

Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc.

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I. INTRODUCTION TO THE SHARING ECONOMY AND UBER TECHNOLOGIES

“Sharing Economy” is a newly coined term for an ancient economic system¹ embracing “community ownership,” efficient use of resources, scaled-back consumption, and “localized production.”² In a Sharing Economy, many small-scale sharing ventures do not aim to profit from a resource but instead aim to offset the cost of ownership by sharing and allocating resources.³ Recently, new app-based companies have popularized the term to describe their business model.⁴ By defining themselves as Sharing Economy companies, the app-based businesses not only represent themselves as economically efficient, but they also bypass regulation.⁵

Using Uber Technologies, Inc. (Uber), a multi-national company that connects riders and drivers through a smartphone application (app),⁶ this Note explores the impact of the Sharing Economy model on the business and regulatory environment. Uber is illustrative because the company is currently facing multiple legal hurdles.⁷ For example, Germany, Spain, Italy, and France either have or have nearly banned Uber nationwide.⁸ Domestically, various states and municipalities have struggled to define Uber’s innovative model under their traditional regulatory frameworks.⁹ After addressing the regulatory landscape, this

1. Molly Cohen & Corey Zehngbot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58 BOSTON BAR J. 2, 6 (Apr. 1, 2014).

2. Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 3 (2012).

3. *Id.* at 7; Catherine Lee Rassman, *Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance “Gap,” and Why Pennsylvania Should Get on Board*, 15 U. PITT J. TECH. L. & POL’Y 81, 81 (2014).

4. See Cohen & Zehngbot, *supra* note 1, at 2 (explaining how companies like Airbnb, Lyft, Sidecar, Uber, Park Circa, Thredup, gearcommons, TaskRabbit, and Zopa all represent themselves as “Sharing Economy” businesses and how this “trend” has grabbed the attention of Congress, venture capitalists and the media who have named it “one of the ten ideas that will change the world”); Rassman, *supra* note 3 (“[I]nnovative ‘sharing’ companies are revolutionizing the way we travel (AirBnB), fundraise (KickStarter), pay (Venmo), multitask (TaskRabbit), and commute (Lyft, Uber).”).

5. Cohen & Zehngbot, *supra* note 1, at 6–8; see also Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco 2* (UCTC, Working Paper No. 8, 2014) (finding ridesourcing generally provides more efficient and convenient transportation, but noting the “advantages may also be explained by its exemption from the supply restrictions that often govern taxis”).

6. UBER, <https://www.uber.com/> (last visited Feb. 17, 2016). Specifically, this Note uses UberX. See Rayle et al., *supra* note 5 (discussing the difference between UberX and other ridesourcing companies). As of January 1, 2016, Uber was operating in 68 countries and over 360 cities worldwide. *Cities*, UBER, <https://www.uber.com/cities> (last visited Feb. 17, 2016).

7. See *infra* Section II.E (discussing Uber’s legal challenges).

8. Landgericht Frankfurt am Main [LG] [District Court Frankfurt am Main] Aug. 25, 2014, docket no. 2-03 O 329/14 (Ger.), http://docs.dpaq.de/7814-beschluss-landgericht-ffm_uber-taxi-deutschland_2014-09-01.pdf. See *Uber App Suspended in Spain*, BBC (Dec. 9, 2014), <http://www.bbc.com/news/business-30395093> (discussing a court decision banning Uber in Spain and opposition in India); see also Mark Scott, *French Law That Banned Uberpop Service Survives Legal Challenge*, N.Y. TIMES (Sept. 22, 2015), <http://www.nytimes.com/2015/09/23/technology/french-law-that-banned-uberpops-service-survives-legal-challenge.html> (“The Constitutional Council in France upheld on Tuesday a law that banned Uber’s low-cost ride-hailing service, a much-awaited decision that underscores how national courts are enforcing limits on the company’s expansion into new markets.”). Uber also faces opposition in the Netherlands and Belgium. *Legal Troubles—Including 173 Lawsuits in the U.S.—Threaten Uber’s Global Push*, BUS. INSIDER (Oct. 15, 2015, 5:38 AM), <http://www.businessinsider.com/r-legal-troubles-market-realities-threaten-ubers-global-push-2015-10>.

9. See *infra* Section II.E (discussing regulatory challenges in Anchorage, Boston, Maryland, Virginia,

Note asserts that app-based companies should be identified according to the service that they administer, a new uniform framework should be established to balance innovation with public interest, and app-based companies should cooperate with regulators in developing that framework.

II. BACKGROUND ON TRANSPORTATION REGULATION, UBER, AND ANTICOMPETITIVE LEGISLATION

This Part discusses a) the history of transportation law, which shaped our current regulatory framework, and b) the relevant ways legislators label business types to associate carrier regulations. Additionally, this Part reviews c) the Uber-app's operation to understand why legislators struggle to label Uber for regulation, and d) the laws that regulate anticompetitive practice. Finally, this Part examines e) the steps some legislators have taken in the wake of Uber's current legal challenges.

A. History of Transportation Law

The conflicts that led to transportation law mirror the conflicts between Uber and taxi companies today.¹⁰ The history of American transportation regulation traces back to early England.¹¹ The Watermen, i.e., sea ferries, provided the main source of for-hire transportation in England prior to 1640, when hackney coaches began to replace them by offering lower prices and greater convenience.¹² With the increase in coaches came concerns for safety.¹³ In response, King Charles I ordered early weight and vehicle width restrictions.¹⁴ Another drive for regulation, however, came from competing businesses.¹⁵ The Watermen experienced a tremendous loss of profit from the increased competition.¹⁶ Anti-innovators joined the Watermen's protest opposing the coaches and calling them:

one of the greatest Mischiefs that hath happened of late Years to the Kingdom, mischievous to the Publick, destructive to Trade, and prejudicial to Lands: First, By destroying the Breed of good Horses, the Strength of the Nation Secondly, By hindering the Breed of Watermen, who are . . . the Bulwark of the Kingdom. Thirdly, By lessening his Majesty's Revenues.¹⁷

In 1635, the King "expressly command[ed] and forb[ade] that no Hackney or hired coach be used or suffered in London, Westminster, or the suburbs thereof."¹⁸ The Watermen did not celebrate for long, however, because by 1685 the King had removed the injunction and

California, Colorado, and Nevada).

10. See *infra* Section II.E (discussing Uber's legal challenges).

11. Jeremy P. Toner, *The Welfare Effects of Taxicab Regulation in English Towns*, 40 *ECON. ANALYSIS & POL'Y* 299, 299 (2010) (noting that the taxi industry's "long history of regulation" began as early as 1635 in London, England).

12. See EDWIN A. PRATT, *A HISTORY OF INLAND TRANSPORT AND COMMUNICATION IN ENGLAND* 39 (1912) (describing how the coaches charged "a shilling for every five miles" and traveled throughout London).

13. The carriages carried heavy loads that broke down the roads. *Id.* at 43–50.

14. The King ordered that carriages must have no more than "two wheels," weigh under "twenty hundred," and restricted the number of horses and the type of wheels attached. *Id.* at 43–48.

15. *Id.* at 59.

16. *Id.* at 12.

17. PRATT, *supra* note 12, at 39–40.

18. *Id.* at 61.

hackney coaches were recognized and regulated like the Watermen.¹⁹

With the exception that automobiles replaced horse-drawn carriages, the New York City taxi industry in the 1900s remained largely unchanged since 17th-century England.²⁰ Although cities and states required taxi drivers to apply for licenses, the industry was mainly unregulated.²¹ Then came the Great Depression, and with it “wildcat” cars.²² Wildcat cars—unlicensed taxis driven by laid-off workers who dramatically lowered fares—took business away from the taxi industry.²³ In 1937, in response to violence and the quickly diminishing taxi industry, legislators passed the Haas Act which established the medallion system²⁴ and the transportation law currently in effect today.

B. Transportation Law Today

Current transportation regulation addresses Common Carrier and Contract Carriers separately.²⁵ Some city legislators have distinct regulations for transportation brokers.²⁶ App-based technology may also fall under telecommunication carrier regulations or exemptions.²⁷

1. Common Carrier

Generally, a Common Carrier is any transportation service that is open to the public, without prejudice and for compensation.²⁸ The service may be either direct or indirect, part-time or full-time.²⁹ Most cities have two main types of Common Carrier regulations: taxi regulations and For-Hire Vehicle regulations.³⁰

All cities license and regulate their taxi industry, and generally define a taxi as a vehicle “bearing a Medallion indicating that it is licensed by the Commission to carry up to five passengers for hire and authorized to accept hails” from persons in the street.³¹ Because most cities cap the number of medallions issued, the system only allows for a set

19. *Id.* at 62–63.

20. Choong-Ho Kang, *Taxi Deregulation: International Comparison* (Aug. 1998) (unpublished Ph.D. dissertation, University of Leeds) (on file with the Institute for Transport Studies), <http://www.taxi-l.org/kang0898.htm>.

21. *History*, TAXI OF TOMORROW (last visited Feb. 17, 2016), http://www.nyc.gov/html/media/totweb/taxioftomorrow_history_regulationandprosperity.html.

22. *Id.*

23. *Id.*

24. *Id.* Section II.B describes the medallion system.

25. J.E.K., *Persons or Corporations Transporting Goods on Public Highways as Common Carrier, or Private or Contract Carrier, Regards Liability for Loss of or Damage to Goods*, 112 A.L.R. 89 § 1 (1938).

26. *See infra* note 100 (discussing Virginia’s decision to regulate).

27. *See infra* Section II.B.4 (discussing whether Uber falls under the Telecommunications Act).

28. J.E.K., *supra* note 25 (citing 9 AM. JUR. pp. 430, 431, § 4); Andy Vuong, *Judge Files Proposed Rules in Uber Case*, DENVER POST (Mar. 27, 2013, 12:05 AM), http://www.denverpost.com/business/ci_22878464/judge-files-proposed-rules-uber-case.

29. Vuong, *supra* note 28.

30. *See, e.g., TLC Rules and Local Laws*, NYC TAXI AND LIMOUSINE COMM’N, <http://www.nyc.gov/html/tlc/html/rules/rules.shtml> (last visited Feb. 17, 2016) [hereinafter *TLC*] (linking both For-Hire Vehicle and Taxi regulations in New York City).

31. N.Y.C. TAXI & LIMOUSINE COMM’N, RULES AND REGULATIONS § 51-03 (2015), http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_51.pdf.

number of drivers per city.³² In New York City, each medallion was estimated to be worth up to \$1.3 million in 2013.³³

As a condition to licensure, taxi drivers submit to background checks³⁴ and pass language and driver tests.³⁵ The car must undergo extensive annual³⁶ and quarterly safety inspections³⁷ and conform with specific labeling.³⁸ The regulations also fix prices,³⁹ require financial reporting, and mandate meters to calculate fares.⁴⁰ By failing to comply with lists of regulations, taxi drivers risk heavy fines and the loss of their license.⁴¹

Cities often define For-Hire Vehicles (FHV) as licensed vehicles, driven for compensation with “a seating capacity of 20 or fewer Passengers,” with “three or more doors,” which are not taxis, authorized buses, or commuter vans.⁴² Luxury cars and limousines are examples.⁴³ Similar to taxi drivers, FHV drivers undergo a detailed background check,⁴⁴ must obtain commercial licenses, submit their vehicle to a number of inspections, and have specific insurance coverage.⁴⁵ Unlike taxis, there are no caps on the number of FHVs permitted to operate in cities.⁴⁶ FHVs in most cities may not hail drivers or be equipped with taximeters.⁴⁷ Generally, however, there are fewer and less restrictive

32. See *2014 Taxicab Factbook*, N. Y. TAXI & LIMOUSINE COMM’N 1 (2014), http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf (reporting 13,437 medallions in New York City as of 2014).

33. Matt Flegenheimer, *\$1 Million Medallions Stifling the Dreams of Cabdrivers*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/nyregion/1-million-medallions-stifling-the-dreams-of-cabdrivers.html>; see Badger, *infra* note 38 (charting how many taxi drivers rent medallions in Chicago). Since the rise of Uber, medallions’ prices have fallen. NY CITY CAB, <http://nycitycab.com/business/taximedallionlist.aspx> (last visited Feb. 17, 2016).

34. N.Y.C. TAXI & LIMOUSINE COMM’N, DRIVER NEW APPLICATION CHECKLIST REQUIREMENTS (2015), http://www.nyc.gov/html/tlc/downloads/pdf/driver_req_checklist.pdf.

35. N.Y.C. TAXI & LIMOUSINE COMM’N, RULES AND REGULATIONS § 54-04 (2015), http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_54.pdf.

36. N.Y.C. TAXI & LIMOUSINE COMM’N, VEHICLE OWNERS & DRIVERS: SOME FREQUENTLY ASKED QUESTIONS ABOUT THE NEW FHV RULES (2015), http://www.nyc.gov/html/tlc/downloads/pdf/new_fhv_license_e_faq.pdf.

37. *Id.*

38. Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years*, WASH. POST (Nov. 27, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/27/as-uber-fights-new-battles-over-privacy-an-older-war-simmers-with-the-cab-industry/>.

39. N.Y.C. TAXI AND LIMOUSINE COMM’N, RULES AND REGULATIONS § 54-17(a) (2015), http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_54.pdf.

40. *Id.* § 54-23, § 54-26.

41. Regulations prevent drivers from overcharging passengers (section 54-17(a)); discriminating against individuals based on sex, age, race, or disability (section 54-20(a)); refusing to service certain neighborhoods (section 54-20(a)); maintaining dirty vehicles (section 54-22(e)), etc. *Id.*

42. N.Y.C. TAXI AND LIMOUSINE COMM’N, RULES AND REGULATIONS § 51-03 (2015), http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_51.pdf.

43. N.Y.C. TAXI AND LIMOUSINE COMM’N, RULES AND REGULATIONS § 59-A-01 (2015), http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_59.pdf.

44. *Id.* § 59B-04.

45. *Id.* § 59A-12.

46. *Id.*

47. In *The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, LLC and Other Similar Companies*, PSCM No. 9325, 50–51 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C9300-9399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91. Instead of using taximeters, FHVs charge by the hour or by the day.

regulations for FHVs.⁴⁸

2. Contract Carrier

Contract Carriers, like Common Carriers, offer transportation service for compensation, but the service (e.g., a delivery truck) is “specialized” and limited to a “particular instance.”⁴⁹ Because Contract Carrier services are private, they are required to show that their service would not harm Common Carrier companies offering public service.⁵⁰ Additionally, unlike Common Carriers, Contract Carriers are able to refuse service.⁵¹

3. Transportation Broker

A transportation broker is a licensed⁵² provider who does not “provide or offer to provide transportation service” or represent itself as a carrier.⁵³ Rather, a transportation broker arranges transportation for profit.⁵⁴ A broker acts as a middle-man, not an agent for the transportation-service provider.⁵⁵

4. Telecommunication Carriers and Information Service Providers

App-based technology may also fall under telecommunication carrier regulations or exemptions. The Telecommunications Act of 1996 defines a telecommunication carrier as “an entity engaged in providing commercial mobile service . . . [or] providing wire or electronic communication . . . transmission.”⁵⁶ Mobile telephone companies are an example. Telecommunication carriers are distinct from information services⁵⁷ because the latter do not fall under Title II carrier regulation.⁵⁸

Information services are businesses “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information” for purposes other than managing, controlling, or operating a telecommunications service.⁵⁹ At the time of this writing, cable internet is an example.⁶⁰ Congress acknowledges that the internet has “flourished, to the benefit of all Americans, with a minimum of government regulation” and that it is the United States’ policy to advance the “development of the internet . . . and

48. *Id.*

49. 13 C.J.S. *Carriers* § 339 (2015).

50. *Id.*; 13 AM. JUR. 2D *Carriers* § 3 (2015).

51. 13 AM. JUR. 2D *Carriers* § 339 (2015).

52. *Transportation of Passengers Broker*, VA. DEP’T OF MOTOR VEHICLES (last visited Feb. 17, 2016), http://dmvnow.com/commercial/#mcs/programs/intrastate/broker_passenger.asp.

53. Andy Vuong, *Inside the Latest Proposed Rules that could Impact Uber’s Operations in Colorado*, DENVER POST: TECH+ (Mar. 27, 2013), <http://blogs.denverpost.com/tech/2013/03/27/inside-a-judges-proposed-that-could-impact-uber-in-colorado/9437/>.

54. *Id.*

55. 13 AM. JUR. 2D *Carriers* § 3 (2015).

56. 47 U.S.C. § 1001(8)(B)(i)–(ii) (1996).

57. *Id.* § 1001(8)(C).

58. See generally 47 U.S.C. § 153 (exempting information services); Jeremy D. Lemon, *Reclassifying Broadband Internet Access: Who Cares What Congress Wants Anyway?*, 6 LIBERTY U. L. REV. 137, 140 (2011).

59. 47 U.S.C. § 1001(6)(A).

60. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 978 (2005).

other interactive media . . . unfettered by Federal or State regulation.”⁶¹ The Telecommunications Act is an example of Congress’ intent to keep the internet unregulated or minimally regulated.⁶²

C. The Uber-App’s Operation

Much of the conflict surrounding app-based transportation is over how to classify it for regulation.⁶³ Understanding which category covers a transportation business helps determine what regulations apply.⁶⁴ To appreciate the difficulty regulators face in labeling app-based businesses, it is necessary to discuss how the Uber-app operates.

After downloading the Uber-app, a user enters his/her name, credit card information, and requested destination to summon transportation.⁶⁵ When the user sends the request, Uber notifies nearby Uber drivers,⁶⁶ persons in their private vehicles who are registered through Uber’s website and who consent to Uber’s Software License and Online Services Agreement.⁶⁷ Notifications provide these drivers with the user’s name, location, and rating.⁶⁸ If the driver accepts the request, the user receives the driver’s name, photo, license plate number, rating, fare estimate, and a notification when the driver arrives.⁶⁹

When the user enters the car and communicates his destination,⁷⁰ the driver uses a smartphone provided by Uber⁷¹ to record the time the ride begins and ends.⁷² An Uber server calculates the fare based on this time and charges it to the user’s credit card.⁷³ At Uber’s discretion, this calculation is discounted or multiplied based on demand.⁷⁴ The entire remittance is sent to Uber who then distributes a percentage to its drivers.⁷⁵ The user is sent a receipt and is asked to rate the driver.⁷⁶ Any dispute or complaint is issued to

61. 47 U.S.C. § 230(b) (1996).

62. Leonard J. Kennedy & Lori A. Zallaps, *If It Ain’t Broke . . . the FCC and Internet Regulation*, 7 *COMMLAW CONSPPECTUS* 17, 17 (1999).

63. See *infra* Section II.E (discussing legal challenges).

64. See *supra* Section II.B (discussing the different carrier categories and the regulations that apply).

65. In The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Techs., Inc. and Other Similar Cos., P.S.C.M. No. 9325, 8 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C93009399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91.

66. *Id.*

67. *Id.* at 9.

68. *Id.* at 8. Drivers “rate” users with a satisfaction or star system. Jeff Bercovici, *Uber’s Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, *FORBES* (Aug. 14, 2014, 12:31 PM), <http://www.forbes.com/sites/jeffbervovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/>.

69. Bercovici, *supra* note 68.

70. In The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Techs., Inc. and Other Similar Cos., P.S.C.M. No. 9325, 8 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C9300-9399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91.

71. The smartphone is reserved for navigation and accepting and rejecting requests. *Id.*

72. *Id.*

73. *Id.* at 8–11.

74. In The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Techs., Inc. and Other Similar Cos., P.S.C.M. No. 9325, 10–11 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C93009399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91.

75. *Id.* at 11, 16.

76. *Id.* at 9.

Uber.⁷⁷

D. Federal Trade Commission and State Unfair Competition Acts

While Uber faces a litany of legal challenges nationally and internationally,⁷⁸ this Note primarily focuses on unfair competition and business practices. This Note does not explore any legal challenges for unlawful conduct as defined by the Lanham Act.⁷⁹ Plaintiffs have brought claims against Uber for unfair business practices and competition because the app-based technology is not “incurring the expense of compliance” with regulations.⁸⁰ This compliance may comprise 35–40% of taxi companies’ operational costs.⁸¹ Providing a similar but unregulated service can result in an anticompetitive market by forcing a regulated company with a greater overhead cost to compete for market dominance.⁸²

The history of unfair competition law consists of a mix of federal, non-uniform state, case, statutory, and municipal law.⁸³ The Federal Trade Commission (FTC) was created in 1914; since its creation, Congress has passed laws that give the agency greater policing authority over anticompetitive practices.⁸⁴ The mission of the FTC is “[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”⁸⁵

The Amended 1938 FTC Act⁸⁶ prohibited unfair business practices, which the FTC defined in 1964 as practices that offended public policy and were “immoral, unethical, oppressive, or unscrupulous,” substantially injuring consumers, competitors, or the market.⁸⁷ Beginning in the 1980s, codified in the 1990s, and remaining so today, the FTC

77. *Id.* at 24.

78. *Supra* note 8 and accompanying text. As of October 2015, plaintiffs had filed 173 lawsuits against Uber since October 2012 in the United States alone. *Legal Troubles—Including 173 Lawsuits in the US—Threaten Uber’s Global Push*, BUS. INSIDER (Oct. 5, 2015, 5:34 AM), <http://www.businessinsider.com/r-legal-troubles-market-realities-threaten-ubers-global-push-2015-10>.

79. In a suit against two for-hire transportation companies, the *Dial a Car* court held that application of the Lanham Act involved statutory interpretation of a municipal regulation. *Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 485 (D.C. Cir. 1996). Therefore, the federal court had no authority to interpret and enforce the regulation before the Commissioner had ever made a statement interpreting the statute. *Id.* Recently, in *Manzo v. Uber Techs., Inc.*, the court analyzed whether plaintiffs could bring allegations in federal court against Uber for violation of the Lanham Act. *Manzo v. Uber Techs., Inc.*, No. 13 C 2407, 2014 WL 3495401, at *4 (N.D. Ill. July 14, 2014). The court held transportation regulations were not clear enough to bar Uber’s interpretation that the company fell outside the regulatory scope because a smartphone, for example, does not necessarily fall under the definition of a taximeter. *Id.*

80. *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148, at *6 (D. Mass. Mar. 27, 2014).

81. Mathew Feeney, *Is Ridesharing Safe?*, CATO INST. POL’Y ANALYSIS No. 767, 1, 2 (Jan. 27, 2015), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa767.pdf>.

82. See *Boston Cab Dispatch*, 2014 WL 1338148, at *6 (finding a plausible claim for unfair competition).

83. CORP. COUNS. GUIDE TO BUS. ETHICS POL’Y § 4:6 (2015).

84. *Federal Trade Commission: Protecting America’s Consumers: About the FTC*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc> (last visited Feb. 17, 2016).

85. *Id.*

86. Wheeler–Lea Act, ch. 49, § 3, 52 Stat. 111 (1938).

87. David Belt, *Should the FTC’s Current Criteria for Determining “Unfair Acts or Practices” be Applied to State “Little FTC Acts”?*, ANTITRUST SOURCE 1, 3 (Feb. 2010), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_Belt2_25f.authcheckdam.pdf.

Act is narrower—a practice is not unfair “unless [it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable . . . and not outweighed by countervailing benefits to consumers or to competition.”⁸⁸ Many states adopted the earlier 1964 reading of the Act.⁸⁹ To provide a private right of action, state unfair trade practice acts are necessary to extend the FTC’s mission to protect consumers and merchants.⁹⁰

E. Uber’s Legal Challenges

This Note previously discussed how plaintiffs are bringing complaints against Uber for operating at a lower overhead and not incurring the cost of compliance with regulation.⁹¹ Several cases help illustrate how cities, states, and nations are responding to Uber’s claims that it does not fall under the existing regulatory framework.⁹² Because there is little uniformity, jurisdictions classify Uber under different labels.

In response, some cities, states, and countries decided to temporarily bar Uber’s operation altogether. In Germany, the Frankfurt district court in *Taxi Deutschland v. Uber Technologies* granted a temporary nationwide injunction banning Uber from operating until a hearing.⁹³ The court imposed a fine of a maximum of €250,000 per vehicle trip if Uber lost its claim and a maximum imprisonment of up to six months for Uber’s German-based employees.⁹⁴ Other countries have taken a similar stance. In a preliminary ruling, a Dutch court banned Uber from operating unlicensed in the Netherlands unless its drivers

88. 15 U.S.C. § 45(n) (1994); Belt, *supra* note 87, at 4.

89. Belt, *supra* note 87, at 7.

90. See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, FLA. L. REV. 17 (forthcoming), http://www.law.gmu.edu/assets/files/publications/working_papers/1045_AreStateConsumerProtectionActs.pdf (stating that the FTC has jurisdiction where a practice “is in or affects interstate or foreign commerce”); Erin Mitchel, Comment: *Uber’s Loophole in the Regulatory System*, 6 HLR 75, 90 (citing *Dial a Car* to argue that plaintiffs should first go to local legislators before taking their claims to federal court). Uber and Lyft successfully received dismissals on a number of cases against them where plaintiffs improperly cited the FTC Act. *E.g.*, *Yellow Grp. LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 WL 3396055, at *1 (N.D. Ill. July 10, 2014); *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148, at *1 (D. Mass. Mar. 27, 2014).

91. *Supra* Section II.D. Efforts to bring cases against cities for labeling Uber differently than taxis have been futile; circuit court decisions hold that there is no equal protection violation because there is a rational basis for disparate labeling. *See, e.g.*, *Boston Taxi Owners Ass’n, Inc. v. City of Boston*, No. 15–10100–NMG, 2015 WL 505397 (D. Mass. 2015); *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, 46 F. Supp. 3d 888 (E.D. Wis. 2014).

92. See Rayle et al., *supra* note 5, at 4–6 (detailing thirty-three states’ existing and proposed ridesourcing policies on Table 1).

93. Landgericht Frankfurt am Main [LG] [District Court Frankfurt am Main] Aug. 25, 2014, docket number 2-03 O 329/14 (Ger.), http://docs.dpaq.de/7814-beschluss-landgericht-ffm_uber-taxi-deutschland_2014-09-01.pdf.

94. Kemp Little, *Is Uber too Advanced for our Regulatory Framework?*, KEMP LITTLE (Oct. 8, 2014), http://www.kemplittle.com/site/articles/kl_bytes/is-uber-too-advanced-for-our-regulatory-frameworks. The injunction was eventually revoked, not because of a hearing on the merits but because Taxi Deutschland failed to timely file its claim. *Id.* However, the judges showed sympathy for Taxi Deutschland. *Id.*

charged nothing.⁹⁵ In *Municipality of Anchorage v. Uber Technologies, Inc.*,⁹⁶ an Alaska court also allowed Uber to operate as long as its drivers charged no fee, despite Uber's defense that it is an internet company not subject to transportation regulation.⁹⁷ At the time this Note was written, Uber agreed to cease operations in Alaska "unless and until they comply with the law."⁹⁸ Nevada became the first state to ban Uber operation statewide and to give police authority to investigate and arrest Uber drivers; Nevada legislature has since voted to remove the ban and allow Uber to compete.⁹⁹

Other states have labeled Uber for regulation so that it can legally operate within their markets. On August 6, 2014, Virginia reached a temporary authority agreement requiring Uber and other app-based driving services to apply for a transportation broker license.¹⁰⁰ As a condition for licensure, Uber must comply with tax laws, maintain rate transparency, conduct extensive background checks, document each driver, and have insurance coverage.¹⁰¹ The state Attorney General explained that Virginia wanted Uber, but it "was [not] acceptable for them to operate without complying with regulations or other measures to help ensure the safety of passengers and motorists."¹⁰² He celebrated the agreement as "responsive to innovative business while promoting public safety and the rule of law."¹⁰³ Virginia is currently working on a long-term legislative solution that ensures a "level playing field."¹⁰⁴ Meanwhile, the Maryland Public Service Commission recently labeled Uber under Common Carrier regulation rather than labeling it as an information service exempt from regulation.¹⁰⁵ California became the first state to create a separate category

95. Robin Van Daalen, *Uber Service Faces Dutch Ban: Mobile Ride-Sharing Service Faces More Regulatory Hurdles After Court Ruling*, WALL STREET J. (Dec. 8, 2014), <http://www.wsj.com/articles/uber-service-faces-dutch-ban-1418037736>. See also *Uber App Suspended in Spain*, BBC (Dec. 9, 2014), <http://www.bbc.com/news/business-30395093> (discussing a court decision banning Uber in Spain and opposition in India).

96. *Municipality of Anchorage v. Uber Techs., Inc.*, No. 3AN-14-09530 CI, 2014 WL 8764776, at *1 (Alaska Super. Ct. Oct. 13, 2014).

97. *Id.* at *2. Specifically, the court held the city ordinance was only under threat of violation because at the time of the decision Uber was promoting its services by not charging customers. Sean Doogan, *As Uber and its ilk Expand, Cities Like Anchorage Struggle to Regulate the Sharing Economy*, ALASKA DISPATCH NEWS (Oct. 19, 2014), <http://www.adn.com/article/20141019/uber-and-its-ilk-expand-cities-anchorage-struggle-regulate-sharing-economy>. The regulations would apply if Uber returned to charging customers. *Municipality of Anchorage*, 2014 WL 8764776, at *4.

98. *Uber Signs Agreement to Stop Operating, Pay Settlement to Alaska*, KTVA CBS 11 NEWS (Sept. 3, 2015, 5:38 PM), <http://www.ktva.com/uber-signs-agreement-to-stop-operating-pay-settlement-to-alaska-808/>.

99. See Lark Gould, *Nevada Becomes the First State to Shut Down Uber*, WASH. TIMES (Nov. 28, 2014), <http://www.washingtontimes.com/news/2014/nov/28/uber-travel-nevada-becomes-first-state-shut-down-u/> (discussing "more than 50" arrests since the Nevada decision banning Uber and finding its business model substantially similar to a taxi company). Tracey Lien, *Uber gets Big Win in Nevada as Legislature Oks Bill Authorizing Service*, L.A. TIMES (May 27, 2015, 5:24 AM), <http://www.latimes.com/business/la-fi-uber-nevada-20150528-story.html>.

100. Press Release, Governor Terry McAuliffe, Virginia Reaches Temporary Agreement to Allow Safe, Regulated Operation of Uber and Lyft (Aug. 5, 2014), <http://governor.virginia.gov/newsroom/newsarticle?articleId=5726>.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. In *The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, Inc. and Other Similar Companies*, PSCM No. 9325, 50 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C9300-

for Transportation Network Companies (TNC) in its regulatory framework.¹⁰⁶

III. ANALYSIS

Consumers and venture capitalists praise the re-emerging Sharing Economy for its efficiency, expediency, and friendly nature.¹⁰⁷ One study—comparing taxi efficiency with app-based transportation services adopting the Sharing Economy model—found the latter provided more “mobility” in fewer vehicles and miles and that app-users waited shorter periods for their ride.¹⁰⁸ Uber supporters also note Uber’s low prices¹⁰⁹ and the convenience of on-demand rides via a smartphone.¹¹⁰ These supporters complain that cities, states, and taxi companies wishing to regulate or impose injunctions on Uber are thwarting innovation in favor of protectionism and are examples of regulatory capture.¹¹¹ Even though some of the regulations are protectionist,¹¹² there are legal challenges with allowing Uber to operate unregulated in an industry that serves many public needs. Uber, like other Sharing Economy technology, operates outside of regulation by claiming a) its drivers are no different than a friend giving persons rides; b) its drivers are independent contractors; or c) the company itself is strictly an information source, or a middle-man

9399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91; In The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, Inc. and Other Similar Companies, PSCM No. 9325, at 1 (Aug. 6, 2014), http://webapp.psc.state.md.us/newIntranet/casenum/CaseAction_new.cfm?CaseNumber=9325. Uber operates in Maryland under FHV-like regulations. Luz Lazo, *Hogan Signs ‘Uber’ Bill*, WASH. POST (May 12, 2015), <https://www.washingtonpost.com/news/dr-gridlock/wp/2015/05/12/hogan-signs-uber-bill/>.

106. Rassman, *supra* note 3, at 91. Colorado also created a TNC category, exempt from a number of regulations reserved for FHV’s and taxis. *Id.* at 92.

107. Michael J. De La Merced, *Uber Attains Eye-Popping New Levels of Funding*, N.Y. TIMES (June 6, 2014, 1:24 PM), <http://dealbook.nytimes.com/2014/06/06/uber-raises-new-funds-at-17-billion-valuation/>. See also CLAYTON M. CHRISTESEN, THE INNOVATOR’S DELIMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL XV (1997) (stating disruptive technology is technology that takes over old designs because it is often “cheaper, simpler, . . . [and] more convenient to use,” but performs worse because of short-cuts). But see Philip Elmer-DeWitt, *Why Apple, Tesla, and Uber are not ‘Disruptive’*, FORTUNE (Dec. 17, 2015, 12:49 PM), <http://fortune.com/2015/12/17/apple-tesla-uber-not-disruptive/> (discussing how Christensen, creator of the ‘disruptive technology’ concept, claims that Uber is not disruptive because the transportation market is not new or over-served).

108. Rayle et al., *supra* note 5, at 11.

109. Inae Oh, *Uber Claims it’s Now Cheaper than NYC Yellow Taxis*, HUFFINGTON POST (July 7, 2014, 6:59 PM), http://www.huffingtonpost.com/2014/07/07/uber-vs-taxi-nyc-uberx_n_5563725.html.

110. Letter from Andrew I. Gavil, Office of Policy Planning, to Jacques P. Lerner, General Counsel 3 (June 7, 2013) (on file with the FTC), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

111. See Lee A. Harris, *Taxicab Economics: The Freedom to Contract for a Ride*, 1 GEO. J.L. & PUB. POL’Y 195, 220 (2002) (discussing that taxis are an example of regulatory capture); Glen Harlan Reynolds, *Regulators Wreck Innovation: Column*, U.S.A. TODAY (June 10, 2014, 1:53 PM), <http://www.usatoday.com/story/opinion/2014/06/09/uber-lyft-taxi-transportation-regulators-column/10198131/> (analyzing how regulations protect companies from competition and agencies delegated to regulate an industry eventually end up “regulating on behalf of that industry”). Cf. Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. CAL. INTERDISC. L.J. 565, 572 (2010) (explaining how licensing laws are “less subject to abuse” because there are other means of transportation available).

112. See *supra* Section II.A (exploring how competing businesses, i.e., the Watermen, petitioned for regulation).

between the drivers and riders.¹¹³ This Part discusses how these labels are inaccurate and neither do, nor should, obviate Uber from the current regulatory framework.

A. A Helping Friend

Supporters claim there is no difference between an Uber driver and a friend offering a ride.¹¹⁴ Regulators, however, insist Uber drivers are service providers.¹¹⁵ The distinction between a friend and service provider is important because most friend-drivers will never come under regulation; it would not be practical or in the public interest to regulate a friend or a true Sharing Economy.¹¹⁶ Regulating business, however, often benefits the public's interest.¹¹⁷ Uber, like other app-based businesses, labels itself as embracing the Sharing Economy, which would not come under regulation.¹¹⁸ Thus, it is important to analyze what "sharing" looks like in a true Sharing Economy.

For an example of a Sharing Economy model, Anne and Jerry are neighbors who live on small lots. Anne owns a lawn mower and Jerry owns a snow-blower. During the summer Jerry uses Anne's lawn mower and during the winter Anne uses Jerry's snow-blower. By sharing, Anne and Jerry both have access to a resource they will sometimes need, but they have only paid for one of the resources. When analyzing the friend-driver and the Uber driver under this model, the friend-driver qualifies but not the Uber driver.

The heart of the difference falls in the drivers' purpose for providing transportation. When a friend volunteers to give a ride, the friend does so because of a social contract with the rider, implying the friend will reciprocate by sharing the same or a different resource in the future.¹¹⁹ Conversely, Uber drivers operate under a capitalism model, not the social contract model.¹²⁰ An Uber driver has no prior social relationship with the riders and his motive is financial gain.¹²¹ Uber says New York City drivers who transport at least 40

113. See *supra* Section II.B.4 (discussing information services).

114. See Rayle et al., *supra* note 5, at 2 (noting that "[d]espite the claims of some ridesourcing supporters, ridesourcing differs from ridesharing").

115. In *The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, Inc. and Other Similar Companies*, PSCM No. 9325, 1 (Aug. 6, 2014), http://webapp.psc.state.md.us/newIntranet/casenum/CaseAction_new.cfm?CaseNumber=9325.

116. See Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 467 (2015), <http://conservancy.umn.edu/bitstream/handle/11299/172061/Ranchord%C3%A1s.pdf?sequence=1&isAllowed=y> (explaining how sharing practices "belong[ing] to our personal sphere" function well under a good samaritan law); see also Cohen & Zehngbot, *supra* note 1 ("Small-scale, non-monetized sharing" has historically remained unregulated because law has drawn the line between "public and private, business and personal, donation and sale, consumer and provider, and . . . [one individual's] property and [that of another].").

117. *Protecting America's Consumers, About the FTC*, FED. TRADE COMM'N, <http://www.ftc.gov/about-ftc> (last visited Feb. 17, 2016).

118. Ranchordás, *supra* note 116, at 420 ("In the world of sharing economy, traditional legal boundaries are easily blurred, resulting in legal gray areas and regulatory uncertainty.").

119. See Brigid Kennedy-Pfister, *Continuity and Contradiction in the Theory and Discourse of Dependence*, 28 FORDHAM URB. L.J. 667, 712 (2001) (noting a social contract "emphasizes everyone's obligation to contribute" and is free from government intervention, e.g., contracts with "family, friends, neighborhoods and churches"). Even if the friend asks for money for the cost of operation, it is not the primary purpose he/she offers the ride.

120. See Rayle et al., *supra* note 5, at 2 (noting Uber's operation "more closely resembles a taxi" than a sharing model).

121. See In *The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the*

hours a week make a median wage of \$90,766 a year.¹²² If true, the salary implies consumers are not merely paying the cost of operation but also the cost of service. The Sharing Economy is not a friend, but a quickly emerging big-business making an estimated \$3.5 billion in 2013.¹²³ Top investors even value Uber to be worth \$50 billion.¹²⁴ Uber's investors value Uber to be "worth more than economies of 60 percent of the nations on Earth."¹²⁵ While the company may seek to allocate resources efficiently, categorizing Uber and other like technology as "sharing" remains inaccurate because the company operates by buying and selling a service, not by sharing.

The decision by the Anchorage Superior Court highlights this difference.¹²⁶ Anchorage ruled Uber cannot charge passengers, thus forcing Uber to operate as a true Sharing Economy service.¹²⁷ To continue operation under the Anchorage ruling, Uber paid its drivers in Anchorage to pick up riders for free.¹²⁸ While Uber's short-term interest required it to maintain brand presence in Anchorage, Uber was unlikely to continue to operate as a true Sharing Economy service because it was not in Uber's business interest.¹²⁹ In September 2015, Uber agreed to cease operation in Anchorage until it complied with regulations.¹³⁰

B. Independent Contractor

Uber attempts to avoid liability for drivers' failure to follow regulations by categorizing its drivers as independent contractors.¹³¹ In future litigation, courts will

Operations of Uber Technologies, Inc. and Other Similar Companies, PSCM No. 9325, 8–9 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C9300-9399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91 (transcribing the testimony explaining the app).

122. See Jillian D'onfro, *Uber Says Its Drivers Are Making \$75,000-\$90,000 A Year*, BUS. INSIDER (May 27, 2014), <http://www.businessinsider.com/uber-drivers-salary-90000-2014-5> (comparing Uber earnings to NYC taxi drivers' \$30,000 salary).

123. Tomio Geron, *Airbnb and the Unstoppable Rise of the Sharing Economy*, FORBES (Feb. 11, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/>.

124. See *Uber Fundraising Drive Values Firm Higher than General Motors*, GUARDIAN (Dec. 4, 2015), <http://www.theguardian.com/technology/2015/dec/04/uber-app-valued-62-billion-general-motors> (discussing how Uber will likely rise from a \$50 billion value to a \$60 billion value in 2016). Liyan Chen, *At \$68 Billion Valuation, Uber will be Bigger than GM, Ford, and Honda*, FORBES (Dec. 4, 2015), <http://www.forbes.com/sites/liyanchen/2015/12/04/at-68-billion-valuation-uber-will-be-bigger-than-gm-ford-and-honda/> (showing Uber's rapid increase in value from 2014 to 2015 on Table 1).

125. Eric Mack, *Uber's Rumored Valuation Bigger than Most Economies on Earth*, CNET (Dec. 3, 2015), <http://www.cnet.com/news/ubers-rumored-valuation-bigger-than-most-economies-on-earth/>.

126. *Municipality of Anchorage v. Uber Techs., Inc.*, No. 3AN-14-09530 CI, 2014 WL 8764776, at *1–4 (Alaska Super. Ct. Oct. 13, 2014), http://www.adn.com/sites/default/files/acsinfosysptr%40courts.state.ak.us_20141013_123658.pdf; *supra* Section II.C.5.

127. *Id.*

128. Doogan, *supra* note 97.

129. *Id.*

130. *Uber Signs Agreement to Stop Operating, Pay Settlement to Alaska*, KTVA CBS 11 NEWS (Sept. 3, 2015, 5:38 PM), <http://www.ktva.com/uber-signs-agreement-to-stop-operating-pay-settlement-to-alaska-808/>.

131. See *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6354534, at *6 (N.D. Cal. Dec. 5, 2013) (where Uber argues that its drivers are independent contractors). Under an employer-employee relationship, the employer controls the employee or dictates how the employee performs his/her duties. Patricia Davidson, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 207–09 (1984). A person hiring an independent contractor, in contrast, hires the independent contractor for a "specified result" and has "little or no control over the execution of the job." *Id.* at 207; *see also*

evaluate whether the “partnership” between the driver and Uber is a de facto employment relationship by analyzing the factors listed in the Restatement of Agency.¹³² Factors suggesting Uber drivers are contractors include the following: drivers sign an agreement specifying they are not in an employment relationship with Uber and Uber does not exercise control over them;¹³³ drivers provide their own cars and pay their own operation expenses (gas, car maintenance, etc.);¹³⁴ they are paid by the job rather than by the hour;¹³⁵ they control their own schedules;¹³⁶ drivers often drive for Uber part-time;¹³⁷ and drivers can choose when, where and whom they pick up.¹³⁸ Factors suggesting Uber drivers are employees include the following: Uber gives drivers detailed instructions including what to say to riders and how to behave, drivers are subject to termination for failure to follow protocol,¹³⁹ drivers can only use the smartphone for business purposes,¹⁴⁰ Uber sets rates and determines surge pricing or discounts,¹⁴¹ Uber advertises its service, complaints are filtered through Uber,¹⁴² drivers’ work is integral to and “part of [Uber’s] regular

Rassman, *supra* note 3, at 85–87 (noting that Uber is “insulating” itself and maintaining “low overhead costs” by calling its drivers independent contractors).

132. The level of control one has over the other in a working relationship is determined by the employment agreement and “whether or not the one employed is engaged in a distinct occupation[;] . . . the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; . . . the workman supplies the instrumentalities, tools, and the place of work; . . . the length of time for which the person is employed; the method of payment, whether by the time or by the job . . .” RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958); *see also* Lopez v. Massachusetts, 588 F.3d 69, 86 (1st Cir. 2009) (despite the way the parties labeled themselves, the parties’ actual conduct showed a different relationship). *Santa Cruz Transportation Inc. v. Unemployment Insurance Appeals Board* held taxi drivers were employees of the taxicab company in part, because the company could terminate drivers for not maintaining “good relations with the public,” taxicabs could not be used for personal use, the company set the driver’s rates, the job was the driver’s main source of income, the drivers did not advertise their own service, and “[t]he driver’s work was part of the regular business of the taxicab company.” EMP. DEV. DEP’T, INFORMATION SHEET: TAXICAB INDUSTRY, http://www.edd.ca.gov/pdf_pub_ctr/de231tc.pdf [hereinafter INFORMATION SHEET].

133. *See* Duggles, *Uber’s Partnership Agreement*, UBER PEOPLE (Sept. 30, 2014) (log into forum and download the posted partnership agreement; alternatively, sign up as a driver at Uber.com) (“The Parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The Parties are not employees, agents, joint venturers or partners of each other for any purpose.”). *Cf.* Serino v. Payday Cal., Inc., No. 08-56940, 2010 WL 1678302, at *1 (9th Cir. 2010) (citing Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3rd 327, 335–36 (Cal. Ct. App. 2007)) (“The parties’ label is not dispositive and will be ignored if their actual conduct establishes a different relationship.”).

134. *See supra* Section II.C (discussing how the Uber-app operates).

135. *Id.*

136. *Id.*

137. *Uber Driver Partner (Part-Time Independent Contractor)*, UBER (Mar. 28, 2014), <https://newsroom.uber.com/drive-with-uber-earn-cash-with-your-car-4-2/> (providing an application to work part-time as an Uber driver); Sara Ashley O’Brien, *Uber Economy Like ‘Turn of the Century Sweatshop’*, CNN MONEY (Sept. 14, 2015, 4:19 PM), <http://money.cnn.com/2015/09/09/technology/nelp-on-demand-report-uber/> (“A recent study found that 34% of U.S. workers are freelancers. Meanwhile, 40% of those surveyed said they worked for two or more companies -- and half said they struggled to find enough work.”).

138. *See supra* Section II.C (discussing how the Uber-app operates); O’Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2013 WL 6354534, at *7 (N.D. Cal. Dec. 5, 2013).

139. *See O’Connor*, 2013 WL 6354534, at *9 (“[Drivers] are . . . subject to termination, based on their failure to adhere to . . . rules regarding their conduct with customers, the cleanliness of their vehicles, their timeliness in picking up customers and taking them to their destination, what they are allowed to say to customers, etc.”).

140. *See supra* Section II.C (discussing how the Uber-app operates).

141. *Id.*

142. *Id.*

business,”¹⁴³ Uber pays its driver’s citations,¹⁴⁴ and Uber has paid drivers where customers ride for free.¹⁴⁵ While there is no “magic formula” to weigh these factors,¹⁴⁶ courts are moving towards requiring fewer of them to establish an employment relationship.¹⁴⁷ Still, it remains unclear whether courts will find Uber drivers qualify as employees when the drivers can refuse requests for rides and often have other primary jobs.¹⁴⁸

Currently, a class action lawsuit filed by Uber drivers in California claiming they have been misclassified as independent contractors is scheduled for trial in June 2016.¹⁴⁹ A 2015 California Labor Commissioner ruled that a California driver was misclassified, and the Bureau of Labor and Industries of the State of Oregon recently issued an Advisory Opinion that Oregon drivers were misclassified.¹⁵⁰ In October 2014, Uber paid the Alaska Department of Labor and Workforce Development Worker’s Compensation Division a \$77,925 settlement for misclassifying workers as independent contractors.¹⁵¹ Of course, whether Uber is mislabeling its drivers may also depend on the state; states like California and Alaska are more employee-friendly than, for example, states like Florida or New York.¹⁵² Lastly, some people advocate that a third category of employment, the dependent contractor, is better suited for Uber and other TNCs.¹⁵³

C. Information Service

Uber claims that it is preempted from all regulation because it is an information service provider under the Telecommunications Act of 1996.¹⁵⁴ Legislative history

143. See INFORMATION SHEET, *supra* note 132, at 20 (discussing *Transp. Inc. v. Unemployment Ins. Appeals Bd.*).

144. Elyce Kirchner & David Paredes, *Uber and Lyft Drivers Told to Ignore Regulations: Companies Pay Airport Citations for Drivers*, NBC (Oct. 12, 2014), <http://www.nbcbayarea.com/investigations/Rideshare-Drivers-Told-to-Ignore-Regulations-Uber-Lyft-will-pay-citations-at-Bay-Area-Airports-278283631.html>.

145. Municipality of Anchorage v. Uber Techs., Inc., No. 3AN-14-09530 CI, 2014 WL 8764776, at *1 (Alaska Super. Ct. Oct. 13, 2014).

146. *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 323 (1992) (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

147. See, e.g., *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 997 (9th Cir. 2014) (holding FedEx improperly labeled drivers in California from 2000–2007 as independent contractors when FedEx controlled drivers’ schedules and determined how they should behave and appear, and because the drivers are an integral part of the business). Cf. *In re FedEx Ground Package Sys.*, 734 F. Supp. 2d 557, 601 (N.D. Ind. 2010) (holding FedEx drivers were not independent contractors when weighing the totality of factors).

148. *Supra* note 132; see also *Rassman, supra* note 3, at 86–87 (discussing the similarities between *Beacon Flag Car Co. v. Unemployment Compensation Board of Review* and Uber litigation and concluding courts will likely find Uber’s drivers are independent contractors because they can refuse requests for a ride).

149. *Uber Drivers*, <http://uberlawsuit.com/> (last visited Feb. 17, 2016).

150. *Id.*

151. *Uber Signs Agreement to Stop Operating, Pay Settlement to Alaska*, KTVA CBS 11 NEWS (Sept. 3, 2015, 5:38 PM), <http://www.ktva.com/uber-signs-agreement-to-stop-operating-pay-settlement-to-alaska-808/>.

152. See generally KENNETH G DAU-SCHMIDT ET AL., LEGAL PROTECTIONS FOR THE INDIVIDUAL EMPLOYEE (4th ed. 2011) (discussing various employment laws throughout the states).

153. Harry Campbell, *Could Dependent Contractors be the Answer for Uber?*, FORBES (June 19, 2015, 6:05 PM), <http://www.forbes.com/sites/harrycampbell/2015/06/19/could-dependent-contractors-be-the-answer-for-uber/2/>.

154. 47 U.S.C. § 153 (2015). Uber’s 2014 contract read:

The company does not provide transportation services, and the company is not a transportation carrier. It is up to the third party transportation provider, driver or vehicle operator to offer

supports Uber’s claim because Congress has often acted to keep regulation of the internet minimal.¹⁵⁵ It seems, however, that in the true nature of an information service, information should be valuable to consumers ipso facto.¹⁵⁶ It is unrealistic that someone would log onto the Uber app merely to browse the number of Uber drivers with red cars. Those who log onto the app seek to book a ride. While information on other internet sites may have independent value, Uber’s information is only of value because of the service its drivers provide.

Regardless of whether Uber is an information service under the Telecommunications Act, a Maryland judge explained the Act did not preempt Uber from being defined and regulated as a transportation Common Carrier as well.¹⁵⁷ Extending Uber’s preemption argument would create “absurd result[s]” by allowing businesses to evade state laws and regulations “simply by connecting the transaction to the internet.”¹⁵⁸ Regulation of the service must be “an obstacle to the development of . . . interactive computer service[s]” for the Act to preempt the regulation.¹⁵⁹

In finding that regulation would not impede all development, the Maryland judge concluded Uber’s activity more closely resembles a general transportation Common Carrier rather than an information service.¹⁶⁰ Specifically, the presiding Maryland judge classified Uber as a Common Carrier because 1) it “own[s]” its vehicles and 2) “operate[s] motor vehicle[s]” under the Public Utilities Article.¹⁶¹ The Public Utilities Article defines “own” to include “control” or “manage.”¹⁶² The judge held Uber “own[s]” vehicles because it influences the operation, “management[,] and policies” of its drivers by 1) determining which drivers to send trip notifications to; 2) calculating and discriminatively increasing or discounting rates; 3) equipping drivers with smartphones reserved for

transportation services which may be scheduled through use of application. . . . The company offers information . . . and has no responsibility or liability for any transportation services provided to you by such third parties.

See Rebecca Lopes, *Uber’s Service Offers a Quick and Convenient Ride, but What Does it Offer When a Ride Leads to Tragedy?*, CLO (Apr. 2, 2014), <http://campbelllawobserver.com/ubers-service-offers-a-quick-and-convenient-ride-but-what-does-it-offer-when-a-ride-leads-to-tragedy/> (showing the 2014 Terms and Conditions). In 2015, Uber updated its Terms and Conditions to more simply read, “The Services constitute a technology platform that enables users of Uber’s mobile applications or websites provided as part of the Services (each, an “Application”) to arrange and schedule transportation . . . YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER.” *Legal*, UBER, <https://www.uber.com/legal/usa/terms> (last visited Feb. 16, 2016).

155. 47 U.S.C. § 230(b) (2015).

156. See *supra* Section II.B.4. (defining information services as services that “mak[e] available information” and detailing Congress’ intent to keep the internet unregulated because of the educational benefits the information provides) (emphasis added).

157. In *The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Techs., Inc. and Other Similar Companies*, PSCM No. 9325, 49 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C9300-9399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91.

158. *Id.* at 49 n.64.

159. *Id.* at 50.

160. See *supra* Section II.E (summarizing the Maryland Commissioner’s decision).

161. In *The Matter of An Investigation To Consider the Nature and Extent of Regulation Over the Operations of Uber Techs., Inc. and Other Similar Companies*, PSCM No. 9325 19 (Apr. 24, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:%5CCasenum%5C9300-9399%5C9325%5CItem_91%5C&CaseN=9325%5CItem_91.

162. *Id.*

company purposes; 4) providing a rating system; and 5) receiving 100% of the fare and issuing out a percentage of it to the drivers.¹⁶³ It also manages drivers and policies by controlling the type of vehicles that can be driven; setting standards of conduct; and unilaterally enforcing terms and conditions in its agreement with drivers.¹⁶⁴ The judge held Uber operates motor vehicles because it offers to provide transportation to persons via motor vehicles.¹⁶⁵ This interpretation was also supported in *O'Connor* when the court noted Uber has an “unduly narrow conception of the term ‘operating’”—there is sufficient evidence “Uber exercises control over (or is ‘in charge of’) vehicles-for-hire . . . [and] sets policies that those drivers follow, such as the use of mobile telephones.”¹⁶⁶

On the other hand, the company may not qualify as a Common Carrier “because its service is made available only to users who download the app on their smartphone, not the general public.”¹⁶⁷ According to the definition, Common Carriers must be available to the public.¹⁶⁸ However, anyone with a smartphone can download the app. Additionally, Uber may still fall under other regulation categories if courts find that imposing Common Carrier regulations on Uber is an obstacle to the development of internet technology so as to preempt regulation under the Act. By claiming it classifies as a middle-man, Uber will probably at the very least need to file for a transportation broker license as it agreed to do in Virginia.¹⁶⁹ This classification has a lighter regulation burden.¹⁷⁰ In future litigation, courts will likely weigh Congress’ intent for minimally regulated access to internet technology with how Uber functions, vis-à-vis Uber’s control and management over its service providers.

D. Dangers of Allowing Uber’s Mode of Current Operation

Allowing Uber and other Sharing Economy technology to operate without regulatory constraint is dangerous in three ways. First, no extensive safeguards ensure consumer protection. Second, allowing a similar industry to operate unregulated while holding another responsible for pages of regulations violates anticompetitive policy. Finally, predatory pricing threatens to drive out established businesses that do provide protections for consumers.

1. Service Lacks Comparable Consumer Protection

By avoiding city ordinances that require licenses, Uber does not have the same

163. *Id.*

164. *Id.* at 19–22.

165. *Id.* at 2.

166. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6354534, at *7 (N.D. Cal. Dec. 5, 2013). The Commissioner’s decision received backlash from the community. Shwetha, *Tell the PSC that Maryland Needs Uber*, UBER BLOG (Aug. 1, 2014), <http://blog.uber.com/marylandneedsuber>.

167. See Conor Shine, *Uber’s Legal Case Against Las Vegas’ Uber-Powerful Taxicab Industry*, LAS VEGAS SUN (Nov. 14, 2014, 2:00 AM), <http://www.lasvegassun.com/news/2014/nov/14/ubers-legal-case-against-las-vegas-uber-powerful-t/> (discussing the Uber attorney’s court arguments against Common Carrier regulations applying to Uber); Scott Sonner, *The Only State that Allows Prostitution Just Banned Uber*, BUS. INSIDER (Nov. 26, 2014, 2:28 PM), <http://www.businessinsider.com/nevada-bans-uber-2014-11> (describing Nevada’s ban).

168. See *supra* Section II.B.1 (defining Common Carriers).

169. See *supra* Section II.E (describing how Virginia temporarily labeled Uber as a transportation broker); Rassman, *supra* note 3, at 95 (discussing whether Uber fits under Pennsylvania’s definition of “broker”).

170. See *supra* Section II.B.3 (discussing transportation brokers).

mechanism as taxis to ensure consumer protection.¹⁷¹ This Note outlined some of the requirements taxi drivers must meet to be licensed, which provide some level of protection from malfeasance.¹⁷² Drivers have incentive to abide by regulatory code because, if they choose not to, they risk license revocation and heavy fines. Additionally, the cap on medallions incentivizes drivers to follow regulation because the medallions' value offsets any regulatory burden.¹⁷³ In practice, however, many medallion owners are investors who rent out medallions to actual drivers.¹⁷⁴ With high regulatory burdens and no property value, drivers renting medallions do not feel the same pressure to abide. Studies show many taxis discriminate despite regulations.¹⁷⁵

While Uber does not operate under the same regulatory constraints,¹⁷⁶ Uber protects consumers by running background checks on drivers,¹⁷⁷ requiring private insurance, and using a rating system to inform customers of driver performance.¹⁷⁸ Additionally, unlike taxi customers, Uber users know the driver's name, photo, customer perception, and license number before entering the vehicle.¹⁷⁹ However, even if Uber did encourage similar practices contained in taxi regulations,¹⁸⁰ such as non-discriminatory pick-up and elderly assistance, noncompliance would only lead to poor online ratings. Poor ratings dissuade customers or cause Uber to deactivate the driver's app, effectively firing the driver.¹⁸¹

Ratings, of course, do not cover all regulatory concerns. For example, consumers do not see the car's engine, the steering fluid level, or the condition of the brakes or tires. Additionally, ratings may not always reflect a driver's safety practices; it is conceivable that riders may rate drivers lower who refuse to let them carry open containers or to ride beyond seating capacity. The incentive to keep one's ratings high is not analogous to heavy fines and the threat of losing a high-value license.¹⁸² Although Uber's rating system does not provide an adequate replacement for regulation, it does provide some inherent protections by equipping users with information.¹⁸³

171. See *supra* Section II.B.1 (discussing Common Carrier regulations aimed at consumer protection).

172. See N.Y.C. TAXI & LIMOUSINE COMM'N, DRIVERS OF TAXICABS AND STREET HAIL LIVERIES §§ 54-20(a)(1-3), http://www.nyc.gov/html/tlc/downloads/pdf/2011rulebook_ch54.pdf (describing how a taxi driver must not refuse disabled passengers).

173. See *supra* Section II.B.1 (discussing penalties for failure to abide by regulation); Flegenheimer, *supra* note 33 (discussing the value of New York medallions).

174. See, e.g., Badger, *supra* note 38 (showing in Table 2 that the top 2% of owners own 41% of medallions in Chicago).

175. See *Notice of Promulgation of Rules*, N.Y.C. TAXI & LIMOUSINE COMM'N 3 (Apr. 19, 2011), <http://rules.cityofnewyork.us/sites/default/files/rules/F-TLC-5-3-12-a.pdf> (finding 95% of taxis pickup in the business district).

176. See *id.* at 3 (stating these rules do not apply to Uber).

177. See Matthew Feeney, *Is Ridesharing Safe?*, 2015 CATO 1, 6, <http://object.cato.org/cato.org/files/pubs/pdf/pa767.pdf> (finding "Uber's and Lyft's background check requirements are stricter than the screening requirements for many American taxi drivers"). But see Chrystal Tomblyn, *The Hidden Costs of Rideshare*, N.C. J.L. & TECH. (Sept. 30, 2014), <http://ncjolt.org/the-hidden-cost-of-ridesharing/> (noting "background checks are not always thoroughly conducted"); Conor Dougherty, *Uber Missed Criminal Records of Drivers, Prosecutors Alert*, N.Y. TIMES (Aug. 19, 2015), <http://www.nytimes.com/2015/08/20/technology/uber-missed-criminal-records-of-drivers-prosecutors-assert.html>.

178. See *supra* Section II.C (discussing how the Uber app operates).

179. See *id.* (discussing the information an Uber user receives).

180. See *supra* Section II.B.1 (discussing common carrier regulations).

181. *Id.*

182. See Flegenheimer, *supra* note 33 (discussing the value of New York medallions).

183. *Id.*

Another difference between regulated taxi companies and unregulated Uber is that taxis carry commercial insurance and most taxi companies carry umbrella coverage for unrelated liabilities like “slipping on ice” or assault.¹⁸⁴ Active Uber drivers also carry commercial insurance but without a similar umbrella.¹⁸⁵ While Uber passengers pay a \$1 safety fee every trip, Uber disclaimed responsibility for events not covered by the drivers’ commercial car insurance.¹⁸⁶ Because liability is placed entirely on the drivers who usually do not have the money to compensate plaintiffs, the consumers remain at risk. Media reports of alleged assaults on Uber customers illustrate driver screening and rating systems may offer less protection than those enforced in regulated transportation.¹⁸⁷ The Better Business Bureau gave Uber an “F” rating in 2014.¹⁸⁸ Although some cities are requiring Uber drivers to comply with taxi regulations or For Hire Vehicle (FHV) ordinances,¹⁸⁹ enforcing compliance remains difficult as discussed below.

2. Anticompetitive

While introducing a new entity into a market increases competition, it only truly increases competition if it competes on a level field. Unfair competition law levels the field.¹⁹⁰ Even if Uber found a “gray area” in the regulatory framework, Uber faces legal challenges for operating unfairly by not incurring the cost of complying with regulation—regulation imposed on similar businesses.¹⁹¹ However, taxi companies operating in states embracing the more recent FTC language in the state’s Fair Trade Acts are less likely to have a case against Uber for unfair business practices¹⁹² because consumers can avoid using Uber and opt instead to use taxis. Thus, the practice of operating outside of regulation cannot readily be said to be *unfair* to the consumer who has a *choice* to use different

184. See *supra* Section II.B.1 (discussing taxi regulations). Note that increased responsibility does not assure that insurance coverage or corporate assets are enough to pay damages. *Walkovszky v. Carlton*, 223 N.E.2d 6, 9 (N.Y. 1966); Dara Kerr, *How Risky is Your Uber Ride? Maybe More Than You Think*, CNET (Oct. 8, 2014, 4:00 AM), <http://www.cnet.com/news/how-risky-is-your-uber-ride-maybe-more-than-you-think/>.

185. Nairi, *Eliminating Ridesharing Insurance Ambiguity*, UBER BLOG (Mar. 19, 2015), <http://blog.uber.com/uberXridesharinginsurance>; Paul Frisman, *Uber’s On-Demand Car Service*, CONN. GEN. ASSEMBLY, <http://www.cga.ct.gov/2014/rpt/2014-R-0173.htm> (last visited Feb. 17, 2016); *Will Uber be Liable for Driver’s Assault on Passenger?*, CNBC (Oct. 2, 2014, 2:21 PM), <http://www.cnbc.com/id/102053831>; see also Rassman, *supra* note 3, at 88–89 (describing the recent change to Uber’s insurance coverage in response to a tragic lawsuit in San Francisco).

186. See Carolyn Said, *Uber Driver Attack May Clarify Firm’s Responsibilities*, GOV. TECH. (Oct. 9, 2014), <http://www.govtech.com/local/Uber-Driver-Attack-May-Clarify-Firms-Responsibilities.html> (discussing how the \$1 “safety fee” surcharge may “buttress” Uber’s legal claims); *supra* Section III.B.

187. See, e.g., Harmeet Shah Singh, *Indian Uber Driver Arrested After Alleged Rape, Police Say*, CNN (Dec. 8, 2014, 10:54 AM), <http://www.cnn.com/2014/12/07/world/asia/india-uber-alleged-rape/> (reporting on an Uber driver in India who allegedly raped his passenger).

188. See Mike Isaac, *Uber Flunks the Better Business Bureau Test*, N.Y. TIMES (Oct. 9, 2014, 3:57 PM), <http://www.bits.blogs.nytimes.com/2014/10/09/uber-flunks-the-better-business-bureau-test/> (reporting that the Better Business Bureau gave Uber an “F” rating in 2014 based on surge pricing complaints and the number of lawsuits against the company); see also *Uber Technologies BBB Business Review*, BETTER BUS. BUREAU, <http://www.bbb.org/greater-san-francisco/business-reviews/transportation-services/uber-technologies-in-san-francisco-ca-438996> (last visited Feb. 17, 2016) (showing how BBB is currently processing Uber’s rating).

189. See *supra* Section II.E (discussing Uber’s current legal challenges).

190. See *supra* Section II.D (discussing unfair competition law).

191. Ranchordás, *supra* note 116, at 8.

192. See *supra* Section II.D (discussing the difference between the earlier and most recent FTC acts).

transportation and *avoid* any possible injury.¹⁹³ Additionally, Uber can argue that the benefits of technology outweigh any injury that might accompany the company's practices because the app is a user-friendly and efficient product.¹⁹⁴ This rationale may be short-lived if Uber drives the taxi companies out of business and thereby effectively limits transportation choice.

Taxi companies in states that embrace the FTC's earlier broad language, however, have a stronger argument.¹⁹⁵ Cities or taxi companies will need to show that Uber's operation classifies as an unfair business practice because its unregulated operation substantially injures consumers, competitors, or the market.¹⁹⁶ Courts have accepted that cities and taxi companies have a plausible claim under this theory.¹⁹⁷

On the other hand, taxi laws and regulations have protectionist effects.¹⁹⁸ The history of transportation regulation shows that the laws and regulations arose partly to protect established businesses.¹⁹⁹ This protectionism remains in the industry today.²⁰⁰ For example, the medallion system limits competition by capping the number of drivers in a city.²⁰¹ Medallions valued at up to \$1.3 million in 2013 demonstrate the spoils imparted by protectionism.²⁰² Protectionism can create the need for more regulation. For example, capping the number of taxis requires oversight of fare rates because of limited supply and high demand.²⁰³ Protectionism may also intentionally drive out innovation.²⁰⁴ Laws should not "[s]hield[] inefficient businesses from competition at the expense of

193. Belt, *supra* note 87.

194. *Id.*

195. See *supra* Section II.D (discussing the difference between the earlier and most recent FTC acts).

196. *Id.*

197. See *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. CIV. A. 13-10769-NMG, 2014 WL 1338148, at *6 (D. Mass. Mar. 27, 2014) (finding a plausible claim for unfair competition).

198. See Reynolds, *supra* note 111 (discussing how companies often seek regulations to protect themselves from competition and how those agencies delegated to regulate an industry eventually end up "regulating on behalf of that industry").

199. See *supra* Section II.A (discussing how the Watermen petitioned the King to regulate carriages to protect their own business and how the medallion system arose because wildcat cars threatened taxis during the Great Depression).

200. *Id.*

201. See *supra* Section II.B.1 (explaining the medallion system).

202. See Flegenheimer, *supra* note 33 (discussing the value of New York medallions).

203. See Jason E. Frankel, Note, *Economics and the Law: Interpreting Primary-Line Injury to Competition Under the Robinson-Patman Act in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 15 WHITTIER L. REV. 271, 313 (1994) (discussing oligopoly, associated with supply and demand, and how the lack of competition results in "supracompetitive profits").

204. See Herbert Hovenkamp, *Competition for Innovation*, 2012 COLUM. BUS. L. REV. 799, 803 (2012) [hereinafter Hovenkamp, *Competition for Innovation*] (discussing two innovation theories). Joseph Schumpeter's theory is that fair competition laws obstructed monopolies (those with the resources to innovate) from innovating for the benefit of society. *Id.* Kenneth Arrow's theory is that the small firms, not monopolies, are the innovators because they "have everything to gain if they innovate aggressively and much to lose if they do not." *Id.* at 806. Additionally, the small firm is in a "better position to profit by upending old technology." *Id.* According to Arrow, antitrust laws are necessary because larger firms are likely to use exclusionary practices at the cost of innovation. *Id.* at 810. Uber's innovation and taxi's traditionalism support Arrow's theory. However, the Uber and taxi battle is more complex because it is Uber, the "small firm," that is allegedly unfairly competing, while taxi companies, the "large firm," are failing to innovate partly because they are following regulation. See also Herbert Hovenkamp, *Restraints on Innovation*, 29 CARDOZO L. REV. 247, 260 (2007) (arguing that the threat imposed by monopoly is less than the threat imposed by restraints on innovation).

consumers.”²⁰⁵ An element to Uber’s popularity is that it could bring down what some view is an archaic conspiracy—between the government and a business—to control the transportation market.²⁰⁶

3. Predatory Pricing

Predatory pricing occurs when a business offers a service for less than the costs of delivering that service so as to drive out its competitors.²⁰⁷ Later, once the business is established, the business can raise prices indiscriminately.²⁰⁸ Unlike taxis, Uber offers promotions to secure market share and raises prices based on supply and demand.²⁰⁹ When Uber raises prices it gives a warning to the user that “surge pricing” is in effect.²¹⁰ However, boundaries between areas that have surge pricing and those that have normal pricing may only be “a few meters apart.”²¹¹ Recently, one Baltimore woman received a bill for over \$362 from a 20 minute Uber ride.²¹² What happened in Baltimore provides a warning of the threat predatory pricing poses on the transportation market.

E. Problems with Attempting to Regulate Uber

While many cities are still deciding how to accommodate Uber, some require Uber drivers to comply with taxi or FHV regulations.²¹³ This Note focuses on two problems in enforcing these regulations. First, it is difficult to enforce regulations on elusive drivers. Second, it is unclear whether to define Uber under FHV or under taxi regulation.²¹⁴

Uber places ultimate responsibility for noncompliance on its elusive drivers.²¹⁵ Therefore, if a court determines Uber must comply with city ordinances, it is structurally difficult to impose regulations because the drivers operate incognito. An Uber driver looks like any other driver on the road.²¹⁶ Drivers are not always operating their vehicles as Uber

205. See Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 ANTITRUST L.J. 749, 749 (2011) (discussing how the history of antitrust law has worked to sometimes “undermine innovation competition”).

206. See Reynolds, *supra* note 111 (discussing protectionism in the current system).

207. See Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 2–3 (2005) (“Society considers predation socially harmful because the artificially low prices of today drive out competitors and allow the high prices of tomorrow.”).

208. *Id.*

209. See *supra* Section II.C (discussing how the Uber-app operates). A 2015 Northeastern University study found that surge pricing does not increase supply and drastically decreases demand; the study also found that surge pricing occurred approximately 14% of the time in Manhattan and around 57% of the time in San Francisco. Lauren Kirchner & Surya Mattu, *Uber’s Surge Pricing May Not Lead to a Surge in Drivers*, PROPUBLICA (Oct. 28, 2015, 11:01 PM), <http://www.propublica.org/article/uber-surge-pricing-may-not-lead-to-a-surge-in-drivers>.

210. Kirchner & Mattu, *supra* note 209.

211. *Id.*

212. Joanna Prisco, *Woman Crowdfunds to Pay for \$362 Uber Ride, Evidently Turns a Profit*, ABC NEWS (Nov. 3, 2014), <http://abcnews.go.com/Lifestyle/woman-crowdfunds-pay-362-uber-ride-evidently-turns/story?id=26659350>; see Maya Kosoff, *Don’t Complain about Uber Surge Pricing Tonight*, BUS. INSIDER (Dec. 31, 2015), <http://www.businessinsider.com/uber-surge-pricing-on-new-years-eve-2015-12> (describing the high New Year’s Eve prices and past complaints about surge pricing).

213. See *supra* Section II.E (noting how some cities, states, and countries have accommodated Uber).

214. See *supra* Section II.B.1 (discussing Common Carrier regulations).

215. See Duggles, *supra* note 133 (noting how Uber drivers consent to an agreement stating that they are independent contractors).

216. See *supra* Section II.C (noting how Uber drivers use their own unmarked cars).

drivers;²¹⁷ they switch to Uber drivers only when they turn on their app.²¹⁸ Thus, enforcing regulation on the drivers themselves is impractical. While cities can give enforcement officers authority, like in Las Vegas, to pose as Uber users to identify Uber drivers, enforcing regulation behind a disguise is a drain on resources.²¹⁹ Rather, shifting responsibility to the company provides the most practical way to enforce regulations on Uber drivers.

If a city determines Uber belongs under its regulatory framework, there is still a question of whether to categorize Uber under FHV or taxi regulations. FHV regulations pertain to for-hire transportation reserved ahead of time rather than hailed from the streets.²²⁰ An Uber user can use the app to schedule a ride and the app immediately notifies the driver.²²¹ Some call this e-hailing.²²² Additionally, unlike taxis, FHVs are not equipped with taximeters.²²³ Functioning similar to a taximeter, the Uber smartphone calculates part of the fee based on GPS enabled maps.²²⁴ The e-hailing and meter-like features of the app position Uber closer to the definition of a taxi than a traditional FHV.

Some states have opted to instead open up a new category in their regulatory framework for Uber and similar companies. Introducing a new category risks complicating an already complicated regulatory system. There is also criticism that creating a new category is effectively choosing winners and losers by making two regulations for one business model and thus allowing Uber to operate in a less-regulated category while still requiring taxis to abide by high regulations.

IV. RECOMMENDATION

As Uber and other disruptive app-based businesses grow in popularity, legislators need to address a business model that replaces regulation with a rating system. Allowing app-based companies to conduct business outside of regulation is neither viable for business nor in the public's interest. This Part addresses a few steps legislators should consider when addressing the concerns Uber and other transportation network companies (TNC) present. Uber's disruption merely highlights the problems in the transportation regulatory system. It is better to look at the regulatory system as a whole when determining how to solve the labeling-for-regulation problem.

A. Cities Should Open Up More Licenses for Taxi Drivers and Modify the Regulatory

217. *Id.*

218. *Id.*

219. Jason Hidalgo, *Full Court Press for Uber in Nevada this Nov.*, RENO GAZETTE-JOURNAL (Oct. 30, 2014), <http://www.rgj.com/story/money/business/2014/10/28/uber-court-hearing-nevada-ban-technobubble/18087753/> (discussing how, in Nevada, agency investigators posed as Uber users in a sting operation).

220. *See supra* Section II.B.1 (explaining the difference between FHVs and taxis). It is important to note, however, that many FHVs illegally street-hail; FHVs illegally pick up approximately 100,000 street-hail passengers per day in Manhattan. Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 134 (2013).

221. *See supra* Section II.C (discussing how the Uber app operates).

222. *See E-Hail*, UBER BLOG (Dec. 13, 2014), <http://blog.uber.com/tag/e-hail/> (defining the term "e-hailing" as hailing transportation over smartphones).

223. *See supra* Section II.B.1 (explaining the difference between FHVs and taxis).

224. *See supra* Section II.C (discussing how the Uber app operates).

Burden on Taxi Drivers

Uber and other TNCs can easily penetrate the public transportation market because cities limit the number of taxi drivers on their streets.²²⁵ Introducing more licenses for taxi drivers by removing the cap will increase supply.²²⁶ The increase will also decrease the value of a taxi license,²²⁷ but Uber and other ride-sharing companies already cause that effect.²²⁸ However, decreasing the value of the licenses limits the amount of regulations that the license will permit.²²⁹ Commissioners need to address this by lessening some of the regulatory burden on taxi drivers until legislators develop a new regulatory framework. To do this, Commissioners should analyze what regulations may be mitigated by an increased supply of drivers and by technology that allows access to more information (driver's license and photo, and passenger's credit-card information) and permits customers to review and rate drivers. Commissioners should also remove regulations that are outdated and unnecessarily burdensome—for example, requiring drivers' socks and trousers to match.²³⁰ However, to maintain safety, the consequences for failing to follow certain regulations—such as annual or quarterly inspections—should result in an automatic revocation of one's license. Because the licenses will have limited value but will be more accessible, regulations need to adjust to account for enforceability.

B. Uber and Other App-based Companies Should Operate Within the Applicable Regulatory Framework While Working Alongside Legislators to Form a New Regulatory Framework

Uber and other app-based companies need to work within the applicable regulatory framework (whether or not a new category is opened for them)²³¹ until legislators make

225. See *2014 Taxicab Factbook*, *supra* note 32, at 12 (finding that there are 13,437 medallions in New York City as of 2014).

226. But see Rayle et al., *supra* note 5, at 3 (discussing how literature shows that removing caps creates over-competition, leading to unsafe travel environments); see also Robert M. Hardaway, *Taxis and Limousines: The Last Bastion of Economic Regulation*, 21 *HAMLIN J. PUB. L. & POL'Y* 319, 322 (2000) (“Experiences in taxicab deregulation show that cities with open entry have more than three times the number of cabs per capita than regulated cities.”). However, the digital age prompts change. Modern technology connects riders with drivers instantaneously and provides a rating recourse for riders to collect information about their drivers. See also Lee A. Harris, Note, *Taxicab Economics: The Freedom to Contract for A Ride*, 1 *GEO. J.L. & PUB. POL'Y* 195, 220 (2002) (arguing there is no evidence deregulating taxis would hurt society and there is evidence it would help).

227. See *supra* Section III.D.2 (stating the value of medallions is linked to the cap on the licenses).

228. *Id.* Allowing unlicensed drivers to operate legally increases the number of drivers for-hire and simultaneously decreases the value of a taxi license, which is linked to the city's cap.

229. *Id.* Licenses are investments and regulations are costs; individuals will not invest in a license if the value of the license is less than the cost of abiding by regulation.

230. See Jon Healey, *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> (discussing how legislators and agencies need to update taxi regulations).

231. While some states like California are opening up a new category in their regulatory framework for Uber, cities like Anchorage refuse to create a new category saying, “We can't have two separate regulations essentially governing the same service, being that if it looks like a duck, quacks like a duck, walks like a duck, it is a duck.” See Patrick Enslow, *Anchorage Taxi Cab Driver Pushes for Uber's Return*, *KTUU* (Dec. 23, 2015, 8:34 PM), <http://www.ktuu.com/news/news/anchorage-taxi-cab-driver-pushes-for-ubers-return/37112702> (quoting Ben Lenga, board member of The Anchorage Taxi Permit Owner's Association). Considering the similarities between Uber and taxis discussed earlier in this Note, opening up a new category may essentially be legislators choosing

changes to the existing framework. Uber's and other app-based companies' arguments that current regulations do not apply are inauthentic given the service the companies provide.²³² To start, Uber and other TNCs should require drivers to possess commercial licenses and register with the city's Taxi and Limousine Commission. The companies should also encourage drivers to follow, not ignore, what the city determines are applicable regulations.²³³ Continuing to work against regulation will likely lead to injunctions against the company, development of heavy regulation,²³⁴ and threats to shut off Uber's ability to do business in multiple locations.²³⁵ These consequences would injure Uber's business model. By working with regulators, Uber can move away from an adversarial position.²³⁶ When TNCs cooperate with taxi companies and legislators to establish a new regulatory system, both businesses benefit and, more importantly, transportation options and the overall city infrastructure improve.

C. Regulations Covering TNCs Should Be Made on a Larger Scale for Consistency and Uniformity

As Uber, other TNCs, and taxi companies work with legislators to develop a new regulatory framework, it is best if legislation is enacted on a larger scale rather than merely at the local level. While local governments should certainly oversee local concerns,²³⁷ the public expects safety and uniformity in public transportation. Creating legislation on a larger scale helps ensure an Uber drive in Los Angeles operates similar to an Uber drive in San Diego. Furthermore, the company benefits from uniform regulations rather than operating under thousands of municipal laws. One app-based room booking company explained that navigating the quick-fix local rules is a struggle and that “[i]t would be paradise for us if we only had one regulator, not thousands of different authorities”²³⁸ The FTC may have limited influence in reaching app-based services where service providers are operating intrastate.²³⁹ Regardless, “[l]ocal agencies are best positioned to

winners and losers.

232. See *supra* Section III (analyzing whether Uber drivers are akin to friends or service providers, are independent contractors or employees, and whether the company is an information service, telecommunication service, or a general Common Carrier).

233. Kirchner & Paredes, *supra* note 144.

234. See, e.g., *Municipality of Anchorage v. Uber Techs., Inc.*, No. 3AN-14-09530 CI, 2014 WL 8764776, at *2 (Alaska Super. Ct. Oct 13, 2014) (imposing no-charge obstacles on drivers).

235. See generally Landgericht Frankfurt am Main [LG] [District Court Frankfurt am Main] Aug. 25, 2014, docket number 2-03 O 329/14 (Ger.), http://docs.dpaq.de/7814-beschluss-landgericht-ffm_uber-taxi-deutschland_2014-09-01.pdf (issuing a nationwide injunction in Germany); see also *supra* note 8 and accompanying text.

236. See, e.g., Mark Scoloro, *Pennsylvania Judges Propose Record \$50M Fine Against Uber*, ABC (Nov. 17, 2015), [http://6abc.com/news/pennsylvania-judges-propose-record-\\$50m-fine-against-uber/1088937/](http://6abc.com/news/pennsylvania-judges-propose-record-$50m-fine-against-uber/1088937/) (describing how Uber deliberately disregarded the commission's authority and has obstructed investigation).

237. See John Byrne, *Illinois Governor Vetoes Statewide Ride-Share Legislation*, GOV. TECH. (Aug. 26, 2014), <http://www.govtech.com/state/Illinois-Governor-Vetoes-Statewide-Ride-Share-Legislation.html> (discussing how the Illinois governor vetoed legislation that would regulate ride-sharing companies, calling it a “one-size-fits-all-approach” and urging that any decision to regulate to be done locally).

238. 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?_r=0.

239. See *Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 485 (D.C. Cir. 1996) (holding that “[i]t is the Taxicab Commission's prerogative in the first instance to interpret Office Administrative Order No. 4 and to determine whether providing Corporate Account Services with regular taxicabs is contrary to D.C. taxicab regulations”).

address transportation needs.”²⁴⁰ The FTC can, however, help guide a uniform regulatory framework over multi-local app-based service companies.²⁴¹

D. Legislation Should Be Adopted that Will Better Embrace Innovation, Account for Public Opinion, and Maintain Reasonably Safe and Trustworthy Public Transportation

As legislators evaluate how to best regulate emerging app-based businesses, they should consider adopting a new regulatory framework that better incorporates app-based companies, as well as public opinion. Public opinion seems to embrace on-demand service—opting to risk traditional transportation safety measures for convenience. While balancing the desire to innovate and to regulate is a challenge,²⁴² legislators should work to find minimally burdensome restrictions that take into account some of the consumer protections in the current models (e.g., rating systems and enhanced access to information).

E. As a Practical Mechanism for Enforcement of Regulations, TNCs Should Be Held Responsible for Any Failure by Its Drivers to Follow Regulation

If the cases pending proceed to trial,²⁴³ courts should hold Uber responsible for its drivers’ failure to abide by regulations. Uber has often taken some responsibility for drivers’ fines and citations;²⁴⁴ however, the contract maintains the drivers are independent contractors, removing the company itself from liability.²⁴⁵ Regardless of whether courts classify Uber drivers as employees or independent contractors, it is impractical to enforce regulation on drivers who can independently decide whether a particular trip should or should not fall within regulation.²⁴⁶ For the reasons given in Part III, courts should examine the purpose behind Uber’s app and determine that Uber and other app-based companies do not fall under the information services definition of the Telecommunication Act of 1996.²⁴⁷

But see K. Casey Strong, *When Apps Pollute: Regulating Transportation Network Companies to Maximize Environmental Benefits*, 86 U. COLO. L. REV. 1049, 1073 (2015) (stating that “[d]espite the long history of city and state regulation of local transportation services, the federal government almost certainly has the power to step in to regulate TNCs through the Commerce Clause. As explained . . . in *In re City of Minneapolis*, a case in which the FTC challenged a local taxi ordinance, taxi companies affect interstate commerce by providing transportation to interstate travelers, using equipment manufactured out-of-state, and employing drivers who hail from other states.”).

240. Strong, *supra* note 239.

241. The FTC has written letters to agencies in Washington D.C, Anchorage, Colorado, and Chicago. Strong, *supra* note 239 at 1074. In a speech on October 2, 2015, the FTC Chairwoman emphasized that there was “no simple answer”; “[w]e must allow competition and innovation” but we must also “ensure these new business models have appropriate consumer protections” and legislators should not be “picking winners” by applying regulations only to taxis. Brendan Sasso, *FTC Chief Calls for ‘Targeted’ Regulation of Uber, Airbnb*, NAT’L J. (Oct. 2, 2015), <http://www.nationaljournal.com/s/74314/ftc-chief-calls-targeted-reg-ulation-uber-airbnb>.

242. *See generally* Ranchordás, *supra* note 116 (explaining the challenge of balancing innovation with public safety). *See also* Hovenkamp, *Competition for Innovation*, *supra* note 204 (discussing the role of antitrust law in connection with two competing theories about the relationship between innovation and competition).

243. *See supra* Section II.E (discussing Uber’s current legal challenges).

244. *See* Kirchner & Paredes, *supra* note 144 (discussing how Uber and another app-based company paid driver’s citations).

245. *See Terms and Conditions*, UBER, <https://www.uber.com/legal/usa/terms> (last visited Feb. 17, 2016) (explaining the terms and conditions of contracting with Uber).

246. *See supra* Section III.E (explaining the difficulty of regulating app-based drivers).

247. *See supra* Section III.C (discussing how Uber’s information is not valuable ipso facto).

Rather, courts should follow Maryland's lead in labeling Uber as a transportation common carrier because Uber exercises a significant level of control over its drivers.²⁴⁸ Like taxi and other for-hire transportation companies, Uber should need a license to operate—a license that is threatened if the company does not take similar steps to ensure its drivers follow regulation.

V. CONCLUSION

Efficient and convenient, the Sharing Economy model is a quickly emerging big business. However, allowing app-based companies to function under inaccurate labels outside of a regulatory framework—against similar businesses which must function inside the framework—is unfair and unsafe. Rating systems are not analogous to regulations and should not replace them, especially not in markets where public safety is at risk. At the same time, however, regulations should not be enforced to protect old structures. Because transportation history reveals some regulations within the current framework originated partially due to protectionism, the framework needs to be rebuilt to support innovation and new technology. Opening up the market will decrease the current value of licenses and thus the regulatory burden each license can support. Public opinion is supportive of innovations in transportation and TNCs are here to stay. Legislation needs to be responsive to the changes these app-based companies bring.

248. *See supra* Section III.C (summarizing how the Maryland Commissioner labeled Uber).