Comment

Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest

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> "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual . . . ."[1]

I. INTRODUCTION

Thousands of years ago, according to legend, a massive tidal wave submerged the mystical City of Atlantis, inaugurating an ongoing search for the city; ancient mariners reconnoitered entire oceans in hopes of discovering Atlantis. Today, explorers continue the quest, once again hoping to uncover the lost civilization and corresponding putative right to its property. On July 9, 1998, the Miami-Dade County Board of County Commissioners ("Board") passed Ordinance No. 98-105,[2] setting in motion a similar search by Miami-Dade County's ("County") taxicab license

1. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 1 (1858).

2. *See* MIAMI-DADE COUNTY, FLA., ORDINANCE No. 98-105, Amended Substitute Agenda Item No. 5(M) (July 7, 1998).

owners; this search, however, is in pursuance of a Fifth Amendment, compensable property interest in a taxicab license.

A. Impetus for the Search

Pursuant to the provisions of Ordinance No. 98-105, effective April 5, 1999, an owner of a County taxicab license may sell, either conditionally or outright, a taxicab license only to a County registered taxicab chauffeur.[3] On October 1, 1981, the County assumed responsibility for taxicab regulation. From October 1, 1981 until April 5, 1999, the County, subject to Board approval, permitted taxicab license holders to sell, transfer, devise, give as a gift, or assign taxicab licenses to any qualified buyer, regardless of whether the purchaser operated the taxicab as a chauffeur.[4]

Taxicabs are a familiar, if not ubiquitous, ingredient of the modern urban landscape. County strictly regulates the taxicab industry, including, but not limited to the following areas: (1) the issuance, renewal, and transfer of taxicab licenses; (2) the condition of vehicles used as taxicabs; (3) the chauffeurs operating taxicabs; and (4) the companies providing taxicab service.[5] Likewise, the vast majority of major metropolitan areas in the United States, in addition to most smaller cities or counties, regulate, license, and inspect the taxicab industry operating in that particular jurisdiction.[6] In all but a few communities, however, the number of taxicab licenses is capped; that is, open entry is the exception. This means that only a limited, fixed number of taxicabs operate at a particular time.[7]

The licenses accrue an artificial value, because government agencies

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3. *See* Miami-Dade County, Fla., Ordinance No. 98-105, at 31-82(r)(3) (this section, entitled, "Assignment, Sale (conditional or outright) and Transfer to Chauffeurs," states, in pertinent part, "[u]nless otherwise provided, from the effective date of this ordinance for-hire taxicab licenses may only be assigned, sold (conditional or outright) or transferred to a Miami-Dade County registered taxicab chauffeur . . . ." *Id.*

4. On June 2, 1981, Miami-Dade County passed Agenda Item 4(l), which terminated dual county-municipal taxicab regulation and instituted a uniform plan of taxicab regulation applicable to the County as a whole. *See* Miami-Dade County, Fla., Mun. Code, Agenda Item No. 4(l) (June 2, 1981).

5. *See* Miami-Dade County, Fla., Code, ch. 31, art. II (1989).

6. *See* Los Angeles, Cal., Mun. Code, ch. VII, art. 1 (1994); Chicago, Ill., Mun. Code, chs. 9-112 (1996); Minneapolis, Minn., Taxicab Ordinances ch. 341 (1993); San Diego, Cal., Mun. Code, Ordinance 11 (1995); Atlanta, Ga., Mun. Code, ch. 162 (1995); Seattle, Wash., Mun. Code, ch. 6.310 (1997); Houston, Tex., Code of Ordinances, 46-66 (1968); New York City, N.Y., Rules of the City of New York, tit. 35 (1996).

7. *See* Dallas, Tex., Mun. Code, ch. 45, art. 1 (1989). The City of Dallas has an open-entry, regulated taxicab industry, where no restrictions exist on the number of taxicab licenses permitted to operate in the city. *See* District of Columbia, Mun. Regulations, tit. 31, (1995). The District of Columbia also has an open-entry taxicab system. *See also* Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: the Paradox of Market Failure,* 24 Transp. L.J. 73, 75-76 (1996) (explaining in an in-depth manner, the legal, historical, economic, and philosophical bases of regulation and open-entry, deregulated taxi industries).

issue taxicab licenses on a limited, infrequent basis.[8] A low supply, combined with a high demand for the taxicab licenses, creates a speculative taxicab license market. This is especially appealing to investors who, instead of operating the taxicab, lease the privilege of using a taxicab license to a taxicab chauffeur.[9]

When, therefore, the County mandated that all future sales of taxicab licenses be to taxicab chauffeurs only, the taxicab license owners feared losing the ability to charge exorbitant lease rates and sale prices. Furthermore, when the unlimited market of potential taxicab license purchasers is compared to the limited, known market of taxicab chauffeurs, taxicab license owners become highly motivated to protect the current, unlimited taxicab license sale system because they will probably lose anticipated or expected profits. In short, taxicab license owners are searching for a compensable property interest in a taxicab license. They claim that limiting sales of taxicab licenses, that is, limiting the market of potential purchasers to a specific group of people, is a taking of their property - the taxicab license- for public use without just compensation.[10]

At the same time, taxicab drivers are also engaged in a search. Their search focuses on finding a way to implement an owner-driver taxicab system, where a taxicab license is a property right, enabling taxicab drivers to use it as collateral for a loan to purchase the license. Under the current taxicab licensing system, as the price of leasing a taxicab license rises, so does the outcry from taxicab drivers, who seek to end the practice of taxicab license leasing.[11] Instead, they want a system where the

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8. *See* Peter T. Suzuki, *Unregulated Taxicabs,* 49 TRANSP. Q. 129, 132 (1995) (limiting taxicab medallions to 11,787 in 1937, caused the medallion prices to reach excessive levels).

9. *See* Bruce Schaller & Gorman Gilbert, *Fixing New York City Taxi Service,* 50 TRANSP. Q. 85, 90 (1996) [hereinafter *Fixing*] (arguing that a fixed cap on taxi medallions enables medallion licenses to gain an enormous monetary value, which leads taxi owners to focus on protecting the values of their investment); *see also* Bruce Schaller & Gorman Gilbert, *Villain or Bogeyman? New York's Taxi Medallion System,* 50 TRANSP. Q. 91, 98-101 (1996) [hereinafter *Villain*] (contending that leasing damages a driver's position in a number of ways: (1) fleet drivers lose nearly all of their fringe benefits and work longer shifts to earn more income from each shift; (2) fewer drivers reap the financial benefits of owning their own medallions because mini fleets and owner-driver cabs are converted to being leased; (3) mini fleet lease drivers lose the opportunity to boost incomes; and (4) lease prices are subject to increase at the whim of the lessor, causing instability for taxicab drivers).

10. *See* U.S. CONST. amend. V. "No person shall be held to answer for a capital . . . nor shall private property be taken for public use, without just compensation." *Id.*

11. Indeed, the drivers are underpaid, but not because there are too many cabs, or because the fares are too low. They are underpaid because they start out of the garage every day minus $100, the ridiculous daily rent or "gate" they must pay to the medallion owner for the right to drive the cab for one 10-hour shift. Letters to the Editor, *Providing More Cab Service for San Francisco Riders*, S.F. EXAMINER, July 31, 1998, at A22.

> Drivers, though see it differently . . . you have to drive for so many hours to make enough money to take home and live, the system is designed to make money for the

taxicab license owner actually operates the taxicab, providing direct service to the consumer.[12]

On July 9, 1998, the Board created a system of taxicab licenses operated by owner-drivers. It defined a taxicab license issued under a medallion system as intangible property and limited the future sale of the medallions only to chauffeurs. Taxicab chauffeur entrepreneurs who own the license and operate the taxicab free themselves from the whims of absentee taxicab license lessors, which leads to better service for consumers.[13] The Board explicitly created a compensable property interest in a taxicab license after April 5, 1999 thereby resolving the taxicab chauffeur's search. However, the taxicab license owners' search for a Fifth Amendment, compensable property interest still existed. It centered on finding a compensable property interest in a taxicab license before the new ordinance of April 5, 1999 took effect.

B. The Search Begins

On July 9, 1998, the Board faced a conundrum: Whether to perpetuate a system where taxicab license owners engage in a speculative taxicab license market, charging high lease rates to taxicab drivers, without operating a taxicab; or, to author a system where, over a gradual period of time, taxicab chauffeurs purchase and own the license, thereby providing direct service to the consumer. The taxicab license owners claim that the County, prior to April 5, 1999, implicitly created a compensable property right in a taxicab license. The County treated the license as compensable property for over seventeen years, permitting the owners to sell, devise, give as a gift, or assign the license to an unlimited, qualified purchaser market. By deciding to restrict the sale of existing and future taxicab licenses to taxicab chauffeurs, the Board, according to current taxicab license owners, diminished the "free alienability" and "right to exclude" strands in the taxicab license owners "bundle of property rights." This places in motion the search for a Fifth Amendment compensable prop-

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fleet owners and no matter how many medallions there are, the fleet owners still milk us and make all the money.

Jennifer Merritt, *Minding the Medallions: Financial Pressures Add More Tension to Bids for Taxi Licenses*, 18 Boston Bus. J., Aug. 14, 1998, at 1.

12. *See Schaller & Gilbert*, *supra* note 9, at 93 (endorsing a strategy to create more owner-driver cabs, which will be beneficial because of the following advantages: (1) "[P]lace more of the industry in the hands of owner-drivers . . . ." *Id.* (2) "[R]educe the role of management companies and absentee medallion [license] owners . . . ." *Id.* (3) "[E]ncourage more drivers to stay in the industry longer." *Id.*).

13. *See Schaller & Gilbert*, *supra* note 9, at 87-88 (recognizing that fundamentally altering the relationships between taxi owners and drivers, and between the taxi industry and its customers, by restructuring taxi medallion ownership towards an owner-driver system will improve service quality to the consumer).

erty interest in a taxicab license. Even though a taxicab license may have some attributes of traditional property, the County maintains that a taxicab license is not a compensable property interest. Instead, a taxicab license is a governmentally conferred benefit, a privilege that the County regulates.[14]

"Similar battles have been fought in many other areas of government activity."[15] Other beneficiaries of government action, including broadcast licensees, welfare recipients, and recipients of inexpensive government hydroelectric power, have "sought to transform the benefits received from a 'privilege' into a property 'right.'"[16] If a benefit is merely a privilege, then it can continue as long as the regulatory body determines that the industry "serves the public interest."[17] On the other hand, "when benefits become a 'right,'" the benefit or privilege become "more certain and secure."[18]

In this Comment, I will analyze the subject of when, how, or if a governmentally conferred benefit or privilege evolves into a compensable property interest, using a taxicab license as a model. I will argue two main points: (1) that if a government agency does not explicitly create a compensable property interest in a taxicab license, the license does not implicitly evolve into a Fifth Amendment, compensable property interest unless, upon license revocation, the license owner must divest himself of any interest in the license instead of surrendering the license to the governmental entity. A pure license, represents a government benefit and privilege, which can be granted or revoked by the governmental regulatory body without providing compensation, despite the preexisting ability of license holders to sell, transfer, or devise the license; and (2) even if a government agency explicitly defines a license as intangible property, as the County did by passing Ordinance No. 98-105, restricting the sale of licenses to a certain population does not eliminate the "alienability" or "right to exclude" strands in the "bundle of property rights." At most, the restriction only shortens the strands, and therefore, does not amount to a taking of private property for public use without just compensation.

As previously stated, while this Comment focuses on taxicab licenses, it addresses the broader topic of when, how, or if governmentally created benefits or licenses evolve into compensable property rights.

14. *See* Robert H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 2 U. ILL. L. REV. 361, 362 (1986) (emphasizing that contrary to accepted regulatory theories, when a government entity regulates a given industry, the regulation is designed and operated for the regulated industry's benefit, in effect, creating a new form of business property, designed, purchased, and managed by the regulated industry).

15. *Id.* at 364.

16. *Id.*

17. *Id.*

18. *Id.*

Part II provides a brief history of taxicab licenses and explains the regulatory environment in County concerning taxicabs, both before and after July 9, 1998. Part III will provide a summary of regulatory takings in general. In Part IV, the search for a Fifth Amendment, compensable property interest begins by surveying case law relating to taxicab licenses to aid in answering the question of whether a taxicab license amounts to a compensable property interest. Next, Part V explores traditional Supreme Court, federal, and state "takings" case law to determine whether restricting one strand of a property right related to a government license amounts to a taking of that property. Finally, Part VI analyzes developing legal tests that help answer the question of when, if ever, a governmentally conferred benefit evolves into a compensable property right. In this part, I propose a new test to evaluate when a governmentally conferred benefit or license evolves into a Fifth Amendment, compensable property interest. We begin by examining the historical roots of taxicab licenses.

II. Historical Origins of Taxicab Licenses

A taxicab license is the authority granted by a regulatory body to an owner, who could also be a driver, to operate a designated vehicle as a taxicab in a particular jurisdiction.[19] In some jurisdictions, like New York and Chicago, the regulatory body issues the owner of a taxicab license a "medallion," which is a plate representing physical evidence of a taxicab license, and is normally, although not required, affixed to the front grill or bumper of a taxicab.[20]

A. Evolution of Modern Taxicab License

While most ancient forms of for-hire transportation probably involved human powered rickshaws or horse-drawn chariots, one can only guess whether the operator charged a fare while transporting a passenger. One must also engage in conjecture as to whether a governing body regulated the ancient forms of transportation.

Taxicab regulation began in earnest in Renaissance Europe with the advent of horse drawn carriages for hire, also known as "Hackneys." These are the predecessors of today's taxicabs, which the cities of London and Paris began regulating sometime between 1600 and 1620.[21] Charles I instituted a licensing scheme in 1635 in order to curb the increasing

19. Memorandum from Nilifur Ozizmer, Law Clerk for Miami-Dade County's Consumer Services Department, to Geralk K. Sanchez, Miami-Dade Assistant County Attorney (May 23, 1994) (on file with author).

20. *See id.*

21. Dempsey, *supra* note 7, at 76.

number of horse drawn carriages for-hire and, in 1654, the British Parliament adopted a licensing scheme which limited the number of hackneys.[22]

To pinpoint the beginning of taxicab license regulation in the United States, one need look no further than New York City, which fathered modern taxicab license regulation during the Great Depression.[23] Entering the taxicab business did not require a large overhead, therefore, the number of unregulated taxicabs grew quickly to approximately 21,000 by 1931. Anyone who owned an automobile could provide taxicab service.[24] As the number of taxicabs operating on the streets of the city increased, officials raised concerns about reckless driving, excessive competition for fares, traffic congestion, and run-down taxicabs. In response, the City Board of Alderman passed the Haas Act in 1937, which placed a moratorium on the issuance of additional taxicab licenses. With this moratorium in place, taxicab licenses became known as taxicab medallion-licenses.[25]

Despite economic growth after World War II, New York City failed to increase the number of taxicabs. As a consequence, the value of taxicab licenses increased and "developed a trading value in the open market."[26] In addition to regulating taxicab licenses, the city also permitted taxicab licenses to be sold, devised, given, or assigned from one party to another.[27] Like New York City, virtually all municipalities currently regulate the taxicab industry pursuant to the jurisdiction's police powers.

B. Miami-Dade County's Taxicab License Regulatory Environment

Before 1981, countywide taxi regulation did not exist; instead, each of Miami-Dade County's various municipalities issued and regulated taxicab licenses separately. As a result, a patchwork of duplicative regulation caused taxicabs to "dead head," i.e., they return to their trip origin, usually the municipality governing the operation of the taxicab, without pas-

22. *Id.*

23. *Villain*, *supra* note 9, at 93.

24. *See id.*

25. *Id.* In 1937, the number of taxicab licenses fell to 11,787 and remained at this number for over 50 years. *Id.* The Haas Act not only capped the number of taxicab licenses, it instituted the following provisions: (1) provided for automatic renewal of vehicle licenses; (2) allowed, subsequent to City approval, the transfer of licenses to qualified purchasers; and (3) mandated that the City issue 60% of the medallions to fleets that could rent the licenses to drivers, and the remaining 40% be issued to owner-drivers, a move intended to guarantee the survival of owner-drivers. *See id.*

26. *Id.*; *see also*, Bob Minzesheimer, *To be a NYC Cabbie, Fare's Not Cheap*, USA Today, May 20, 1996, at 2A (explaining that for the first time since 1937, when medallions sold for $10.00 a piece, New York City auctioned 260 taxicab medallion licenses which sold from $175,000 to over $220,000).

27. *See* Ozizmer, *supra* note 19.

sengers. When taxicabs "dead head" they lose money and provide inefficient transportation to consumers. In addition, if a taxicab operator desired to operate in more than one municipality, he needed to obtain a separate taxicab license from each jurisdiction, including Miami-Dade County if the taxicab operated in any unincorporated area. Each jurisdiction, therefore, had separate, sometimes conflicting standards. Furthermore, each taxicab could charge different rates, creating confusion among consumers. Also each jurisdiction imposed varying taxicab operating and safety standards, including vehicle age, signage, and taxicab management company responsibilities.

On July 21, 1981, the Board found dual taxicab regulation against public interest and approved Ordinance No. 81-85. This amended Chapter 31 of the Miami-Dade County Code ("Code") and eliminated the existing system of dual county-municipal taxicab regulation. Ordinance No. 81-85 placed sole responsibility for taxicab regulation under the supervision and jurisdiction of the County.[28] Ordinance No. 81-85 became effective on October 1, 1981, and contained the following provisions: (1) a person desiring to operate a taxicab in the County must first obtain a County for-hire license;[29] (2) only the County Commission determines the need for additional taxicab for-hire licenses;[30] (3) a taxicab for-hire license owner must renew the license by October 1 of each year; and failure to renew results in the license expiring and reverting back to the County;[31] (4) a taxicab for-hire license holder may assign, sell (either outright or under a conditional sales contract), or transfer the license to another for-hire license owner or other qualified person after approval by the Board;[32] (5) the Office of Transportation Administration enforces the provisions of the Code;[33] (6) uniform taximeter rates throughout the County;[34] (7) for-hire taxicab license suspension and revocation proceedings;[35] and (8) caps on the number of taxicab licenses in the County at

28. *See* MIAMI-DADE COUNTY, FLA., ORDINANCE No. 81-85 (1981).

29. *See id.* at 3(2)(A). Section B and C required, among other things, that each application contain information concerning the class or classes of transportation service the applicant desires to furnish; the names and addresses of at least three residents of the County as references; a factual statement indicating the public need for the proposed service; a record of all crimes of which the applicant has been convicted within the five years preceding the date of the application; and two credit references, including at least one bank, where the applicant maintains an active account. *Id.* at 3(2)(C).

30. *See id.* at II(E).

31. *See id.* at II(H & I).

32. *See id.* at II(J).

33. *See id.* at IV(A).

34. *See id.* at VII.

35. *See id.* at XI. The County, upon proper notice and hearing, could recommend suspending or revoking for-hire taxicab license under the following conditions: (1) a court convicted the license owner of a felony or any criminal offense involving moral turpitude; (2) the license

one taxicab per 1,000 residents.[36]

The County granted each taxicab license owner, who had operated a taxicab in one of the municipalities before the ordinance passed, a County for-hire taxicab license.[37] Because the County limited the number of taxicab licenses, the licenses began accruing value.[38] The taxicab license regulatory system, initiated pursuant to Ordinance No. 81-85, remained substantially the same though experiencing some modifications, from October 1, 1981 until July 9, 1998.

The first mention of taxicab medallions in the County occurred in mid-1989. Industry members, including taxicab license owners and drivers, began exploring the feasibility of converting the taxicab license system to a taxicab medallion system. Some members of the taxicab industry, including both chauffeurs and license owners, wanted to encourage more taxicab owner-drivers. A medallion represented a property interest, thereby creating a mechanism for drivers to borrow money from a financial institution to purchase a taxicab license.[39] In addition, taxicab license owners believed that a medallion system would permit the owners to finance new vehicles to sell to chauffeurs who, in turn, would use the vehicles as taxicabs.[40] The Board, however, did not amend the existing taxicab license regulatory system. Instead, between 1990 and 1994, County staff, along with taxicab industry representatives, convened over 72 workshops, in a forum known as the Ground Transportation Advisory Committee, to formulate changes and enhancements to the existing taxicab regulatory system.[41] Moreover, between 1994 and 1998, the County conducted numerous meetings with the taxicab industry, including meeting once per month to discuss the current and future state of the taxicab industry. Finally, on July 9, 1998, after two days of consecutive

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owner lied on an initial or renewal application; (3) the license holder permitted the taxicab to be operated in violation of any law; (4) the license holder failed to comply with or willfully violated a provision of the Code; or (5) the public interest will best be served; however, the County must demonstrate good cause. *Id.*

36. *See id.* at XIII(C). The County granted a for-hire license to each taxicab operating in the County before Ordinance 81-85 passed; however, the cap of 1:1000 remained in effect. *Id.*

37. The County issued 1,504 taxicab for-hire licenses shortly after Ordinance 81-85 passed; between the inception of Countywide regulation and 1988, the County did not issue additional licenses. In 1988, however, the Board authorized the issuance of 323 additional taxicab licenses, distributed pursuant to a lottery, which brought the total number of authorized taxicab licenses to 1,827. *See* Memorandum from Merrett Stierheim, Miami-Dade County Manager, to the Board of County Commissioners (July 7, 1998) (on file with author).

38. *See id.* Data concerning the sales prices of taxicab licenses is available since 1992: In 1992, the average taxicab license sold for $26,321; by 1997, the average taxicab license sold for $51,658, with one license selling for over $80,000. *Id.*

39. *See id.*

40. *See id.*

41. *See* Metro-Dade County, Draft Ground Transportation Regulation Recommendations Report submitted to the Community Affairs Committee (August 14, 1991) (on file with author).

public hearings, the Board culminated over eight years of workshops and committee meetings by approving Ordinance No. 98-105, significantly altering the County's taxicab regulatory landscape.

The new taxicab regulatory environment differed from the County's original system in a number of ways. First, the Board distributed existing taxicab licenses pursuant to a "medallion system," which is defined as "the system which deems a taxicab for-hire license to be intangible property."[42] Second, the County will issue each taxicab for-hire license owner a "medallion," defined as "a plate or decal issued . . . as the physical evidence of a taxicab license, affixed to the outside or inside of such taxicab."[43] Finally, a taxicab for-hire license is defined as "an annual, renewable license . . . which may expire, be suspended, or revoked." If the license, however, expires, is revoked, or suspended, the license does not return back to the County; that is, the County will no longer have final control over the use of the taxicab license. Instead, only the license owner's ability to operate the license is adversely affected, but the license itself remains in the public market for purchase by a Board qualified third party.[44]

Besides remaining in the public market place upon revocation, a taxicab license issued under a medallion system is significantly different from a taxicab license issued pursuant to a pure licensing scheme. A medallion system permits liens to be placed on taxicab licenses, making them subject, like private property, to involuntary transfer through foreclosure.[45] Even though a taxicab license under a medallion system is intangible property, the Board still retains the power to change licensing criteria or regulations pertaining to subsequent transfers of taxicab licenses; however, the Board's authority to make such changes could affect a lender's willingness to lend money for the taxicab licenses.[46] A medallion system, therefore, may have a chilling effect on the Board's willingness to change the Code in the future. Conversely, under a taxicab permit system, most lending institutions did not loan money and use the taxicab license as collateral because the County treated the license as a pure privilege. The County was free to adjust the operating abilities of license holders, including revoking the license and reissuing or disposing of the license. On the other hand, under the medallion system, revocation of a license by the County does not extinguish the operating rights of the license, i.e.

42. *See* MIAMI-DADE COUNTY, FLA., ORDINANCE No. 98-105 at 31-81(aa). Intangible property is defined as property which cannot be touched because it has no physical existence such as claims, interests, and rights. *See* BLACK'S LAW DICTIONARY 846 (6th ed. 1991).

43. *See* MIAMI-DADE COUNTY, FLA., ORDINANCE No. 98-105, at 31-81(z).

44. *See* MIAMI-DADE COUNTY, FLA., CODE ch. 31, art. II, at 31-81(r) (1998).

45. *See* Stierheim, *supra* note 37.

46. *See id.*

while the owner may be forced to divest himself of any interest in the taxicab license, the lien holder or transferee will continue to operate the license.[47]

While the majority of Ordinance No. 98-105 enhanced existing regulatory provisions, such as insurance requirements, taxicab company responsibilities, vehicle age requirements, and enforcement mechanisms, the amended Code limited the sale or transfer of a taxicab license only to qualified chauffeur-drivers.[48] Even though the license owner may sell the license only to a chauffeur, the amended Code permits the 1,824 existing taxicab license owners to continue to lease the license to a chauffeur for an owner's lifetime. The owner can also devise or give the license as a gift to an immediate family member. The owner thereby retains the taxicab license in his family in perpetuity.[49] Before discussing whether a taxicab license is a compensable property interest, a review of regulatory takings is warranted in order to establish the appropriate framework to analyze the two major arguments of this Comment.

III. Regulatory Takings in General

The Takings Clause of the Fifth Amendment protects private property from appropriation by the government without just compensation.[50] The Supreme Court has long held that the Takings Clause applies to the states through the Fourteenth Amendment.[51] Case law recognizes two distinct categories of takings: physical and regulatory.[52] A physical taking occurs when the government actually seizes or performs the equivalent of actually seizing the property. A pure physical taking is rare because our government or its agents infrequently seize or occupy private property. The typical physical takings cases involve government appropriation of the private property to use for a public purpose. In *United States v. Causby*, the government used a citizen's airspace for its planes.[53] Similarly, in *Loretto v. Telemprompter Manhattan CATV Corp.* the government used a small area of the citizen's building.[54] In *Hendler v. United*

47. *See id.*

48. *See* Miami-Dade County, Fla., Ordinance No. 98-105, at 31-82(r)(5)-(6).

49. *See id.*

50. U.S. Const. amends. V, XIV.

51. *See* Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 233 (1897).

52. *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (regulatory taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical taking); United States v. Causby, 328 U.S. 256 (1946) (physical taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulatory taking).

53. *Causby*, 328 U.S. at 264 (recognizing that a physical invasion of airspace over a landowner's property by intermittent entry of government planes amounted to a taking).

54. *Loretto*, 458 U.S. at 441 (finding that a New York law requiring landlords to permit the permanent installation of cable TV apparatus gave rise to a physical taking).

States the government used the citizen's land for its test wells.[55]

By contrast, the regulatory taking category relates mainly to economic losses and involves the imposition upon private property of some required government restriction, generally limiting or prohibiting any beneficial use by the private owner. In 1978, the Supreme Court decided *Penn Central Transportation Co. v. City of New York*, identifying three factors to consider in analyzing whether governmental action amounts to a regulatory taking: (1) the character of the government action; (2) the economic impact of the regulation; and (3) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations.[56] The Court added that these factors should be evaluated by "focusing on the uses the regulations permit,"[57] and rejected the "contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel."[58] If a landowner is left with some property value, the takings analysis requires the balancing of the three *Penn Central* factors.[59] In 1980, in *Agins v. City of Tiburon*, the Court further clarified the issue of "regulatory takings" by holding that to establish a just compensation claim, a landowner must show that the challenged regulation (1) does not substantially advance legitimate state interests; or (2) denies him economically viable use of his land.[60] To help evaluate the second prong of the *Agins* test, courts will use the three factors of the *Penn Central* test.

Although the Court in *Penn Central* did not elevate the importance of any one factor above another, the Court later carved out two circumstances, one for a physical taking and one for a regulatory taking, under which a single factor alone might determine the outcome of a takings case. The Court announced the first "per se rule" in *Loretto*, explaining that because a government regulation that authorizes a permanent physical occupation of property so closely resembles an exercise of eminent domain, a taking should be found regardless of the other *Penn Central* factors.[61]

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55. Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir.1991) (ruling that a physical taking occurred when the EPA issued an order giving itself and the State of California authority to enter plaintiff's land to test for ground water pollution and to return as often as they pleased to continue the monitoring).

56. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also* Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 641-47 (1993).

57. *See Penn Cent. Transp. Co.*, 438 U.S. at 131.

58. *Id.* at 130 n. 27.

59. Callies, David L., TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS, 166-88, 171 (1996).

60. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); *see also* Reahard v. Lee County, 968 F.2d 1131, 1135 (11th Cir. 1992).

61. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

The Court, in *Lucas v. South Carolina Coastal Council*, announced the second per se rule, which involved an economic taking analysis finding that a regulation which deprives real property of *all* economic value is a taking, without considering the other *Penn Central* factors, unless the regulation prevents an activity that would have been considered a nuisance under historical state common law.[62]

The Court qualified the *Lucas* rule, however, by holding that a total loss of value would not trigger a taking if "the owner's estate shows that the proscribed use interests were not a part of his title to begin with."[63] In cases where *all* economic use is deprived, the Court will most likely grant the remedy of compensation.[64] On the other hand, if less than permanent deprivation of all use takes place, both federal and state courts have held that no taking occurs.[65] Again, if the *Lucas* per se rule does not apply, a court will engage in balancing the *Penn Central* factors.

If a takings claim does not fall within either the *Loretto* or the *Lucas* per se rules, a plaintiff can claim he had reasonable investment-backed expectations in the property, thereby invoking the balancing of *Penn Central* factors. This limits recovery to property owners who can demonstrate that they made an investment in reliance upon the nonexistence of the challenged regulatory regime, i.e., one who invests in property with the knowledge of a restraint, or strict regulatory climate, assumes the risk of economic loss.[66] In *Ruckelshaus v. Monsanto Co.*, the Court resolved a regulatory takings claim solely under the reasonable-investment backed expectation factor of the *Penn Central* test.[67] Monsanto argued that various amendments to federal law, providing for the disclosure of trade secrets, submitted in government pesticide registration constituted a taking of those secrets.[68] The Court, however, relying on the highly regulated nature of the pesticide industry, rejected Monsanto's taking claim and held that Monsanto did not have a reasonable investment-backed

62. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992); Preseault v. United States, 27 Fed. Cl. 69, 86 (1992).

63. *See Lucas*, 505 U.S. at 1027.

64. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

65. *See generally* Citizen's Ass'n v. Int'l Raceways, Inc., 833 F.2d 760, 762 (9th Cir. 1987) (holding that a mere reduction in property's value is not sufficient to constitute a taking); *see also* Haas & Co. v. City of San Francisco, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (finding that a 95 percent reduction in value does not amount to a taking).

66. *See* Loveladies Harbor v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994); Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994) (questioning the reasonableness of a property owner's purchase and development of property in light of a strict regulatory climate at the time of the purchase).

67. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

68. *Id.* at 1008. The federal law in effect at the time Monsanto submitted the trade information did not address the issue of disclosure of trade secrets.

expectation that their property would be protected.[69] In other words, the Court found no taking on the basis of expectations alone. Moreover, in *Connolly v. Pension Benefit Guaranty Corp.*, the Court ruled that property owners, in a highly regulated field, could not have a reasonable expectation that government regulation would not be altered to their detriment.[70] The Court rejected the plaintiff's claim that an amendment of federal pension law, requiring greater financial contributions from employers than originally anticipated, did not constitute a taking. The Court found that "[t]hose who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[71]

IV. When Does a Taxicab License Become a Compensable Property Interest?

The major thrust of this Comment has centered thus far on establishing the groundwork for the study of whether a taxicab license is a compensable property interest falling under Fifth Amendment protection. This section will address the following questions: (1) where a government entity has not expressly created a compensable property interest in a license or permit, under what circumstances does regulatory action, or inaction, by the government entity create a compensable property interest?; and (2) where a compensable property interest exists in a government license or benefit, under what circumstances may a government entity be obligated to compensate as a consequence of regulatory action?; i.e., does shortening the "alienability" or "right to exclude" strands in the "bundle of property rights" amount to a taking?

Property interests are not created by the Constitution; rather, they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[72] As stated earlier, taxicabs are a ubiquitous ingredient in most cities across the United States. As a result, an interesting body of case law developed, which outlines the circumstances by which a government entity's regulatory action or inaction may create a compensable property interest in a taxicab license among the various states.

69. *Id.* at 1013.

70. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 227 (1986).

71. *Id.* (quoting FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958)).

72. *Connolly*, 475 U.S. at 224 (eschewing "the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment," and relying instead "on ad-hoc, factual inquiries into the circumstances of each particular case.").

A. Survey of Case Law Relating to Taxicab Licenses

1. Taxicab Licenses are Privileges, Not Compensable Property Interests

One line of cases focuses on a common theme in many jurisdictions: Taxicab permits, issued as incident to a city's regulation of the use of its streets, like a franchise do not constitute a compensable property right. Taxicab licenses are mere privileges granted for the purpose of regulation.[73] In some instances, even an exclusive concession to provide taxicab service is not considered a compensable property right. Primarily, this is due to the fact that terminating the franchise or exclusive concession does not adversely affect the taxicab company's ability to continue operating on the public streets.[74] Moreover, commercial businesses cannot acquire a vested property right to use the public streets in pursuit of private, commercial gain; therefore, when a governmental entity passes legislation adversely affecting existing taxicab owner's licenses, a challenge based on infringing upon a substantive property right will not be countenanced.[75]

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73. *See* Luxor Cab Co. v. Cahill, 98 Cal. Rptr. 576 (Cal.App.1 1971) (acknowledging that the use of the streets by taxicabs is a privilege that may be granted or withheld without violating due process or equal protection); *Ex Parte* Sterling, 53 S.W.2d 294, 297 (Tex. 1932) (holding that the long-standing law in Texas is "that the use of public highways by common carriers . . . is an extraordinary use enjoyed as a mere privilege or license, revocable at the will of the Legislature"); Bellew v. City of Houston, 456 S.W.2d 185 (Tex. App.-Houston [1st Dist.] 1970, writ denied); White Top Cab Co. v. City of Houston, 440 S.W.2d 732, 735 (Tex. App.- Houston [14th Dist.] 1969, writ denied) (holding that plaintiff's existing permits to operate taxicabs do not constitute a compensable property right when regulatory agency granted additional taxicab permits to competitors); Dallas Taxicab Co. v. City of Dallas, 68 S.W.2d 359, 362 (Tex. App.-Dallas 1934, no writ) (holding that the "right to solicit passengers and convey them for hire from one point to another in a city . . . is a privilege . . . granted by the city."); Kizee v. Conway, 35 S.E.2d 99, 101 (Va. 1945) (holding that a new taxicab ordinance, which fixed the number of taxicab licenses, thereby precluding some existing license holders from operating, is not unconstitutional because "[t]he right to use the streets of a city as a common carrier for hire is a privilege and not an inherent right, and may be granted or refused by the city, in the exercise of its police power, at its pleasure.");

74. *See, e.g.*, Rocky Mountain Motor Co. v. Airport Transit Co., 235 P.2d 580 (Colo. 1951) (rejecting the claim that the original taxicab company had a property right to continue its taxicab business at the airport because of its general license to operate upon the streets of the City and County of Denver); Independent Taxicab Assoc. v. Columbus Green Cabs, Inc., 616 N.E.2d 1144, 1150 (Ohio Ct. App. 1992) (holding that even though appellants had most of airport business before the city contracted with appellee, no property right exists in guaranteeing independent taxicab drivers a certain amount of airport business).

75. *See White Top Cab Co.*, 440 S.W.2d at 735; *Bellew*, 456 S.W.2d at 185; *see also* Yellow Taxicab Serv. v. City of Twin Falls, 190 P.2d 681, 682 (Idaho 1948) (recognizing that no one has a vested right to use the streets for or in the prosecution of a business for private gain, including the right to taxi stands, which the city has the power to revoke or replace, even though the taxicab stand existed in the same location for 16 years); State *ex rel.* Fohl v. Karel, 180 So. 3 (Fla. 1938) (recognizing as valid a statute requiring transportation companies engaged in for-hire operations to obtain certificates of public convenience and necessity because the right to use the public highways and streets for profit may be wholly denied or permitted to some and denied to others in order to promote the safety, welfare, health and morals of the people).

2. Taxicab Licenses Do Not Create Vested Rights

Related to the concept of a taxicab license being considered a governmentally conferred "privilege" is a jurisdiction's police power to validly enact new legislation governing the operation of taxicabs. This occurs either where no regulation previously existed, or when enacting changes to existing ordinances. One example, is where government entities had no rules controlling the operation of taxicabs, but later enacted such laws adversely affecting existing taxicab companies. Courts have upheld this type of legislation because no commercial entity has an inherent right to use the public streets for private gain.[76] In *Allen v. City of Kosciusko*, taxicab owners challenged the city's revocation of all existing taxicab licenses and refused to reapply for brand-new licenses under a new regulatory scheme.[77] The court held that "[a] permit to operate taxicabs . . . is a mere personal privilege, revocable for due cause and is not a vested, or property right in a constitutional sense."[78] In *Seattle Taxi, Inc. v. King County*, a taxicab company challenged the validity of legislation setting uniform taxicab rates.[79] The court used a two-part test established in *State v. Conifer Enterprises, Inc.*,[80] to hold the legislation valid.[81] The *Conifer* two-part test required the following: (1) that King County's new legislation promote the health, safety, morals, good order, and welfare of the people; and (2) the legislation bear a reasonable and substantial rela-

76. *See* Caulkins v. Wilkes, 58 N.W.2d 391, 393 (Iowa 1953) (acknowledging as a valid exercise of police power the City of Knoxville's regulation of taxicabs and subsequent limiting the number of licensed taxicabs to five, despite the objections of current taxicab license owners who did not receive one of the five permits "[because] no person has the inherent right to use the streets and highways for the operation of vehicles for hire."); Yellow Cab & Baggage Co. v. Publix Cars, 253 N.W. 80, 84 (Neb. 1934) (emphasizing that regulation requiring taxicab owners to apply for and obtain an operating permit not arbitrary, nor did it deprive existing taxicab owners of their property or property rights when regulations are enacted to protect the "public interest"); Bryan v. Olson, 282 N.W. 405, 406 (N.D. 1938) (upholding the authority of the City of Bismarck to enact taxicab regulations requiring an applicant to meet certain eligibility requirements before being able to operate a taxicab, even though the taxicab owner operated before the passing of the new legislation). The taxicab owners attempted to attack the ordinance as class legislation; however the court stated, "[i]t does not confer a class privilege or deprive any person or class of persons of a personal or property right." *Id.* at 406 (quoting Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

77. Allen v. City of Kosciusko, 42 S.2d 388 (Miss. 1949)

78. *See id.* at 389.

79. Seattle Taxi, Inc. v. King County, 744 P.2d 1082 (Wash. App. 1987).

80. State v. Conifer Enterprise, Inc., 508 P.2d 149 (Wash. 1973). The two-part test is as follows: (1) does the new legislation tend to promote the health, peace, morals, education, good order, and welfare of the people; and (2) whether the particular statute bears a reasonable and substantial relation to accomplish the purpose established in step one. *Id.*

81. *Seattle Taxi, Inc.*, 744 P.2d at 1084 (holding that setting uniform taxicab rates, where none existed before, a valid exercise of the county's police power because it meets the requirements of the test laid out in *Conifer*).

tion to accomplish the purpose outlined in step one.[82]

3. Is a Taxicab License Property for Due Process Purposes?

Still another line of cases relates to whether a jurisdiction must guarantee due process, under the Fourteenth Amendment, to taxicab owners before changing or affecting their ability to operate taxicabs.[83] In some jurisdictions, a taxicab license is a constitutionally protected property interest, and courts have held that the rights embodied in a taxicab license cannot be abrogated without due process of law.[84] In *Cooper v. City of Chicago*, a taxicab driver claimed the City deprived him of his property interest in earning a living while he attended a hearing on a citation he received for not abiding by the City's taxicab rules.[85] The court, however, held that the driver failed to state a due process claim because attending a hearing is not a deprivation of a protectable property right in earning a living.[86] In addition, before a person can make a denial of due process claim, he must have a property interest in whatever is being denied or taken away.[87] Even if he has a security interest in a taxicab medallion, if the debtor company received proper notice of a hearing to revoke the medallion, a creditor entity having a security interest need not receive notice of the hearing and, therefore, cannot claim a denial of due process.[88]

On the other hand, in *Flower Cab Co. v. Petitte*, the court upheld a Fourteenth Amendment denial of due process claim when the Commissioner of the City of Chicago's Department of Consumer Services Department retroactively prohibited the sale, transfer, or assignment of taxicabs.[89] The court reasoned that only the legislative body, not an administrative appendage, could amend existing ordinances or place a moratorium on sales, transfers, or assignments of government largess.[90]

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82. *Id.*

83. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

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

85. Cooper v. City of Chicago, No. 87C10924, 1988 WL 58597 (N.D. Ill. May 27, 1988).

86. *See id.* at *2.

87. *See* Strickland v. Daley, No. 91C0194, 1991 WL 14085 (N.D.Ill. Feb. 2, 1991) (holding that a person who expressed only a desire to obtain a City of Chicago taxicab medallion does not have a sufficient property interest to state a due process claim); *see also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . . He must indeed, have a legitimate claim of entitlement to it.").

88. *See* Standard Acceptance Co. v. Lewis Cab Co., No. 92C7072, 1996 WL 450811 (N.D.Ill. Aug. 6, 1996).

89. Flower Cab Co. v. Petitte, 658 F.Supp 1170 (N.D.Ill. 1987).

90. *See id.* at 1175. The court spoke of a due process property interest only, not Fifth Amendment property interests, invoking a functional view of property for due process purposes,

4. Is a Taxicab License Property for Purposes of a Fifth Amendment "Taking"?

Perhaps the strongest case for acknowledging a compensable property interest in a taxicab license occurred in *Boonstra v. City of Chicago*, especially because the City of Chicago did not explicitly define a taxicab medallion as a compensable property interest.[91] During the pendency of *Flower Cab Co.* in the Seventh Circuit, the City of Chicago ("City") passed an ordinance amendment that retroactively banned the assignment of taxicab licenses.[92] Almost one and one-half years earlier, however, Mr. Joseph Zawistowski purchased, by assignment, a taxicab license issued by the City: a taxicab license he operated as an owner-driver.[93] Although Mr. Zawistowski paid the annual renewal fees for the years preceding the ordinance amendment, the City, in 1984, and only two days after Mr. Zawistowski's death, went to his home and confiscated the taxicab license based on the theory that the sale violated the ordinance amendment.[94] Almost six years later, the City repealed the ordinance and once again allowed taxicab licenses to be freely transferred to qualified persons under the provisions of their licensing scheme; the City, however, failed to return Mr. Zawistowski's taxicab license to his estate.[95]

The court rebuffed the City's contention that a taxicab license is not a protectable property interest on the following grounds: (1) the City limited the number of taxicab licenses; (2) the City permitted the assignment or sale of the licenses; and (3) the City never rejected a proposed assignment of a taxicab license.[96] According to the court, "[t]he hallmark of a

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which focuses on whether the taxicab license constituted "secure and durable" property. *Id.* To the court, "secure and durable" meant that the taxicab license holder is the exclusive owner, can assign it with few qualifications, and is entitled to renew the license absent revocation or suspension. *Id.*

91. *See* CHICAGO, ILL., MUN. CODE ch. 9-112-010(l) (1996) (defining a "medallion" as "a metal plate . . . for display on the outside hood of a taxicab, of such size and shape . . . as shall be required by this ordinance and by the commissioner.").

92. *See* Boonstra v. City of Chicago, 574 N.E.2d 689, 692 (Ill. App. Ct. 1991).

93. *See id.* at 690. Mr. Zawistowski later died, and his estate represented his interests in this case. *Id.* at 693.

94. *See id.* at 692.

95. *See id.* at 692-93. The decedent's estate, therefore, brought this action claiming, among other things, that the City unconstitutionally took his property without due process or just compensation. *Id.* at 693. The City contended, however, that a taxicab license is not property for purposes of the Fourteenth Amendment and, as long as it acts through the legislative process, "may reorder the property rights of its citizens as it chooses even depriving citizens of property." *Id.*

96. *See id.* at 694. In effect, the court held that because the City fostered and created a public marketplace for the assignment of taxicab licenses, a taxicab license constituted more than a personal permit. *Id.* Moreover, relying on the functional definition of property, the court ruled the City parented a system where taxicab licenses constituted "secure and durable" property. *Id. But see* O'Connor v. City of San Francisco, 153 Cal. Rptr. 306, 310 (Cal. Ct. App. 1979)

constitutionally protected property interest is an individual entitlement which cannot be removed except for cause or with just compensation."[97] In other words, despite the lack of an explicit recognition that a taxicab license constituted a compensable property interest, the court reasoned that because the City treated the taxicab license as a traditional form of property, the City implicitly created a compensable property right in a taxicab license.

Alternatively, see in *O'Connor v. City of San Francisco*, when the City San Francisco, pursuant to an ordinance known as Proposition K, compelled all existing 700 taxicab permittees to surrender their existing taxicab permits in exchange for new permits, and prohibited the future transfer or assignment of the new permits. The court held that motor vehicle for-hire permits were privileges granted pursuant to the city's police power, and did not convey any vested property rights.[98] In addition, the court relied heavily on the rationale, adopted by a vast majority of other jurisdictions, that the "use of the streets by taxicabs is a privilege that can be granted or denied without violating either due process or equal protection."[99]

In *Boonstra*, the court held that while a legislative body may reorder property rights as it chooses, once a right is conferred, it may not authorize the deprivation without due process or just compensation. To do so, the court held, is a taking of property without due process or just compensation.[100] Conversely, in *O'Connor*, the court rejected the plaintiff's contention that revoking existing taxicab permits unconstitutionally deprived them of property without just compensation.[101] Instead, the court reasoned that because existing taxicab owners did not have vested rights to begin with, the statute did not unconstitutionally infringe on any compensable property right.[102]

(finding that "[a] license or permit to engage in the taxicab business, issued by the City pursuant to its police power, does not convey a vested property right."); *cf.* Allen v. City of Kosciusko, 42 S.2d 388 (Miss. 1949) (holding that a permit to operate a taxicab is a mere personal privilege, revocable for due cause and is not a vested, property right in a constitutional sense).

97. *See Boonstra*, 574 N.E.2d at 694.

98. *See O'Connor*, 153 Cal. Rptr. at 308. Proposition K also mandated that a new permit will be automatically revoked in the event of the death of the permit holder or when 10 percent or more of the stock or assets of the license changes during a sale or transfer of the license. *Id.* Also, Proposition K limited the number of permits one can hold to one (1) and, in the future, permits could be held only by natural persons, except in the case of legal entities currently holding permits. *Id.*

99. *See id.* at 309-10 (quoting Luxor Cab Co. v. Cahill, 98 Cal. Rptr. 576 (Cal. Ct. App. 1971)).

100. *See Boonstra*, 574 N.E.2d at 695.

101. *See O'Connor*, 153 Cal. Rptr. at 310. The court stated, "[b]ut the fact that an enactment alters legal relationships and disappoints business expectations is not fatal." *Id.*

102. *See id.*

Although *Boonstra* supports the argument that a taxicab license is a Fifth Amendment, compensable property interest, when juxtaposed with the *O'Connor* decision, it loses its luster. First, *Boonstra, incorrectly* extends to government largess compensable property right protection and abrogates the ability of legislative bodies to implement new legislation pursuant to the government entity's police power. Second, *Boonstra* creates a slippery slope where all forms of government largess are susceptible to becoming compensable property interests once a government entity issues licenses or benefits, limits the number of licenses, and permits the licenses to be transferred. The court in *Boonstra* appears to imply that if government largess has some indices of traditional property, than the governmental entity is precluded from implementing new legislation to enhance existing laws because the largess evolved into a compensable property interest, and any change in the law has Fifth Amendment implications.

5. *Taxicab Case Law: Comparing Miami-Dade County & Chicago's Regulatory System*

As the case law relating to taxicab licenses reveals, the vast majority of states do not consider a taxicab license a Fifth Amendment, compensable property interest. In Illinois, however, even though Chicago did not explicitly define a taxicab medallion as a compensable property interest, a taxicab license apparently evolved into an implicit, compensable property interest because Chicago limited the number of licenses and always permitted the sale, transfer, and assignment of a taxicab license. If both the County and Chicago permit similar activities relating to a taxicab license, what distinguishes a taxicab medallion in Chicago considered a compensable property interest, from a taxicab license in the County recognized as a mere privilege?

Two distinguishing differences exist between a taxicab medallion in Chicago and a taxicab license in the County. First, Chicago does not define the authority to operate a taxicab as a license; rather, it is, and always has been, defined as a "medallion." Lending institutions in Chicago use the medallion as collateral for loans, where the medallion holder grants the lending institution a security interest in the medallion in order to secure payment of the loan. Conversely, the County, from October 1, 1981, until April 5, 1999, defined the authority to operate a taxicab as a "license," and lending institutions have never been willing to use a license as collateral for a loan because licenses are considered privileges, not property interests. Second, if Chicago revokes a medallion owner's ability to operate the medallion, it permits a secured party to foreclose on a taxicab

license and then sell the medallion to a qualified buyer.[103] Chicago, therefore, does not retain final control over the medallion in cases involving foreclosure or revocation of the medallion. The County, on the other hand, always retaines final control over the issuance, reissuance, or disposal of a taxicab license and, if the County revoked a license owner's ability to operate the taxicab, the County then assumes control over the license for reissuance or disposal.

The County's regulatory actions concerning existing taxicab license owners is consistent with the facts and decision in *O'Connor*, and indicate a strong desire not to recognize a taxicab license as a compensable property interest. First, unlike *Boonstra*, the County never physically appropriated a properly assigned taxicab license between 1981 and 1998.[104] Furthermore, the County, under the regulatory scheme before the ordinance amendment passed, never placed a moratorium on the assignment, sale, or transfer of a taxicab license. Second, the County's current taxicab license holders continuously operated the taxicabs pursuant to a license system, regarded as a privilege, not as a compensable property right.

Also, the County continually notified the taxicab license holders of the possibility of a change in the current ordinance.[105] Where parties are on notice that their property interests may change or when regulatory action adversely affects property acquired while the regulatory system is in effect, a plaintiff will probably not be able to successfully assert an unconstitutional taking claim.[106]

Finally, the *Boonstra* court's broad, functional "secure and durable" property test constrains the government and is more appropriate in the due process atmosphere, rather than in an unconstitutional taking environment. *Boonstra* is consistent with Supreme Court precedent relating

103. *See* M & Z Cab Corp. v. City of Chicago, 18 F.Supp.2d 941, 947 (N.D.Ill. 1998) (noting CHICAGO, ILL., MUN. CODE ch. 9-112-320(f) (1996)).

104. The County, however, did revoke four taxicab licenses either because the owner did not meet the criteria or operated in violation of the Code; the County did not reissue the four licenses.

105. *See M & Z Cab Corp.*, 18 F.Supp.2d at 947 (finding that the City, by not permitting the assignment of a taxicab license until a revocation hearing, did not violate plaintiff's due process rights because of the temporary nature of the prohibition and the hold on the sale served an important government interest: whether the licensee has any rights to transfer the license). The court went on to hold that property which is acquired, generated, and developed within a preexisting regulatory scheme which subjects the property to the deprivation complained of cannot constitute a taking provided the regulations are rationally related to a legitimate government interest). *Id.* at 953.

106. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007 (1984) (recognizing that no taking occurs where a party was on notice of the conditions under which the property interest may be affected); *see also* NL Indus., Inc. v. United States, 12 Cl. Ct. 391, 400 (1987) (finding no taking when regulatory action affects property that is acquired while the regulatory system is in effect).

to government largess, such as driver's licenses,[107] disability benefits,[108] and welfare benefits,[109] which all focus on due process protections only.

The body of case law which considers a taxicab license to be a privilege instead of a property right is consistent with, and supports, the County's position that the ability to operate a taxicab is a privilege, and not a compensable property right.

B. Taxicab License Case Law in Florida

In Florida, a taxicab license is not considered a compensable property interest; instead, similar to the vast majority of states, the license represents a privilege, not an inherent right.[110] In *Hamid v. Metro Limo, Inc.*, the court found that a common carrier does not have an inherent right to operate a taxicab, but only a mere privilege, a privilege which can only be acquired by a license or a permit issued from the government entity.[111]

C. Taxicab Licenses Compared to Liquor Licenses

When discussing whether a license is considered a privilege or a Fifth Amendment property interest a taxicab license is often compared to a liquor license. Great diversity exists among the states as to whether a liquor license should be considered property; however, in Florida, a liquor license is not considered a property interest.[112] In *Leafer v. State*, the court stated, "a [liquor] license is not property in a constitutional sense, . . . since it confers no right or estate or vested interest."[113] Like taxicab licenses, liquor licenses have many attributes of property: the right to obtain, the right to alienate, the right to renew, and the state's

107. *See* Bell v. Burson, 402 U.S. 535 (1971).

108. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

109. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

110. *See* Yellow Cab Co. v. Ingalls, 104 So.2d 844, 847 (Fla. Dist. Ct. App. 1958) (holding that a license or permit to operate motor vehicles on public streets for the conduct of a private business is mere privilege, not an inherent right).

111. *See* Hamid v. Metro Limo Inc., 619 So.2d 321, 322 (Fla. Dist. Ct. App. 1993).

112. *See* Leafer v. State, 104 So.2d 350, 351 (Fla. 1958) (holding that a liquor license was not a property right; and subsequently enacted statute which prevented the renewal of the license by anyone, other than the owner of the licensed premises, to distribute the liquor did not deprive the purchaser of the liquor license of due process of law).

113. *See id.* at 351. The plaintiff, who purchased the license from the license owner pursuant to state guidelines, challenged new legislation which prohibited anyone other than the owner of the liquor establishment from renewing the license. The purchaser did not own the motel where the license granted authority to engage in selling intoxicating liquors. *Id.* The court rejected the plaintiff's argument that a "property right" vested in the license upon purchase and wrote, "[w]hen a person enters the business of selling liquor he does so well-knowing that the legislature has the power not only to regulate but to prohibit."). *Id.*

right to revoke.[114] While not recognizing a property interest in the liquor license, however, courts do countenance property right protection in a legitimate liquor business.[115] Interestingly, language such as "not a vested interest" or "confers no right" appears when courts reject the proposition that taxicab or liquor licenses amount to a compensable property interest.

As previously mentioned, the great majority of case law does not establish a Fifth Amendment property interest in a taxicab license; that is, absent explicit language defining a taxicab license as a form of intangible property, a taxicab license does not normally evolve into a compensable property interest. Rather, taxicab licenses are viewed as mere privileges, not as a vested, compensable property right.

The next question this Comment poses is the following: Where a government entity explicitly creates a compensable property interest in a government license or benefit, under what circumstances may a government entity be obligated to compensate as a consequence of regulatory action?; i.e., does shortening the "alienability" or "right to exclude" strands in the "bundle of property rights" amount to a taking?

V. The Alleged Regulatory Taking

If a taxicab license is considered a compensable property interest, a takings challenge can be raised whenever a regulatory action detrimentally impacts a licensee's interests. The analysis of a personal property taking is similar to the analysis of a taking of real property. Thus, the *Agins* test must be applied to any regulatory action affecting intangible, personal property such as a taxicab license. The first element of the *Agins* test is met because restricting the sale of medallions to chauffeurs only will advance a legitimate County interest in improving the quality of taxicab service and eliminating the practice of charging high lease rates to taxicab drivers. The second element of the *Agins* test, however, requires an examination of the nature of the challenged regulatory action, and it is here where courts use the three *Penn Central* elements to determine if the property owner is deprived of all beneficial use of the property.

In 1922, Justice Holmes set an agenda for generations of lawyers with his famous epigram, "while property may be regulated to a certain

114. *See* Yarbrough v. Villeneuve, 160 So.2d 747, 748 (Fla. Dist. Ct. App. 1964) (noting that because the number and location of liquor establishments are limited, a liquor license has come to have some quality of property, "with an actual pecuniary value far in excess of the license fees exacted by the state.").

115. *See* Davidson v. City of Coral Gables, 119 So.2d 704,709 (Fla. Dist. Ct. App. 1960) (finding that "while a liquor business is a legitimate business protected by law as are other businesses, such a license is not a vested right, and it can be subject to further regulation or even revocation, at the pleasure of the legislature.").

extent, if regulation goes 'too far' it will be recognized as a taking."[116] In cases where a physical occupation does not occur, determining how far is "too far" plagued the Court for over six decades,[117] and the attempt to differentiate "regulation" from "taking" is a difficult jurisprudential problem.[118] To help settle whether the County went "too far" when it shortened one of the strands in the traditional "bundle of property rights" by restricting the sale of medallion licenses to chauffeurs only, we first look at *Lucas* for guidance, and then to *Penn Central* for clarification.

A. Permanent Takings Claim

Is it possible for taxicab license owners to assert a successful permanent takings claim? The County's restrictions on alienability did not constitute a physical invasion of property. However, when an owner's property is affected by government regulation, the owner may argue that the government's actions have gone "too far," resulting in a compensable taking of the property, under one of two tests. First, the property owner may show that the government has effected a "categorical taking" by demonstrating that the regulation denies the property owner of "all economically beneficial or productive use of the property."[119] As the court explained in *Florida Rock Industries, Inc. v. United States*, "[i]f a regulation categorically prohibits all economically beneficial use of [property], destroying its economic value . . . the regulation has an effective equivalent to permanent physical occupation. There is, without more, a compensable taking."[120]

The rule outlined in *Lucas* and *Florida Rock* does not apply to the County because restricting the sale of taxicab medallions only to chauffeurs does not deprive license owners of all economically beneficial or productive use of the property; license owners may still lease the license to a chauffeur, sell the license to a qualified chauffeur, keep the license and operate the taxi themselves, or give the license to an immediate family member.

B. Partial Regulatory Taking

Applying the second part of the *Agins* test demonstrates that even if

116. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

117. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (emphasizing that the court has never precisely determined those circumstances where land-use regulations amount to a taking); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 105 (1978) (taking analysis involves essentially ad-hoc, factual inquiries).

118. *See* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

119. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

120. Florida Rock Indus. Inc. v. United States, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994).

a taxicab owner is unable to prove that the County effected a categorical taking pursuant to the *Lucas* rule, he may nevertheless be able to prove that the government has effected a compensable "partial taking."[121] In cases where the property owner alleges a partial taking of property, the court must conduct an ad-hoc factual inquiry into the circumstances of each scenario. The Court balances the following three factors: "(1) 'the economic impact of the regulation on the property owner'; (2) 'the extent to which the regulation interferes with distinct investment backed expectations;' and (3) 'the character of the government action.'"[122] The critical factor, however, in determining whether the government has effected a taking of property under the ad-hoc test is the relationship between the value of the property interest allegedly taken and the value of the property owner's interest in the "parcel as a whole."[123] A successful just compensation claim hinges on the remaining economically viable uses of property rather than on the ability to take advantage of a particular right relative to the property.[124]

C. The Economic Impact Factor

From the perspective of the taxicab license owners, the economic im-

121. *See id.* at 1570.

122. *See* Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). *See also* Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380-81 (Fla. 1981) (establishing the framework in Florida for a takings analysis by holding that the following factors, or some combination thereof, are important: (1) whether there is a physical invasion of the property; (2) the degree to which there is a diminution in value of the property, i.e., whether the regulation precludes all economically reasonable use of the property; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes the health, safety, welfare, or morals of the public; (5) whether the regulation is arbitrary and capriciously applied; and (6) the extent to which the regulation curtails investment-backed expectations).

123. *See Penn Cent. Transp. Co.*, 438 U.S. at 130 (stating "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); *see also* Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 614 (11th Cir. 1997) (emphasizing that a rezoning of property which eliminated the landowner's ability to construct high-density apartment complexes is not considered a taking because "[a]ny constitutional claim . . . challenging the regulatory deprivation of a single use of real property alleged to be vested under state law must be considered in light of the remaining use of the property as a whole."); Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So.2d 761 (Fla. Dist. Ct. App. 1994) (holding that restricting development of 48 acres near a bald eagle nesting site not to be a taking because the property as a whole retained economic life and, therefore, did not deprive the developer of most or all of its interests in the property); Marshall v. Board of County Comm'rs for Johnson City, 912 F.Supp 1456, 1472 (D.Wyo. 1996) (agreeing that the proper inquiry is to examine the entire bundle of property rights rather than analyzing each strand separately).

124. *See* Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1074 (11th Cir. 1996). In *Corn*, the City denied a landowner the ability to build a shopping center and mini-warehouses after the City rezoned the property for residential use. *Id.* at 1068.

pact of the County's new regulation destroyed their ability to freely sell taxicab licenses. This could result in reducing the value of the license in the future. Determining value is difficult because it is a nebulous concept; however, a few points are clear. First, before the County created the medallion system and subsequent restraint on alienability, taxicab licenses sold between $60,000 - $80,000; during this time period, many chauffeurs purchased taxicab licenses under conditional sales contracts, paying as much or higher than non-chauffeurs. Even though chauffeurs purchased taxicab licenses in the past, the license owners feared that restricting the purchaser's market to chauffeurs would drastically reduce the sales price of taxicab licenses to $40,000 or less. Potential economic losses, however, even though substantial, do not amount to a taking.[125]

Second, taxicab license owners retain the ability to lease the licenses to chauffeurs and currently earn between $7,800 to $10,400 per year. A taxicab license owner who leases the license to a chauffeur, for example, retains the ability to recover the cost of a license he purchased for $60,000 in less than six years. A reduction in value, even to the extent where government regulations prevent the most profitable use of a claimant's property, is not necessarily equated with a taking.[126]

The facts in *Andrus v. Allard* are strikingly similar to the circumstances of taxicab license owners. Pursuant to the Eagle Protection and Migratory Bird Treaty Acts, both designed to prevent the destruction of

125. *See* United Nuclear Corp. v. United States, 17 Cl. Ct. 768 (Fed. Cir. 1989) (holding that a severe economic impact alone, which in this scenario reached upwards of $5 million in exploration costs, did not amount to a taking); Naegele Outdoor Adver., Inc. v. City of Durham, 803 F.Supp 1068 (M.D.N.C. 1992) (finding that a Durham ordinance requiring removal of certain outdoor advertising signs did not amount to a taking, even though the claimant lost use of over 54% of its signs, reducing Naegele's revenue by 29.75% because the City provided a generous amortization period to realize a reasonable return on its remaining signs); *see also Flotilla*, 636 So.2d at 765 (noting that "[t]he loss of future profits . . . provides a slender reed upon which to rest a takings claim.") (quoting Andrus v. Allard, 444 U.S. 51 (1979); Gardens Country Club, Inc. v. Palm Beach County, 712 So.2d 398, 402 (Fla. Dist. Ct. App. 1998) (holding that a regulation which reduced the value of the owner's land from $8,000 per acre to $3,000 per acre not to be a taking because the remaining value constituted more than a negligible amount)).

126. *See* Andrus v. Allard, 444 U.S. 51, 66 (1979) (holding that even though the federal statute denied the claimant's the most profitable use of his property, a reduction in value does not equal a taking); *see also Corn*, 95 F.3d at 1072 (noting that the correct standard by which to test for deprivation of all economically viable use of property "is not whether the [owner] has been denied those uses to which he wants to put his [property]; it is whether the landowner has been denied all or substantially all economically viable use of his land."); PVM Redwood Co., Inc. v. United States, 686 F.2d 1327 (9th Cir. 1981) (ruling that passage of the Redwood Park Expansion Act, which reduced the supply of wood to the plaintiff by 98%, requiring the company to deal with inferior grade lumber, did not amount to a taking because it had not ownership interest in its source of supply and the company could still operate its sawmill); Rubano v. Department of Transp., 656 So.2d 1264, 1267 (Fla. 1995) (noting that a loss of access to an interstate highway does not constitute a taking when considered in light of the remaining accesses to the property) (quoting Palm Beach County v. Tessler, 538 So.2d 846, 849 (Fla. 1989)).

certain species of birds, persons engaged in the sale of bird artifacts, such as feathers, could no longer market and sell "preexisting" artifacts.[127] The Court held that denying the sellers most profitable use of his property did not amount to a taking.[128] Similarly, the County's new law affects the future sale of preexisting taxicab licenses; however, the County is not banning the sale of licenses, only limiting the potential market to chauffeurs.

In *Burns Harbor Fish Co., Inc. v. Ralston*, the court held that a prospective ban on gill net fishing did not amount to a taking of the fisherman's fishing licenses, even though the law significantly reduced the company's profitability.[129] While the fisherman had a property interest in the gill nets themselves, the state did not preclude the fisherman from selling the nets or fishing with them outside of Indiana waters. Instead, the court found no compensable property interest in a fishing license and noted, "[w]hen an individual or corporate entity purchases personal property . . . to engage in a commercial venture, the purchaser is taking a risk that government regulation will diminish the value of that property."[130]

Assuming, in a light most favorable to the taxicab owners, that the County's new laws may have a slight negative economic impact on taxicab owners' ability to sell the licenses, the controlling question now becomes whether the taxicab license owners could reasonably expect that they would be permitted to freely sell their licenses in the most profitable manner.

D. Interference with Investment-Backed Expectations

The taxicab owners argue that the County's new regulatory scheme disturbed the owner's reasonable investment-backed expectations to use a taxicab license in the most profitable manner. In analyzing the reasonable investment-backed expectation part of the *Penn Central* test, courts limit recovery to property owners who can demonstrate that they purchased property relying upon the nonexistence of the challenged regulatory scheme.[131] Investing or purchasing government largess with the

127. *See Andrus*, 444 U.S. at 53.

128. *See id.* at 66.

129. *See* Burns Harbor Fish Co. Inc. v. Ralston, 800 F.Supp 722, 724 (S.D. Ind. 1992).

130. *See id.* at 726. In addition, the court states, "[b]y reason of the State's traditionally high degree of control over commercial dealings, [such a purchaser] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).

131. *See* Good v. United States, 39 Fed. Cl. 81, 109 (1997); *see also* Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1492-93 (11th Cir. 1990) (finding that a mere license or permit to use land did not rise to a protected, compensable property interest where the state granted the license subject to the public trust doctrine). Also, the court wrote, "[b]oth federal and . . . state cases stand for the proposition that permits to perform activities on public land, whether the

knowledge of a possible future restraint is similar to the tort doctrine of assumption of risk. Under that doctrine a plaintiff, who voluntarily assumes a known risk, will probably be held comparatively negligent, thereby reducing or eliminating the liability of a tortfeasor. When determining whether the property owner knowingly purchased property subject to future limitations, courts examine not only the specific regulatory restrictions at issue, but also the regulatory climate of the industry, and whether the owner's investment is objectively reasonable in light of that climate.[132]

Taxicab license owners may argue that they justifiably relied upon the existence of the County's previous regulatory scheme, which allowed unrestricted alienability of taxicab licenses. Therefore, the County is now estopped from denying free alienability. The owner's argument, however, is flawed. Since 1981, the County stringently regulated the taxicab industry, enacting numerous ordinance amendments relating to the operation of the taxicab licenses. Furthermore, beginning in 1990, the County held over 72 separate Ground Transportation Review Committee meetings over the next four years, focusing on taxicab industry reform. After 1994, the County held many workshops with the taxicab industry, again concentrating on changing the nature of taxicab licenses. The taxicab license owners, therefore, conducted business in a climate of regulatory flux, seriously diminishing their expectations in the status quo, and undermining any reasonable investment-backed expectations.

Moreover, when determining whether the County exercised a regulatory taking of the taxicab owner's property, investment-backed expectations must be more than a unilateral expectation or abstract need; instead the expectation must be reasonable in light of all the circumstances surrounding the regulated field.[133] Also, depriving a claimant of expected

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activity be building, grazing, prospecting, mining, or traversing, are mere licenses whose revocation cannot rise to the level of a Fifth Amendment taking." *Id.*

132. *See id.* at 109.

133. *See* Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 76 (1997) (holding that the claimant did not have a reasonable investment-backed expectation to develop a lake bottom because it purchased the land knowing the highly regulated nature of the field); Shrader v. United States, 38 Fed. Cl. 788, 796-97 (1997) (finding that more than a "mere expectancy" is needed for a pilot to be able to renew a pilot's license given the Air Force's wide discretion in establishing eligibility standards); Herndon v. United States, 36 Fed. Cl. 198 (1996) (ruling that more than a "mere expectancy" is required for Oregon to convey title to land); Store Safe Redlands Assoc. v. United States, 35 Fed. Cl. 726, 734 (1996) (maintaining that the plaintiff did not have a compensable expectancy in grazing permits because the "plaintiff bought its interests subject to all existing statutes, regulations, . . . and had very specific notice prior to purchase that forage would be reduced."); 767 Third Ave. Assoc. v. United States, 48 F.3d 1575, 1581 (Fed. Cir. 1995) (finding that no taking occurred because the claimant knew, as a member of the public, that the U.S. government could close a foreign government's offices and freeze its assets and, therefore, had no reasonable investment-backed expectations regarding its rights under lease

markets, and corresponding loss or gain of anticipated revenues or profits is not a reasonable, compensable property interest.[134] A property owner need not even foresee changes in the regulatory scheme for a court to hold no taking occured.[135] In short, "[i]nterests that are not sufficiently bound up with reasonable expectations of the claimant are not 'sticks' in the claimant's 'bundle of rights' and thus do not constitute property for Fifth Amendment purposes."[136]

E. Character of Government Action

The third part of the *Penn Central* analysis focuses on the character of the government action; looking at whether the government regulatory action is a physical invasion or a type of program, which is rationally related to a legitimate state interest. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[137] The County's ordinance is not a physical invasion of the taxicab license owner's property; rather, it is a legitimate exercise of the County's police power, regulatory in nature, framed to advance the County's legitimate interest in providing better quality taxicab service to the County's tourists, residents, and visitors.

Taxicab licenses are a form of government largess, issued in the public interest and subject to limitations that may reasonably be imposed upon them to further the public interest.[138] Not all government adjustments to largess will be acceptable to all concerned parties because gov-

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with a foreign government); Broughton Lumber Co. v. United States, 30 Fed. Cl. 239, 243 (1994) (emphasizing that not approving a license to build a hydroelectric plant is not a taking because a claimant operating in a highly regulated field cannot expect "clear sailing"); *see also* Coastal Petroleum v. Chiles, 701 So.2d 619, 625 (Fla. Dist. Ct. App. 1997) (holding that a royalty interest is too speculative to be protected as a compensable property interest where the state retains the right to control land uses).

134. *See* NL Indus., Inc. v. United States, 12 Cl. Ct. 391, 405 (1997) (holding that "market expectations" are not automatic or foregone conclusions). In addition, anticipated profits and revenues do not qualify as property within the Fifth Amendment. *Id.* at 405.

135. *See* Allied-General Nuclear Serv's. v. United States, 12 Cl. Ct. 372, 381 (1987) (finding that "[just] as private ventures reap the rewards of success, so must it bear the burden of loss.").

136. *See* M & J Coal Co. v. United States, 30 Fed.Cl. 360, 367 (1994) (quoting Penn Central v. City of New York, 438 U.S. 104, 124-25 (1978)).

137. *See Penn Central*, 438 U.S. at 124; *accord* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

138. *See* Air Lines Pilots Assoc., Int'l v. Quesada, 276 F.2d 892, 896 (2d Cir. 1960); *see also* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1579 (10th Cir. 1995) (stating, "[w]hile a property owner does not and should not expect to be forced to dedicate land . . . it is well established that a property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.") (quoting *Lucas*, 505 U.S. at 1027).

ernment regulation necessarily involves adjusting rights for the public good.[139] In *Andrus*, the Court stated, "[t]o require compensation in all such circumstances would effectively compel the government to regulate by purchase."[140]

The taxicab license owners simultaneously offer two contradicting propositions. First, the license owners applaud the ordinance for limiting the number of medallions permitted to operate in the County, thereby maintaining the licenses value. Simultaneously, however, the license owners decry regulation which may decrease the future marketability of the licenses. Government largess does not exist solely for the benefit of the regulated industry; rather, the public interest should supersede private gain. The County, therefore, by limiting the sale of taxicab licenses to chauffeurs only, legitimately advanced its interests in improving the quality of taxicab service, and should not be held hostage to a regulated industry solely interested in protecting its private, economic profits.

After performing the previous takings analysis, an argument can be made that even though the County explicitly created a compensable property interest in a taxicab license after April 5, 1999, shortening the "alienability" or "right to exclude" strands in the "bundle of property rights" does not amount to a "regulatory taking."

VI. Developing Legal Theories Concerning the Creation of a Compensable Property Interest

The discussion thus far on whether a taxicab license is a compensable property interest, followed by the takings analysis, leads to the final question of this Comment: Absent explicit language creating a compensable property interest, does a legal theory or test exist which answers the question of when, how or if, a governmentally conferred benefit or privilege evolves into compensable property interest? Any legal theory concerning this question must take into account the problematic nature of property and the burgeoning amount of governmentally conferred benefits and licenses.

A. The Problematic Nature of Property

What does it mean to have rights or interests in private property which are subject to the Takings Clause? Most people have various and quite different visions of property. The traditional "dominion" conception of property rights refers to ownership of corporeal things such as

139. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979).

140. *See id.* The Court went on to note, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

land and chattels and certain intangibles including bills, notes, stocks, and bonds.[141] While physical occupation or confiscation of real property or chattels is easily grasped, the same cannot be said for more nebulous, intangible forms of property interests, such as those involving permits and licenses.

Clearly delineating a property interest meriting protection becomes difficult because property can be tangible or intangible. Property interests are not created by the Constitution; rather, property dimensions generally stem from state law. As a result, while the Just Compensation Clause appears to represent a substantial check on government power, a federal, state, or local government agency might simply respond: "You can't complain of any injury at all because you never had what you claim we took away. From the very beginning, your property was subject to the condition that, if and when we thought it wise to do so, we could restrict it as we have or transfer it as we have."[142] No longer, therefore, are property rights the "sole and despotic dominion which one man claims over the external things of the world."[143] Instead, a state or local government can realign state-created property rights to serve legitimate state or local interests. Determining whether the government has "taken" property necessarily involves a resolution of exactly what rights the individual has in a particular property. This is especially true when a governmental entity creates "new property" to serve the public interest; taxicab licenses or medallions are forms of this "new property."

B. New Property Rights

Professor Reich, in his groundbreaking article "The New Property," described "new property" as a person's interest in government largess: "While Government acts as a gigantic siphon, drawing in revenue and power, it also pours forth wealth in the form of benefits, services, contracts, franchises, subsidies, and licenses."[144] Property, therefore, increasingly took the form of rights rather than tangible goods such as real or personal property.[145] For example, a person's employment interest can be more valuable than a house, car, or bank account.[146] Likewise, a government license to operate a radio station, liquor license, grazing permit,

141. *See* Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. Pa. L. Rev. 691, 691-92 (1938).

142. *See* Dames & Moore v. Regan, 453 U.S. 654, 674 n.4 (1981) (holding no taking existed when U.S. nullified attachments of Iranian assets because petitioner's attachments were "revocable" and "contingent"); HFH Ltd. v. Superior Court, 542 P.2d 237, 247 (Cal. 1975) (arguing that every land investor must know that environmental controls might be imposed at any time).

143. *See* Blackstone, *supra* note 1.

144. *See* Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

145. *See id.* at 738.

146. *See* Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Prop-*

or taxicab license is an extremely valuable commodity. The owner of such a license considers this wealth his "own," often seeking legal protection against interference from his enjoyment.[147]

The "new property" conception includes entitlements to government benefits or economic rights which had previously been considered "privileges." Reich contends that once a government creates and distributes benefits or other economic rights, subsequent government action regarding a particular benefit or other economic right may give rise to a "taking."[148] Controversies over largess may arise from a variety of government actions: (1) denial of the right to apply; (2) denial of an application; (3) attaching conditions to a benefit; (4) modification of a benefit already made; or (5) suspension or revocation of a benefit.[149] Courts tend to provide the greatest protections in cases of suspension or revocation of largess. However, those protections are mainly procedural, that is, a government benefit that supposedly vests cannot be taken away without providing the beneficiary due process.[150] A new applicant for a license, however, is offered less protection, and substantive safeguards to possess and use the largess remain very limited because largess remains revocable.[151] In addition, because most forms of largess are subject to limitations on their use, such as transferring a benefit only with government approval, or limiting the use to a specific purpose, the largess does not usually vest in the recipient.[152] While Reich concentrated on the "new property's" Fifth Amendment, due process interests, he did not fully explore the area of when, how, or if largess evolves into a Fifth Amendment, compensable property interest; consequently, an examination of a variety of additional theories.

C. Four Theories of how Fifth Amendment, Compensable Property Rights Are Created

1. The Nelson Model

Robert H. Nelson's theory states that property rights are created pursuant to a four step process: (1) when demands for the use of a given resource, tangible or intangible, grow large enough to create a congestion

erty Rights, 37 U. Kan. L. Rev. 529, 549 (1989) (arguing that "new property" rights arise from the expectation of the individual and should not be treated exactly like "old property").

147. *See* Reich, *supra* note 144, at 738-39.

148. *See id.* at 744.

149. *Id.*

150. *Id.*

151. *See id.* at 744-45 (Reich stresses that because largess is doled out in the "public interest," when largess, such as television licenses, are revoked in the public interest, the largess holder usually receives nothing.).

152. *Id.* at n. 62 (citing Osborn v. United States, 145 F.2d 892, 896 (9th Cir. 1944) (holding that a grazing permit on public lands may be revoked without payment of just compensation)).

problems, i.e., when excessive use deteriorates the quality of the resource, spawning a desire for social control; (2) when a government unit establishes a permit system, pursuant to its respective police powers, to manage the congestion and improve the quality of the resource; (3) when the government unit allows the resource to be traded and sold, sometimes encouraging the sale, but restricting the types of purchasers or imposing conditions that a transfer serve a "public purpose"; and (4) when the government regulatory entity terminates its regulatory activities, shifting total use rights to the private user.[153]

Nelson contends that when a government institutes a regulatory program which creates the condition of scarcity, limiting the ability of potential users to enter the regulated industry, "the best government policy will normally be to eliminate actions that cause the scarcity."[154] In this way, the government could deregulate an industry, thereby eliminating the new property rights it hatched in the first place.[155] However, eliminating the regulation is politically difficult once an industry acquires regulation that equals a "de facto" protectionist economic environment in favor of the regulated industry.[156] Nelson then contends that if the government cannot eliminate the scarcity of the resource, formally recognizing the property is an option that encourages the greatest efficiency of property use.[157]

On the other hand, when the government creates "new property," such as taxicab licenses, by artificially limiting the scarce resource through regulation, the "new property" rights are considerably less secure because the government may eliminate the scarcity, thereby undercutting the value of the right.[158] When the government faces a regulated industry claiming "new property rights," Nelson affords four options: (1) eliminate, through legislation, the scarcity of resources by not capping the entry of the resource, thereby eliminating the value and subsequent claim to a property right; (2) accept the existence of private rights but adopt or strictly enforce laws that prohibit the sale and transfer of the resource; (3) recognize the private rights, encouraging the sale, but leave open the possibility of later rescinding the rights of users; or (4) provide the legal protections that ordinary private property owners enjoy.[159]

If we apply Nelson's four step test to the County's regulatory history

153. *See* Robert H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve,* U. ILL. L. REV. 361, 374-75 (1986).

154. *See id.* at 381.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.* at 380. Nelson states, "[t]axi medallions similarly have a high selling price in some cities that regulate the total number of taxis." *Id.*

159. *See id.*

and system, a number of important factors become more pellucid. First, in 1981, the County began regulating and permitting taxicabs for the following reasons: (1) to curtail the congestion of taxicabs; (2) to reduce deadheading; (3) to improve the quality of service to users; and (4) to enhance the caliber of taxicab owners, chauffeurs, and vehicles used to provide taxicab service. The County's regulatory system, which artificially limited the number of taxicabs under a highly regulated permit system, therefore, meets the first and second prongs of Nelson's test.

Second, the County allowed the artificially scarce taxicab licenses to be transferred, assigned, and sold. However, the County imposed stringent transfer and sale qualifications and reserved the right to deny a transfer if an applicant did not meet the requirements of the Code, or if the transaction would not serve the "public interest." By sanctioning the sale and transfer of taxicab licenses, albeit according to strict transfer standards, taxicab licenses meet the third stage of Nelson's property right development test.

Finally, the County never shifted total use rights to taxicab license holders by terminating its regulatory activities. Rather, when faced with taxicab license owners claiming Fifth Amendment, compensable property right protections, the County persisted in stringently regulating the sale, assignment, and transfer of taxicab licenses. Thus, reserving the right to liquidate the scarcity of licenses by instituting a regulated, unlimited license entry system. According to the Nelson Model, the County, while constantly providing due process protections,[160] never implicitly recognized a Fifth Amendment, compensable property interest in a taxicab license.[161] In addition, a government's reservation to amend a created "new property" right for Fifth Amendment purposes does not need to be express. Instead, the reservation may be implied, based on prior actions of the government authority that created the "new property" right in the

160. *See* Perry v. Sindermann, 408 U.S. 593, 602-03 (1972) (holding that procedural safeguards must accompany the revocation of governmentally issued benefits, permits, or licenses).

161. *See* Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n, 38 F.3d 603 (D.C. Cir. 1994) (holding that where the court reserves the power to amend attorney fee provisions of a compromise agreement on an ad-hoc basis, the interests that attorneys may have had in being paid additional fees from a common fund never achieved the status of "private property" under the ambit of the takings clause of the 5th Amendment). In addition, the court stated, "[g]enerally, when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." *Id.* at 606. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 1011 (1984) (emphasizing that when a government unit intends to reserve the power to modify a government created right in response to changing conditions, it indicates an unwillingness by the government entity to relinquish control of the property to such an extent that it acquires the status of "private property").

form of largess.[162]

On a broad level, the Nelson Model is useful because it provides a comprehensive model which tracks the normal course of government regulation. The course flows from need and regulation, to permitting, to allowing the transfer of permits or licenses, and finally, to either formal recognition of a compensable property interest or total deregulation. Nelson's Model, however, fails to address the issue of when largess evolves into a compensable property interest during regulation; that is, before the government entity decides to either recognize the property interests as compensable or to deregulate the industry.

2. *The Rasmussen Model*

In *G.S. Rasmussen & Associates v. Kalitta Flying Service, Inc.*, the court outlined three criteria which must be met before the law will recognize a property right: (1) the interest must be capable of precise definition; (2) the interest must be capable of exclusive possession; and (3) the putative owner must have established a legitimate claim to exclusivity of the property interest.[163]

This case involved an attempt to protect intellectual property developed pursuant to a government privilege. Rasmussen, an aeronautical engineer, developed an aircraft modification allowing certain types of airplanes to carry significantly more cargo than permitted under the airplane's original type-certificate issued by the Federal Aviation Administration ("FAA").[164] The FAA approved the design modification, and issued a Supplemental Type Certificate ("STC"), certifying a major alteration to the planes already type-certified.[165]

Although the court in *Rasmussen* declared the "[p]roperty interest is of a most interesting and peculiar sort . . .," it further explained that the "[i]nterest has value only because it helps secure a government privilege to do something that would otherwise be forbidden."[166] The court, ad-

162. *See Democratic Cent. Comm.*, 38 F.3d at 607; Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10, 16 (7th Cir. 1990).

163. G.S. Rasmussen & Assocs. v. Kalitta Flying Service, Inc., 958 F.2d 896, 903 (9th Cir. 1992).

164. *See id.* at 899 The FAA certifies airplane types rather than individual airplanes, and once a manufacturer successfully demonstrates the safety of its design, the FAA issues what is known as a Type Certificate. *Id.*

165. *See id.* Kalitta owned and operated numerous cargo aircraft and, after declining Rasmussen's offer to license the STC to Kalitta for $95,000, Kalitta copied the design from a flight manual installed on one of its airplanes, and applied to the FAA for an air worthiness certificate in effect pirating Rasmussen's new design. *Id.* at 900.

166. *See id.* at 900-01. The court reasoned that even though Rasmussen's interest is limited to obtaining a federal government privilege, under California law, its status as a property interest is not diminished. *Id.* at 902.

hered to a very broad definition of compensable property.[167] It held that Rasmussen had a protectable, Fifth Amendment compensable property interest in the design because the interest met the three-prong property interest test outlined by the court.[168] First, an STC is capable of precise definition, enabling an airplane owner the ability to obtain an airworthiness certificate for a particular airplane design modification.[169] Second, Rasmussen, the designer, could exclusively possess or transfer control of the design to a third party.[170] Third, because Rasmussen spent considerable time, effort, and money to develop the design, the STC Kalitta relied on would not exist but for Rasmussen's efforts, thereby legitimizing his claim to exclusivity.[171]

When applying the *Rasmussen* property interest test to taxicab licenses, it is important to note that the test may be appropriate for property interests developed as intellectual creations, even when tied to securing a government privilege. However, where the claimed property right is based solely on the privilege of operating a license, issued by the government entity, to serve the public interest, and not involving independent innovative scientific or technological advances, the test falls dismally short for a number of reasons.[172]

First, taxicab license owners, like most recipients of largess, do not bring independent innovations or creations to the taxicab permit table. Most taxicab license owners do not even own the vehicle used to provide taxicab service but, instead, lease the taxicab license to a chauffeur, who supplies the vehicle, taxicab meter, signage, top light, and color markings. Furthermore, existing taxicab license owners desiring to sell the privilege of operating a taxicab under the County's regulatory system are not the exclusive decision makers as to the pool of potential applicants who can

167. The court uses the broad definition enumerated by the California Supreme Court, "although a . . . license is merely a privilege so far as the relations between the licensee and the state are concerned, it is property in any relationship between the licensee and third persons, because the license has value and may be sold." *Id.* at 902 (citing Roehm v. County of Orange, 196 P.2d 550 (Cal. 1948)).

168. *See* G.S. Rasmussen & Assocs. v. Kalitta Flying Service, Inc., 958 F.2d 896, 903 (9th Cir. 1992).

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* J. Miles Hanisee, *An Economic View of Innovation and Property Right Protection in the Expanded Regulatory State*, 21 PEPP. L. REV. 127, 161 (1993). The author proposes a two-pronged analysis to be used when determining whether an interest using regulatory privileges, in conjunction with products of intellectual creation, rise to the level of a compensable property interest: "First, property right protection should be provided only upon showing measurable scientific or technological or scientific advances resulting directly from the design or innovation. Second, the standard measuring such an advance should ask whether society now has the capacity to do something that it could not have done prior to the innovation." *Id.*

purchase the license. The County still reserves the right to deny an applicant if he does not meet the criteria of the Code.

Second, a taxicab license is not under the exclusive control of the taxicab owner. The County mandates strict control over the operation of the taxicab by outlining requirements related to lost and found procedures, taxicab rates, complaint procedures, and adherence to minimal insurance standards.

Third, if a taxicab owner violates the Code, the County retains the right to revoke the taxicab license and not reissue the licenses to new operators.[173] Property right protections of government privileges must be juxtaposed with the innovation, if present, and "[t]he property rights retained are not the rights to receive such a privilege from the government, but rather to protect such a privilege from conversion after the receipt."[174]

The Rasmussen Model provides too broad a definition of a "property interest" to be useful in most forms of largess. A driver's license, for example, is capable of precise definition: exclusive possession by the licensee. The licensee does have a legitimate claim to the license because he must successfully complete a written test before obtaining the driver's license. Few would argue, however, that a license is a Fifth Amendment, compensable property right; to hold otherwise would mean affording compensable property rights to largess solely intended as a mere privilege.

3. The Salvatore Model

A third theory of property right evolution focuses not on the property right of the beneficiary or recipient of largess, but on the property right of the government entity distributing the wealth through permits, licenses, or other types of government benefits. In *United States v. Salvatore*, the court held that video poker licenses constituted property of the State of Louisiana to support a mail fraud conviction.[175] The court, in affirming the conviction of the defendant for fraudulently obtaining a video poker license through the mail,[176] rebuked the defendant's argument that video poker licenses do not constitute "money or property"

173. *See supra* text accompanying note 103.

174. *See* Hanisee, *supra* note 172, at 162.

175. United States v. Salvatore, 110 F.3d 1131, 1132 (5th Cir. 1997). After 1991, any manufacturer, distributor, or owner of a video poker machine in Louisiana needed to be licensed by the state pursuant to the "Video Draw Poker Devices Control Law." *Id.* at 1135.

176. To obtain a video poker license, Louisiana required that each applicant satisfy certain "suitability" requirements, precluding person's from obtaining a license convicted of certain criminal offenses; and the defendant acted as a front man for applicants involved in organized crime. *See id.* at 1135.

under the mail fraud statute.[177]

In affirming the mail fraud conviction, the court relied on *McNally v. United States*,[178] and *Carpenter v. United States*,[179] to shape its rationale. First, the Court in *McNally* determined that although the mail fraud statute "does not refer to the intangible right of the citizenry to good government;"[180] the Court concluded that "any benefit which the Government derives from the [mail fraud] statute must be limited to the Government's interest as property holder."[181] Second, in *Carpenter*, the Court extended the mail fraud statute's protections to intangible property, resolving that confidential business information is property.[182] The court in *Salvatore*, therefore, needed to determine whether Louisiana not only had a regulatory interest, but also a property interest in the video poker licenses.

In *Salvatore*, the court grounded its decision that video poker licenses are a form of state property from a blend of two important ingredients. First, property must be viewed not only in terms of state law but also traditional property law where property is regarded as a "bundle of rights." In this case, the state zealously sought to control one of the most important sticks in the bundle: the issuance and use of such licenses.[183] Furthermore, the state mingles in Professor Reich's ingredient of government largess, noting that a license is a form of government largess "[which] is originally a form of public property, comes from the state, and may be withheld completely."[184]

Second, the court looked to the character of the license itself to aid in deciding whether Louisiana has a property interest in the video poker licenses.[185] Because Louisiana acted in a proprietary as well as regulatory manner, by defining the licensee's participation in an enterprise from which the state derives significant revenues,[186] the court distinguished a number of cases which stood for the proposition that a government entity has only a regulatory interest in largess.[187] In *Toulabi v. United States*, for

177. *See id.* at 1138.

178. McNally v. United States, 483 U.S. 350 (1987).

179. Carpenter v. United States, 484 U.S. 19 (1987).

180. *See McNally*, 483 U.S. at 356.

181. *See id.* at 358 n. 9.

182. *See Carpenter*, 484 U.S. at 25. In *Carpenter*, the Court affirmed the conviction of a defendant who schemed to defraud the Wall Street Journal of confidential business information by obtaining, through the mail, pre-publication release of the confidential information. *See id.* at 22-24.

183. *See* United States v. Salvatore, 110 F.3d 1131, 1140 (5th Cir. 1997).

184. *Id.* (quoting Reich, *supra* note 144, at 778).

185. *See id.*

186. *See id.*

187. *See, e.g.*, Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989) (holding that the City of Chicago had no property interest in a fraudulently obtained taxicab driver's license because the license, at most, represented a promise not to interfere rather than a sliver of prop-

example, the court stressed that a chauffeur's license to drive a taxicab is different than a taxicab medallion because Chicago does not cap the number of driver's licenses, and the driver's license does not accrue a value. Chicago does cap the number of medallions, however, thus creating a value to the medallions which the city participates in distributing to potential applicants.[188]

The Salvatore Model stands for the proposition that when a government entity acts in a proprietary fashion, (1) deriving significant revenues from the regulated industry; (2) controlling who receives and uses the license; and (3) limiting the number of licenses to be issued; it creates value to the license. The court held, however, that for the purposes of the mail fraud statute, the government, not the licensee, had a protectable property right.[189]

Applying the Salvatore Model to the County's regulatory system concerning taxicab licenses, one observes that the County closely mirrors Louisiana's regulation of video poker licenses. The County controls the issuance and use of taxicab licenses, caps the number of licenses available, thereby creating a value to the licenses, and derives regulatory fees, which totally fund the regulating agency. Also, taxicab licenses represent public property distributed as largess to entities which are supposed to act in the "public interest." Furthermore, if the County revokes a taxicab owner's privilege of operating a taxicab license because of violating certain provisions of the Code, the County takes back the license and either reissues the license pursuant to a lottery or retains the license without reissuing it to a new operator.

Because the Salvatore Model stresses that largess is the property of the issuing government entity, the model is deceptively appealing. However, most government entities do not issue largess in a proprietary fashion. Rather, largess is more often distributed in a pure regulatory environment, where the only revenue generated is used to partially or totally fund the governmental entity responsible for oversight of the regu-

erty); *see also* United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) (recognizing that the State of Missouri had no property interest in a school bus permit when a licensee falsified the permit application because defrauding the citizens of their right to loyal and faithful services to government officials is not a property interest of the State under the mail fraud statute).

188. *See Toulabi*, 875 F.2d at 125.

189. *See* United States v. Turoff, 701 F.Supp 981, 985 (E.D.N.Y. 1988) (holding that a scheme to defraud the City of New York of unissued taxicab medallions deprived the City of property for purposes of the mail fraud statute). The court further accented that the medallions are a valuable, marketable commodity and that the City maintained them under lock and key, had title to the medallions, and would maintain an action for conversion if stolen. *See id.* at 986; *see also* United States v. Sacco, 923 F.2d 970, 976 (2nd Cir. 1991) (holding that a scheme aimed at obtaining "something of value" from the State by deceptive means deprives the State of a property interest).

lated industry. The Salvatore Model could apply when a government entity derived a certain percentage of revenue from the sale, auction, or issuance of largess, above typical regulatory fees designed to fund the entity responsible for regulatory oversight. Then the government entity, not the regulated industry, may be able to claim a property right in the largess. The Salvatore Model, however, does not address the issue of when largess evolves into a compensable property interest in a pure regulatory environment.

4. A Proposed Model

I propose an alternative method of evaluating when, how, or if largess evolves into a Fifth Amendment, compensable property interest. First, determine if the government entity explicitly created a property interest in largess. If the government entity does explicitly create a property interest then clearly the analysis ends and a compensable property interest exists. An example is when the County, on July 9, 1998, defined a taxicab license issued pursuant to a medallion system as intangible property. If, on the other hand, no explicit recognition of a compensable property right exists, the next question becomes whether the government entity, through regulatory action or inaction, implicitly created the compensable property interest.

The dividing line between regulatory action and inaction is often gray and difficult to discern. Regulatory actions which may imply a compensable property interest in largess, for example, include a government entity limiting the number of licenses available for issuance, thereby adding value to the largess. Another example is a government entity explicitly permitting largess to be transferred, sold, assigned, or devised, which creates the inference that largess embodies some important "transfer strands" of traditional property's "bundle of rights." Alternatively, an example of government inaction which may create an implied compensable property right is a government entity ignoring the language of a "Bill of Sale," submitted as part of a transfer of a taxicab license that contains words such as, "this taxicab license constitutes the property of the seller." By ignoring the reference to a taxicab license being property, the government entity could be viewed as implicitly recognizing the license as property. Conversely, in response to a taxicab license owner referring to a taxicab license as property, the government entity could have required the license owner to remove any reference to the word "property." Over time, the regulated industry could assemble other examples of a government entity's actions or inactions into a cohesive body which stands for the proposition that the governmental entity implicitly created a compensable property interest in the largess.

The two factors to consider and balance in determining when, how,

or if the governmental entity, through action or inaction, implicitly created a compensable property interest in largess are the following: (1) the nature of the regulatory system; and (2) the reasonable expectations of the regulated industry.

A. Nature of the Regulatory System

The nature of the government entity's regulatory system can be determined by analyzing and balancing the following aspects of the regulatory system: (1) the regulatory requirements for issuance of a license; (2) the regulatory requirements for operation or use of a license; and (3) the regulatory requirements and consequences where a licensee involuntarily ceases to operate the license.

1. The Regulatory Requirements for Issuance of a License

The regulatory requirements for issuance of a license element of the Proposed Model considers the following additional items: (1) whether the government entity limits or caps the number of licenses available for use by the regulated industry; and (2) the type of criteria the government entity uses to determine who is eligible to receive the license. If, for example, the government entity does not limit the numbers of licenses available for issuance, then the licenses do not accrue an artificial value. Even if entry is highly regulated, licensees will not need to transfer, assign, sell, or devise the largess because an unlimited supply of licenses are available and any qualified applicant can obtain the largess. A driver's license, for example, is largess issued in unlimited numbers to qualified applicants which has no value and is not transferable by gift or sale, assignable, or devisable. Conversely, if the government entity limits or caps the number of licenses available for issuance, the licenses will accrue an artificial value and license holders will most likely desire to start trading, selling, transferring, assigning, or devising the license because of the license's artificial value. In most jurisdictions taxicab licenses are an example of largess which is limited in quantity. New York City, Chicago, and the County, where taxicab licenses sell for $250,000, $80,000, and $60,000 respectively, are excellent indicators of how limiting the available license creates value in the largess.

Determining whether a government entity numerically limits the issuance of largess functions as a "railroad switch" for the remainder of the analysis; that is, if the government entity limits the number of largess available, the analysis moves to the next factor of the Model. On the other hand, if the largess is not numerically limited, an argument can be made that no compensable property interest will evolve because an unlimited number of licenses, available to all qualified applicants, means

that the largess will not accrue value. If the largess is limited, then the next item to analyze is the degree to which the government entity restricts applicant entry into the regulated industry.

Entry into the regulated industry relates to how strictly the government entity governs the criteria used to determine who is eligible obtain the largess. Where a government entity establishes applicant standards related to character, which may include criminal history and driver's license standards, financial ability, and personal credit references, the entity is further restricting the ability of applicants to obtain the largess. If, for example, the government entity imposed a standard which prohibited the issuance of largess to an applicant convicted of certain types of felonies, the largess becomes even more scarce, and, therefore, more valuable. From the point of view of the government entity, however, strict applicant standards do not create more value to the largess; instead, more rigid regulation means that the largess is less like traditional property because it is not freely available to all potential users. If the government entity strictly regulates who can obtain the largess, the next element to discuss concerns whether the government entity places restrictions on how the largess can be used.

2. The Regulatory Requirements for Operation and Use of the License

The regulatory requirements for operation and use of a license factor of the Proposed Model considers whether the government entity establishes guidelines on how or when the license can be operated and used. When a government entity adopts standards which establish the hours of operation, location of use, or user requirements after initial issuance, it is implicitly saying to the regulated industry that the license is not like traditional property because a license holder cannot exclude governmental regulation, even if the license has value. For example, when a government entity requires a taxicab license holder to charge a fixed rate, train chauffeurs who operate the taxicab, implement a management plan which contains a complaint handling and lost and found element, submit taxicab accident reports to the regulatory entity, comply with minimum insurance standards, and maintain minimum taxicab vehicle safety standards, the government entity is ensuring that the largess is operated in the "public interest," not in the interest of the license owner only. On the other hand, if little or no restrictions are placed on the use of the largess, the license holder retains more control over the use and scope of the largess, similar to the control a person exercises over private, personal property. When, therefore, a government entity establishes use and operation requirements which touch and restrict almost every aspect of the largess, the government entity is implying that the largess is not like traditional

property. Rather, the largess constitutes more of a privilege which the government entity strictly monitors and controls.

3. The Regulatory Requirements and Consequences of Involuntary License Transfer

While each element of the Proposed Model is important, the following element has greater weight than the others during the factual, balancing inquiry: Whether the government entity retains control and discretion over the ultimate fate of the largess upon involuntary cessation of the license holder's operation of the license. Assuming that all elements of the Proposed Model are met in favor of the regulated industry's claim of a compensable property interest, if the government entity revokes the licensee's ability to use or operate the largess and retains control and discretion over whether to reissue or dispose of the license, then no compensable property interest exists for the licensee under the theory that the government did not implicitly intend the recipient to have ultimate control over the continued operation of the largess.[190] Any form of government largess which, upon revocation, returns to the government entity to either reissue or dispose is not compensable property; that is, upon revocation, the license holder is left with nothing, regardless of the license holder's investment in the largess. Before April 5, 1999, if Miami-Dade County revoked a taxicab license holder's ability to operate the license, the license returned to the County to reissue or dispose; the license never remained in the public market for purchase by a qualified third party.

On the other hand, if, upon license revocation, the governmental entity does not retain final control and discretion over the license, and instead the largess remains in the public market for purchase by a qualified third party, the government entity implicitly intended the largess to remain private property, similar to real or personal property.[191] A taxicab

190. *See* Gluck v. City of Syracuse, 665 N.Y.S.2d 135, 136 (N.Y. App. Div. 1997) (holding that airport medallions did not create a vested property right because the City issued the medallion for a vehicle, not a person and, upon transfer or destruction of the vehicle, had to be surrendered back to the City). In addition, the court explained that because the "Chief of Police had full discretion to determine the number of medallions . . . the medallions lacked an essential quality of 'investment-backed expectations' that must be compensated if taken by the City." *Id.* at 136.

191. In New York City, where a taxicab medallion is intangible property, when the City revokes a taxicab license, the owner must divest himself of any interest in the license; however, the City never regains possession of the license. *See* King Victor Taxi Corp. v. New York City Taxi & Limousine Comm'n, 654 N.Y.S.2d 358, 359 (N.Y. App. Div. 1997) (holding that divestiture requirement is not so disproportionate as to shock one's sense of fairness); Boiadjian v. New York City Taxi & Limousine Comm'n, 663 N.Y.S.2d 176, 177 (N.Y. App. Div. 1997) (ruling that taxicab owners who fraudulently removed vehicle identification numbers from taxicabs must divest themselves of any interest in the taxicab license); Mystic Cab Corp. v. New York City Taxi

medallion in Chicago and New York always remains in the public market, even if the license is revoked.

B. Reasonable Expectations of the Regulated Industry

The second prong of the Proposed Model relates to the regulated industry's reasonable expectations: Could the regulated industry and those industries connected with the regulated industry, e.g., lending institutions, reasonably expect that the largess is a compensable property interest. To claim "reasonable expectations," the regulated industry must be able to demonstrate some action or inaction by a government entity which caused the regulated industry to rely upon the existence of a compensable property right in the largess. The elements necessary to evaluate the reasonableness of the industry's expectations include the following factors: (a) statements or actions, either written or verbal, indicating that the government entity considers the largess a compensable property interest; and (b) conduct on the part of industries closely connected to the regulated industry, such as lending institutions, which indicate they consider the largess to be collateral to secure repayment of a loan. The regulated industry's expectation that the largess in a compensable property interest must be reasonable in light of all the circumstances surrounding the regulated field.

1. Governmental Conduct Which May Lead to Reasonable Expectations

Governmental action or inaction which may lead a regulated industry to reasonably expect that largess is a compensable property interest concerns the relationship between conduct and reliance. For example, the regulated industry may view the ability to transfer, sell, devise, or assign largess as affirmative conduct on the part of the government entity which is sufficient to foster reliance by the regulated industry that the largess is a compensable property right. On the other hand, a government entity may deny the regulated industry's "reliance interests" on specific conduct because participants in a highly regulated field should know that relying on a regulatory system in constant flux is not reasonable.

The "reasonable expectations" prong is crucial, because unless a qualified, commercial lending institution considers the largess to be a form of intangible property, the likelihood of the lending institution loaning money for the purchase of the largess is slight. If the holder of largess knows that a lending institution will not loan money for the purchase of the largess and use the license as collateral to secure repayment of a loan,

& Limousine Comm'n, 663 N.Y.S.2d 539 (N.Y. App. Div. 1997) (directing taxicab owners to sell their taxicab medallions because they submitted fraudulent worker's compensation certificates).

the license holder may reasonably expect that the largess is not a sufficiently definite property interest to assert a takings claim.

C. Application of the Proposed Model

If we apply the Proposed Model to the County's taxicab regulatory system before April 5, 1999, one finds that the County did not explicitly create a compensable property interest in a taxicab license. The next step, therefore, is to examine each element of the "nature of the regulatory system" and "reasonable expectations" prongs of the Proposed Model. Because the County limited the number of licenses, creating an artificial value and permitted the license holders to sell, give, or devise the licenses, the taxicab license holders can argue that these government actions implicitly created a compensable property interest in a taxicab license. On the other hand, because the County strictly regulated entry into the field and established operating standards for taxicabs, the County can argue that a taxicab license is a stringently controlled privilege. The key ingredient, therefore, relates to who retains control and discretion over the operation taxicab license when the license is revoked. Since the County maintained strict control and discretion over the final use of the license upon revocation, which also negatively influences the parties' "reasonable expectations" that the license is similar to traditional property, the County can tip the balance in its favor.

Conversely, when applying the Proposed Model to the Chicago's taxicab regulatory system, one finds that Chicago's regulatory system meets all elements of the test favoring a compensable property interest, including the element relating to Chicago relinquishing control and discretion over taxicab medallion upon revocation of the license. According to the Proposed Model, therefore, a Chicago taxicab license implicitly evolved into a compensable property interest.

The Proposed Model can be applied to other forms of largess, including driver's licenses, welfare benefits, hunting licenses, liquor licenses, and pilot licenses. Assume, for example, that a government entity issues hunting or fishing licenses in limited numbers, permits the licensee to transfer the license, and restricts market entry and use of the license. If the government entity revokes either license, the license is void and cannot be used by any other licensee. In effect, the government entity retained final control and discretion over the operation of the hunting license, never implicitly intending to grant a compensable property interest because the government entity has the discretion to simply reissue or dispose of the license.

VII. CONCLUSION

A taxicab license, like other largess, is a valuable asset to the license holder, whether it is considered a privilege or a property interest. As this Comment illustrates, in the arena of taxicab licenses, the vast majority of jurisdictions deem a taxicab license not to be a compensable property interest.

Determining when, how, or if a governmentally conferred benefit, permit, or license implicitly evolves into a Fifth Amendment, compensable property interest is important in today's environment of increasing governmental regulation of activities relating to the public's health, safety, and welfare. Recognizing compensable property interests in largess may create a substantial limitation on subsequent government regulation, effectively binding the hands of a government entity to enact future legislation designed to serve the "public interest."

When regulatory authorities do not explicitly define largess as a compensable property interest, the licensee is likely to expect some constitutional protection, especially if the government entity implicitly treats the largess as property. By using the Proposed Model's factual, balancing inquiry, which considers a number of important elements, the extent of such constitutional protection will depend on the "nature of the government entity's regulatory system" and the "regulated industry's reasonable expectations" that the largess is a compensable property interest.