriateness of app-based ridesharing regulation at both the state and local levels.

A careful examination of the jitney-era regulations also reveals a distinction that is important in the modern scholarship on regulation: the distinction between *economic regulation* and *health and safety regulation*. Economic regulation is designed to handle market inefficiencies, such as those associated with the existence of natural monopolies in the provision of some goods.⁷ Health and safety regulation, on the other hand, addresses

7. W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, *ECONOMICS OF REGULATION AND ANTITRUST* 5–6 (4th ed. 2005).

externalities and information asymmetries.⁸ The use of each form of regulation is thus justified only in certain circumstances. Moreover, economic regulation and health and safety regulation employ fundamentally different tools in achieving their goals. The jitney experience suggests, and a closer analysis of the modern ride-for-hire industry confirms, that only health and safety regulation—manifested in the form of insurance-holding requirements and safety standards—is truly justified when it comes to regulating ride-for-hire services.⁹ Despite this, the regulatory program the taxicab industry has been defending—and which CPUC regulations have so far allowed app-based services to subvert—is characterized by the tools of economic regulation, including barriers to market entry and price restrictions.

The lessons of the jitney era, while valuable, can only be taken so far. The jitney story is more a cautionary tale than a pure analogy: the jitney system was imperfect and eventually collapsed in the face of intense civic and regulatory opposition. Thankfully, app-based rideshares have not suffered a similar fate. In their embrace of health and safety regulatory tools rather than economic ones, new California laws accommodating app-based rideshare services represent not merely an isolated victory for innovators in the ride-for-hire industry, but also suggest a more appropriate approach toward regulating the industry generally. They thus provide an opportunity for regulators at the local level in California currently grappling with the app-based rideshare problem (as well as regulators in other parts of the country) to rethink the way that the ride-for-hire industry is regulated. Building off of recently adopted rules and statutes in California, and critiquing some still-apparent flaws in their reasoning, this Note recommends future statutory adjustments that would bring the entire ride-for-hire industry under the auspices of state public utilities regulation.

The Note begins by describing the history of jitneys in Los Angeles in Part II. It uses the story as a jumping-off point for a broader examination of regulation in the ride-for-hire industry. Part III then turns to an economic analysis of ride-for-hire, finding that only health and safety regulation, rather than economic regulation, is appropriate given the industry's characteristics. Part IV discusses the newly-adopted CPUC regulations and the ways in which they reflect a beneficial health and safety regulatory scheme; it also critiques some aspects of and gaps in the new rules. Part V

8. *Id.* at 8.

9. This Note uses the term “ride-for-hire” to refer to any service which offers vehicular transit for a fare. For purposes of our discussion, it may include not only automobile-based transit like taxicabs or buses, but also rail service.

concludes by moving beyond ridesharing to briefly examine the implications of new ridesharing regulations for emerging problems in the industry and for other facets of the burgeoning “sharing economy.”

II. THE JITNEY ERA IN LOS ANGELES

The jitneys’ origins trace back to 1914, when L.P. Draper of Los Angeles offered a short ride in his Model T to a passenger in exchange for a nickel.¹⁰ Draper’s inaugural fare captured the essence of the movement he would inspire: jitneys would come to be described as “[a]nything that runs on four wheels and gasoline and 5 cents.”¹¹ They were mostly Fords, and indeed the ubiquity of the Ford Model T was one of the primary reasons that the jitney’s popularity was even possible.¹² They were predominantly operated by men who, because of an economic depression, had few other viable employment opportunities and little else to occupy their time.¹³ Commuters came to adore the jitneys for their efficiency and novelty.¹⁴ The Police Commissioner’s office was inundated with new requests for chauffeur’s licenses, apparently the only requirement for a driver to operate a jitney service from his vehicle.¹⁵ But the jitneys quickly found a formidable enemy in Los Angeles’s railway operators, who lost passengers and profits to jitney competition,¹⁶ and the railway companies quickly mounted a determined push for regulation.¹⁷

Jitney travel was only possible thanks to the growing popularity of the automobile. Transportation at the turn of the twentieth century was dominated by rail travel, and the automobile was slow to take its place for a number of reasons. Many states had laws limiting the speed at which cars could travel in order to reduce the noise and pollution they created.¹⁸

10. Ross D. Eckert & George W. Hilton, *The Jitneys*, 15 J.L. & ECON. 293, 294 (1972). However, an early *Los Angeles Times* article traces the jitney’s emergence to 1911 in Phoenix, Arizona. *The Jitney Bus Motor Plague*, L.A. TIMES, Dec. 6, 1914, at VII2.

11. Carlos A. Schwantes, *The West Adapts the Automobile: Technology, Unemployment, and the Jitney Phenomenon of 1914–1917*, 16 W. HIST. Q. 307, 308 (1985).

12. *Id.* at 308, 312–13. Other brands of cars were also used as jitneys, as were retrofitted delivery trucks. *Id.* at 308.

13. *Id.* at 309, 314.

14. See Letter to the Editor, *Jitneys and Service*, L.A. TIMES, May 15, 1917, at II5.

15. *Many Hundreds After Nickels*, L.A. TIMES, Dec. 3, 1914, at II10; *Regulation of Auto Busses*, L.A. TIMES, Nov. 7, 1914, at II10.

16. For instance, by fall 1914, the Pacific Electric Railway Company could no longer afford to maintain its usual schedule of streetcars in Long Beach because of the growing popularity of jitneys. *Jitney Busses Swiping Trade*, L.A. TIMES, Oct. 22, 1914, at II8.

17. *Id.*

18. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 158 (1985).

Infrastructure was also a problem, as roads were often unpaved or poorly maintained for car travel, and highways between urban areas simply did not exist.¹⁹ Nor had roads to that point been designed with automobiles in mind: it was difficult for drivers to navigate through narrow and winding streets with minimal signage.²⁰ Early cars were also, as one might expect, quite dangerous, not only because of their mechanical limitations, but also because few people understood how to drive them.²¹ In short, at the turn of the twentieth century, Los Angeles, like the rest of the country, simply was not ready for cars.

The introduction of the Ford Model T in 1908 marked a dramatic shift from this state of affairs. Easy to use and dependable, it quickly dominated the automotive market. Ford's innovative production methods made the Model T readily available throughout the country for a bargain price.²² By 1913, one million automobiles were registered in the United States, and this number increased exponentially over the next decade largely due to Ford.²³ Still, the early hurdles to the automobile's popularity had not been entirely cleared by the time the first jitneys appeared on Los Angeles's streets.

However, the regulatory suppression of jitneys was not a foregone conclusion. Despite the arguments of railway industry proponents to the contrary,²⁴ the jitneys were not an inherently inferior transit option whose emergence necessitated protective regulation. To the extent that they were inefficient or unprofitable, the jitneys would eventually leave the market, something the railway operators fully realized.²⁵ What they feared was not that the jitney would singlehandedly destroy their hold on the ride-for-hire market, but rather the commuter frustrations for which jitneys provided an outlet, as well as the four-wheeled future the jitneys heralded. This was the

19. *Id.*

20. *Id.* at 158–59.

21. *Id.* at 159.

22. *Id.* at 160–61.

23. *Id.* at 162. By 1927, twenty-six million automobiles were registered in the United States, and half of all the automobiles in existence worldwide were manufactured by Ford. *Id.*

24. See, e.g., *The Jitney as a Gold Brick*, 45 ELECTRIC RAILWAY J. 919, 919 (1915) (describing the economics of jitney operation from an individual operator's perspective and concluding that the enterprise was financially fruitless). See also E.L. Lewis, *The Jitney Bus in Los Angeles*, 45 ELECTRIC RAILWAY J. 757, 757–58 (1915) (describing the emergence of the jitney movement in Los Angeles and dismissing it as little more than a passing fad). It bears mentioning that this publication was an outlet of railway industry proponents.

25. SCOTT L. BOTTLES, *LOS ANGELES AND THE AUTOMOBILE: THE MAKING OF THE MODERN CITY* 50 (1987). See also, e.g., *Fight Jitneys for Nickels*, L.A. TIMES, Mar. 8, 1915, at I18 (“Now that it is no longer a novelty to ride in a public auto, local people choose the electric car rather than the auto, and a big reduction in the jitney bus receipts are looked for.”).

root of the regulations that ultimately stamped out jitneys. A regulatory battle provided an arena in which railway operators could draw attention to the jitney's perceived social maleffects. Indeed, the eventual regulations were the product of pressure from the transportation industry establishment—namely, the railway operators—rather than of economic or social necessity.

On the other hand, jitneys also made available for common consumption an exciting technological advancement in transportation.²⁶ They also offered, at least ostensibly, economic freedom to their operators, thus providing an outlet for the frustrations of the unemployed. Still, many in the city despised the jitneys and their drivers for their contributions to traffic congestion and lack of safety. The intersection of these social and political responses to the jitney phenomenon played a key role in the jitneys' suppression.

A. THE "JITNEY MEN"

One fascinating aspect of the jitney phenomenon in Los Angeles was the number of people who were drawn to become jitney operators despite the business' myriad complications. The city's unemployed population saw great potential in the jitney venture, even though the hard economics of the enterprise probably should have inspired more caution. It seems that what was important to drivers about the jitney was not so much the promise of financial gain as the opportunity it provided to express one's independence and self-worth. It seems likely as well that jitney operators, along with their customers, saw the jitney as an effective means of challenging the arrogant and well-funded streetcar barons who monopolized transportation in Los Angeles at the time.²⁷

The number of drivers who followed L.P. Draper's example and took up jitney operation grew substantially in late 1914,²⁸ by which time an economic depression had resulted in substantial unemployment in Los Angeles and steered many to jitney operation.²⁹ According to Carlos Schwantes, "[t]he average jitney driver was often yesterday's unemployed locomotive engineer, policeman, bartender, printer, barber, or clerk. In Los

26. Schwantes, *supra* note 11, at 307–10.

27. *Id.* at 310.

28. *Many Hundreds After Nickels*, L.A. TIMES, Dec. 3, 1914, at H10. Jitney men initially reasoned that all that was required to operate a jitney was a cheap chauffeur's license that essentially anyone could obtain. Eckert & Hilton, *supra* note 10, at 294–95.

29. Unemployment was estimated to be about 11 percent at this time. Schwantes, *supra* note 11, at 313–14.

Angeles, streetcar motormen and conductors put out of work by the jitney craze took up driving jitneys themselves.”³⁰ It was thus not merely the development of the automobile that prompted the jitney phenomenon; the concurrent existence of an idle workforce played a critical role in the jitneys’ rapid surge in popularity.

Despite its apparent financial attractiveness, however, the jitney was at bottom a bad deal for its drivers. Per-day out-of-pocket costs for the typical driver were estimated to be around six dollars, while gross income for each day would amount to only about eight.³¹ The two-dollar surplus remaining had to account not just for a driver’s wages, but also his substantial fixed costs; one commentator estimated the annual sums of fixed costs and implied wages to be in the realm of \$750 and \$700 respectively, for a total of \$1,450 per year, far exceeding the annual earnable amount.³² Jitney proponents and railway operators differed markedly in their estimations of the ultimate profitability of the enterprise,³³ but it seems clear that drivers themselves tended to ignore, or perhaps were unaware of, the substantial costs associated with their vehicles’ unavoidable depreciation.³⁴

Indeed, if jitney operators were driven out of the business, it was because at some point, regardless of the enterprise’s superficial appeal, making a living off of jitney wages proved impossible. One 1915 study of jitney operation found that jitney drivers consistently operated for a surprisingly brief period—on average a driver spent only nineteen days plying his trade as a “jitneyman.”³⁵ Even though this was an estimate, commentators have observed that the jitney market as a whole was characterized by high rates of worker entry and exit.³⁶ However, “the

30. *Id.* at 314.

31. Eckert & Hilton, *supra* note 10, at 300. The computations assume a fare of five cents per ride.

32. F.W. Doolittle, *The Economics of Jitney Bus Operation*, 23 J. POL. ECON. 663, 674–75 (1915).

33. Eckert & Hilton, *supra* note 10, at 300–01. *See also* “Jitney” *Bus in Collapse*, L.A. TIMES, Mar. 14, 1915, at III (arguing that jitney operation was “mostly expense” and that even a successful operator would find it nearly impossible to turn a profit in Los Angeles).

34. Schwantes, *supra* note 11, at 314–15. This is not to say that jitney men never considered costs but merely that certain costs, like that of depreciation, were hidden from them in ways that other costs were not. For instance, a spike in the price of gasoline in early 1916 nearly extinguished jitney service in Los Angeles. *Four-Fifths of City’s Jitneys Die of Thirst*, L.A. TIMES, Feb. 13, 1916, at III. It seems instead that the psychological benefits of jitney operation, discussed further below, tended to disguise the long-run costs of operation like depreciation but could not offset the more salient short run costs of items like gasoline or of an extremely low implicit wage.

35. Eckert & Hilton, *supra* note 10, at 303, 309–10. It is important to consider the limitations of this study, as well as the fact that it was published by an outlet of the railways.

36. *See, e.g., id.* at 303 (finding that if the drivers were unemployed and the alternative use of the

number of jitneys in a city receded only modestly below the initial supply,” indicating that new drivers were always ready and willing to step in to replace those who left.³⁷ In Los Angeles, for instance, the railway superintendent found that the average driver operated for about sixty days and that statistics for entry and exit during given periods were roughly equal.³⁸ Also common was part-time jitney operation, in which drivers worked only during rush hour periods before and after their normal jobs.³⁹

It is impossible to know precisely what jitney operators were thinking when they calculated the costs and benefits of their new line of work (or if in fact they even did so). However, it appears that the main draw of the jitney to its drivers was its nonfinancial value. To many drivers, jitney operation was a means of satisfying a “psychological need to fill their idle hours and to provide for their families.”⁴⁰ There was also quite likely a sense of commitment among jitney drivers derived from the fact that, relative inexpensiveness aside, an automobile was a major investment for someone without a job; used cars were often purchased on credit in order to be used as jitneys.⁴¹ Thus, jitney men either did not bother to concern themselves with long-term costs like vehicle depreciation or loan interest, or they were willing to pay these costs to fill a psychic void.⁴² What mattered was the existence of a consistent stream of tangible income—however small—and the sense of independence that jitney operation provided.⁴³ Jitneys were thus profoundly valuable to their operators for their perceived financial value and, more importantly, for their ability to provide drivers with a new identity.⁴⁴ In this context, it is telling that the

vehicle was private, the rational choice was to neglect long-term costs in favor of the short-term gains of jitney operation).

37. *Id.*

38. *Id.*

39. *Id.* at 297. The prevalence of part-time jitney operators may help explain the lack of organized associations of drivers. *Id.* It also supports the idea that jitney operation was perceived by drivers as more of a means of expressing independence than making money: building economies of scale via association surely would have helped in offsetting the costs of operation, but it also would have made the enterprise as a whole feel less independent to each of its drivers.

40. Schwantes, *supra* note 11, at 314.

41. *Id.*

42. Schwantes appears to suggest that the latter reason was the case. *See id.* (explaining that the otherwise unemployed operators satisfied their psychological needs “even if they were eating at the expense of the autobus” (internal quotation marks omitted)).

43. *Id.*

44. Schwantes hypothesizes the following assertions of a representative jitney driver: “In the first place I have the car. And having stuck my \$500 into it, it might just as well keep running If I run a jitney I can be my own boss, and go home to lunch when I want to.” *Id.* (internal quotation marks omitted).

railway superintendent who performed the study of the Los Angeles jitney market found that the city's chronically large unemployed population created a practically "endless supply" of jitney drivers.⁴⁵

B. THE ESTABLISHMENT

Opposition to the jitneys came largely from a single source—the railway companies, the dominant providers of transportation in 1914 Los Angeles. Railway operators saw the jitneys as an unwelcome intrusion on a profitable industry over which they had long exercised full control. And such was the power of these companies that they were able to bring the local media and several local politicians into their corner. The positions taken by railway operators regarding the jitneys' social utility, economic efficiency, and ultimate value thus played a critical role in shaping the debate over jitney regulation.

One can trace the origins of Los Angeles railways to 1874, when horse-drawn lines ran through the center of downtown,⁴⁶ but the industry really only began to develop in the late 1880s when construction of the first electric railway systems became practical.⁴⁷ Railways in Los Angeles followed both interurban and intracity routes, with the latter being primarily the domain of the streetcar service.⁴⁸ Street railways throughout the country had monopolies over municipal transportation, usually protected by franchise rights.⁴⁹ They charged a flat five-cent fare for travel regardless of distance; this allowed for cross-subsidization of fares, by which passengers who rode short distances helped offset the cost to the railway of transporting long-distance travelers.⁵⁰

The jitneys threatened this established order in a number of ways. Most apparent to observers at the time, the jitneys stole away numerous riders from the streetcars and interurban railways. It was estimated that the Los Angeles Railway ("LARY") lost six hundred dollars per day in revenue at the height of the jitney craze, and the company was forced to lay off upwards of eighty employees and withdraw twenty-one cars to maintain

45. Eckert & Hilton, *supra* note 10, at 303.

46. BOTTLES, *supra* note 25, at 28–29.

47. JACKSON, *supra* note 18, at 103–05, 107–09.

48. BOTTLES, *supra* note 25, at 29.

49. Eckert & Hilton, *supra* note 10, at 294.

50. Schwantes, *supra* note 11, at 316. More specifically, "the passengers who rode distances of under approximately two miles subsidized the longer distance passengers." Eckert & Hilton, *supra* note 10, at 294.

profitability.⁵¹ The *Los Angeles Times* on numerous occasions published reports documenting the plight of the railway companies, concluding that prolonged jitney operation would surely signal the end of rail service in the city altogether.⁵² Railways were particularly alarmed by the threat posed by jitneys to the five-cent fare, “an institution hallowed by tradition” and one that enabled the cross-subsidization that made rail service at least somewhat cost-effective.⁵³ Jitney passengers tended to be short-distance travelers, especially those commuting in and around the downtown area.⁵⁴ But these were exactly the kind of short-distance riders that railways relied on for cross-subsidization; without them, the economics of the railway system as a whole were called into question.⁵⁵ Given the significant efficiency problems that came along with jitney operation, about which railway outlets published numerous studies, railway operators were at a loss as to how their control over transportation in Los Angeles could have been so easily disrupted; still, they were nonetheless quite certain at the beginning of the craze that jitneys simply could not last and that jitney drivers would realize the financial error of their ways in due time and eventually return the stolen passengers back to the streetcars.⁵⁶

That being said, the jitney phenomenon still alerted railway operators to the fact that commuters were willing abandon the rails if they could. Although they believed that the circumstances leading to the jitney craze—

51. Eckert & Hilton, *supra* note 10, at 295.

52. See, e.g., *Another Line Lopped Off*, L.A. TIMES, Dec. 13, 1914, at IV12 (reporting that the railway company Pacific Electric (“PE”) was discontinuing service on certain routes because it was losing business on these routes to jitneys); *Begins War on Jitneys*, L.A. TIMES, Feb. 29, 1916, at I4 (reporting that street car companies had virtually ceased expansion of lines or service because of jitney competition); *Forty Cars Go Back To Barns*, L.A. TIMES, Dec. 16, 1914, at III (reporting that the Los Angeles Railway (“LARY”) was losing \$1200 per day due to jitneys, that it had had to retire forty rail cars from service indefinitely, and that it was considering reductions in overall service and in employment of rail workers); *Jitney Bus or Electric Car?*, L.A. TIMES, Mar. 30, 1916, at III (reporting a statement by the PE President that a “crisis” had been reached given that the operating expenses of maintaining rail service in many parts of metropolitan Los Angeles were far exceeding revenues); *Jitney Busses Cause Strife*, L.A. TIMES, Sept. 11, 1915, at II7 (reporting that PE officials had stated that it would be more cost effective to abandon most of their Long Beach lines than continue in the face of jitney competition); *Jitneys Cost Railroads Five Million Dollars*, L.A. TIMES June 13, 1916, at I1 (estimating the total revenue losses among California railroad companies in 1915 to be close to five million dollars); *State’s Railway Lines Menaced by the Jitney*, L.A. TIMES, Sept. 17, 1916, at II6 (describing the losses of state railway companies due to jitney competition); *Too Much Jitney Bus*, L.A. TIMES, May 13, 1915, at II10 (reporting that the PE had received permission to abandon and tear up tracks on routes adversely affected by jitney bus competition).

53. Schwantes, *supra* note 11, at 316. See also *supra* note 50 and accompanying text.

54. Eckert & Hilton, *supra* note 10, at 296.

55. Schwantes, *supra* note 11, at 316–17.

56. Eckert & Hilton, *supra* note 10, at 300–01.

poor economic conditions and drivers' miscalculation of operating costs—would soon dissipate, they also realized that “business conditions . . . could worsen as well and again expose the industry to new hordes of casual jitneys.”⁵⁷ And it seems likely that railway operators realized that the future might yield automobile technology allowing for more cost-effective jitney operation than was possible in 1914. Railway operators were thus convinced to turn to the municipal government for protection.⁵⁸

According to some commentators, local government regulators generally were “unanimously willing” to provide such protective aid for several reasons.⁵⁹ Many believed that one of the leading Supreme Court cases on public utility regulation, *Smyth v. Ames*,⁶⁰ implied that the government should always step in to protect regulated firms from forces threatening their decline.⁶¹ Municipal governments also tended to feel that the transition to a world of jitney transportation would be difficult. They feared losing out on both the revenues provided by railway companies through payment of franchise fees⁶² and the railways' provision of public services such as street lighting and paving.⁶³ Local governments also thought that the cross-subsidization benefits of the five-cent fare promoted suburban development by making it relatively cheap to live on the outskirts of town and commute into the city center.⁶⁴ “Municipal governments were

57. *Id.* at 304.

58. *Id.*

59. *Id.*

60. *Smyth v. Ames*, 171 U.S. 361 (1898). Eckert and Hilton note that municipal governments were generally willing to provide regulatory protection to the electric railway companies because, under the implied logic of the doctrine of *Smyth v. Ames*, this was considered a *quid pro quo* for the firms' willingness to be regulated. Eckert & Hilton, *supra* note 10, at 304.

61. It is unclear whether this was an appropriate reading of *Smyth*, as Eckert and Hilton note that “nothing in *Smyth v. Ames* directs a regulatory body in what to do when the regulated firm begins to decline.” Eckert & Hilton, *supra* note 10, at 304. This lack of express direction, combined with the observation that “regulated firms are particularly likely to decline, since—as in the present instance—their discriminatory pricing structures give the economy an incentive to find alternatives for their services,” *id.*, suggests that local governments may have overstated the doctrinal justifications of *Smyth v. Ames* in their attempts to aid the railway companies by enacting protective regulations.

62. At one point early on in the craze, railway heads were asked to testify to the California state legislature regarding their reduced revenues and the effect this would have on tax revenues for the state. *Railway Heads Go To Discuss Tax Losses*, L.A. TIMES, Jan. 19, 1915, at II5.

63. See *Cars' Benefit to City Vast*, L.A. TIMES, Dec. 10, 1914, at II7; *Jitney Traffic Blow to State*, L.A. TIMES, June 14, 1916, at I4; *Must Pave Streets for Jitneys' Uses*, L.A. TIMES, Sept. 17, 1916, at II6.

64. One San Francisco railway manager said,

No one factor in the development of American cities has had more influence . . . than the system of a flat street car fare . . . It has enabled the working man to acquire a home in the suburbs at reasonable cost and has eliminated the congestion so common to cities of the old world, where the transportation systems have developed on the so-called zone system.

Schwantes, *supra* note 11, at 316 (internal quotations omitted). His sentiment is surely applicable to the

essentially unanimous in their unwillingness to [charge varying fares proportional to distance traveled], and thus to forego the force for diffusion [out to the suburbs] inherent in the 5-cent fare.”⁶⁵ That is, local regulators recognized that long-distance travelers benefited from the cross-subsidization of fares, and they were loath to see long-distance fares rise should a flat five-cent fee be abolished, since cheap long-distance rail fares facilitated suburban expansion.⁶⁶ The same considerations with regard to suburban real estate development that motivated railway owners thus appealed to municipal regulators as well. Some government officials also agreed with the railway operators that jitneys were more of a passing fad than a realistic and viable transportation option for Los Angeles’s future,⁶⁷ thus, they felt that all jitneys could ultimately do was make things more difficult for railways while offering nothing of benefit in the long run.⁶⁸ That being said, many officials who would eventually be tasked with regulation were not wholly opposed to the jitney movement.⁶⁹

Thus, in voicing their opposition to the jitneys and in stoking public resentment of the new form of transportation, the railway establishment found important supporters in local government. Opposition from the railways was motivated not so much by a fear that jitneys in particular meant, in 1914, an end to railway transportation in Los Angeles, but rather from a desire for long-run protection from all manner of disruptive threats. This resulted in the railway operators’ push for jitney regulation, an effort in which both municipal regulators and local media were willing to aid. Although the railway operators did not have total control over the local government,⁷⁰ their ability to show that they had been financially harmed,⁷¹ combined with the fact that their interests were in many ways aligned with

Los Angeles experience.

65. Eckert & Hilton, *supra* note 10, at 305.

66. *Id.* at 294 (“Municipal governments typically felt they received a considerable benefit from this cross-subsidization, since the electric streetcar had increased the feasible home-to-work distance greatly, and thus made possible a broader and more deconcentrated urban area. The electric streetcar, which was providing some 90 percent of urban trips by 1906, became the principal force in shaping American cities, creating a pattern of a central business district for central-office employment, shopping of the more specialized or more expensive sorts, and a restaurant-amusement complex, surrounded by a radial or grid pattern of strip shopping streets for the more ordinary classes of stores along the streetcar lines, and secondary business districts at the intersections of major lines.”).

67. *See, e.g.*, BOTTLES, *supra* note 25, at 50 (recounting Mayor Henry Rose’s statement that “the people in the end will be compelled to depend upon the street railways for transportation”).

68. *Id.* As Mayor Henry Rose put it, “To dally longer in our present state of irresolution and inaction as regards the ‘jitney’ bus is to be guilty of gross injustice to the people.” *Id.*

69. *See infra* Part II.D.

70. *See* BOTTLES, *supra* note 25, at 50–51.

71. Eckert & Hilton, *supra* note 10, at 306–07.

those of local politicians, ensured that the railway operators would control the debate over jitney regulation.

C. THE PEOPLE

The primary selling points of jitneys from a consumer standpoint were their efficiency and relatively high quality of service. The jitneys' strength was short trips; most jitney commutes were only two-and-a-half miles or less in length.⁷² A ride in a jitney was estimated to be, on average, almost twice as fast as a streetcar journey.⁷³ Jitneys thus were in high demand among short-distance passengers who would otherwise travel by streetcar. Their users included a broad swath of the population, in particular "the young, businessmen and others with a high valuation of time, and those who found prestige or novelty in automobile trips."⁷⁴ But jitneys did not merely steal away passengers from the railways: one study discovered that jitney revenues tended to exceed the loss of revenues incurred by railways during the craze, implying that jitneys attracted to vehicular transportation a whole new class of users who would otherwise have traveled on foot.⁷⁵

Beyond speed, jitneys offered flexibility to passengers, who were no longer forced to plan their trips in accordance with the fixed routes of the railways.⁷⁶ Thanks to the large number of jitneys, service was regularly available and comparatively unaffected by breakdowns and accidents.⁷⁷ Jitney drivers were also uniquely responsive to demand, with many additional drivers operating during rush hours, thus ensuring that there were more cars on the roads when people needed them most.⁷⁸

Prior to the jitneys' emergence, the LARY streetcar was the only transit option (besides walking) in downtown Los Angeles. The LARY carried nearly 90 percent of rail passengers in the city, and it was estimated that residents averaged nearly a ride per day on its lines before the jitneys'

72. *Id.* at 296.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* This flexibility provided unique benefits in Los Angeles, where motion picture industry workers found jitney travel particularly useful in moving quickly around the city as their profession often required. *Id.*

77. *Id.* at 297.

78. *Id.* at 297–98. The jitneys' responsiveness to demand was also demonstrated by the fact that, during rainy weather, jitneys were far less likely to be found on the streets. Their open tops made them less attractive in rainy weather than the closed-top streetcars. *Id.* at 298. Price, too, could fluctuate in response to demand, at least in some cities where jitneys became popular; but prices typically did not drop below five cents per ride. *Id.* at 299.

arrival.⁷⁹ Beyond downtown, Los Angeles citizens were also heavily dependent on the interurban railways that offered service to the city's burgeoning suburbs.⁸⁰

Impressive usage statistics aside, Angelenos in fact disliked the railways for their poor service and safety records, their abuse of franchise privileges, and their profiteering activities.⁸¹ Accidents involving streetcars were often heavily publicized, generating significant public discontent and calls for reform.⁸² Moreover, streetcars were often extremely crowded, offending the sensibilities of many riders who felt that any fare-paying traveler deserved a seat.⁸³ Citizens connected the LARY's perceived lack of concern with problems of safety and overcrowding to its desire to turn a profit at all costs, and consequently viewed the company, and the railway industry generally, with significant mistrust.⁸⁴

However, despite the practical and political benefits of jitneys, commuters in Los Angeles still had many reasons to dislike them as well. They may have been frustrated with the perceived safety deficiencies of the railways, but this was nothing compared to the vitriol many of them felt toward jitney men for the dangerous, and often deadly, risks they took while driving their vehicles.⁸⁵ Jitney drivers often competed with one another for passengers by racing through narrow streets—many of which had not yet been redesigned to accommodate the increased automobile traffic caused by the jitney craze⁸⁶—and running their cars up onto curbs and street corners in order to get as close as possible to potential

79. BOTTLES, *supra* note 25, at 31, 33. "People living in other cities of comparable sizes averaged only half as many daily rides." *Id.* at 33.

80. *Id.* at 32–33.

81. *Id.* at 34.

82. *Id.* at 35.

83. *Id.* at 38–39.

84. Whether citizens' assessment of the railway companies' concerns and motives was accurate is debatable, and in fact, citizens' attitudes were probably at least somewhat misguided. Scott Bottles notes that the streetcar's accident record was actually low relative to the size of its operations. *Id.* at 35. Moreover, the overcrowding problem likely could have been resolved, or at least ameliorated, with the help of a fare increase; but citizens rejected all attempts by railways to increase their fares beyond the five-cent figure that was standard in most cities in the early twentieth century. *Id.* at 33–38.

85. As discussed above, the railroads were in fact quite safe relative to the size of their operations, though their safety lapses received great public attention and aroused significant furor. Jitney drivers received a significant level of public attention for their lack of safety as well, but much of this was rightfully earned. The pages of the *Los Angeles Times* from the jitney era were littered with tales of drivers' recklessness and the numerous resulting fatalities.

86. See JACKSON, *supra* note 18, at 163–68 (discussing the need for street improvements across the country in order to accommodate the advent of the automobile).

customers.⁸⁷ Increased traffic congestion was a problem in and of itself,⁸⁸ but jitney drivers' methods also increased the risk of injury to both passengers and pedestrians. Indeed, for a time, injuries to pedestrians caused by reckless jitney drivers were a regular occurrence in the city. A wartime editorial in the *Los Angeles Times* memorably dramatized the extent of the danger:

If Germany really wishes to reduce the surplus noncombatant population of the British empire: if she wishes to make effective war upon cripples, and old men, and women and children, she will buy the thousand jitneys that now make a slaughter pen of the streets of Los Angeles, hire the accomplished assassins who act as chauffeurs, and transport them to London⁸⁹

Jitneys were also prone to overturning on streets and crashing into one another, or to colliding with streetcars, which they often shadowed closely in the hope of purloining a few extra riders.⁹⁰ Moreover, the drivers themselves were viewed with suspicion: many in the city were concerned with protecting the safety of women who rode in jitneys with unknown men down impossible-to-trace routes.⁹¹ And jitneys also contributed heavily to traffic congestion, overloading downtown Los Angeles with automobiles in a way that the designers of its streets had not accounted for originally.⁹²

Beyond these concerns, many citizens perceived jitney operation as being socially and economically unfair. The average commuter in Los Angeles may well have mistrusted the LARY or the Pacific Electric Railway, but at least she could rest assured that the railway companies were paying taxes, along with a host of operating and franchising fees, in order to run on city streets. Jitney operators, on the other hand, paid only a nominal licensing fee in order to use the roads, and were thus perceived as having obtained for free many of the benefits of operating a transit vehicle.⁹³ Jitney men were criticized, for instance, for making no

87. Eckert & Hilton, *supra* note 10, at 307.

88. Congestion was not just an aesthetic inconvenience or a source of noise and other pollution. As one citizen, P.W. Breese, pointed out to the *Los Angeles Times*: "Since the 'jitney' busses became so prevalent it has become almost impossible to get ambulance calls answered promptly, if the run goes through the downtown streets." *Quick Action on Bus Evil*, L.A. TIMES, Jan. 12, 1915, at II3. See also Harvey E. Westgate, *Swarms of Jitneys, 40,000 Autos and Narrow Streets Cause of Congestion*, L.A. TIMES, Dec. 3, 1916, at VII ("Every street in the business district is a hive for a swarm of jitneys.")

89. *The Jitney Assassins*, L.A. TIMES, Jan. 4, 1915, at II4.

90. See Eckert & Hilton, *supra* note 10, at 307.

91. *Id.*

92. BOTTLES, *supra* note 25, at 15.

93. *Id.* at 50.

contribution to the upkeep of Los Angeles's system of roads, even though they were its primary users and contributed most to its congestion and wear.⁹⁴ Moreover, since they paid no franchising or licensing fees, jitneys contributed practically nothing to city or state revenues; this fact, when coupled with the railways' substantial profit losses (and resultant reduced tax bills) was of particular annoyance to local and state politicians, who lambasted the jitneys as a drain on public revenues.⁹⁵ And since jitney men typically operated individually and faced no mandated insurance or bond-posting requirements, victims of drivers' negligence were often left without any tort remedies.⁹⁶

Commuters in Los Angeles thus had a number of reasons to both embrace and reject the jitney, causing cleavages among the city's population during the regulatory struggle. As a news article regarding the debate put it, "for the time being all Los Angeles is divided into two classes—those who ride and those who dodge."⁹⁷ Citizens' reactions to the jitney phenomenon, along with those of the railway companies, the media, local politicians, and the jitney drivers themselves, would shape and inform the debate over regulation that began soon after the jitneys first appeared on the city's streets.

D. THE REGULATORS

The push for jitney regulation began not long after the jitney's initial emergence in Los Angeles in 1914, but it took three years for the railways to secure the rules that would stamp out the jitney phenomenon once and for all. Despite the railway companies' apparent capture of many local regulatory officials, in general, regulators in Los Angeles shared the concerns of commuters regarding the railway operators' poor service, and they were interested in seeing whether jitneys could offer something that the established transportation systems could not. The ultimate regulatory victory of the railway companies was thus contingent on their ability to mobilize political opposition to the jitneys, a task made easier thanks to the popular perception—perhaps rightfully earned—of jitneys and their drivers

94. See, e.g., *Whole County One Community*, L.A. TIMES, Dec. 11, 1915, at II2 (reporting the statement of a railway representative that railways were burdened by the costs of road upkeep and that jitneys should pay their fair share).

95. BOTTLES, *supra* note 25, at 50. See also *Opens Attack on Jitbus Law*, L.A. TIMES, May 26, 1915, at II2 (relaying the statement of Los Angeles Mayor H.H. Rose that jitney competition was unfair to the railways and the city and that jitneys should be combatted with the strictest possible regulations).

96. R.D. List, Letter to the Editor, *What About the Jitney Bus?*, L.A. TIMES, Dec. 6, 1914, at II13.

97. *Agree on Regulation but Disagree on Kind*, L.A. TIMES, Jan. 5, 1915, at III1.

as dangerous. Later developments would suggest that the railway operators' concern in pushing for regulation was not with the jitneys *per se*, but with the development of a protective regulatory scheme that would compensate for the inefficiencies of railways as compared to automobiles.

In Los Angeles, local regulators' initial reaction to the jitney craze was one of ambivalence, or perhaps even curiosity. Members of the City Council, which initially assumed regulatory authority over jitney transportation, understood the many frustrations that commuters had with the local railways and were willing to adopt a "wait-and-see" approach with regard to the jitneys. At the dawn of the jitney era, it seemed possible that the jitneys would become the dominant mode of transportation in Los Angeles, and regulators were thus willing to see if jitneys could indeed provide service that was more efficient and more desirable than that of the railways.⁹⁸ "Though dubious, public officials were willing to accept alternative means of urban transportation."⁹⁹

Eventually, however, regulators found themselves compelled to act. Jitneys making short trips in downtown Los Angeles proved particularly profitable.¹⁰⁰ The profits of the LARY were thus significantly diminished by the jitney craze, since its downtown streetcar lines faced direct jitney competition.¹⁰¹ The LARY was thus quick to denounce the jitneys for their adverse effect on ridership and railway revenues, which it claimed would be bad for the city generally by lowering tax revenues and putting railway employees out of work.¹⁰² The problems of street congestion and traffic safety led to many more complaints, not just from the railways, but also from common citizens fed up with the swarm of jitneys careening through downtown.¹⁰³

Among "jeers and hisses" at a January 1915 meeting of the Los Angeles City Council Public Utilities Committee, these groups demanded

98. BOTTLES, *supra* note 25, at 49.

99. *Id.*

100. *Id.* at 49–50. Interurban jitneys—those that made long range trips to suburban areas—found less success, as they had to deal with poorly maintained roads, and the long travel distances contributed to depreciation of the cars themselves. By stretching railway lines outwards to places no one else had yet gone, the railways secured for themselves (for a time at least) the most profitable means of providing travel to these places, in addition to increasing demand for the real estate itself. *Id.*

101. *Id.* at 50; THE YELLOW CARS OF LOS ANGELES: A ROSTER OF STREETCARS OF LOS ANGELES RAILWAY AND SUCCESSORS FROM THE 1890S TO 1963, at 116 (Jim Walker ed., 1977). The LARY was actually forced to stop production on a new line of "sowbelly" cars when the jitneys emerged and drove the company close to financial ruin. *Id.* at 114.

102. BOTTLES, *supra* note 25, at 50; *Forty Cars Go Back to Barns*, *supra* note 52.

103. *Agree on Regulation but Disagree on Kind*, *supra* note 97.

jitney regulation, with the *Los Angeles Times* reporting that all in attendance favored some form of regulation, though they disagreed on what kind was best.¹⁰⁴ Railway proponents called for increased licensing fees, indemnity bonds and insurance requirements, and caps on jitney ridership.¹⁰⁵ Meanwhile, representatives of the jitneys were willing to support regulation as well, though of a more accommodating type: they requested reductions in licensing fees and ordinances prohibiting overcrowding on both streetcars and jitneys.¹⁰⁶ Jitney operators' accession to some form of regulation suggests that they understood, given the furor at that point, that some form of regulation was likely, and they wanted to mitigate the harm it might cause them.

Only a week after this meeting, members of the City Council's Public Utilities Committee announced its intention to regulate jitneys,¹⁰⁷ but the initial regulations proposed were regarded as little more than a mild inconvenience to jitney operation.¹⁰⁸ Critically, the Committee announced that it believed the jitneys to be a "permanent feature" of the transportation industry in Los Angeles going forward, and that the movement should thus be treated fairly "and be encouraged to develop along natural lines, leaving the experience of time to demonstrate whether it will develop as an aid to established methods, or whether it will work a complete revolution as an urban passenger common carrier."¹⁰⁹ Under the proposed rules, license fees for jitney operation would remain unchanged, and no insurance or indemnification requirements would be introduced.¹¹⁰ The proposal did, however, require drivers to register and show proof of a driver's license, and operating licenses were to be issued only for jitneys operating on definite routes with predetermined endpoints selected by the applicants and posted on the windshields of their cars.¹¹¹ Jitneys were also required to be equipped with non-skid tires, drivers were required to understand traffic laws, the cars could no longer load or unload curbside, and there was a limitation placed on the number of passengers who could ride in one

104. *Id.*

105. *Id.*

106. *Id.*

107. *Quick Action on Bus Evil*, *supra* note 88.

108. *See Slight Regulation of "Jitney" Busses*, L.A. TIMES, Jan. 20, 1915, at H2 ("Only slight regulation of the 'jitney' busses is provided for in an ordinance which the City Council will likely put through this morning, and business men are much dissatisfied with it. No indemnity bond is required for the protection of passengers or the public, the present low license fee is to remain the same, and the drivers of 'jitneys' are to select their own routes.").

109. *Id.*

110. *Id.*

111. *Id.*

vehicle.¹¹²

The *Los Angeles Times* labeled the proposal “regulationless,” and business leaders and the Mayor were outraged by the Council’s apparent intent to let the jitney industry alone, if not encourage its development outright.¹¹³ From the standpoint of railway supporters, which included the city’s business and political elite, the early regulations were worthless since they did not make jitney operation significantly more expensive through the imposition of higher licensing fees or bond-posting requirements;¹¹⁴ nor was the main source of the jitneys’ competitive advantage, their ability to travel short-hop routes through downtown, thought to be substantially affected given that jitney operators could select the routes they wished to drive. Arguments about unfair treatment again cropped up.¹¹⁵ As Mayor Rose put it in a letter to the *Times*:

[T]hat provision giving autobus applicants the option [sic] of choosing their own routes I believe to be utterly wrong in principle [I]t is absurd to relegate to the drivers, many of them ignorant and untrained men, a privilege that should be jealously guarded by the city. We grant no such privilege to the responsible street car companies¹¹⁶

As one might expect, railway supporters were quick to petition for new, more stringent regulations that would be “fairer” to the railway operators.¹¹⁷

Under pressure from railway supporters, the Council rewrote its ordinance proposal to compel jitney drivers to choose between insuring

112. *Id.*

113. *Regulationless Bus Law Suits Council*, L.A. TIMES, Jan. 21, 1915, at III.

114. “Expensive” here is a loaded term, since, as discussed in Part II.A, modern analyses have suggested that jitney operation was an economic sinkhole for drivers. Here, the notion of regulations that might have made jitney operation “significantly more expensive” refers to increased barriers to entry into the jitney operation market. Opponents of the jitneys sought bond-posting and similar requirements that would have ex ante raised the fixed costs of jitney operation beyond what the typical driver would have cared to spend (imagine, for instance, a license that cost a year’s salary to acquire). This would prevent new entrants from accessing the market, thus cutting off the entry of new drivers to replace the ones who exited the market quickly after gaining an appreciation for the sizeable costs of jitney operation. *See supra* text accompanying notes 35–39.

115. *See supra* text accompanying notes 93–96.

116. *Regulationless Bus Law Suits Council*, *supra* note 113.

117. *Again Petition for Regulation*, L.A. TIMES, Feb. 15, 1915, at I18. A consortium of large business concerns in Los Angeles drafted a letter to the City Council stating that the ordinance which you have under consideration is entirely inadequate, does not offer proper indemnity protection and will fail of its purpose. It does not even prohibit carrying passengers on the steps or running board If the ‘jitney’ bus has come to stay it must be prepared to face the regulation and taxation through the maintenance of paving and upkeep of the streets which is now carried on by the railway companies.

Id.

passengers or posting an indemnity bond with the city.¹¹⁸ After much delay,¹¹⁹ the new version of the ordinance was finally passed by the City Council in March 1915, over the veto of Mayor Rose—who still thought the law was too weak—and the protestations of jitney drivers upset by the newly added requirements.¹²⁰ Jitney operators struck back by putting up for public vote an initiative ordinance that would free them of the indemnification requirements; this initiative in turn was attacked by the Mayor and a cartel of business owners, who urged the public to vote against it.¹²¹ The initiative ordinance eventually failed, and the City Council subsequently began considering proposals for higher bond-posting requirements,¹²² while other city officials planned for more stringent safety and ridership rules.¹²³ Meanwhile, jitney operators began dealing with the fallout from the new ordinance: some drivers were unable to pass the new tests required to obtain a license,¹²⁴ on top of this, insurance rates had risen as well.¹²⁵

This was the beginning of the end. In October 1916, power to regulate the jitneys was transferred from the City Council, which had regulated jitneys via ordinance, to the city's Board of Public Utilities, an agency that governed urban transportation regulation in Los Angeles.¹²⁶ Bringing jitneys within the jurisdiction of a regulatory agency that oversaw all transportation was perhaps a signal that city officials were ready to regulate jitneys more strictly.¹²⁷ Indeed, the Board of Public Utilities was thought to be able to deal more flexibly and efficiently with the jitneys since each of

118. *Five Thousand Dollars for Jitneys' Victims*, L.A. TIMES, Feb. 19, 1915, at III.

119. *More Delay on Bus Ordinance*, L.A. TIMES, Feb. 20, 1915, at III0.

120. *Jitbus Law is Over the Veto*, L.A. TIMES, Mar. 5, 1915, at III0. The Mayor thought that the indemnity requirement of \$5000 should be doubled, that there should be rules against allowing passengers to ride on jitneys' running boards, and that jitneys should be prohibited from operating on Main, Broadway, and Spring streets downtown. *Id.* Meanwhile, the Council also faced opposition to the new ordinance from jitney operators who were displeased with the new insurance requirements. *Id.*

121. *See, e.g., Eugene Brown, Justice and Jitneys*, L.A. TIMES, June 1, 1915, at II4 (arguing for greater regulations of jitneys); *Opens Attack on Jitbus Law*, *supra* note 95 (relaying Mayor Rose's opposition to the initiative ordinance); *Vote Against Jitney Initiative, They Urge*, L.A. TIMES, May 31, 1915, at II9 (describing a committee of businessmen's opposition to the initiative ordinance).

122. *Jitbus Fight is on Again*, L.A. TIMES, June 16, 1915, at III2.

123. *Jitbus Fenders Not for Seats*, L.A. TIMES, Sept. 1, 1915, at III0.

124. *Illiterate Chauffeurs*, L.A. TIMES, July 8, 1915, at II3.

125. *Tough on Nickel-Chasers*, L.A. TIMES, Sept. 4, 1915, at II0.

126. *Bus Ordinance Goes Through*, L.A. TIMES, Oct. 18, 1916, at II2.

127. The transfer of jurisdiction had first been proposed in late 1915 by the Police Commissioner. *Bus Traffic Regulations*, L.A. TIMES, Dec. 15, 1915, at III0. The long delay in transferring power over the jitneys suggests that the City Council was still unsure about giving up its regulatory authority, perhaps because it realized that a transportation regulation authority would be more likely to enact purely protective regulations that favored the railway companies. *Id.*

their decisions did not have to be enacted through the passage of an ordinance.¹²⁸

This assessment eventually proved inaccurate. Although rules were enacted in November 1916 that allowed the Board to revoke a jitney permit without notice or hearing if the driver had a prior conviction,¹²⁹ this move—arguably not even very damaging to the jitney operators—was one of the few proactive steps taken by the Board of Public Utilities in response to the jitneys, which continued to thrive into 1917.¹³⁰ Complicating the issue was the fact that, for the most part, commuters in Los Angeles continued to like and use the jitneys on a regular basis, at least for downtown travel.¹³¹ Moreover, some business representatives apparently began to see the jitneys' virtues, as cars were adapted for use in transporting goods for sale to suburban areas and for tourist trips.¹³² The Board of Supervisors for the county began authoring new regulations to quell the growth of jitneys in suburban areas¹³³ and passed an ordinance outlawing the use of "free-lance" jitneys that operated with no scheduled route in the suburbs.¹³⁴

In the end, it was the maneuvering of the railway companies that brought an end to the jitney movement. Pressure this time came not directly from the railway heads, but from LARY employees who were frustrated by their low and stagnant wages, whose lack of movement had been attributed by the railway heads to the effects of prolonged competition with the jitneys.¹³⁵ The message sent from LARY bosses to their workers was simple: for workers to get higher pay, the jitneys would have to disappear. As E.L. Lewis, the LARY superintendent, put it, he was powerless to increase wages because, "[u]nder present conditions this company cannot raise wages and meet nickel snipping competition."¹³⁶ The railway

128. *Id.* That being said, representatives of the jitney drivers raised no objections to the transfer of jurisdiction, perhaps suggesting that they saw no threat of more stringent regulations due to the change. *Id.*

129. *New Rules Are Passed by Board*, L.A. TIMES, Nov. 22, 1916, at II8.

130. Westgate, *supra* note 88 (describing the serious congestion problems that remained in downtown Los Angeles due to jitney traffic).

131. *Jitneys and Service*, *supra* note 14.

132. *Motor Vehicle Owners Object*, L.A. TIMES, Feb. 4, 1917, at IV12.

133. *Id.*

134. *To Regulate Jitneys*, L.A. TIMES, Mar. 28, 1917, at II5.

135. *Oust Jitneys; Boost Wages*, L.A. TIMES, Mar. 28, 1917, at II10. The workers made an en masse demand of their bosses for increased wages, only to be presented with copies of the company's books, suggesting that no wage increase was possible without a reduction in jitney competition and the increased revenues that would follow. *Id.*

136. *War on Jitney on in Earnest*, L.A. TIMES, Apr. 21, 1917, at II10 (reporting that as a result of

employees thus petitioned for an ordinance that would impose high enough burdens on jitneys to stamp them out completely.¹³⁷ The LARY initiative would have repealed all other jitney-related ordinances, kept control over jitneys in the hands of the Board, prevented any more downtown licenses from being issued, dramatically increased drivers' individual damages liabilities, and imposed strict routing and scheduling requirements, effectively destroying the jitneys' competitive advantage over the railway operators.¹³⁸ The initiative, which appeared on the ballot in June 1917, obtained the support of Los Angeles business leaders¹³⁹ and the *Los Angeles Times*.¹⁴⁰ By the end of June, the ordinance had passed, jitney operators were no longer able to obtain licenses to operate on the most profitable downtown routes, and the jitney era in Los Angeles was essentially over.¹⁴¹ The ban went into effect in September 1917 after a failed attempt by jitney operators at obtaining an injunction of the ordinance,¹⁴² and jitneys were off the streets soon after.¹⁴³

A review of the struggle over jitneys in Los Angeles reveals a number of interesting considerations about regulation of the ride-for-hire industry. For instance, the fact that the public reacted negatively to the serious safety concerns raised by unregulated jitney operation suggests the need for rules in the ride-for-hire context that would promote public safety; conversely, the politicized and self-interested push by the railway barons for anti-competitive restrictions on market entry and pricing in the urban transportation industry generally suggests a paucity of substantive economic arguments supporting these kinds of restrictions. These considerations offer important insights into the modern story of ridesharing regulation and inform the discussion of what sort of regulation is justifiable in the ride-for-hire industry.

having been denied wage increases due to jitney competition, 3500 LARY employees circulated petitions for the initiative vote, representing 10,000 persons dependent on the railways for income).

137. *Oust Jitneys; Boost Wages*, *supra* note 135.

138. *War on Jitney on in Earnest*, *supra* note 136.

139. *Merchants Will Vote to Regulate Jitneys*, L.A. TIMES, May 30, 1917, at II5; *Regulate the Jitneys, Says Commerce Chamber*, L.A. TIMES, June 1, 1917, at II10.

140. *Use Care On Polling Day*, L.A. TIMES, June 3, 1917, at II2.

141. *Jitneys to Go in Two Days*, L.A. TIMES, June 29, 1917, at II8. Even operators who had obtained licenses before the ordinance had passed were affected, as they would not be able to renew their licenses for the next quarter of the year as they were required to do. *Id.*

142. *Jitney Question Near a Decision*, L.A. TIMES, July 22, 1917, at II8.

143. *Bus Ban's in Effect Today*, L.A. TIMES, Sept. 27, 1917, at II8.

III. THE JUSTIFICATIONS FOR RIDE-FOR-HIRE INDUSTRY REGULATION

Like any other legal constraint on activity, regulation demands a principled justification. Ideally, the justification for ride-for-hire regulation would have two prongs. First, it would identify problems in the regulated industry that cannot be solved via unregulated activity. Second, the regulatory solution would demonstrably be able to ameliorate the identified problems and would in fact be the most effective possible means of doing so.¹⁴⁴ The need for a robust, principled justification for any sort of regulation is heightened by the immense role regulation—at both the federal and state levels—plays in our daily lives.¹⁴⁵ Regulatory critics often point to research that suggests that for all of the resources expended on regulation, the rules promulgated often have only minimal effects on the problems they are intended to solve.¹⁴⁶ Moreover, even a set of rules justified on principle could turn out to have unexpected or even random effects.¹⁴⁷ A careful analysis of the nature of the industry one intends to regulate, and a thoughtful inquiry into the potential effects of such regulation, is thus key to any regulatory proposal.¹⁴⁸

In justifying regulation, economists have often drawn a distinction between *economic regulation* and *health and safety regulation*.¹⁴⁹ Economic regulation is rulemaking geared toward resolving market inefficiencies, especially the problem of natural monopoly.¹⁵⁰ Through price setting, market entry and exit restrictions, and minimum wage floors, among other mechanisms, economic regulation attempts to mitigate the adverse effects on consumers (and industries) of market inefficiencies.¹⁵¹ Health and safety regulation, in comparison, attempts to compensate

144. The last point is particularly salient: even if a market failure demanding some sort of government response is identified, the advocate of regulation would need to consider why an attempt to directly control behavior would be more effective than offering monetary incentives to change, such as taxes. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 2–3. *See also id.* at 695 (describing the key ingredients of valid health and safety regulation).

145. STEPHEN BREYER, REGULATION AND ITS REFORM 1–4 (1982).

146. *See, e.g., id.* at 2 (describing scholarly critiques of health, safety, and environmental regulation that show statistically insignificant effects of such regulation on work conditions or environmental quality). *See generally* Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607.

147. BREYER, *supra* note 145, at 3–4.

148. A consideration of the potential effects of any regulation should surely include an analysis of the history of the industry one seeks to regulate.

149. But as Viscusi, Harrington, Jr., and Vernon point out, “[T]he exact dividing line between economic regulations and [health and safety] regulations is unclear.” VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 8.

150. *Id.* at 5–6. For a definition and discussion of natural monopolies, see *infra* Part III.A.

151. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 5–6.

society for the externalities that result from economic activity, to provide to the public information that private actors would otherwise have no incentive to deliver, and to aid consumers in estimating prices associated with transactions into which they had no real choice in entering.¹⁵² As will be demonstrated later, it is the externality problem that is most relevant in the ride-for-hire context. Broadly, externalities arise when economic actors do not internalize the total effect of their activities.¹⁵³ In such cases, health and safety regulation aids consumers by forcing actors to internalize their externalities, thereby placing the burden on the parties that would create them and who presumably are in the best position to mitigate and compensate for them.¹⁵⁴

Therefore, when we think about regulation, we ought to consider whether the problem we wish to address is best handled by economic regulation or by health and safety regulation: Is the problem one of competitive inefficiency calling for economic regulation? Or, rather, is it an externality that merits some form of health and safety regulatory response? The answer to these questions is critical to determining what kind of regulation is appropriate and indeed whether any kind of regulation is justified at all. An affirmative answer to either the economic or health and safety regulation inquiry, however, is not the end of the analysis. These questions address only the first prong of the regulatory justification framework proposed at the beginning of this Part—whether a systemic problem exists in a particular industry. The second prong of the analysis—whether a regulatory scheme can resolve the problem, and do so more effectively than any other response—still demands a careful analysis and resolution. The rest of this Part intends to demonstrate that both of these justificatory prongs can be answered in the affirmative with regard to the ride-for-hire industry, but that health and safety regulation is the preferable path to a regulatory solution.

152. *Id.* at 8.

153. *Id.*

154. As Ronald Coase demonstrated, the externality problem can be resolved without intervention in the ideal situation in which bargaining between parties is costless, regardless of where the initial right exists. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). In our world, however, “bargaining is not costless,” and Coase’s logic is unlikely to apply in a way that would suggest no regulation. BREYER, *supra* note 145, at 24. A stronger criticism, discussed further *infra* Part III.B, is that tort liability can adequately distribute the costs of activity in a fairer way than direct regulation can. *Id.* at 24–25.

A. ECONOMIC REGULATION IN THE RIDE-FOR-HIRE MARKET IS
UNJUSTIFIED

Justifying ride-for-hire regulation at all requires understanding what problems, if any, exist in the ride-for-hire industry that resist resolution through the normal operation of the market. Considering again the jitney context, in which the main problems that Los Angeles commuters identified in the new form of transportation were safety-related—drivers were poorly trained and lacked insurance. More generally, they failed to take into account the effects of their activities with regard to traffic congestion and street usage.¹⁵⁵ These sorts of problems are best characterized as externalities, in that the jitney drivers were not internalizing the true costs of jitney operation; instead, these costs spilled over to the public and were borne by ordinary citizens. But the regulations enacted via ordinance in 1917 were not solely of the type that might address these externalities, in that they were not mere insurance requirements or background checks; they went beyond the mechanisms of *health and safety* regulation. Rather, the 1917 regulations terminated the new provision of services in the downtown area and sought to eliminate the jitanes' competitive advantage by stripping jitney drivers of the ability to select routes at will or operate at certain hours.¹⁵⁶ This kind of regulation more accurately reflects the tools employed by *economic* regulation.

As discussed above, economic regulation is primarily designed to address the problem of natural monopoly. A natural monopoly exists in an industry in which long-run average costs are minimized when only one firm acts as a producer.¹⁵⁷ In such a situation, cost-efficient production is achieved by localizing production in just one firm—this remains true regardless of changes in demand.¹⁵⁸ The natural monopoly problem is that in this situation, cost efficiency does not also yield allocative efficiency, since the single-firm producer has monopoly power to set prices and will not do so in a way that minimizes costs to consumers.¹⁵⁹ In the transportation context, a natural monopoly would exist where provision of transportation services required a producer to invest heavily in expensive capital in order to operate, for which costs could be recouped only by

155. See *supra* Part II.

156. See *Jitanes to Go in Two Days*, *supra* note 141; *War on Jitney on in Earnest*, *supra* note 136.

157. SANFORD V. BERG & JOHN TSCHIRHART, NATURAL MONOPOLY REGULATION: PRINCIPLES AND PRACTICE 51 (1988).

158. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 402.

159. *Id.* at 376 (“The problem with a natural monopoly is that there is a fundamental conflict between allocative efficiency and productive efficiency.”).

intensive consumer use over a long period. A railroad company is a prime example of a natural monopolist, since it must make large investments in constructing tracks and railcars, and such investments would not be feasible unless the company planned to subsequently operate on a grand scale.¹⁶⁰ Moreover, such a large capital expenditure might go to waste if more than one firm were to compete in such a situation, since consumers could take advantage of only one firm's services at a time.¹⁶¹ The problem from a regulatory perspective, then, is that some firm must be induced to enter this market and provide a valuable service (via protection from other competitors that could harm it in the short run) while consumers also must be protected (via price ceilings that prevent gouging).¹⁶²

The railway industry is a classic example of natural monopoly. It is unclear, however, that the ride-for-hire industry as a whole suffers from this problem; indeed, economists generally agree that automobile-based ride-for-hire services like the taxicab are not natural monopolies.¹⁶³ Natural monopolies are typically characterized by economies of scale,¹⁶⁴ high demand at peak times, and storable resources.¹⁶⁵ Robert Cervero has noted that, although the ride-for-hire industry does exhibit peak-load demands (spikes in traffic at rush hour times) and has storable inventory (automobiles, buses, railcars, and so forth), it appears to lack economies of scale, except in "very capital-intensive rail transit systems" as described above.¹⁶⁶ In fact, in automobile-based ride-for-hire services like taxis,

160. BERG & TSCHIRHART, *supra* note 157, at 21–22. *See also* VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 376 ("Natural monopolies are likely to exist when there is a large fixed-cost component to cost. For example, most public utilities . . . are natural monopolies.")

161. *Cf.* Ross D. Eckert, *The Los Angeles Taxi Monopoly: An Economic Inquiry*, 43 S. CAL. L. REV. 407, 429–30 (1970) (describing reasons why taxicab services do not constitute natural monopolies).

162. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 375–78.

163. Adrian T. Moore & Ted Balaker, *Do Economists Reach a Conclusion on Taxi Deregulation?*, 3 ECON. J. WATCH 109, 110 (2006). *See also* Eckert, *supra* note 161, at 429–30.

164. Economies of scale are achieved when a firm's average costs decline as production increases; that is, it is cheaper in per-unit terms to produce a lot of a particular good than a small amount of it in a scale economy. BERG & TSCHIRHART, *supra* note 157, at 21. *See also* JAMES COOPER, RAY MUNDY & JOHN NELSON, TAXI! URBAN ECONOMIES AND THE SOCIAL AND TRANSPORT IMPACTS OF THE TAXICAB 22 (2010) ("Classical transportation entry regulation is based on the public interest being served by one or a few providers that have the size and equipment to serve a geographic market. It was typically argued that there was, or is, a minimum 'economies of scale' or scope in which a firm could economically serve the market at the lowest cost to the consumer.")

165. ROBERT CERVERO, PARATRANSIT IN AMERICA: REDEFINING MASS TRANSPORTATION 154 (1997).

166. *Id.* Cervero points to empirical studies by a number of modern researchers casting doubt on the traditional view that urban transit systems can achieve scale economies. *Id.* at 162 n.1. Factors that tend to prevent large transit fleets from reducing their average costs over the long run include surface

jitneys, or rideshares, even the storable inventory question is ambiguous, since the real problem presented by storable plant is the cost of housing a large amount of physical capital, like a whole fleet of buses or railway cars.¹⁶⁷ If ride-for-hire services are conceived primarily in terms of personal automobile-based services, then it is less clear that resources are “storable” in a way that matters economically, since the physical plant in these situations can be “stored” wherever the operator lives, and thus does not translate into higher costs as a result of engaging in the ride-for-hire industry.

More importantly, automobile-based ride-for-hire services appear to lack economies of scale, which in turn suggests that natural monopoly conditions are not met.¹⁶⁸ In comparing taxicab service to the obvious natural monopoly situation of railroads, Ross D. Eckert notes,

[T]axis bear no economic similarities to railroads: the optimal plant size is small relative to market demand, and where cruising is profitable or where access to stands is inexpensive, small taxi companies should be able to survive alongside large ones [D]uplication of facilities is desirable since consumers are thereby protected in pricing and service quality by competition between sellers.¹⁶⁹

Moreover, there seem to be few reasons to think that automobile-based ride-for-hire services require a significant capital investment for firms interested in entering the market, since automobiles are produced for sale to individuals (unlike, say, large buses, which are not typically produced for reasons other than commercial use), and the roads on which they drive are a public good.

The absence of the traditional indicators of natural monopoly in the automobile-based ride-for-hire industry suggests that economic regulation is inapplicable as a solution to the industry’s problems. Indeed, the problem as such does not even exist. Still, “draconian entry and price regulations”¹⁷⁰ remain in the modern taxicab market, despite scholars’ repeated assertions

street congestion and upward pressure on wages from unions. *Id.*

167. This must be the case since the question of whether storable resources translate to natural monopoly conditions implies that the existence of storable resources must increase the fixed costs associated with participation in the industry.

168. See Moore & Balaker, *supra* note 163, at 109–10 (summarizing economic research and analysis of taxi market regulation, while asserting that taxis, lacking scaleable economies, are not a natural monopoly). *But see* VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 405 (“[E]conomies of scale (declining average cost) are not necessary for a single-product natural monopoly (although they are sufficient).”).

169. Eckert, *supra* note 161, at 430.

170. Moore & Balaker, *supra* note 163, at 110.

that taxicabs ought to be deregulated.¹⁷¹ Indeed, the general consensus among economists who have studied the issue in detail appears to support deregulation of the taxicab market.¹⁷² The question of why, then, the taxicab market ever was regulated, or why this continues to be the case, will be taken up in Section C of this Part.

B. HEALTH AND SAFETY REGULATION IN THE RIDE-FOR-HIRE MARKET IS JUSTIFIED

In contrast to economic regulation, health and safety regulation represents an attempt to address problems of externalities and information asymmetry.¹⁷³ An externality occurs when a firm fails to account for the total costs of its activities, and these costs are instead borne by a third party.¹⁷⁴ Information asymmetry refers to the situation in which not all market participants have equal access to relevant information that would inform their choices.¹⁷⁵ Both problems are generally understood to lead to inefficiencies in the market, and health and safety regulation is thought to resolve them via the imposition of standards and rules intended to either assign burdens to the actors who caused them, or to force the disclosure of

171. See, e.g., Eckert, *supra* note 161, at 449–53 (arguing that the Los Angeles taxicab market’s regulatory system is irrational and based on the self-interest of both taxicab companies and regulators); Jonas Häckner & Sten Nyberg, *Deregulating Taxi Services: A Word of Caution*, 29 J. TRANSPORT ECON. & POL’Y 195, 204 (1995) (using mathematical modeling to find that “a strong case for [taxicab] deregulation” exists but cautioning that some regulation of ordering systems may be necessary); Edmund W. Kitch, Marc Isaacson & Daniel Kasper, *The Regulation of Taxicabs in Chicago*, 14 J.L. & ECON. 285, 343–45 (1971) (finding that taxicab regulation in Chicago has been enabled by a “myth” that competition would be dangerous to the industry, and that the city and courts have propagated this myth thanks to the lack of concrete information about the industry); David J. Williams, *The Economic Reasons for Price and Entry Regulation of Taxicabs: A Comment*, 14 J. TRANSPORT ECON. & POL’Y 105, 111 (1980) (analyzing the reasons for taxicab regulation and finding “little reason to regulate either price or entry”). But see Roger F. Teal & Mary Berglund, *The Impacts of Taxicab Deregulation in the USA*, 21 J. TRANSPORT ECON. & POL’Y 37, 54–55 (1987) (finding that deregulation can have unexpected effects due to problems of industrial organization related to how the taxicab industry operates, and that a partially deregulatory plan that retains some aspects of price or entry restrictions is thus preferable). For a general discussion of the economic consensus on taxicab deregulation, see Moore & Balaker, *supra* note 163. Moore and Balaker find that the general consensus favors deregulation and “that some [economists] judge deregulation negatively arises in part from deregulation not having gone far enough.” *Id.* at 126.

172. Moore & Balaker, *supra* note 163, at 126 (“Two out of three articles on taxi-market policy by economists find taxi deregulation beneficial, and their judgments expressed in their writing show that a strong majority support deregulation.”).

173. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 8.

174. See *id.* at 745 (explaining that externalities arise in environmental situations when actors “have not contracted to bear the environmental damage”).

175. BREYER, *supra* note 145, at 26–28.

relevant information to the market at large.¹⁷⁶ Health and safety regulation is also valuable in situations where working markets do not exist at all, making price calculation extremely difficult.¹⁷⁷ Health and safety regulation will generally aim to identify and mitigate risks in markets where consumers are unable to accurately assess them.¹⁷⁸

Many of the concerns one might have regarding the ride-for-hire industry are best characterized as externalities, or as related to problems of information asymmetry or risk calculation. Our examination of the jitney era in Los Angeles, for instance, reveals that a central worry among consumers and local authorities was the safety risks associated with jitney traffic, both for pedestrians and riders. In the health and safety regulatory context, these safety risks represent the negative externalities of ride-for-hire drivers' activities; in the ride-for-hire context, such externalities occur when drivers operate their vehicles without accounting for the increased risk of injury to pedestrians or their passengers.¹⁷⁹ An example illustrates the point: a driver might negligently injure—or even kill—a pedestrian or a passenger and simply continue operating without accounting for the costs of the injury when the driver computes total costs of operation (which might include fuel, maintenance, and so forth). But the costs are rightly borne by the driver, since they resulted from the driver's bad actions.¹⁸⁰ The inherent costs accordingly represent the sort of problem that health and safety regulation is designed to address, thus satisfying the first prong of our regulatory justification framework.¹⁸¹

To satisfy the second prong, however—whether regulation is the most effective means of mitigating the externality—we must conduct a further inquiry into the other ways that this sort of problem may be handled.

176. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 691–92.

177. *Id.*

178. *See id.* at 790–92.

179. In fact, there are a variety of potential and actual externalities associated with these activities. For example, drivers do not have to account for the increased air pollution or street wear caused by ride-for-hire operation, or the increased intensity of traffic, which results from driving, especially in congested areas where peak hour demands for service are high.

180. Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1784–97 (2009) (positing a general moral foundation for the right of a tort victim to pursue recourse against the party responsible for the injury). *See generally* ROBERT E. KEETON, LEWIS D. SARGENTICH & GREGORY C. KEATING, *TORT AND ACCIDENT LAW: CASES AND MATERIALS* (4th ed. 2004) (describing the impact of insurance on tort law).

181. The accident problem might also be characterized as an information asymmetry problem, at least in the commuter-specific context, to the extent that accidents result from commuters' ignorance about the risks of riding in ride-for-hire cars. This is alternatively also a risk assessment issue. Since health and safety regulation is designed to address all of these situations, the result is obviously the same.

Indeed, an obvious solution to the driver negligence problem described in the example above already exists: tort liability rules granting damages to the injured party in order to compensate for the driver's negligence. Liability rules reflect an attempt to force producers of externality-generating outputs—like our homicidal ride-for-hire driver—to internalize the externalities, thus shifting the unrecognized costs of their activity back onto them.¹⁸²

It is not clear, however, that liability rules will provide adequate protection for consumers in every context. Tort law is an *ex post* solution to the externality problem, since claims in tort will be brought only *after* harm is caused. Although liability rules may in the long run deter bad conduct by causing potential tortfeasors to alter the intensity of their activities, a regulatory scheme imposing insurance-carrying requirements would supplement existing tort rules in a number of ways. Most important for purposes of this Note, such a scheme would help ensure compensation for tort victims, as well as clarify the varying levels of responsibility for harm among individual drivers, app-based rideshare providers, and insurers.

Indeed, the problem at issue here—the negligence of ride-for-hire drivers—allows some room for regulatory standards to supplement tort doctrine. First, many ride-for-hire providers implicate a principal/agent problem that could have consequences for tort liability, since it is rare that sole proprietors operate these kinds of services.¹⁸³ In fact, many ride-for-hire drivers, for instance, taxicab operators, are employees of corporations, meaning that their employers are actually liable for the damages resulting from injury so long as they are acting within the scope of their employment.¹⁸⁴

With this legal standard in mind, it is important to consider what gaps might arise in tort liability—and who is responsible for damages—if a driver is not an employee in legal terms, but rather an independent contractor responsible for his or her own damages arising from negligence; indeed, in the context of app-based ridesharing, these questions have already begun to emerge.¹⁸⁵ In 2014, a six-year-old girl in San Francisco

182. BREYER, *supra* note 145, at 174–77.

183. Indeed, traditional rules regarding the taxicab industry would technically forbid this kind of activity. The case of app-based rideshare providers is considered here and below.

184. *See generally* RESTATEMENT (SECOND) OF AGENCY § 229 (1958) (defining the parameters of conduct considered within the scope of employment).

185. In 2014, a complaint was filed on the issue of when an app-based rideshare driver comes within the scope of agency for tort liability purposes. Complaint for Damages and Demand for Trial by Jury ¶ 14, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014), *available at*

was struck and killed by an Uber driver who was allegedly driving around while awaiting a potential fare. In defense of the ensuing lawsuit, the company argued that it was not liable as an employer since the driver was not chauffeuring a passenger, en route to pick up a passenger who had hailed him via the app, or responding to a request for transportation using the app.¹⁸⁶ The case, *Liu v. Uber Technologies, Inc.*,¹⁸⁷ thus raises complex questions of when and how to assign liability in tort, and its adjudication raises questions of fairness, since it is possible that different plaintiffs will achieve different outcomes in different cases.¹⁸⁸ And given the emerging involvement of cutting-edge technological issues in the ride-for-hire industry,¹⁸⁹ it is possible that ride-for-hire in the app-based rideshare era is approaching questions whose answers “do not fit easily into traditional tort categories,”¹⁹⁰ thus making the case for regulations clarifying the issue particularly strong.¹⁹¹

Second, the availability of reliable insurance policies ensures

http://www.taxi-library.org/liu-vs-uber_complaint_2014-jan.pdf. For a further description of the issues in the *Liu* case, see Karen Gullo, *Uber Sued for Wrongful Death Over 6-Year-Old Child*, BLOOMBERG BUS. (Jan. 27, 2014, 9:01 PM), <http://www.bloomberg.com/news/2014-01-27/uber-sued-for-wrongful-death-over-6-year-old-child-killed.html>.

186. Answer and Affirmative Defenses of Defendants at 6–7, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014), available at <http://www.scribd.com/doc/222241859/Uber-s-response-to-wrongful-death-suit-from-new-year-s-even-death-of-sofia-liu>. See also Jessica Kwong, *Uber Driver Accused in Fatal Collision Told Police He Was Awaiting Fare*, S.F. EXAMINER (Jan. 2, 2014), <http://www.sfexaminer.com/sanfrancisco/uber-driver-arrested-for-vehicular-manslaughter-in-girls-death/Content?oid=2664123>.

187. Complaint for Damages and Demand for Trial by Jury, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014), available at http://www.taxi-library.org/liu-vs-uber_complaint_2014-jan.pdf.

188. See R.J. Lehmann, *Blurred Lines: Insurance Challenges in the Ride-Sharing Market*, R STREET POL'Y STUDY, Oct. 2014, at 3–9, <http://www.rstreet.org/wp-content/uploads/2014/09/RSTREET28.pdf>; Josh Constine, *Uber's Denial Of Liability In Girl's Death Raises Accident Accountability Questions*, TECHCRUNCH (Jan. 2, 2014), <http://techcrunch.com/2014/01/02/should-car-services-provide-insurance-when-ever-their-driver-app-is-open/>.

189. For instance, the crux of the *Liu* case is the liminal employment status of a driver who has his smartphone app activated for use, but who is not actively using it. Uber's defense in the case suggests that technological change could alter the contours of the employer/employee relationship in the ride-for-hire industry. California's regulatory response to the issue is taken up *infra* Part IV.

190. Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. 54, 58 (1991).

191. On the other hand, at least one scholar has suggested that tort law possesses an intrinsic cost-of-enforcement advantage over regulation, since tort liability only arises (and thus claims must only be litigated) when a party actually causes harm. Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 J. LEGAL STUD. 275, 280–87 (2013). It has also been suggested that new insurance products that toe the line between personal and carrier-liability insurance will be developed in response to growing demand from ridesharing companies. See Lehmann, *supra* note 188, at 12.

compensation for injured parties for losses caused by driver negligence.¹⁹² The availability of insurance protects tort victims by ensuring that tortfeasors will be able to compensate victims fully for the harms caused by their tortious activities.¹⁹³ Tort law, however, ultimately cannot force potential tortfeasors to *obtain insurance*; if a party found liable in tort has no insurance and cannot otherwise pay damages, the injured party has no recourse. Regulation avoids this problem by compelling certain classes of persons whose activities present a high risk of tortious outcomes.¹⁹⁴ Regulation thus ensures that ride-for-hire service providers fully internalize the costs of their activities in the form of premiums paid to obtain and maintain insurance.¹⁹⁵

The problems of insurance and emerging gaps in tort doctrine together suggest that regulation is a more effective means of addressing the consequences of the externality problem created by ride-for-hire services than reliance on tort law alone; indeed, regulations that force drivers to carry insurance and specify when employer liability is triggered for tort purposes can ensure recovery for individuals who might otherwise be unfairly hung with the burden of medical costs resulting from injuries caused by a rideshare driver.¹⁹⁶ The second prong of our regulatory justification framework thus appears to be satisfied.

A related but distinct safety problem concerns the risks associated with individual drivers themselves—whether they are careful drivers generally, as well as whether they present some other potential dangers to passengers (such as the risk of robbery or sexual assault). This problem might be characterized as an information asymmetry disfavoring consumers: individual passengers have little way of knowing whether the particular driver they hail has a poor driving history or a long criminal record. Regulation can address the problem via the introduction and enforcement of standards, most importantly robust background check requirements, that ensure that all drivers employed by ride-for-hire services have a safe driving history and present little or no criminal threat.

192. “Insurance may be defined as a device for reducing risk by combining a sufficient number of exposure units to make their individual losses collectively predictable. The predictable loss is then shared proportionately by all units in the combination.” KEETON, SARGENTICH & KEATING, *supra* note 180, at 727.

193. *Id.* at 723.

194. In fact, the taxicab industry is regulated in this way.

195. The premiums may be thought of as the cost of increased risk stemming from the drivers’ activities.

196. See *supra* notes 185–189 and accompanying text.

Beyond accidents and driver safety, there are other problems in the ride-for-hire industry that may also necessitate some form of health and safety regulation. These are related to collective action problems among consumers in advocating for accommodations and protections from ride-for-hire service providers.¹⁹⁷ One such problem is that private individuals who take up work as drivers on behalf of ridesharing services are often unprepared to provide accommodations for passengers with disabilities.¹⁹⁸ Another is that consumers appear to have little leverage in bargaining over how their personal information is utilized by app-based ridesharing companies.¹⁹⁹ Health and safety regulation can be useful in resolving these issues via the introduction of standards governing disability accommodations and data privacy.

The consequence of the analysis so far is that any regulatory scheme governing the ride-for-hire industry ought to reflect the existence of health and safety, rather than economic, regulation. The way in which these two regulatory schemes ultimately differ is in the tools that they employ in carrying out the regulatory process. Economic regulation typically utilizes price restrictions and barriers to market entry in order to maintain a robust single firm in a natural monopoly position, while artificially capping prices to mitigate the resulting harm to consumers.²⁰⁰ This is the kind of regulation that has long existed in the ride-for-hire market—indeed, our analysis of the Los Angeles jitney experience reveals that railway companies were early progenitors of this sort of anti-competitive regulatory scheme in the industry. In order to suffocate the jitney movement, railways demanded caps on license issuance and bond-posting requirements designed to reduce entry into the ride-for-hire industry. The steady growth in popularity of the automobile prevented the railways from totally consolidating power, but ride-for-hire in the city (and across the country) came to be characterized by cartel-like taxicab services that employed a complex system of medallions²⁰¹ or operator limits, price ceilings, and rate-setting requirements that enforced an economic regulatory framework across the industry.²⁰² However, the natural monopoly problem does not exist in the ride-for-hire industry; thus, the resulting economic regulatory

197. See *infra* notes 248–252 and accompanying text.

198. See *infra* note 249.

199. See *infra* note 275.

200. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 5–7.

201. “A medallion is a metal plate signifying proper taxi licensing that is bolted onto the car body where it can be easily seen (sometimes on the hood, sometimes on the trunk).” CERVERO, *supra* note 165, at 163 n.8.

202. *Id.* at 156–59.

framework and the tools it employs lacks justification.

The justification for a health and safety regulatory scheme, however, does exist, and the tools of health and safety regulation are accordingly suited to the ride-for-hire market. These tools include standard-setting, insurance requirements, safety checks, and possibly some form of safety-based licensing. Going forward, then, it is important to consider ways in which the existing, unjustified regulatory scheme might change and adapt to shifting circumstances in ways that employ the tools of health and safety regulation.

C. TAXICAB REGULATION IS A SPECIES OF (UNJUSTIFIED) ECONOMIC REGULATION

If economic regulation of the ride-for-hire industry is unjustified, then why has it existed for so long? The taxicab industry is rife with regulation, and the defining rules govern how the taxicab industry is run.²⁰³ The market for urban taxis is characterized by high barriers to entry via caps on the total number of cabs and services that can operate in particular areas. In Los Angeles, for instance, “notoriously restrictive” barriers to entry in the taxicab market keep the ratio of cabs to residents set at about 0.4 to 1000, and the result has been substantially higher fares and less responsive services than in cities with less restrictive regulations.²⁰⁴ In describing Los Angeles’s expansive web of taxicab regulation, one scholar noted that, “[f]rom an economist’s standpoint, the [c]ity’s choice of monopoly regulation is perplexing in that the taxicab industry bears none of the characteristics that are usually thought to call for the establishment of a legal monopoly and its regulation as a public utility.”²⁰⁵ Price regulations in the form of fare restrictions and metering requirements are also common in the taxicab industry.²⁰⁶

This raises an important question that often arises in the context of potentially competitive industries that have been regulated: “[I]f there is no market failure, why then is there regulation?”²⁰⁷ Scholars have typically tended to answer that question by pointing to the actions of private actors, who seek regulation in situations where it may not apply in principle in

203. *Id.* at 156; RONALD F. KIRBY ET AL., *PARA-TRANSIT: NEGLECTED OPTIONS FOR URBAN MOBILITY* 14–15 (1974). Note also that today, railways are a matter of public enterprise, so they are relevant to the modern ride-for-hire discussion only as a matter of theory.

204. CERVERO, *supra* note 165, at 156.

205. Eckert, *supra* note 161, at 407.

206. KIRBY ET AL., *supra* note 203, at 15.

207. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 555.

order to consolidate control or increase the profits of their industry.²⁰⁸ The economic theory of regulation, for example, posits that industry insiders interested in enacting a protective regulation would have a much larger incentive to campaign for the regulation than consumers would have to oppose it. This is because, in order to secure the benefits of wealth redistribution that accompany regulation, regulated interest groups will curry favor with the political elite, promising political support to legislators in exchange for regulations that favor their industry.²⁰⁹ Using this logic, economists have theorized that the industries most likely to be regulated are those in which pre-regulation prices are significantly different from what they would be with regulation. In such situations, members of the regulated industry would have a lot to gain or lose from regulation.²¹⁰ Indeed, highly competitive and highly monopolistic industries are among the most highly regulated, as the model would predict.²¹¹ More specifically, this appears to be exactly what has occurred in the taxicab industry not only in Los Angeles, but also throughout the country.²¹²

The imposition of high barriers to ride-for-hire market entry was thus a product not of the market inefficiencies that typically justify economic regulation, but of powerful interest groups. And in Los Angeles especially, the legacy of jitney regulation, which itself was the product of interest group advocacy on the part of railway companies, could have assisted only in paving the way for the restrictive—and unjustified—set of ride-for-hire industry regulations that exist today. As Robert Cervero notes, “[m]any of today’s state and local regulatory frameworks carry forward legal and economic premises first devised roughly [ninety-five] years ago.”²¹³ Understanding the real reasons for taxicab regulation, as well as the lack of

208. *Id.* at 375–96. See also BREYER, *supra* note 145, at 10 (describing the theory of agency “capture” by the industry establishment); Eckert, *supra* note 161, at 443 (arguing that regulators in Los Angeles were compelled to maintain and advance the regulation of taxis in order to expand the budgets and staffing of their departments, and to secure higher monetary rewards for themselves).

209. This is the well-known Stigler/Peltzman model of regulation. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 381–82. See also Paul Krugman, Op-Ed., *Why Does Regulation Work?*, N.Y. TIMES (May 22, 2010, 12:29 PM), <http://krugman.blogs.nytimes.com/2010/05/22/why-does-regulation-work>.

210. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 385.

211. *Id.*

212. *Id.* at 583. The economic theory of regulation also casts light on the jitney regulation saga, as it suggests similar forces at work in the regulations imposed in 1917.

213. CERVERO, *supra* note 165, at 155 (internal quotation marks omitted). Cf. VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 594 (discussing the arguably analogous anti-competitive regulation of the trucking industry as being motivated not by economic realities such as natural monopoly conditions, but rather by the interest group organization of the railroad industry that sought regulations that would benefit their own industry at the expense of trucking as well as consumers).

justification for the anti-competitive kinds of regulations that currently exist, should prove valuable to regulators now tasked with addressing the emergence of app-based ridesharing services, since entrenched members of the taxicab industry are currently advocating for an expansion of the existing taxicab regulatory scheme to this new form of ride-for-hire service.

IV. REGULATION OF APP-BASED RIDESHARING IN CALIFORNIA: A “THIRD WAY”

The emergence of mobile app-based ridesharing services in Los Angeles and elsewhere in California has spurred the push for a new form of ride-for-hire regulation in the state, one that adheres more firmly to the principles of health and safety regulation. App-based rideshares, which consist of unlicensed drivers who are connected to passengers via a mobile phone application operated by a third party company like Uber or Lyft, have exploded in popularity, much as the jitneys did a century before them.²¹⁴ Indeed, in their utilization of otherwise “everyday” people and vehicles as drivers, they represent the jitney movement resurrected in Los Angeles.²¹⁵ Consumers in California were quick to embrace the new services, which offered lower rates,²¹⁶ a substantially better response time,²¹⁷ and a better customer experience than traditional taxicabs.²¹⁸ By early 2015, Uber, in particular, had become a massive enterprise, with operations—and criticism—spanning not just the United States, but also

214. See, e.g., Brad Tuttle, *Rideshare Battle Shifts to L.A.: City Tells Uber, Lyft, Sidecar to Stop Picking Up Riders*, TIME (June 27, 2013), <http://business.time.com/2013/06/27/rideshare-battle-shifts-to-l-a-city-tells-uber-lyft-sidecar-to-stop-picking-up-riders/> (describing the reaction of local government to the growing popularity of ridesharing).

215. Matt Novak, *What Uber, Lyft and Sidecar Can Learn from the Jitney Cars of the 1910s*, PAC. STANDARD (Dec. 26, 2012), <http://www.psmag.com/blogs/time-machine/uber-lyft-sidecar-jitney-cars-los-angeles-ride-sharing-50890/>.

216. See *infra* note 259.

217. Eric Jaffe, *People in a Hurry Choose Uber over Traditional Cabs*, CITY LAB (Aug. 29, 2014), <http://www.citylab.com/tech/2014/08/uber-has-an-enormous-wait-time-advantage-over-regular-taxis/379358/> (discussing data suggesting faster response times for Uber smartphone hails than calls to taxi companies during daytime and evenings, on all days of the week, in all areas of San Francisco).

218. Justin Wolfers, *Uber Improves Life, Economists Agree*, N.Y. TIMES (Sept. 30, 2014), <http://www.nytimes.com/2014/10/01/upshot/uber-improves-life-economists-agree.html> (“When asked whether ‘letting car services such as Uber or Lyft compete with taxi firms on equal footing regarding genuine safety and insurance requirements, but without restrictions on prices or routes, raises consumer welfare,’ the responses varied only in the intensity with which they agreed. Of the 40 economists who responded, 60 percent ‘strongly agree,’ 40 percent ‘agree,’ and none chose ‘uncertain,’ ‘disagree’ and ‘strongly disagree.’”). See also Melena Ryzik, *How Uber is Changing Night Life in Los Angeles*, N.Y. TIMES (Oct. 31, 2014), <http://www.nytimes.com/2014/11/02/fashion/how-uber-is-changing-night-life-in-los-angeles.html?src=xps/> (tying the emergence of ridesharing apps, especially Uber, to an improving quality of life and cultural experience in otherwise-difficult-to-traverse Los Angeles).

the world.²¹⁹ But taxicab drivers and supporters of the taxi industry have decried ridesharing services' apparent failure to comply with existing ride-for-hire regulations.

Initially, app-based rideshares circumvented the plethora of urban transit regulations that would normally bar new entrants to the ride-for-hire market by arguing that their drivers and passengers were simply normal individuals, and that the only regulable entity was the third party app provider.²²⁰ Municipal transit regulations, of course, do not apply to such technologies, at least not on their face, and for a time, app-based rideshares were able to skirt regulation entirely and pick up a sizeable following of riders.²²¹ App-based ridesharing services were—and remain—popular thanks to their lower fares relative to taxicabs,²²² as well as perceived improvements over cabs in terms of quality of service.²²³

Just as occurred during the jitney era, the established industry players—this time the Los Angeles taxicab drivers, rather than railway operators—were quick to call for regulation that might preserve their position in the market.²²⁴ By all accounts, the new rideshare services were able to offer a service that many users found cheaper, more comfortable, and more efficient than taxis (or trains and buses, for that matter).²²⁵ But

219. By December 2014, Uber was valued at over \$40 billion. Mike Isaac & Michael J. de la Merced, *Uber Adds a Billion Dollars More to its Coffers*, N.Y. TIMES DEALBOOK (Dec. 4, 2014, 11:43 AM), <http://dealbook.nytimes.com/2014/12/04/uber-files-to-sell-1-8-billion-in-new-shares/?src=xps>. For a brief introduction to some of the resistance faced by Uber and similar apps worldwide, consider David Jolly, *Uber is Ordered by Spain and Thailand to Halt Operations*, N.Y. TIMES (Dec. 9, 2014), <http://www.nytimes.com/2014/12/10/technology/uber-is-ordered-by-spain-and-thailand-to-halt-operations.html?src=xps>, and Raphael Minder & Mark Scott, *Sharing Economy Faces Patchwork of Guidelines in European Countries*, N.Y. TIMES (Sept. 21, 2014), <http://www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html?emc=eta1>.

220. See Editorial, *Uber, Sidecar and Lyft: Don't Call Them Cabs*, L.A. TIMES (June 26, 2013), <http://www.latimes.com/news/opinion/editorials/la-ed-taxi-uber-lyft-sidecar-crackdown-20130626,0,2480891.story#axzz2nruIw63a> (“Uber, Sidecar and Lyft may be disrupting the cab business, but they’re not operating cab companies.”). See also Michael Cabanatuan, *Putting Brakes on Ride-Sharing Apps*, SFGATE (Feb. 2, 2014, 9:21 AM), <http://www.sfgate.com/bayarea/article/Putting-brakes-on-ride-sharing-apps-3927193.php> (reporting on the ways in which Uber and Lyft have attempted to circumvent taxicab regulations that would otherwise appear to apply to them, including describing the services as innovative and evolutionary).

221. See, e.g., Grant, *supra* note 4 (describing the explosive popularity of ridesharing).

222. See *infra* note 259.

223. See, e.g., Ajit Pai, Op-Ed., *L.A., Let Uber's Cars Share the Road*, L.A. TIMES (July 9, 2013), <http://www.latimes.com/news/opinion/la-oe-pai-uber-taxi-app-20130709,0,4643851.story> (extolling the virtues of Uber and similar companies).

224. See, e.g., *id.* (“Simply put, Uber and the other companies are a threat—a threat to entrenched incumbents.”).

225. See, e.g., Editorial, *The Promise of Ridesharing Apps*, CHI. TRIB. (Sept. 29, 2013),

pro-regulatory voices charged that ridesharing services were inefficient, while also raising concerns regarding safety and fairness.²²⁶

At the state level, much of the early debate centered on the jurisdictional question of whether the California Public Utilities Commission had authority to regulate app-based services like Uber and Lyft at all. Regulation of ride-for-hire services is authorized under section 5360 of the California Public Utilities Code,²²⁷ which defines a “charter-party carrier of passengers” as any “person engaged in the transportation of persons by motor vehicle for compensation . . . over any public highway.”²²⁸ This provision is subject to a set of exclusions in section 5353 of the Code, which exempts ridesharing²²⁹ from regulation only if the persons involved have a common work-related purpose, the vehicle seats fifteen or fewer people, and the ridesharing is incidental to another purpose of the driver.²³⁰ But, the ridesharing exemption does not apply “if the primary purpose for the transportation of those persons is to make a profit.”²³¹ Moreover, section 5353 exempts taxicabs from state regulation.²³² The taxicab industry is thus subject only to regulations enacted at the local level, by regulatory authorities like the Los Angeles Department of Transportation (“LADOT”).²³³ The debate surrounding app-based ridesharing regulation has thus played out at multiple levels of California’s transit regulatory apparatus, with both state regulators at the CPUC and local regulators at LADOT playing a role.²³⁴

http://articles.chicagotribune.com/2013-09-29/opinion/ct-edit-ride-20130930_1_ride-sharing-apps-uberx-lyft (commenting on the virtues of app-based ridesharing); Pai, *supra* note 223 (same); *Uber, Sidecar and Lyft: Don't Call Them Cabs*, *supra* note 220 (same).

226. Pai, *supra* note 223 (critiquing and rejecting these claims).

227. CAL. PUB. UTIL. CODE § 5360 (West 2010).

228. *Id.*

229. *Id.* § 5353(h). “Ridesharing” is defined in the California Vehicle Code as “two or more persons traveling by any mode, including, but not limited to, carpooling, vanpooling, buspooling, taxipooling, jitney, and public transit.” CAL. VEH. CODE § 522 (West 2010).

230. CAL. PUB. UTIL. CODE § 5353(h) (West 2010).

231. *Id.*

232. *Id.* § 5353(g).

233. “LADOT regulates taxicab companies, vehicle owners, and drivers. Permission to operate taxicab service in the City of Los Angeles is approved by the Board of Taxicab Commissioners, the City Council, and the Mayor through the granting of a taxi franchise.” *Taxicabs*, LADOT, <http://ladot.lacity.org/WhatWeDo/TaxicabsAmbulancesPipelines/Taxicabs/index.htm> (last visited Apr. 17, 2015). LADOT has replaced the Board of Public Utilities as Los Angeles’s taxicab regulatory authority; the formation of the state-level CPUC and various federal-level agencies resulted in the abrogation of many of the Board of Public Utilities’ former duties. See Eckert, *supra* note 161, at 408–09, 408 n.4 (describing the history and jurisdiction of the old Board of Public Utilities).

234. *Compare* Press Release, Cal. Pub. Utils. Comm’n, CPUC to Evaluate Ridesharing Services 1 (Dec. 20, 2012) (on file with author) (claiming that CPUC is responsible for determining the public

A. ACCOMMODATING INNOVATION

In late 2012, the CPUC instituted an order proposing rulemaking to govern app-based ridesharing throughout California.²³⁵ The goals of the proposal were telling: “The purpose of this Rulemaking is not to stifle innovation and the provision of new services that consumers want, but rather to assess public safety risks, and to ensure that the safety of the public is not compromised in the operation of these new business models.”²³⁶ Clearly, the CPUC was sympathetic to the emergence of app-based ridesharing, in that it expressly dismissed the idea that regulation should stifle rideshare companies’ development.

The CPUC claimed jurisdiction under California Public Utilities Code section 5360, finding that app-based rideshares were “charter-party” carriers within the meaning of the statute, and that the Commission thus had authority to regulate them under section 5381 of the Code.²³⁷ The resolution of this jurisdictional issue was critical, since the CPUC has no authority to regulate typical taxicab services, which, as noted above, are regulated only at the local level.²³⁸ Local taxicab regulations, which set prices and limit market entry, are more in the vein of economic regulation, which, as discussed previously, is unjustified in the ride-for-hire context.²³⁹ Since regulators at the local level have imposed more stringent requirements on taxicabs than can the CPUC on charter-party carriers,²⁴⁰

safety effects of “charter-party carriers,” assuming that the term includes app-based ridesharing), and Press Release, Cal. Pub. Utils. Comm’n, CPUC Enters into Operating Agreement with Uber (Jan. 31, 2013), available at <http://www.cpuc.ca.gov/NR/rdonlyres/F013B3B9-ED4E-4554-9C34-E468C9DAED88/0/CPUCEntersIntoOperatingAgreementwithUber.pdf>, with Dara Kerr, *Uber, Lyft, Sidecar Get Cease-and-Desist Letters from LA*, CNET (June 25, 2013, 4:12 PM), <http://www.cnet.com/news/uber-lyft-sidecar-get-cess-and-desist-letters-from-la/> (describing Uber and other rideshare services’ rejection of the proposition that LADOT had jurisdiction over them after they signed agreements with CPUC to adhere to safety standards).

235. Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n Dec. 20, 2012) [hereinafter CPUC Order], available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M040/K862/40862944.PDF>. See also Press Release, Cal. Pub. Utils. Comm’n, CPUC to Evaluate Ridesharing Services, *supra* note 234.

236. CPUC Order, *supra* note 235, at 2.

237. See *id.* The Code also requires that charter-party carriers operate on a prearranged basis. CAL. PUB. UTIL. CODE § 5360.5 (West 2010). “Prearranged basis” is not defined in terms of time either by the Code or by its accompanying regulations. CPUC Order, *supra* note 235, at 2. This issue will be discussed further *infra* at Part IV.B.

238. “Taxicab regulation is specifically excluded from the [CPUC’s] jurisdiction pursuant to Government Code § 5353(g). Cities and counties regulate Taxicab service under Government Code § 53075.5.” CPUC Order, *supra* note 235, at 2.

239. See *supra* Part III.A.

240. See CPUC Order, *supra* note 235, at 2–3. (“Some local jurisdictions limit the number of

proponents of the taxicab industry wishing to stifle their app-based competitors preferred local to state jurisdiction to regulate these competitors, whereas proponents of app-based ridesharing services preferred the opposite.²⁴¹

Indeed, comments to the proposed rulemaking released over the ensuing year reflected this divergence of interests. One taxicab company argued that the intensive activity of app-based rideshare drivers carries with it the risk of violent crime—not only toward passengers, but also toward the drivers themselves, and despite the essentially cash-free nature of the new service:

[E]xperienced taxi operators know that many violent work-related crimes arise from non-robbery motives such as ethnic tensions, intoxication, road rage, fare disputes and sexual assault. To reduce risk of violent crime against drivers, taxi-like services such as Lyft, Sidecar and Uber should be subject to the same taxi regulations as licensed operators.²⁴²

Taxicab companies also discussed the lack of public safety associated with app-based ridesharing, arguing that stringent local taxicab regulations enforce a “culture of safety” that other, less intensive systems of regulation could not match.²⁴³

However, an important point to consider regarding these appeals to safety is that their acknowledgment does not require anything more than the enforcement of standards, background checks, and the like. Indeed, the regulatory efforts suggested in comments advocating safety assurances include training, accessibility requirements, inspections, and enforcement.²⁴⁴ They thus appear to reflect the basic tools and philosophy of health and safety regulation, *not* economic regulation. Assuming that

taxicab licenses they issue. They may also have more stringent requirements (e.g., criminal background checks of drivers) for obtaining and maintaining a license than state law provides for charter-party carriers.”).

241. Or at the very least, proponents of the taxicab industry would advocate for a more stringent set of state-level regulations than would their app-supporting counterparts.

242. Comments to Order Instituting Rulemaking Filed on Behalf of Luxor Cab Co. by Charles Rathbone, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n Jan. 25, 2013), *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M042/K159/42159690.PDF>.

243. *See, e.g.*, Additional Comments of Luxor Cab to Order Instituting Rulemaking, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n June 3, 2013) [hereinafter Additional Luxor Comments], *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M075/K728/75728616.PDF> (arguing that there is no app for the public safety culture that develops within a regulatory system that includes educational training for drivers, certification, company training, rules and training regarding accessibility, the provision of specialized equipment, routine inspections and enforcement, and community safety initiatives).

244. *Id.*

these standards are not enforced in an extreme way intended to squelch the development of app-based rideshares, as some ride-for-hire safety regulations were during Los Angeles's jitney era in the late 1910s,²⁴⁵ they are hardly objectionable.

The proposals for regulation submitted by taxicab industry advocates, however, extended beyond this sort of health and safety-based approaches to include proposals for economic regulation. The arguments for economic regulation tended to stem from the idea that allowing app-based rideshares to operate under lower regulatory hurdles than those faced by locally-regulated taxicab industries would be unfair to taxicab companies, in that it would offer rideshares a competitive advantage over taxis. As one United Taxicab Workers ("UTW") representative put it, the ridesharing companies "seek a privileged space that will allow them to feast off the fat part of the taxi market *while remaining free of the obligation to serve the public at large.*"²⁴⁶

We have seen this argument before, in the protestations of various railway representatives and local officials in jitney-era Los Angeles;²⁴⁷ in the modern context, the argument is still wanting. Indeed, it appears to be premised on the idea that taxicabs in fact have greater obligations than do app-based ridesharing services when it comes to serving the public. The UTW Comments, for instance, point out that taxicabs are required to provide accommodations for people with disabilities, whereas app-based rideshares are not.²⁴⁸ But the lack of disability accommodations among app-based rideshare providers, while a serious flaw in the service,²⁴⁹ is

245. See *supra* Part II.D (discussing the imposition of onerous insurance-holding and bond-posting requirements on jitney drivers).

246. Reply Comments on the Issues Identified in the Scoping Memo Ruling Filed on Behalf of United Taxicab Workers by Mark Gruberg 2, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm'n June 12, 2013) [hereinafter UTW Comments] (emphasis added), available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M076/K860/76860996.PDF>.

247. See *supra* text accompanying notes 93–96.

248. See, e.g., UTW Comments, *supra* note 246 ("It is significant that . . . neither Lyft nor SideCar even discuss service to the disabled community."); Additional Luxor Comments, *supra* note 243 (discussing training and certification requirements for taxicab drivers operating in San Francisco).

249. Indeed, the failure of app-based ridesharing services to provide proper accommodations for riders with disabilities—and their apparent failure to have so much as *considered* the issue prior to 2013—stands as one of the most significant and disheartening failures of the services thus far. See, e.g., Jon Brooks, *UberX and Lyft Disability Plans Not Wowing Advocates*, KQED NEWS (Feb. 17, 2014), <http://blogs.kqed.org/newsfix/2014/02/17/lyft-uber-disabled/> (describing the lack of rideshare vehicles in San Francisco capable of carrying riders with disabilities and noting that part of the problem stems from the fact that many drivers of taxicabs outfitted with ramps have left the taxicab service to join app-based ridesharing companies); Stephanie Chuang, *Transportation Network Companies Accused of Discrimination*, NBC BAY AREA (Mar. 7, 2014, 11:23 PM),

better characterized as a negative externality addressable through health and safety regulatory tools such as standard setting.²⁵⁰ Economic regulations—like barriers to market entry against the app-based rideshare providers, or price-fixing—would not in and of themselves resolve this kind of problem.²⁵¹ It is thus not clear why this particular failure on the part of app-based rideshare services is one that necessitates anti-competitive economic regulation; health and safety regulation will do.²⁵²

Similarly, taxicab industry advocates have claimed that app-based rideshare competition is unfair because rideshares are not attentive (or at least are not required to be attentive) to environmental goals like avoiding traffic congestion or limiting carbon-based emissions.²⁵³ However, it is not clear that even taxicabs themselves are regulated in a way that requires them to account for these costs, at least not to the extent suggested by industry-submitted comments.²⁵⁴ Nor is it apparent that these problems are

<http://www.nbcbayarea.com/news/local/Transportation-Network-Companies-Accused-of-Discrimination-249095101.html> (describing the frustrations of people with disabilities in San Francisco who are unable to use app-based ridesharing services because the vehicles they hail are not accessible or do not allow them to ride with their service animals); Carolyn Said, *As Uber, Lyft, Sidecar Grow, So Do Concerns of Disabled*, SFGATE (Feb. 25, 2014, 5:25 PM), <http://www.sfgate.com/news/article/As-Uber-Lyft-Sidecar-grow-so-do-concerns-of-5240889.php#page-2> (describing the efforts of app-based ridesharing companies to provide accommodations for users with disabilities and the marked need for such provisions among people with disabilities).

250. The externality here is a failure to account for the costs to people with disabilities that are associated with app-based ridesharing generally—the fact that there are likely few cars outfitted with the appropriate equipment to accommodate, say, a wheelchair—as well as the costs associated with the development of app-based ridesharing and its resultant effect on the relatively disability-friendly taxicab market, which has begun to shrink. See Brooks, *supra* note 249 (noting that many taxicab drivers that previously drove cars outfitted with ramps and the like have left the taxicab industry to become rideshare drivers).

251. And in fact, removing a potential ride-for-hire provider from the market only limits the options that riders with disabilities have in terms of private transit.

252. Thankfully, in accordance with CPUC requirements, rideshare services have begun to explore ways of resolving the disability accommodations issue and have already taken some preliminary steps in that direction. *E.g.*, Lyft, *Plan on Avoiding Divide Between Able and Disabled Communities*, available at <http://www.cpuc.ca.gov/NR/rdonlyres/A3FC8D18-83A1-42A4-B88D-DC74711702E3/0/LyftPlanonAvoidingDivideBetweenAbleandDisabledCommunities122313.pdf> (last visited Apr. 17, 2015). *But see* Brooks, *supra* note 249 (describing the criticisms of ridesharing companies efforts in this arena in the six months following the CPUC's order in September 2013).

253. See UTW Comments, *supra* note 246, at 8–9 (describing the incursion of app-based rideshares on the taxicab market as a tragedy of the commons problem necessitating government intervention); Initial Comments to Order Instituting Rulemaking Filed on Behalf of the San Francisco Municipal Transportation Agency 2, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm'n Jan. 28, 2013), available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M042/K159/42159581.PDF> (“Because regulated transportation for hire will play a key role in meeting state and local congestion management and environmental goals, cut rate unregulated providers should not be allowed to drive them out of business.”).

254. There is no indication, for instance, that taxicab regulation was ever designed, as the UTW

any different from externalities better addressable via health and safety regulation. Again, barring other entrants to the ride-for-hire market or setting prices is not necessarily a solution to what is at bottom a health-and-safety problem.²⁵⁵

Other arguments for imposing anti-competitive regulations that have been suggested by taxicab industry advocates include the straightforward assertion that app-based ridesharing is impermissible to the extent that it resembles actual taxicab service as defined by state law.²⁵⁶ LADOT, for instance, has argued that app-based rideshare providers regulated as charter-party carriers may not represent themselves as taxicabs or similar services, nor should they be able to use vehicles with top lights or meters, since these qualities would make them “taxicabs” rather than “charter-party carriers” and thus remove them from the CPUC’s jurisdiction.²⁵⁷ A prohibition on meters, if ever adopted, would prove particularly difficult for app-based rideshare providers to comply with. App-based services use a meter system native to the smartphone application to calculate rates for each ride.²⁵⁸ Without this meter system, rate calculation on a ride-by-ride

Comments assert, to address a supposed tragedy of the commons problem with regard to the use of public roads. UTW Comments, *supra* note 246, at 8–9. Indeed, it seems clear that the regulation of taxicabs through limits on the number of vehicles allowed would do little to alleviate the problem of congestion on highways in Los Angeles or San Francisco, or any other major city with a large volume of vehicular traffic. Taxicabs in Los Angeles do have to contend with the recent “Green Taxi” Resolution of the LADOT Board of Taxicab Commissioners, which requires 80 percent of each licensed taxicab fleet to consist of designated fuel-efficient vehicles by the end of 2015. Board Order No. 062, at 1, (Bd. of Taxicab Comm’rs Dec. 16, 2010), *available at* http://ladot.lacity.org/stellent/groups/departments/@ladot_contributor/documents/contributor_web_content/lacityp_021598.pdf. But there seems to be little practical difference between this requirement and the requirement among app-based ridesharing companies that drivers own cars produced after the year 2000. *See, e.g., Become a Lyft Driver, supra* note 2 (explaining that Lyft drivers must have a four-door vehicle that is from year 2003 or newer).

255. And in this case, the call for economic regulation is particularly inapt: there is no indication that allowing app-based ridesharing will result in there being more cars on the road, nor that these cars (which are required by ridesharing companies to be relatively new makes) will be more harmful to the environment. *See, e.g., Become a Lyft Driver, supra* note 2 (requiring Lyft drivers to have a vehicle from year 2003 or newer).

256. City of Los Angeles Department of Transportation Comments on Proposed Decision 4–5, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n Aug. 19, 2013), *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M075/K768/75768264.PDF>.

257. *Id.*

258. For descriptions of the meter systems internal to the Lyft and UberX applications, see, for instance, *Los Angeles, LYFT*, <https://www.lyft.com/cities/los-angeles> (last visited Apr. 17, 2015) (describing the rate system for Los Angeles-area travel), and *Los Angeles, UBER*, <https://www.uber.com/cities/los-angeles> (last visited Apr. 17, 2015) (same). Note that in some cities, Lyft at one point ran pricing under a “donation” system in which payment is not required, theoretically suggesting that they are not at all regulable as a ride-for-hire service. The CPUC refused to acknowledge Lyft as anything other than ride-for-hire, however. *See* CPUC Decision, *supra* note 3, at

basis would be near impossible, and fares would probably have to be charged based on some flat rate that would potentially strip app-based ridesharing services of their competitive advantage over taxicabs in terms of pricing.²⁵⁹ The CPUC, for its part, addressed these concerns by drawing a fine distinction between the service provided by taxicabs and that provided by rideshares, one that turns on the idea that app-based rideshares are “prearranged” in a way that taxicab rides are not. This distinction—and its weaknesses—will be explored more thoroughly in Part IV.B.

The CPUC’s eventual decision on rules for the ridesharing industry ultimately did not go as far as proponents of the taxicab industry had demanded. The Commission opted for a scheme of health and safety regulation that aimed to protect the public welfare while purporting to nurture the app-based ridesharing industry.²⁶⁰ The decision created a new classification of transportation services, called Transportation Network Companies (“TNCs”) that would be covered by the regulations; TNCs include organizations providing “prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.”²⁶¹ After finding that the CPUC had jurisdiction over TNCs,²⁶² the decision mandated that TNCs meet certain insurance-holding and safety requirements. Among other things, TNCs must maintain commercial liability insurance policies covering at least one million dollars per incident; drivers must carry proof of both personal and commercial insurance in the case of an accident; drivers must undergo criminal background checks; TNCs must institute a zero-tolerance drug and alcohol policy for drivers, refrain from hiring those with poor driving records, and establish driver training programs; drivers themselves must possess California licenses and be over twenty-one years old; and vehicles must

22 (“[A] ‘donation’ for passenger transportation service is equivalent to direct compensation for the service provided, which falls under the jurisdiction of this Commission.”).

259. Compare *Los Angeles*, LYFT, *supra* note 258 (setting a Lyft base charge of \$0.80 and fees of \$1.10 per mile and \$0.21 per minute travelled, plus a \$1.50 trust and safety fee), and *Los Angeles*, UBER, *supra* note 258 (setting a base fare of \$0.00 with fees of \$0.90 per mile and \$0.18 per minute travelled), with L.A., Cal., Ordinance 181745 (Mar. 17, 2011) (setting a \$2.65 drop charge plus additional charges of \$2.70 per mile and \$0.30 per each thirty-seven seconds of waiting time), available at

http://ladot.lacity.org/stellent/groups/departments/@ladot_contributor/documents/contributor_web_content/lacityp_027413.pdf.

260. See CPUC Decision, *supra* note 3, at 2–3 (adopting permitting requirements and background checks for drivers, establishing a driver training program, implementing a zero-tolerance drug and alcohol policy, and requiring drivers to have commercial and individual insurance).

261. *Id.* at 2.

262. *Id.* at 21–23. See also *supra* text accompanying notes 237–241.

undergo an annual nineteen-point inspection.²⁶³

The critical victory for app-based rideshare advocates was that all of these regulations were in the manner of health and safety regulation. They were safety standards and requirements designed to increase to TNCs the costs of accidents, vehicle breakdowns, and driver negligence, defensible on the theory that such costs are negative externalities to the public that TNCs ought rightfully to account for.²⁶⁴ Of particular salience here, the CPUC decision appears to ameliorate the possible uncertainties faced by future accident plaintiffs via the intersection of app-based rideshare technology and tort²⁶⁵ by mandating that commercial insurance be held by all vehicles, and by effectively requiring drivers to always carry proof of both personal and commercial insurance. The decision further required that TNCs file plans relating to the disability access problems that most, if not all, of their vehicles suffer from.²⁶⁶ The plans were required to include timelines for modifying apps to allow passengers to specify their access needs, devising plans for how TNCs will help provide the necessary vehicles to make accommodations, allowing service animals in vehicles, and crafting general nondiscrimination policies.²⁶⁷ Taken together, the CPUC declared that its decision on TNC regulation represented something of a “third way” of regulation in the ride-for-hire context, one that toed the line between restrictive local taxicab regulation and total deregulation.²⁶⁸ In fact, this “third way” reflects the underlying principles of health and safety regulation.

B. A DISTINCTION WITHOUT DIFFERENCE?

In its accommodating stance toward an innovative application of technology in the sphere of urban transit, the CPUC decision represents an important step forward for the app-based ridesharing industry in California. Indeed, it should come as no surprise that app-based rideshare services themselves were quick to embrace the decision, hailing it as something akin to the dawn of a new era in the state and for the ride-for-hire industry

263. CPUC Decision, *supra* note 3, at 26–29.

264. See VISCUSI, HARRINGTON & VERNON, *supra* note 7, at 691–709 (discussing the types of problems that merit health and safety regulatory intervention and the tools of such regulation).

265. For more on this problem, see *supra* text accompanying notes 192–195.

266. For discussion of the accessibility problems, see *supra* notes 249–250 and accompanying text.

267. CPUC Decision, *supra* note 3, at 42–43. *But see supra* notes 248–252 (discussing the slow pace of TNCs in implementing these changes).

268. See CPUC Decision, *supra* note 3, at 63 (“We reject [the] allegation that a third way of regulation is the same as deregulation.”).

generally.²⁶⁹ It is not clear, however, that local regulators are ready to give up the ghost when it comes to regulation of these services. LADOT, for instance, still retains regulatory authority over standard taxicab services in Los Angeles, and it continued to assert some measure of authority over ridesharing within the city's borders even after the CPUC's decision. It appears from the language of the CPUC decision that the Commission's rationale for distinguishing between taxicabs and TNCs turns on the idea of "prearrangement," that is, the idea that TNCs alone must communicate with potential passengers prior to pickup. The prearrangement concept finds its statutory basis in section 5360.5 of the Public Utilities Code, which requires charter-party carriers to operate on a "prearranged" basis.²⁷⁰

However, the CPUC's description of how app-based rideshares meet the prearrangement requirement, and why prearrangement matters at all, leaves much to be desired. The Commission states that prearrangement is based on two characteristics of ridesharing services. First, passengers must actually download an app and agree to a provider's terms of service before use.²⁷¹ Second, passengers must input information prior to boarding a rideshare, such as current location.²⁷² It is not clear, though, that this account of prearrangement is robust enough to support the distinction that the CPUC purports to draw between taxicabs and app-based ridesharing. From a common-sense perspective, taxicab rides, too, may be prearranged, in that riders have long been able to hail cabs by telephone.²⁷³

Moreover, the two characteristics of ridesharing that the CPUC points to in order to show that ridesharing services are "prearranged" within the meaning of the Code are qualities that taxicabs themselves possess. The emergence of taxicab industry-sponsored apps that allow travelers to hail taxis via smartphone, which themselves require user agreement to various terms of service prior to use, suggests that a user's acceptance of certain terms through an app prior to hailing a ride cannot alone support a distinction in the way ridesharing and taxicabs are regulated.²⁷⁴ Nor does

269. Anthony Ha, *California Regulator Passes First Ridesharing Rules, A Big Win for Lyft, Sidecar, and Uber*, TECHCRUNCH (Sept. 19, 2013), <http://techcrunch.com/2013/09/19/cpuc-ridesharing-regulations/>; John Zimmer & Logan Green, *California Makes History: Votes in Favor of Lyft & Peer-to-Peer Transportation*, LYFT BLOG (Sept. 19, 2013), <http://blog.lyft.com/posts/2013/9/19/california-makes-history-votes-in-favor-of-lyft-peer-to-peer-transportation?rq=california%20makes%20history>.

270. CPUC Decision, *supra* note 3, at 20.

271. *Id.* at 20–21.

272. *Id.* at 21.

273. Not to mention via app. *See infra* note 274.

274. Taxi companies in Los Angeles, for instance, have begun offering booking services through their own mobile "app," originally called Taxi Magic, now known as Curb. *See* Kate Knibbs, *Taxi*

the input of information by users prior to rides support such a distinction, since most of the information that users must input before any given ride is their current location, and they are actually forced to do this by the apps themselves, which do not function without a GPS locator enabled.

But taxi rides are prearranged in a more fundamental sense. Taxicabs are marked by the logo and colors of the company that owns them, and these insignia possess a legitimating function that informs potential riders of the service being offered, letting them know that they may hail a car and expect a ride if they see one available. Indeed, this is what distinguishes hailing a cab from, say, hitchhiking. Taxicab users, like users of rideshares, agree to certain terms when using taxi services, such as the rates that will be charged and in a broader sense the extent of the driver's and company's liabilities. The only difference between the two services bearing on prearrangement is the (traditional) mechanism of hailing a taxicab: flagging one down on the street, mere moments before formally requesting a ride. But it is unclear why exactly this timing difference—cabs can be hailed on the spot, practically in person, while rideshares must be hailed via app, with the time between hailing and pickup extended to minutes instead of seconds—should matter. Surely this difference in timing, in and of itself, has no bearing on why one form of travel should be subject to a totally different regulatory scheme from the other. And it seems too fine a distinction to say that app-based rideshare users have agreed to terms in a more fundamental way than have typical taxicab users merely because they pressed an “agree” button on a “clickwrap” form contract in order to use a smartphone app.²⁷⁵

Is not a taxicab service, then, prearranged? Is the only distinction that taxicabs may be hailed on the street, when the passenger is already in sight of the cab, whereas app-based rideshares must be hailed via smartphone application? This seems to be a weak and rather arbitrary distinction. In

Magic is Fighting Ride-Sharing Giants Like Lyft and Uber with Some Social Media Magic, DIGITAL TRENDS (Nov. 23, 2013), <http://www.digitaltrends.com/social-media/taxi-magic-uses-social-media-stand-crowd/>; Andy Vuong, *Taxi Magic Relaunches as Curb Amid Competition from Uber, Lyft*, DENVER POST (Aug. 6, 2014, 12:01 AM), http://www.denverpost.com/business/ci_26282136/taxi-magic-relaunches-curb-amid-competition-from-uber. Signing up for the Curb app requires agreeing to the service's terms of use, just as does signing up to use Lyft, Uber, or any other app-based ridesharing service. See generally CURB, <http://gocurb.com/> (last visited Apr. 17, 2015).

275. For a discussion of how users have traditionally been thought to be without legitimate contractual protections when it comes to “signing” internet-based contracts of this kind, see Andrea M. Matwyshyn, *Privacy, The Hacker Way*, 87 S. CAL. L. REV. 1 (2013). Moreover, the existence of apps that allow similar geolocation technology to be applied when hailing taxicabs makes the “information input” distinction essentially meaningless, since there is no other information, say about drop-off destination that users cognitively input into the app-based ridesharing system when hailing cars.

fact, to say that the only difference between the two forms of service is the fact that one makes use of a cutting edge technology undercuts an argument made by the CPUC as to why it had jurisdiction over app-based ridesharing services in the first place—that these are not fundamentally technology services but rather charter-party carriers.²⁷⁶

The dubious distinction articulated by the CPUC between app-based rideshares and taxicabs suggests, in the long run, at least three possible outcomes.²⁷⁷ The current cleavage between app-based ridesharing and taxicab regulation could persevere, which would likely have the effect of slowly and painfully squeezing taxicab drivers out of the ride-for-hire market to the extent that taxicabs remain a less desirable option for consumers. Alternatively, local regulatory authorities like LADOT might successfully argue that any distinction between the services is meritless, that app-based ridesharing services are like taxis, and that they ought to be subject to the same slate of economic regulations, including price and entry restrictions, that apply to taxicabs. And finally, the state legislature could find that taxicabs are in fact like TNCs—as the CPUC has so defined them—and that consequently CPUC regulations ought to abrogate local level rules so that the state commission can regulate taxicab services as it does TNCs. This would result in the statewide repeal of economic regulation of automobile-based ride-for-hire services.

Based on the discussion in Part III regarding the lack of justification for economic regulation in the ride-for-hire industry, and the strong corresponding justification for health and safety regulation of the kind recently promulgated by the CPUC with regard to app-based ridesharing, the third option seems to be the optimal approach. Rather than maintaining a cleavage in the regulation of two forms of ride-for-hire that, in their essentials, amount to the same thing, it seems preferable that the state legislature amend the Public Utilities Code to allow for a single type of ride-for-hire regulation that properly accounts for the externality problems in this industry, without trampling beneficial competition for reasons rooted in history and politics.²⁷⁸ The weakness of traditional economic arguments for regulating taxicabs,²⁷⁹ as well as the distinct lack of revenue-

276. See CPUC Decision, *supra* note 3, at 11–20 (arguing that state and federal laws governing technology and other telecommunications services do not apply in this realm, since ultimately the app-based ridesharing services are charter-party carriers).

277. Thanks to Alex Lee for his assistance with this point.

278. See *supra* Part II.

279. See *supra* Part III.

raising justifications for local-level regulation,²⁸⁰ suggest that it is purposeless to continue adhering to a two-tiered system of ride-for-hire regulation.²⁸¹ Consolidation of ride-for-hire regulation as a form of health and safety regulation in the hands of one authority would allow the retention of the so-called “third way” regulatory policy in substance, but in a way that benefits the ride-for-hire industry overall and increases consumer welfare.

In fact, subsequent developments in California law suggest that those responsible for ride-for-hire regulation at both the state and local level are open to developing the law in a manner that embraces the benefits of app-based innovations in the industry while keeping abreast of its costs: the “third way” is quickly becoming the law in California. In September 2014, the California state legislature enacted Assembly Bill No. 2293,²⁸² adding new sections to the California Public Utilities Code that define TNCs²⁸³ and require them to carry a form of hybrid insurance that functions as a commercial policy when a participating driver logs on to a ridesharing platform (and searches for and accepts a fare) but then reverts to a standard personal insurance policy when the driver is not working.²⁸⁴ The new law

280. See Eckert, *supra* note 161, at 437–40 (arguing that the early regulators of Los Angeles’s taxicab industry did not attempt to regulate taxicabs in a way that maximized revenues to the city, suggesting that revenue collection was not their primary motive). See also Kitch, Isaacson & Kasper, *supra* note 171, at 303–04 (discussing taxicab regulation in Chicago and noting that the city “has shown a singular lack of interest in this aspect of taxi regulation”).

281. It is not clear why local regulation of taxicabs has for so long been treated as a sacrosanct privilege of municipal corporations. According to Cooper, Mundy, and Nelson, taxicab regulation is necessary because states have a “legal responsibility” to regulate, and regulation is in the public interest. COOPER, MUNDY & NELSON, *supra* note 164, at 16. Ignoring the seemingly tautological nature of the former argument, the “public interest” side of the argument is that fares will otherwise increase uncontrollably, operators will use shady tactics to keep customers, and the “public image” of taxicabs will deteriorate. *Id.* at 16–17. Given the discussion *supra* Part III.A regarding the dubious status of urban transit as a naturally monopolistic industry, however, it is not clear that the public interest requires price regulation or activity regulation beyond rules regarding safety. On the other hand, there is some evidence in recent months of price gouging efforts by at least one rideshare company. See Carmel Lobello, *Why You Should Probably Get Used to Uber’s Price-Gouging*, WK. (Dec. 17, 2013), <http://theweek.com/article/index/254210/why-you-should-probably-get-used-to-ubers-price-gouging>.

282. Assemb. B. 2293, 2013-2014 Leg., Reg. Sess. (Cal. 2014).

283. CAL. PUB. UTIL. CODE § 5431(a) (West Supp. 2014) (“[A] ‘transportation network company’ is an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.”).

284. *Id.* §§ 5433–34. See also Ben Bergman, *With Signing of Insurance Bill, Lyft, Uber Ridesharing Loophole Comes to an End*, 89.3 KPCC: S. CAL. PUB. RADIO (Sept. 17, 2014), [http://www.scpr.org/blogs/economy/2014/09/17/17309/with-signing-of-insurance-bill-a-ridesharing-loophole/](http://www.scpr.org/blogs/economy/2014/09/17/17309/with-signing-of-insurance-bill-a-ridesharing-looph/) (“AB 2293 also specifically bans drivers from using their personal policies and mandates drivers have to be covered from the moment they turn on their app and look for customers, which is a response

effectively resolves the ambiguity in drivers' tort liability described in Part III—the new Public Utilities Code section 5434 makes clear that commercial policies should provide primary liability coverage whenever a rideshare app driver has the app turned on and is waiting to take a new customer.²⁸⁵ This approach makes sense: it forces rideshare app providers, the least-cost insurers, to internalize the full extent of the risks associated with ridesharing, and it appropriately protects consumers by increasing the likelihood that they will be adequately compensated for accidents.²⁸⁶ Still, there remains some concern that the coverage provisions included in the new law may not be sufficient to cover all manner of potential injuries in the event of an accident, suggesting that state regulators still have some role to play in balancing risks in this area.²⁸⁷

Meanwhile, at the local level, regulators in Los Angeles have begun strategizing a new approach to taxicab regulation that would revamp local rules governing taxicabs and make them more similar to the new rules governing ridesharing apps. Also in September 2014, in response to a request from Los Angeles Mayor Eric Garcetti, the city's Board of Taxicab Commissioners agreed to “review a 64-page taxi rulebook with an eye toward scrapping some regulations and modifying others that put cabs at a competitive disadvantage.”²⁸⁸ The new strategy—modifying rules so as to make taxicab regulation looser, rather than attempting to impose more onerous restrictions on app-based rideshare companies—represents a significant leap forward in the city's, and indeed the country's, response to the emergence of ridesharing services.²⁸⁹ The move indicates an

to the tragic accident on New Year's Eve in San Francisco when an UberX driver hit and killed a six year old child.”); *California Governor Signs Bill Fixing TNC's Insurance Gaps*, INS. NEWS NET (Sept. 18, 2014), <http://insurancenewsnet.com/oarticle/2014/09/18/california-governor-signs-bill-fixing-tncs-insurance-gaps-a-556919.html#.VKMKXGTF-iZ>.

285. CAL. PUB. UTIL. CODE § 5434(a) (West Supp. 2014) (“Nothing in this section shall be construed to require a private passenger automobile insurance policy to provide primary or excess coverage during the period of time from the moment a participating driver in a transportation network company logs on to the transportation network company's online-enabled application or platform until the driver logs off the online-enabled application or platform or the passenger exits the vehicle, whichever is later.”).

286. The new law takes effect in July 2015. *Id.* § 5434(d).

287. Marc Lifsher, *Gov. Brown Signs Ride-Sharing Insurance Bill into Law*, L.A. TIMES (Sept. 17, 2014, 5:53 PM), <http://www.latimes.com/business/la-fi-ride-sharing-bill-20140918-story.html> (noting that the California State Insurance Commissioner did not support the new law's ceilings on coverage and that the CPUC is considering further regulatory proposals based on AB 2293).

288. Laura J. Nelson, *L.A. to Re-Examine Regulations Controlling City's Taxi Companies*, L.A. TIMES (Sept. 18, 2014, 9:28 PM), <http://www.latimes.com/local/cityhall/la-me-taxi-rules-20140919-story.html>.

289. *Id.* (“Other U.S. cities, including Chicago, Houston and Seattle, have moved to impose controls on ride-sharing firms, requiring driver training, insurance policies and vehicle inspections. Los

understanding on the part of local regulators that ride-for-hire services do not really require the intensive web of regulations that historically have governed taxicabs, and along with the enactment of Assembly Bill 2293, it suggests that regulators are inching toward a full embrace of the “third way” approach to regulation in this area, one that treats ride-for-hire services more equitably but also governs them at a more appropriate level of intensity.

V. CONCLUSION

This Note began with an examination of the regulatory suppression of jitneys in Los Angeles in the early twentieth century, which was instigated by pressure from entrenched members of the urban transportation industry. Thankfully, the same mistake has not been made with regard to the modern kin of the jitneys, app-based ridesharing services. The emergence of app-based ridesharing has been more than a boon to California consumers searching for a new and more efficient way to travel. Ridesharing’s emergence has also presented an opportunity for regulatory rationalization in California’s ride-for-hire industry. The California Public Utilities Commission, and more recently the state legislature, have begun the process of regulatory reform by recognizing a new class of ride-for-hire providers—Transportation Network Companies—that are subject to a novel regulatory scheme based on insurance coverage requirements and driver background checks. But the state still retains the traditional scheme of taxicab regulation at the local level, one that includes not only these health and safety requirements, but also a system of price controls and market entry restrictions.

The California legislature must now consider ways of further rationalizing ride-for-hire regulation throughout the state by removing the anti-competitive pricing and entry restrictions that exist in locally-regulated taxicab markets, thus allowing a statewide network of health and safety

Angeles is the first major city to pursue the opposite strategy: easing regulations for legacy cab operations.”). See also Jon Healey, Op-Ed., *Garcetti’s Response to Uber: Smarter Rules for Cabs, Not Necessarily Equal Ones*, L.A. TIMES (Sept. 21, 2014, 5:00 AM), <http://www.latimes.com/opinion/opinion-la/la-ol-garcetti-taxi-regulations-uber-lyft-20140919-story.html> (“Los Angeles is the first to try to modernize its rules for taxis in response to the disruption caused by the smartphone-based ride-summoning services, rather than simply treating the latter as if they were cab companies.”); Emily Alpert Reyes & Marc Lifsher, *3 L.A. City Council Members Back New Rules for Ride-Share Services*, L.A. TIMES (June 10, 2014, 9:54 PM), <http://www.latimes.com/local/cityhall/la-me-0611-rideshare-fight-20140611-story.html> (describing city officials’ concern with the “double standard” of ride-for-hire regulation in Los Angeles, and their support for proposed state legislation that would have required ridesharing companies to carry full-time insurance coverage for all drivers, rather than the mere hybrid scheme imposed by AB 2293).

regulation to blossom. Health and safety regulation of the ride-for-hire industry would protect consumers by controlling for the externalities associated with the provision of ride-for-hire services, while still allowing competition to keep prices low and to effect high levels of service quality.²⁹⁰

Ideally, the resulting system would provide a net surplus for consumers and allow rates to more accurately reflect the value of services provided by ride-for-hire drivers. Some qualifications, however, are necessary. First, the removal of price restrictions comes with an obvious cost: although certain trips may be cheaper for consumers using app-based rideshares subject only to health and safety regulations, riders must be aware that price competition is a double-edged sword. Indeed, there have already been frustrated reports from consumers regarding price gouging tactics by some rideshare services during times of particularly high demand,²⁹¹ and this trend seems quite likely to continue into the future.²⁹²

290. Alternatively, the state legislature might consider placing the regulation of ride-for-hire services within the hands of local regulators, but with conditions that ensure that the anti-competitive tools of economic regulation are not applied.

291. Lobello, *supra* note 281.

292. See, e.g., Jordan Crook, *Be Smarter Than That, Uber Users*, TECHCRUNCH (Nov. 2, 2014), <http://techcrunch.com/2014/11/02/be-smarter-than-that-uber-users/> (describing frustrations with Uber's surge pricing policies on Halloween night 2014); *Prime Time*, LYFT, <http://www.lyft.me/help?article=1353884> (last visited Apr. 17, 2015) (describing Lyft's Prime Time pricing system, under which the cost of rides is increased based on demand during particular times of day). See also Taylor Soper, *Uber Luxury Service Temporarily Available in Austin for SXSW, but Rides Will Cost at Least \$55*, GEEKWIRE (Mar. 6, 2014, 10:06 AM), <http://www.geekwire.com/2014/uber-temporarily-available-austin-sxsw-rides-will-cost-least-55/> (describing Uber's practice of "surge pricing" by which ride prices are increased during times of high demand, but noting that the \$55 figure is due to city regulations and the service being discussed here is Uber's black car limousine service). Lyft also specifies so-called "Hot Zones" in Los Angeles and other cities, which are areas that are particularly busy and thus have more intensive levels of service. See, e.g., *Los Angeles*, LYFT, <https://www.lyft.me/help?article=1263250> (last visited Apr. 17, 2015). One obvious application of the "Hot Zones" concept for the future is to charge higher prices for trips originating from or terminating in one of those zones. In considering the surge pricing problem, however, it is important to remember that to some extent it is tied to the immense market share held by just one app-based rideshare provider—Uber. As the new rules governing TNCs in California begin to be implemented, it is all but assured that there will be an increased level of competition among services for customers that will contribute to a net reduction in fares. This competition will come not just from other new app-based companies, but also from the taxicab industry itself, if and when the local regulatory provisions governing taxicabs are relaxed. See, e.g., Mike Flacy, *Flywheel Battles Uber Surge Pricing with \$10 Rides on New Year's Eve*, DIGITAL TRENDS (Dec. 29, 2014), <http://www.digitaltrends.com/mobile/flywheel-battles-uber-surge-pricing-10-rides-new-years-eve/> (discussing app-based company that connects users to traditional cabs). Cf. Josh Barro, *Under Pressure from Uber, Taxi Medallion Prices are Plummeting*, N.Y. TIMES (Nov. 27, 2014), <http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html> (discussing market pressures in the ride-for-hire industry in New York and Chicago).

It is also important to consider the potentially damning effect that revocation of the taxicab industry's protections at the local level might have on the fortunes of that industry's established firms, and especially on its drivers. Although in the current environment of open competition between taxicabs and app-based ridesharing, many taxicab drivers have proven willing to make the switch to ridesharing companies,²⁹³ it is possible that some may be left out of work if a new regime of health and safety regulation were to be implemented in the near future.²⁹⁴ It remains to be seen as well how California's accommodation of app-based ridesharing will influence, if it does so at all, the development of ridesharing in other parts of the country.²⁹⁵

Another issue of which consumers should remain aware is the way in which app-based ridesharing services collect data about their users through their smartphones. The potential for privacy violations, or at least the perception thereof, is surely high in situations in which service providers can collect massive amounts of private user information, including location, travel history, credit card information, and more with relative ease; indeed, some of the commentary in the months leading up to the CPUC's decision on ridesharing addressed this issue.²⁹⁶

Finally, it is important to think about the way in which ridesharing, though certainly an innovation in its own right, also reflects a broader change in the American economy related to how consumers and producers exchange goods and services. No longer is production solely the domain of

293. See Brooks, *supra* note 249 (noting that many taxicab drivers that previously drove cars outfitted with ramps and the like have left the taxicab industry to become rideshare drivers).

294. On the other hand, some commentators have suggested that there are ways in which app-based ridesharing's development might enhance the fortunes of taxicab drivers. Tim Worstall, Op-Ed., *How Lyft and Uber Will Raise Taxi Drivers' Incomes, Not Lower Them*, FORBES (Dec. 12, 2013, 12:37 PM), <http://www.forbes.com/sites/timworstall/2013/12/12/how-lyft-and-uber-will-raise-taxi-drivers-incomes-not-lower-them/>.

295. See, e.g., Taylor Soper, *UberX, Sidecar and Lyft Reveal How Many Drivers They Have in Seattle*, GEEKWIRE (Mar. 6, 2014, 11:48 PM), <http://www.geekwire.com/2014/3000-uberx-sidecar-lyft-drivers-seattle/> (describing preparations being made by ridesharing companies in anticipation of an upcoming vote in Seattle on the ridesharing question).

296. See Reply Comments of the Electronic Frontier Foundation on the Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ride Sharing, and New Online-Enabled Transportation Services 4, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm'n Feb. 11, 2013), available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M049/K940/49940583.PDF> (noting that providers of app-based ridesharing services "appear to fall short" of consumer protection principles when it comes to the data they collect about their users, a fact that is especially troubling in light of the large amount of information they collect and its deep and probing nature). It is possible that, as contract theory develops, consumers will find themselves and their information protected by novel contract doctrines designed to protect consumer privacy in the information age. See generally Matwyshyn, *supra* note 275 (discussing privacy in the digital age).

established service providers or good producers; rather, certain industries are beginning to feel the effects of the so-called “sharing economy,” broadly defined as a set of peer-to-peer schemes that allow individuals to transfer the right to use their otherwise unused or underused property to others who demand them for a limited period.²⁹⁷ Policymakers must consider the way that the slow shift in certain industries affects or calls into question the underlying assumptions about those industries; this is particularly important since the factors underlying the development of the sharing economy have emerged quickly in the last decade and appear to be here to stay.²⁹⁸ How should the law adapt to protect consumers as portions of the economy undergo the same transition as we have recently experienced in the realm of ride-for-hire? And what role will the distinction between health and safety regulation and economic regulation have to play in those industries currently subject to intensive oversight? Lawyers, economists, and legislators should be aware of the potential of these sorts of changes in the nature of economic activity to serve as unique opportunities to reflect on and reform regulatory structures.

297. See *All Eyes on the Sharing Economy*, *ECONOMIST* (Mar. 9, 2013), <http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items> (“Such peer-to-peer rental schemes provide handy extra income for owners and can be less costly and more convenient for borrowers.”); Michael Hiltzik, *‘Sharing Economy’ is Here to Stay, so Get Used to It*, *L.A. TIMES* (Sept. 27, 2013), <http://articles.latimes.com/2013/sep/27/business/la-fi-hiltzik-20130927> (describing ridesharing as one aspect of the broader sharing economy and the CPUC’s embrace of it as signaling a broader governmental embrace of sharing in other domains).

298. See Vincent Trivett, *The Economic Factors Driving the Growth of Sharing Economy*, *SKIFT* (Jan. 22, 2014, 7:00 AM), <http://skift.com/2014/01/22/the-economic-factors-driving-the-growth-of-sharing-economy/> (describing the factors driving the sharing economy’s growth, including a desire for thrift in the wake of the 2008 financial crisis, and the concurrent rapid growth of the Internet as a global marketplace for goods).

