

State Supreme Courts and American Transportation Policy in the Jacksonian Decade

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I. "TRANSPORTATION IS CIVILIZATION"¹

Postcolonial Americans experienced dramatic change in all aspects of societal life. In particular, crucial developments in the means of transportation were materializing at a rapid pace. America was, after all, a new nation characterized by a large sparsely populated land mass. Transportation developments were essential to the very success of the enterprise known as the United States.² The future of trade and general economic

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1. Rudyard Kipling, *With the Night Mail*, *McLURE'S MAGAZINE* (1905), reprinted in *FORGOTTEN FUTURES, THE ONLINE COLLECTION OF FORGOTTEN FUTURES* (Marcus L. Rowland ed. 1993), <http://forgottenfutures.com/game/ff1/night.htm> (last visited Feb. 4, 2006) (observing in this article that transportation is civilization).

2. See JOHN MAYFIELD, *THE NEW NATION 1800-1845*, at 66 (David Herbert Donald ed., rev. ed. 1982) (stressing the linkage between transportation and economic growth and even democracy itself).

growth of the country were closely tied to advances in technology and the formulation of a transportation policy for the new country. A significant and well-studied aspect of the formulation of policy in this area centers around the debate over private versus public development of technological advances.³ In fact, the real progress in transportation policy in the first half century after the ratification of the Constitution came through private as well as governmental efforts. Both private companies and, in particular, state and local governments acted to move beyond the “somewhat haphazard system of wagon roads, canals, and ferries [used] to move people and goods from place to place” in the early part of the nineteenth century.⁴ These efforts ushered in the American Transportation Revolution—a period of amazing developments in transportation from approximately 1815 to 1860.⁵

Certainly, the new national government was also involved in early transportation efforts. Federal subsidies were involved in such projects as Zane’s Trace (1796),⁶ the Natchez Trace (1803),⁷ and the Cumberland Road (1806).⁸ However, as noted by Robert Dilger, a scholar of American transportation policy, “[M]ost bills authorizing the expenditure of national government funds for transportation projects were vetoed by presidents convinced that the bills were unconstitutional infringements on states’ rights.”⁹ The presidents that Professor Dilger refers to are Presidents Madison, Monroe, and, in particular, Jackson.¹⁰ With regard to Jackson, Dilger argues that “President Andrew Jackson’s (D, 1829-1837) election and the ascendancy of the Democratic Party and its advocacy of states’ rights slowed the national government’s increased involvement in transportation policy for nearly a generation.”¹¹

Two specific events occurred during the Jacksonian decade that played a significant role in the federal government’s departure from the transportation policy business. First, President Jackson vetoed the Maysville Road project in 1830.¹² Second, the National Road project was

3. See ROBERT JAY DILGER, *AMERICAN TRANSPORTATION POLICY* 4 (2003).

4. *Id.* at 5.

5. See GEORGE RODGERS TAYLOR, *THE TRANSPORTATION REVOLUTION 1815-1860, THE ECONOMIC HISTORY OF THE UNITED STATES SERIES* (vol. IV 1951).

6. DILGER, *supra* note 3, at 6.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 6-7.

11. *Id.* at 7. President Madison vetoed a Bill authorizing the use of dividends from National Bank stock to fund road construction. In Madison’s view, the plan went beyond the constitutional powers of the national government. Similarly, President Monroe vetoed legislation that provided for the collection of tolls on the National Road. Monroe believed that collection of national tolls on state land would be a violation of state sovereignty. *Id.* at 6-7.

12. *Id.* at 7. The Maysville Road project was a sixty-four-mile extension of what was eventu-

turned over to the states in 1834.¹³

In the end, the early role of the national government in transportation policy can be characterized as limited and indirect.¹⁴ Therefore, the utilization of new technologies and the development of transportation policy was largely left to the state and local governments and private enterprise. This mix of public and private policy concerns at the state and local level was the primary source of development in American transportation in the antebellum period.¹⁵

The conventional approach to the study of these advances in transportation has been to examine the actions of private enterprise as well as the initiatives of the legislative and executive branches at the state level.¹⁶ Indeed, the actions of industry and these governmental institutions did much to affect changes in the means and policies of transportation in the early history of the United States. On the other hand, formulation of transportation policy issues was not only the province of state legislatures and executives. State courts also faced issues tied to the development of new transportation technologies and policies. A look at the role of the state courts in addressing transportation related issues offers a means to better understand the changes that occurred in transportation during this early developmental period. The transportation issues of the times came under review in the everyday, routine disputes brought before the courts of the American states. An evaluation of these early cases is thus crucial to understanding this development.

The research project presented in this Article was based on a keen interest in the role of law and the courts as institutions within society. The research performed was aimed at gaining insight into how courts interact within a society undergoing significant change and how these institutions act in the process of policy formulation. More specifically, this

ally known as the National Road. This roadway, which received early federal funding for various sections, offered a means of trade and expansion by linking the East Coast with the Northwest Territories. President Jackson vetoed funding for the Maysville section based on his view that since the project was wholly on state land it was an internal improvement and outside federal purview. *Id.*

13. *See id.* Of course, this national versus state authority issue had been a constant source of debate stemming back to the Federalists and Anti-Federalists writings in the early days of the nation and the struggle over the ratification of the Constitution. Jackson's views of state sovereignty accompanied by his veto action stymied efforts for a national transportation policy and put state and local policy makers in charge of the transportation policy for years to come.

14. *Id.* at 8.

15. *See id.* at 10.

16. *See generally* TAYLOR, *supra* note 5; SEYMOUR DUNBAR, *A HISTORY OF TRAVEL IN AMERICA* (1915); CAROLINE E. MACGILL UNDER THE DIRECTION OF BALTHASAR HENRY MEYER, *HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860* (1948); J. L. RINGWALT, *DEVELOPMENT OF TRANSPORTATION SYSTEMS IN THE UNITED STATES* (William N. Parker ed., reprint 1966) (1888).

relationship was examined through the review of all decisions reached by six American state supreme courts during the period of 1828 through 1837, a period commonly referred to as the Jacksonian decade. The six target states were: Missouri, Ohio, North Carolina, Massachusetts, Pennsylvania, and Louisiana.¹⁷ The focus of this particular article is the interaction between society and the state supreme courts of the six states listed with respect to matters of transportation policy, an interaction which offers a view of everyday transportation issues faced by Jacksonian society. It also reveals the role of the state supreme courts in addressing transportation changes and forming transportation policy through judicial decisions.

II. RESEARCH DESIGN

The research upon which this article is based was centered on the idea that the study of events in extraordinary times provide valuable insight into how institutions and societies relate.¹⁸ With respect to extraordinary times, the Jacksonian decade spans a period of considerable and well documented change in American society. The period of the Jackson Presidency was at the center of an era of far reaching changes of real importance for the United States. As described by two well-known historians, Jackson's "election of 1828 was like an earthquake" on the American scene.¹⁹ This shaking of the foundations that surrounded the 1828 election was accompanied by significant economic, political, and social change.²⁰ These important economic and social changes accompanied the virtual revolutions in transportation, industry, and demographics of the period.²¹ Given such significance, it is no small wonder that the

17. The six states—Missouri, Ohio, North Carolina, Massachusetts, Pennsylvania, and Louisiana—were non-randomly selected to offer a cross-section of states (e.g. old-new, north-south, east-west, rural-commercial) of the antebellum period. Additionally, the states offer a cross-section of various transportation contexts (e.g. coastal, river, mountainous and plain).

18. See PETER GOUREVITCH, *POLITICS IN HARD TIMES: COMPARATIVE RESPONSES TO INTERNATIONAL ECONOMIC CRISES* (Peter J. Katzenstein ed., University of Michigan Press 1996) (1986). Gourevitch's research approach uses comparative national policy within the historical context of economic crisis. Gourevitch's method presents an analytical framework for better understanding the politics and societal relationships as well as other variables involved in national and international political economies. A basic tenet of this approach is the assumption that hard times produce stress and that this stress can expose the inner workings of the policy decision institutions. Stress is what makes such a period "extraordinary." *Id.* See also Rogers M. Smith, *Science, Non-Science, and Politics*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 119, 147 (Terence J. McDonald ed., 1996). Smith notes, in a discussion of historical analysis and the new institutionalism school of thought, that periods of revolutions and new foundings may be especially important times for research. He calls these periods "extraordinary." *Id.*

19. ALLEN NEVINS & HENRY STEELE COMMAGER, *A POCKET HISTORY OF THE UNITED STATES* 164 (9th rev. ed., Pocket Books 1992) (1942).

20. See *id.* at 169-74.

21. See Douglas T. Miller, *The Birth of Modern America, 1820-1850* (1970), in *THE NATURE*

Jacksonian Era has been a continuing subject of study since Alexis de Tocqueville and others of that period recorded contemporaneous observations of antebellum America and the societal changes of the times. It is just such a period that presents a society and its courts with issues resulting from the stress of change—change like the development of transportation policy that is responsive to the needs of a new nation.²² This is why the Jacksonian decade was selected. It was a period located in roughly the middle third of the 1815-1860 Transportation Revolution.²³ The method of study employed in this research is essentially a close examination of the relevant court decisions of the times.

State supreme court case decisions offer a valuable lens for the study of law in American society. The central role of courts and law in American society has been the subject of considerable scholarly discussion, especially from the institutional perspective. For example, J. P. Nettl, in his classic essay “The State as a Conceptual Variable,” argues that law in America acts as the functional equivalent of the European state.²⁴ With regard to development in the early American republic, including the Jacksonian Era, the courts and the law have been regarded as having particular significance. Stephen Skowronek’s classic 1982 study of the development of the American state considers the state courts and parties of the early American republic as the primary institutions of the early American state.²⁵ Also, Tocqueville noted the importance of judge-made law in America in his oft quoted observation: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”²⁶ A study of court decisions, especially decisions from the highest state courts, can shed light on policy development in American society, in general, and American transportation policy, in particular.

In addition to selecting a timeframe for study (the Jacksonian decade) and a unit of analysis (state supreme court decisions), a framework of analysis was also selected. A framework offers a means of evaluating

OF JACKSONIAN AMERICA 3, 5 (Douglas T. Miller ed. 1972); see also Michael Chevalier, *Railroads in America* (1839), in *THE NATURE OF JACKSONIAN AMERICA* 17, 17 (Douglas T. Miller ed. 1972).

22. Chevalier, *supra* note 21, at 17. In commenting on the observations of Frenchman, Michael Chevalier and his travels in antebellum America, historian Douglas Miller notes that the transportation revolution was “[c]entral to the restless optimism of the Jacksonian Americans.” *Id.*

23. *See id.*

24. J. P. Nettl, *The State as a Conceptual Variable*, 20 *WORLD POL.* 559, 586 (1968).

25. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE, THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877 – 1920*, at 37 (1982) (discussing in chapter 2 the years of the Early Republic).

26. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Phillips Bradley ed., vol. I 1959).

the role of court decisions in the policy making process. One such framework can be found in a paper written by Dr. Harry N. Scheiber, the Riesenfeld Professor of Law and History at the Boalt Hall School of Law, University of California at Berkeley. In the paper, Professor Scheiber makes the point that the issues debated during the Transportation Revolution were not the same at the federal and state levels.²⁷ The national debate centered primarily on issues of federalism.²⁸ Controversies over transportation policy that arose at the state level involved practical issues stemming from the new developments in transportation itself.²⁹ Scheiber outlines five major categories or topics of concern regarding transportation policy issues that were of particular significance at the state level.³⁰ Scheiber's categories have been adopted as framework issues for this article's research. Given that these issues were the key transportation policy concerns for the states during the revolution, state supreme court decisions addressing these framework issues are evidence of the courts' participation in the formation of transportation policy. Based on Scheiber's work, the categories of framework issues examined in this study of state supreme court decisions of the period include:

Category 1 Allocation: the allocation of authority and responsibility for transportation improvements among the national, state and local governments.

Category 2 Prioritization: the prioritizing of planning goals, particularly balancing rationality and fairness concerns.

Category 3 Financing: the means of financing transportation improvements.

Category 4 Privileges, Immunities, and Responsibilities: the application of privileges, immunities, and responsibilities between various entities involved in transportation matters.

Category 5 Legal Matters: the consideration of specific public and common law causes of action and procedures in light of the new developments in transportation.³¹

These five categories provide a shorthand to capture the essential issues surrounding the development of an American transportation policy as the new nation faced growth and expansion. The policy that resulted from addressing these issues during the antebellum period, including the

27. See generally Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy*, in *TRANSPORTATION AND THE EARLY NATION* 1 (1982) (providing an overview and appraisal of the Transportation Revolution in American law by examining the National Arena, the Supreme Court and Formal Law, and then the State Arena).

28. *Id.* at 18.

29. *See id.* at 1, 18-22.

30. *Id.* at 18.

31. *See id.* While patterned after Scheiber's categories, my categories are somewhat broader than the originals.

Jacksonian decade, deeply affected the overall development of the United States. To the extent that these framework issues were addressed and shaped by the states through their courts, the study of state supreme court decisions with respect to transportation policy can offer a means to better understand the overall development of the states and the nation. These categories serve as a starting point for this analysis. While a court's decisions may address only one or, on the other hand, several of the categories, close examination of how these particular issues are addressed will help explain the courts' role in the development of American transportation during the early years after independence.

This paper is based on a database created from a review of all of the reported decisions of the supreme courts from each of the six target states issued during the Jacksonian decade. The source for the court decisions were the official state reporters. The research database consists of categories or data points of information observed in each of the reported decisions.³² After each decision was reviewed, the resultant information was recorded in a specially formulated relational database using data point entries. The data points described the courts' decisions from various perspectives. Additionally, the database has a section for recording the rationales used in each decision. Using this database, it was possible to isolate those decisions that addressed transportation in the new nation.

III. FINDINGS

The basic findings regarding state supreme courts and transportation related case decisions can be expressed in a simple tabular format. First, the number of case decisions in each of the original six target states differed during the Jacksonian decade. As Table 1 indicates, the number of overall case decisions reported in my target states for the Jacksonian decade varied from 428 decisions in Missouri to 2007 in Louisiana. The total number of Jacksonian decade decisions for the six target states is 7200.

TABLE 1 NUMBER OF CASE DECISIONS IN SIX TARGET STATES IN THE JACKSONIAN DECADE

Total Decisions	MO	OH	NC	MA	PA	LA
7200	428	488	989	1593	1695	2007

Tables 2, 3, 4, 5, and 6 provide more specific details regarding the

32. The areas of law used in my database are generally the same classifications used by Robert Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler in their longitudinal state supreme court database. See Robert Kagan et al., *The Business of State Supreme Courts, 1870 - 1970*, 30 STAN. L. REV. 121 (1977).

number of transportation related cases decided by the target state supreme courts during the decade. Supreme court decisions that addressed canal issues, railroad issues, and highway (including turnpikes, streets, and roads) issues were used as a means to identify transportation related cases for the period.

TABLE 2 TRANSPORTATION RELATED DECISIONS DURING THE JACKSONIAN DECADE - CANALS

Target States	MO	OH	NC	MA	PA	LA	Overall
Canals/All Decisions	00/428	06/488	00/989	02/1593	06/1695	01/2007	15/7200
Percentages	00%	01.23%	00%	00.13%	00.35%	00.05%	00.21%

TABLE 3 TRANSPORTATION RELATED DECISIONS DURING THE JACKSONIAN DECADE - RAILROADS

Target States	MO	OH	NC	MA	PA	LA	Overall
Railroads/All Decisions	00/428	01/488	00/989	01/1593	02/1695	02/2007	06/7200
Percentages	00%	00.2%	00%	00.06%	00.12%	00.10%	00.08%

TABLE 4 TRANSPORTATION RELATED DECISIONS DURING THE JACKSONIAN DECADE - HIGHWAYS

Target States	MO	OH	NC	MA	PA	LA	Overall
Highways/All Decisions	02/428	04/488	06/989	77/1593	36/1695	10/2007	135/7200
Percentages	00.47%	00.82%	00.61%	04.83%	02.12%	00.50%	01.88%

TABLE 5 TRANSPORTATION RELATED DECISIONS DURING THE JACKSONIAN DECADE - ALL

Target States	MO	OH	NC	MA	PA	LA	Overall
Transportation/All Decisions	02/428	11/488	06/989	80/1593	44/1695	13/2007	156/7200
Percentages	00.47%	02.25%	00.61%	05.02%	02.60%	00.65%	02.17%

IV. CASE DECISIONS

As noted in the findings section, the six target state supreme courts reported 7200 total decisions for the Jacksonian decade. Of these, only 156, or slightly over two percent, were transportation related. Certainly, the number of transportation case decisions is small. This is not surprising, however, when the dramatic changes of the Transportation Revolution are considered. Debates regarding transportation policy took place in all branches of government and at all levels, and were not always resolved in the courts. This small number of decisions suggests that, while the state supreme courts of the period did address transportation issues, parties were not litigating every transportation dispute they experienced at this early stage. However, an examination of the decisions in these cases does reveal the type of transportation issues brought to these supreme courts during the stress of the Jacksonian decade, as well as the reasoning of the deciding courts. This Article focuses on a selection of approximately ten percent of these transportation related decisions, at least one from each target state. These case decisions are presented as a means of exploring how the judiciary can shed light on the transportation changes in the period, as well as the relation between American society and the institution of the state supreme courts. The courts' written opinions are quoted extensively in an effort to present, in the judges own words, a better picture of the transportation policy questions of this period as well as the resolutions reached.³³ Additionally, using the five issue categories suggested by Harry Scheiber's work as a framework for analysis, the decisions can show just how these state supreme courts participated in the development of transportation policy during this critical period. In fact, these decisions demonstrate that the state supreme courts did indeed address the core issues of the Transportation Revolution.

A. MISSOURI

The Missouri Supreme Court addressed transportation matters in just 2 of 428, or 0.47%, of its decisions during the Jacksonian decade.³⁴ These decisions in general address policy issues involving the building and protecting of public highways. Perhaps the most significant case, with respect to transportation policy, is the 1831 case of *Pearce v. Myers*.³⁵ The *Pearce* case involved an action for recovery of the statutory penalty for placing obstructions in a public road.³⁶ The defendant lost the case

33. These quotes offer direct evidence of the courts' view of the transportation issues raised by Jacksonian society and the rationale of the courts in resolving these issues.

34. See *supra* Table 5.

35. *Pearce v. Myers*, 3 Mo. 31, 31 (1831).

36. *Id.*

before a justice of the peace and appealed to the circuit court.³⁷ The circuit court ruled that there was no avenue of appeal in such cases.³⁸ On appeal of the circuit court's decision, the Missouri Supreme Court first explained the penalty statute and its private citizen prosecution provision. The court then ruled that, while the case was in fact appealable, it should have been set aside for want of proper procedures, stating:

The law clearly intends that some [private] person shall prosecute for the penalty, to the half of which he will be entitled. In this case the process of the justice was utterly void for want of parties, and the Circuit Court instead of dismissing the appeal, should have entertained jurisdiction, and set aside the proceedings before the justice.³⁹

In this decision, the Missouri Supreme Court affirmed an enforcement scheme for protecting roadways that relied on citizen prosecutors rewarded with part of any resultant fine.⁴⁰ The *Pearce* case highlights a method of private enforcement of transportation related public law penalties.⁴¹ This enforcement scheme reflects the limited availability of Missouri governmental resources for enforcement action regarding transportation matters. The case decision demonstrates that the court considered the legal procedures of the day that allowed for citizen enforcement regarding transportation related penalties, a legal matters (Category 5) framework issue.⁴² Here, the court's decision offers support for a transportation policy that relies on a penalty-reward system.

B. OHIO

The Ohio Supreme Court reviewed transportation matters in 11 of 488, or 2.25%, of its Jacksonian decade decisions.⁴³ A review of these cases reveals public versus private policy issues dealing with the operation and maintenance of canals, railroads, and highways. For example, in the case of *Arnold v. Flattery*, the Ohio Supreme Court reviewed a dispute over whether a public rather than a private highway existed over the land of the plaintiff.⁴⁴ In this action for trespass, the court determined that evidence of long-term use supported the claim that the property was public and not private:

Where a road has been laid out in the manner prescribed by law, opened and used many years, it can not be allowed that it shall be suddenly closed by any

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See *supra* text accompanying note 31.

43. See *supra* Table 5.

44. *Arnold v. Flattery*, 5 Ohio 271, 273 (1831).

individual through whose land it passes, on the hypothesis that the road used does not exactly follow the courses and distances of the recorded survey. Nor can it be required, after the lapse of many years, that to sustain a public road every preliminary step directed to be taken in establishing it must be proven by existing papers or records.⁴⁵

Here, the Ohio Supreme Court afforded public road status to a road that had become public in practice even if some of the formalities were not followed.⁴⁶ In so ruling, the court keeps the road open to the public and not subject to private closure.⁴⁷ This decision addresses issues regarding prioritizing interests (Category 2), allocating privileges (Category 4), as well as matters related to legal evidence (Category 5). In particular, the *Arnold* decision appears to lean toward giving fairness to the public a high priority (Category 2).⁴⁸ The court's decision demonstrates that, with respect to the issue of what has priority in transportation policy, the public interest ranks high on the list.⁴⁹ This type of decision supported, and perhaps even fostered, a transportation policy emphasizing increased roadway mileage for the developing State of Ohio, as well as the nation.

In the case of *Bates v. Cooper*, the owner of the reversion in certain property brought an action against a superintendent of the Miami Canal for unlawful entry and digging up soil on the property.⁵⁰ The soil was taken for the purpose of repairing parts of the canal pursuant to an Ohio statute.⁵¹ The plaintiff challenged the constitutionality of the takings statute.⁵² In its decision, the Ohio Supreme Court reviewed the statute and considered both private rights and public interests within the context of transportation policy issues, stating:

The constitution must receive a construction that will leave it possessed of practical utility. The public interest is to be promoted while private rights are secured – but can it be for a moment supposed that a road or canal of general importance to the community should be interrupted or suspended at the capricious will of an individual? . . . The statute must receive such a construction as looks to the accomplishment of the great objects the legislature had in view, and not such a one as would make it powerless to attain to that end. The object was the structure and maintenance for use of navigable canals If the authority to take the materials for the prosecution of the improvements intended by the act does not embrace cases of causal sinking of the banks and repairing breaches, we are at a loss to discover its practical

45. *Id.*

46. *See id.* (refusing to convert the public road to a private road simply because it does not “follow the courses and distances of the recorded survey.”).

47. *See id.*

48. *See supra* text accompanying note 31.

49. *See supra* text accompanying note 31.

50. *Bates v. Cooper*, 5 Ohio 115, 116 (1831).

51. *Id.* at 116.

52. *Id.* at 117-18.

benefit. Such a construction would be altogether too narrow for the liberal policy of the act, and would warrant the setting up of a petty private interest in opposition to the great interests of the whole people of the state.⁵³

Here, the Ohio Supreme Court found ample protection for private landowners in provisions of the state's takings statute and supported a policy favoring the canal building enterprise as a part of the public interest.⁵⁴ The *Bates* decision examined the legislature's support of the canal and considered issues of prioritizing the interests involved in the project (Category 2) and the applicability of privilege (Category 4).⁵⁵ The court also considered the question of the legal liability of the canal builder (Category 5).⁵⁶ The court was keenly aware of the benefit to the community that comes from a supportive transportation policy.⁵⁷ The *Bates* decision suggests that the public interest in developing modes of transportation was viewed as a high priority in deciding transportation related disputes.⁵⁸ The decision demonstrates the court's view that this high priority status is part of the intent of the Ohio legislature that should be supported by the courts.

C. NORTH CAROLINA

The North Carolina Supreme Court decided transportation related issues in 6 of 989, or 0.60%, of its decisions during the Jacksonian decade.⁵⁹ These decisions address various policy issues, including the operation and maintenance of the highways. For example, in 1834, the North Carolina Supreme Court reviewed a case that raised the question of whether a carriage used for the transportation of the mail as well as passengers was subject to the toll on a corporate turnpike. In its decision in *Buncombe Turnpike Co. v. Newland*, the North Carolina Supreme Court examined the boundary between the public and the private within the scope of transportation policy, providing:

As the record speaks, the single question is, whether by the terms of the charter, the plaintiffs can recover in this action a toll on a carriage belonging to the defendant which is called a *mail stage* We have found no act of Congress exempting persons or carriages engaged in the business of the post office, from the payment of tolls for passing ferries, bridges or roads. As

53. *Id.* at 118-20.

54. *See id.* at 120.

55. *Id.* at 118; *see also supra* text accompanying note 31.

56. *Bates*, 5 Ohio at 118-20.

57. *See id.* at 119-20 (determining that the purpose of the statute was structure and maintenance for use of navigable canals and recognizing that the superintendent of the Miami canal was "engaged in the construction of a great public improvement, for the sole benefit of the state.").

58. *See id.*

59. *See supra* Table 5.

such tolls are granted as the price of constructing and repairing those public accommodations, and are necessary for those purposes, and to no establishment are such facilities more indispensable than to the post office itself, it is probable that no such act ever has been, or ever will be passed It is true the road is a highway, but not a common and free highway. It was constructed by the plaintiffs at their own expense, and is to be kept in repair by them for a long period under heavy penalties. As compensation for their services, and as reimbursement of their expenditures, the tolls are granted It is not to be presumed, that passage to any person or thing was intended to be toll free, unless either there be a special exception, or they cannot reasonably be brought within the meaning of general terms descriptive of the subjects made liable to tolls The owners of the road have a fair right to remuneration from all who derive a benefit from their labour.⁶⁰

In this decision, the court discussed several issues that fit into the five category issue framework. For example, it addressed allocation of authority issues related to federal law and the required payment of tolls (Category 1) and the prioritizing of the interests of the landowner and road builder (Category 2).⁶¹ The decision also specifically addressed a Category 3 financing question—a key aspect of transportation policy.⁶² In the end, the court was supportive of the costs incurred by the turnpike company and held that a fair remuneration was required.⁶³ Obviously, consideration of the costs of building a completely new transportation system, often from scratch in a wilderness setting, was an important aspect of the transportation policy of the Jacksonian decade. In *Buncombe Turnpike*, the court discussed the framework issues of federalism and concerns regarding the balancing of interests.⁶⁴ However, in the end, the court's decision was particularly supportive of the effort to build the transportation infrastructure necessary for the growing State of North Carolina and the nation.

D. MASSACHUSETTS

The Massachusetts Supreme Court of the Jacksonian decade addressed transportation matters in 80 of 1593, or 5.02%, of its reported decisions.⁶⁵ This is compared to an overall average of 2.17% for all of the six target states.⁶⁶ These transportation related decisions provide insight into some of Massachusetts' transportation policies regarding the mainte-

60. *Buncombe Tpk. Co. v. Newland*, 15 N.C. (4 Dev.) 463, 464-67 (1834) (alteration in original).

61. *See id.*; *see also supra* text accompanying note 31.

62. *Buncombe Tpk.*, 15 N.C. at 463-64; *see also supra* text accompanying note 31.

63. *Buncombe Tpk.*, 15 N.C. at 464.

64. *See id.* at 463-464.

65. *See supra* Table 5.

66. *Id.*

nance and operation of the canals, railroads, and highways of the Jacksonian decade. For example, one case from 1829 involved issues of the extent of authorized activities for a turnpike corporation. In the case of *Tucker v. Tower*, a plaintiff landowner brought a trespass action against a turnpike company for digging pits, cutting down trees, and erecting a house for a toll collector on his property.⁶⁷ The plaintiff, who had consented to the use of his land by the company for all legal purposes, claimed that the company only had an easement on the property and that their activities went beyond what was legally authorized.⁶⁸ The Massachusetts Supreme Court's decision considered the needs of the public and took a broad view regarding the activities necessary to support a turnpike:

It is too clear to require any discussion, that the proprietor of land over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any corporation by authority derived constitutionally from the legislature The right was given to appropriate the land of the plaintiff for the purposes mentioned in the act, and he having been indemnified for this use of his property, the corporation had a right to erect their gate across the *locus in quo*, and to demand toll at that gate The ground taken by the plaintiff is founded upon a supposed limitation of the right of the corporation to use the surface of the land only for the purpose of travel; but we do not understand their right to be so limited, but that they may make such use of the land below the surface as may be necessary to secure and maintain the proper enjoyment of their franchise.⁶⁹

In this case, the toll road construction received support from the Massachusetts Supreme Court.⁷⁰ Despite the objection of the private landowner, the court broadly interpreted the extent of required construction activities.⁷¹ The *Tucker* decision prioritized interests in favor of the corporation—a prioritization consideration (Category 2).⁷² The decision also provided for legal protection of the developers (Category 5) in broadly interpreting the legal definition of an easement.⁷³ While the court discussed the dispute in terms of the opposing interests of the landowner and the corporation and ruled in favor of the corporation's enjoyment of the franchise,⁷⁴ the net result was an enhancement of a

67. *Tucker v. Tower*, 26 Mass. (9 Pick.) 109, 112 (1829).

68. *Id.* at 111-12.

69. *Id.*

70. *Id.* at 113.

71. *See id.* at 112.

72. *See id.*; *see also supra* text accompanying note 31.

73. *Tucker*, 26 Mass. (9 Pick.) at 112.

74. *See id.* at 110.

transportation policy climate that encouraged the development of transportation within Massachusetts and the nation.

Also decided in 1829, the case of *Parks v. Mayor of Boston* involved the authority to lay out and alter streets in Boston.⁷⁵ A store owner challenged the decision of the officials of Boston to widen certain streets, taking away part of the petitioner's store in the process.⁷⁶ The immediate issue before the Massachusetts Supreme Court was whether the store owner's petition for a writ of certiorari was the appropriate legal means to challenge the local decision making process regarding the streets of Boston.⁷⁷ In its decision, the Massachusetts Supreme Court addressed the nature of the official street modification process after finding that the question is judicial and, thus, the resultant policies are reviewable by the court.⁷⁸ The court stated:

We cannot doubt that the power thus conferred is judicial The error assigned is, that the petitioner's land was taken for the accommodation of private individuals, and not for public uses, in violation of the 10th article of the declaration of rights. But this we think has not been made to appear. The record shows that the mayor and aldermen have adjudicated on the subject, and that they expressly resolved that the public safety and convenience required that the street in question should be widened If the public necessity and convenience required the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit. A street or highway is not the less public, because it accommodates some individuals more than others, for this is the case in regard to all streets and ways⁷⁹

In this case, the Massachusetts Supreme Court rejected claims by private landowners that special interests had influenced the city's road widening project.⁸⁰ The court found that, if public interest is served, funding sources are irrelevant.⁸¹ The *Parks* decision reflects issues from a number of Schreiber's framework categories. For example, the question of the authority of the local officials to widen streets is an allocation matter (Category 1), while the question of whose interests are to be served involves prioritization (Category 2).⁸² The court also addressed a legal matters issue (Category 5) when it ruled that the question was judicial

75. *Parks v. Mayor of Boston*, 25 Mass. (8 Pick.) 218, 231 (1829).

76. *Id.*

77. *Id.*

78. *Id.* at 233.

79. *Id.* at 231-33.

80. *Id.* at 233.

81. *Id.*

82. *See supra* text accompanying note 31.

and, therefore, reviewable by the court.⁸³ The decision in this case is strongly supportive of local control of transportation matters in Massachusetts. While declaring that transportation policy issues are indeed reviewable by the judiciary, the court largely defers to the policy decisions of the local government.⁸⁴

In 1834, the Massachusetts Supreme Court decided a case stemming from an indictment for continuance of a nuisance on a highway. In *Commonwealth v. Wilkinson*, the defendant maintained certain buildings within the limits of a turnpike road.⁸⁵ These buildings were the subject of the nuisance case.⁸⁶ In its decision, the court addressed the question of whether a turnpike is a public road protected by nuisance law, stating:

But the principal question, and one which goes to the foundation of this proceeding is, whether a turnpike road in this Commonwealth, is a highway, and whether an indictment will lie against any person, for an obstruction thereon as a public nuisance. We think, that a turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance; and the cost of construction and maintenance, is reimbursed by a toll, levied by public authority for the purpose. Every [traveler] has the same right to use it, paying the toll established by law, as he would have to use any other public highway.⁸⁷

Here, the Massachusetts Supreme Court essentially removed the distinction between toll roads and public highways, thus extending state protections of public highways to toll roads.⁸⁸ In so doing, the court specifically addressed issues of privileges, immunities, and responsibilities (Category 4), as well as the law of nuisance, a legal matter (Category 5).⁸⁹ This decision offers a significant grant of protection to turnpike owners in Massachusetts. Extending the privileges and immunities enjoyed by public roads to the non-public developers of highways was a significant benefit for those engaged in private development of roads at that time.

In the following year, 1835, the Massachusetts Supreme Court decided another case that dealt with the nature of turnpikes. The case of *Hartford & Dedham Turnpike Corp. v. Baker* was a debt action brought

83. *Parks*, 25 Mass. (8 Pick.) at 231.

84. *Id.*

85. *Commonwealth v. Wilkinson*, 33 Mass. (16 Pick.) 175, 176 (1834).

86. *Id.* at 176.

87. *Id.* at 176-77.

88. *Id.* at 177.

89. *See supra* text accompanying note 31.

by a turnpike company to collect tolls for use of their turnpike road.⁹⁰ The defendant claimed that the tolls were not due because the toll-gate had been moved from its originally authorized location.⁹¹ In its decision, the court discussed the authority of a turnpike company:

[T]he plaintiffs have removed the gate to suit their own convenience or interest, without complying with the terms which the legislature have clearly and wisely pointed out. And as the plaintiffs had no legal right to remove the gate from the place where it was first put, to the place where it stood when the claim of the plaintiffs arose for tolls, we are all of opinion, that they could not there rightfully stop the defendant with his horses and wagon, and could not lawfully demand and recover toll from him at that place.⁹²

This decision demonstrates that the Massachusetts Supreme Court found some limits to its support of the actions of toll road companies. The court held that, once established, it would limit a company's discretion to modify its turnpike operation.⁹³ The *Hartford & Dedham* decision presents considerations regarding a number of Schreiber's framework issues. The decision considers the allocation of the authority of the legislature to set limits on transportation corporations (Category 1), the priority of the fairness of the situation (Category 2), as well as the extent of the privileges, immunities and responsibilities of a turnpike company (Category 4).⁹⁴ The decision also addressed the legal applicability of the terms of the company's charter (Category 5).⁹⁵ While many of the state court decisions of the Jacksonian decade appear to be supportive of the development of the transportation infrastructure—both public and private—there were limits. Here, the court did not support the corporation's action to collect more revenue than originally authorized.⁹⁶ The limits placed on the corporation, however, were not so severe as to inhibit the fostering of transportation development in the state.

Land speculation and canal building were at issue in the 1836 decision, *Cobb v. Hampshire & Hampden Canal Co.*⁹⁷ In this case, a landowner brought suit to recover land used by a canal company to build a canal that never went into full operation.⁹⁸ The canal company resisted the landowner's recovery, claiming that they had a grant of an easement under a contract between the land owner and four private individuals.⁹⁹

90. *Hartford & Dedham Tpk. Corp. v. Baker*, 34 Mass. (17 Pick.) 432, 433 (1835).

91. *See id.* at 433-34.

92. *Id.* at 434.

93. *See id.* at 432.

94. *See id.* at 433-34; *see also supra* text accompanying note 31.

95. *See Baker*, 34 Mass. (17 Pick.) at 433; *see also supra* text accompanying note 31.

96. *Baker*, 34 Mass. (17 Pick.) at 434.

97. *Cobb v. Hampshire & Hampden Canal Co.*, 35 Mass. (18 Pick.) 340, 340 (1836).

98. *Id.* at 343-44.

99. *Id.* at 343.

The decision of the Massachusetts Supreme Court considered the realities of the speculative nature of the canal building enterprise, providing:

The question submitted for the consideration of the court is, whether the evidence set forth in the report is sufficient to support the plea of grant The plea alleges a grant of a perpetual easement by the plaintiff to the defendants, embracing not only an authority to enter and excavate the canal and raise the embankments, but a perpetual right to use and improve the same, for all the purposes of a public navigable canal . . . a use so entirely incompatible with any beneficial use to be made of the land by the owner, that it is in effect equivalent to a claim of the fee But this contract, so far as it affected the rights of the company, was inchoate, executory and prospective, and a contract *inter alios* [between other persons], under which no actual rights vested in this company Under these circumstances the Court are of opinion, that this instrument cannot be relied on, as proof of a grant to the company, and that the plea is not supported.¹⁰⁰

This is another instance in which the activities of a transportation enterprise were limited by a decision of a state supreme court. Here, the company's claim of a grant from the plaintiff to use his land for canal building was rejected by the court.¹⁰¹ The court recognized the claim as part of a land speculation scheme and refused to support it. The *Cobb* decision demonstrates how the Massachusetts Supreme Court looked to the realities of the case in addressing fairness issues (Category 2) and contract legalities (Category 5) in transportation related disputes.¹⁰² This decision reflects the court's awareness of the nature of the times and the Transportation Revolution in Massachusetts. While the court may have been generally supportive of a development-oriented transportation policy, it did not turn a blind eye to the realities of speculation in the complicated financing schemes of the day.

The case of *Yale v. Hampden & Berkshire Turnpike Corp.* involved a hole in the surface of a turnpike and the fall of a horse.¹⁰³ In response to the damage suit brought by the owner of the lamed horse, the turnpike company claimed that they were without fault or negligence.¹⁰⁴ The 1836 decision by the Massachusetts Supreme Court addressed the liability standard for turnpike companies:

It is proper, in the outset, to distinguish between the legal liability of turnpike corporations and that of towns The Court are of opinion, that by this act it was intended to provide, that whenever the [traveler] himself is not chargeable with negligence or rashness, but where from an unforeseen cause the road is actually defective and in want of repair, and an accident occurs

100. *Id.* at 343, 346.

101. *Id.* at 346.

102. *See supra* text accompanying note 31.

103. *Yale v. Hampden & Berkshire Tpk. Corp.*, 35 Mass. (18 Pick.) 357, 358 (1836).

104. *See id.* at 358-59.

without the default of either party, the company should be held liable. It is founded on the consideration, that the toll is an adequate compensation for the risk assumed, and that by throwing the risk upon those who have the best means of taking precautions against it, the public will have the greatest security against actual damage and loss This construction of the statute is not likely to expose turnpike corporations to any extraordinary burden, because if there be a bridge broken down or a chasm made by floods, or other open and visible obstruction, and the [traveler] through his own negligence or rashness should fall in and suffer damage, such damage would be attributable to himself, and could not be said to arise from want of repair in the road.¹⁰⁵

The *Yale* court held the company liable for damage suffered by non-negligent turnpike customers, reasoning that the tolls collected by the company ensured it sufficient compensation to pay for such damage.¹⁰⁶ This case presented the court with a number of the transportation framework issues. In reaching its decision, the court considered priority of interests issues (Category 2), cost issues (Category 3), responsibility issues (Category 4), and assumption of risk issues (Category 5).¹⁰⁷ The decision in this case addressed an important transportation policy issue, other than the obvious questions of who regulates, who finances, and who profits from transportation development. Here, the question was: who is liable? The *Yale* court declared that the public in Massachusetts was to be afforded some protection from injury even if the transportation corporation was not negligent.¹⁰⁸

E. PENNSYLVANIA

The Pennsylvania Supreme Court addressed transportation-related issues in 44 of 1695, or 2.60%, of its decisions during the Jacksonian decade.¹⁰⁹ These cases addressed policies involving the operation and maintenance of canals, railroads, and highways. For example, in 1830 the Pennsylvania Supreme Court decided a case involving a dispute over who had authority to set specific requirements for a turnpike running through a newly incorporated town. In *Kensington District Division*, an existing turnpike company challenged the town's authority to change widths and raise road levels.¹¹⁰

In its decision regarding public rights and private property, the Pennsylvania Supreme Court viewed the turnpike corporation as an individual—with no less and no more protection than the individual from

105. *Id.* at 359.

106. *Id.*

107. *Id.*; see also *supra* text accompanying note 31.

108. *Yale*, 35 Mass. (18 Pick.) at 359.

109. See *supra* Table 5.

110. See *In re Kensington Dist. Div.*, 2 Rawle 445, 447-48 (Pa. 1830).

governmental taking.¹¹¹ At the same time, the court held that local governments had the authority to plan and lay out communities including the local roadways:

The intention of the legislator was, to give all the authority necessary to the commissioners, to lay out the town in the manner most convenient and useful to the inhabitants of the district; and in furtherance of this object, so highly beneficial to the citizens, they have vested in the surveyors full and plenary authority, liable to be reviewed and corrected in the manner therein prescribed It is a fundamental principle of all government, that the rights of individuals must yield to the general welfare, and the only security of the citizen (and in most cases it is an ample one) consists in the constitutional provision: "That no man's property shall be taken or applied to public use, . . . without a just compensation being made." And in conformity to this article of the constitution, the legislature have guarded the interests of all concerned, by declaring, "That no street, road, lane, court, or alley, shall be opened and appropriated to public use, until the owner of the ground shall be compensated for the damages he may have sustained." . . . We think it right to give the [compensation] act such a construction as to secure to the inhabitants of the district the object they had in view, and at the same time, to guard the rights of the company from violation, and secure to them such compensation as they may be justly entitled to under all the circumstances. If, as has been suggested, the property of the company has been taken in contradiction to the directions of the act, it is such an injury as may be compensated in damages in the usual manner.¹¹²

In this decision, the Pennsylvania Supreme Court expressed its view regarding governmental authority and private compensation.¹¹³ The local government, as the representative of the local citizens, was afforded broad support.¹¹⁴ The company's recourse, as with any private interest, was limited to its pursuit of compensation.¹¹⁵ In the *Kensington* case, the Pennsylvania Supreme Court explored a number of Schreiber's framework issues. In some respects, the court's decision might be viewed as primarily examining an allocation of authority issue (Category 1).¹¹⁶ However, the court also clearly considered priority of interests issues (Category 2), financing issues (Category 3) and privileges, immunities, and responsibilities issues (Category 4).¹¹⁷ In this decision, the Pennsylvania Supreme Court strongly supported local authority in formulating transportation policy.¹¹⁸ With respect to limiting the transportation re-

111. *See id.* at 447.

112. *Id.* at 447-49 (referring to the United States Constitution and state legislation).

113. *See id.*

114. *See id.* at 447.

115. *See id.* at 448-49.

116. *Id.* at 447; *see also supra* text accompanying note 31.

117. *In re Kensington*, 2 Rawle at 448; *see also supra* text accompanying note 31.

118. *See In re Kensington*, 2 Rawle at 447.

lated actions of local government, the court viewed the compensation schemes existing at the time as an adequate means of reimbursement.¹¹⁹

In 1833, the Pennsylvania Supreme Court heard an appeal stemming from a stage coach and wagon accident on the turnpike from Harrisburg to Lebanon, Pennsylvania. In *Bolton v. Colder*, a dearborn wagon was struck and upset by an overtaking mail coach.¹²⁰ The jury found for the plaintiff, the injured wagon driver.¹²¹ In its decision, the Pennsylvania Supreme Court discussed the state of the law with respect to traffic regulation on the state's highways, holding:

The movement of carriages passing on our turnpike roads in opposite directions, is regulated by special enactment; but there is no positive law to regulate the passing of those who are [traveling] in the same direction. The defendants gave evidence of its being a custom in the latter case for the leading carriage to incline to the right, the other making the transit at the same time by the left; whence it was attempted to be shown that the injury suffered by the plaintiff had been occasioned by his own neglect of this custom It was not pretended that the mail coaches are entitled to precedence, or the enjoyment of any particular privileges. They are, indeed, protected by an Act of congress from being willfully and wantonly obstructed or delayed; but in every other respect they are on an equal footing with all other carriages; and it is right, perhaps, that it should be so. Experience proves that the drivers of them are not the most eligible depositories of power; and there are few who have not to do with them either as passengers or [travelers]. The public, consequently, has an important interest in having them, in common with the drivers of other carriages, held strictly to the measure of their rights; and this can be done only by making their employers sureties for their good conduct, as far as the law permits, and liable for their acts [T]he verdict was properly rendered for such damages as will probably induce the proprietors of mail coaches to take care that their drivers be more attentive to the rights of others for the future.¹²²

The decision offers a view of how the early "rules of the road" developed. In the *Bolton* decision, the court considered the role of state and federal legislators (Category 1), as well as the privileges and immunities of the litigants (Category 4) in determining what the law should be in the relatively new area of transportation litigation (Category 5).¹²³ This decision demonstrates the early involvement of the Pennsylvania Supreme Court in the "nitty-gritty" area of traffic rules. Beyond the obvious need for definitive, well-publicized rules, the *Bolton* court recognized the power of the damage award as an inducement for proper behavior within

119. *See id.* at 448-49.

120. *Bolton v. Colder*, 1 Watts 360 (Pa. 1833) (providing background information prior to the court's opinion).

121. *Id.* (providing background information prior to the court's opinion).

122. *Id.* at 362-64.

123. *Id.* at 362-63; *see also supra* text accompanying note 31.

American transportation policy.¹²⁴

In the 1834 case of *Commonwealth v. M'Allister*, the Pennsylvania Supreme Court reviewed a damage assessment stemming from the construction of the Pennsylvania Canal.¹²⁵ In its decision upholding the damages, the Pennsylvania Supreme Court explained the basis for the reimbursement policy:

And again, I think it cannot be fairly questioned, but that it was the intention as well as the duty of the legislature, in framing the act, to provide for the state's making adequate reparation to the party injured, as soon as the extent of the damage could be fully ascertained with reasonable precision The intention of the legislature is very clearly manifested by the acts passed on this subject; and it is, that the state shall pay for every foot of land taken by her from the owner, so far as he has not been compensated for it by the advantages which may reasonably be expected to accrue to him by the canal's enhancing the value of the residue of his land.¹²⁶

This decision explained and affirmed the Pennsylvania compensation process for damages incurred in a canal building in the state.¹²⁷ In its decision, the court considered the responsibility of the state legislature in addressing damage laws and procedures within its transportation policy (Category 1 and Category 5), as well as the fairness of the compensation scheme (Category 2).¹²⁸ The court followed the policy established by the state legislature with respect to compensation and transportation development.¹²⁹ As interpreted by the court, the policy in Pennsylvania, while providing property owners with reparation, was designed to facilitate the construction of canals – an important part of the transportation infrastructure of the period.¹³⁰

Again in 1834, the Pennsylvania Supreme Court addressed the issue of compensation for damages claimed to be caused by canal activity in the case of *Union Canal Co. v. O'Brien*.¹³¹ In this case, the plaintiffs brought suit for alleged damages that arose from the erection of a dam across the Schuylkill River by the defendant, a canal company.¹³² The plaintiffs argued that the canal company went beyond its authority in erecting the dam and that the claims process set up by the statute did not apply.¹³³ The Pennsylvania Supreme Court held that the applicable stat-

124. See *Bolton*, 1 Watts at 363-64.

125. *Commonwealth v. M'Allister*, 2 Watts 190, 194-95 (Pa. 1834).

126. *Id.* at 193, 197.

127. See *id.*

128. See *id.*; see also *supra* text accompanying note 31.

129. See *M'Allister*, 2 Watts at 197, 200.

130. See *id.* at 191.

131. *Union Canal Co. v. O'Brien*, 4 Rawle 358, 359 (Pa. 1834).

132. *Id.*

133. *Id.* at 359-60.

utes, when read together, authorized the construction of the dam and established a damage redress process.¹³⁴ However, the court also required specificity in such complaints and held that the plaintiffs in this case failed to provide sufficient information to allow their complaint to move forward:

And these acts being *in pari materia*, must be construed as one act, and the remedy therefore provided by the first, may, as it appears to me, be well applied to obtain redress for such injuries as the erection of the dam shall produce immediately to the lands of the complainants, or shall in all cases of the like kind be the inevitable consequences of its erection, under the authority contained in the act of 1826 Hence it may be that the complainants in this case have sustained a damage as an inevitable consequence from the erection of the dam by the company, in having their messuage, distillery, and lot of ground constantly inundated with the water of the river, although situate at some distance from the canal, and above the dam upon the river. But it is impossible to say from anything that is stated in their petition, or that is reported on the subject by the jury, that they have sustained any damage from such a cause. The nature of the injury, and the particular ground of their complaint, are not set forth in this petition. This ought to have been done¹³⁵

In this decision, the Pennsylvania court affirmed the damage compensation process, but required that claims be pled with specificity.¹³⁶ The court's ruling with regard to the authority to build the dam considered the allocation of responsibility (Category 1) framework issue.¹³⁷ Fairness issues (Category 2) were also raised by the court.¹³⁸ The ruling with regard to the pleadings issues was based on the existing legal procedural requirements of the times (Category 5).¹³⁹ As a result of this decision, the Pennsylvania transportation policy regarding dam building for the purpose of canal maintenance was upheld as a valid transportation related enterprise. While compensation was authorized for damages, damage was not cause for prohibition.¹⁴⁰

F. LOUISIANA

The Louisiana Supreme Court addressed transportation related matters in 13 of 2007, or 0.65%, of its reported decisions.¹⁴¹ These decisions generally addressed policies involving the maintenance and operation of

134. *Id.* at 360.

135. *Id.* at 360-61.

136. *Id.* at 361.

137. *Id.* at 360; *see also supra* text accompanying note 31.

138. *O'Brien*, 4 Rawle at 360; *see also supra* text accompanying note 31.

139. *O'Brien*, 4 Rawle at 361; *see also supra* text accompanying note 31.

140. *See O'Brien*, 4 Rawle at 360-61.

141. *See supra* Table 5.

canals, railroads, and highways. For example, in *Carrollton Rail Road Co. v. Avart*, a railroad company brought a condemnation action to acquire the use of a strip of land for their operations.¹⁴² The owner of the land claimed damages for trespass because the railroad company had taken possession of the land prior to any proceedings in condemnation.¹⁴³ The Louisiana Supreme Court's decision in this case examined the applicable legislation and ruled that the condemnation action was not to be denied because of the means taken by the railroad to obtain possession of the private property:

The evidence of the case does not show the manner in which they [the railroad] obtained possession, whether forcibly or by consent of the defendants. But it must be presumed from the present pursuit to obtain title, that the possession which the plaintiffs now hold is not based on any title. How this naked possession can preclude them from taking steps [authorized] and prescribed by the act to obtain titles, we cannot conceive. There is no penalty of this kind denounced in the law itself as a consequence of taking property, nor are we acquainted with any provisions of the general laws now in force in this state from which such a penalty or prohibition may be deduced.¹⁴⁴

The Louisiana Supreme Court decision in this case supported the canal building process by not requiring strict compliance with established acquisition procedures.¹⁴⁵ The decision gave priority to the railroad company over the landowner (Category 2) in its refusal to authorize damages or interfere with the condemnation process (Category 5).¹⁴⁶ The court refused to allow a procedural imperfection to impede the development of transportation in the state.

In the 1837 case of *Mabire v. Canal Bank*, a land owner brought suit against a canal company for damage to his property that was adjacent to the construction of a new canal.¹⁴⁷ The canal company appealed an adverse verdict, claiming that their legislative charter of incorporation protected them from liability for the damage.¹⁴⁸ The Louisiana Supreme Court examined both the provisions of the charter in question and the issue of compensation for the expropriation of private property for a transportation related project authorized by the legislature, stating:

The question then occurs, has the legislature assumed to exempt the defendants from the usual responsibility imposed by law, and authorized them to obstruct the natural drains of water, so as to cause damage to the adjacent

142. *Carrollton R.R. Co. v. Avart*, 9 La. 205, 207 (1836).

143. *See id.*

144. *Id.* at 207.

145. *See id.*

146. *See id.*; *see also supra* text accompanying note 31.

147. *Maire v. Canal Bank*, 11 La. 83, 84 (1837).

148. *Id.* at 84-85.

proprietors, without regard to their rights Nothing but the most clear and unequivocal language could induce us to suppose, that the legislature intended at the same time to authorize the corporation to lay those same lands under water, over which they could not pass without compensation, by shutting up the natural or artificial channels by which they were previously drained, and that without paying for the damages thus occasioned. No such language is to be found in the act We cannot entertain the idea that the legislature will ever sanction the expropriation of, or injury to private property, without a just indemnity.¹⁴⁹

The court refused to support the canal company's claim of immunity from damages, finding that private property owners were due proper indemnity.¹⁵⁰ The decision demonstrates concern with legislative authority and intent (Category 1), fairness (Category 2), and privileges, immunities, and responsibilities, (Category 4).¹⁵¹ The Louisiana Supreme Court thus established a limit to the policy of offering protection to those developing modes of transportation in the state.¹⁵² The court recognized the importance of transportation, but did not believe it should override the rights of property owners.¹⁵³

V. CONCLUSIONS

This review of various state supreme court decisions from the Jacksonian decade offers a revealing picture of the condition of state transportation policy within society and judicial institutions of the early years of the American republic. While the six state supreme courts were presented with relatively few transportation related cases during this period, their decisions, as demonstrated by the cases discussed, address a variety of policy issues regarding the operation and maintenance of the transportation systems of the day. These case decisions describe the issues, the resolutions reached by the courts and the rationales used to explain the results. As a consequence, these decisions, often notably mundane in basic subject matter, offer a unique picture of Jacksonian society as well as the everyday transportation disputes of the times. Further, they are indicative of the role of state supreme courts in the development of transportation policy. Most of the cases deal with highways. However, canal and railroad issues were also considered. The decisions reveal that the state supreme courts were generally supportive of the transportation boom of the period. Nonetheless, the courts also set limits on the business of

149. *Id.* at 86-87.

150. *Id.* at 87-88.

151. *See id.* at 86-87; *see also supra text* accompanying note 31.

152. *See Maire*, 11 La. at 86-87.

153. *See id.* at 86-87.

transportation—particularly in situations where the public and private interests were at odds.

Supportive transportation rulings are found in a number of the decisions cited previously. For example, in *Bates*, the Ohio Supreme Court recognized the important public interest value of road construction.¹⁵⁴ In *Buncombe Turnpike*, the North Carolina Supreme Court recognized that an expectation of compensation is part of the road making process at the private turnpike level.¹⁵⁵ The Massachusetts Supreme Court offered broad support for turnpikes. For instance, in *Tucker*, the court found authority for extensive turnpike activities.¹⁵⁶ In *Wilkinson*, the court afforded a turnpike the same nuisance protection of a public highway project, equating the construction effort to that of a public highway.¹⁵⁷ Similarly, in *Parks*, the Massachusetts Supreme Court held that a street that serves the public is public, regardless of its funding source.¹⁵⁸

On the other hand, the supreme court decisions of the Jacksonian decade also set some limitations on the transportation activities. For example, in *Baker*, the Massachusetts Supreme Court limited a turnpike company's right to collect tolls from a relocated toll-gate.¹⁵⁹ In *Cobb*, the same court applied privity requirements strictly and denied a turnpike company's claim that it had a grant to use certain property.¹⁶⁰ In *Yale*, the Massachusetts Supreme Court again found against a turnpike company, holding that turnpikes are liable for damages even if they are not at fault or negligent.¹⁶¹ The Louisiana Supreme Court also held a transportation company liable in *Mabire*, a case in which a canal company attempted to avoid damage payments.¹⁶² The court insisted on clear legislative authority for such a limitation on citizen protections.¹⁶³ Finally, the Pennsylvania Supreme Court upheld a limit to turnpike authority with regard to local planning for the public good in *In re Kensington*.¹⁶⁴

With respect to the larger transportation related issues of the day, the actual decisions of the courts clearly show that these courts encouraged the Transportation Revolution. As can be seen by the state supreme courts' open recognition of the five framework categories, the

154. *Bates*, 5 Ohio at 118-20.

155. *Buncombe Tpk.*, 15 N.C. at 464-67.

156. *See Tucker*, 26 Mass. (9 Pick.) at 111-13.

157. *Wilkinson*, 33 Mass. (16 Pick.) at 176-77.

158. *Parks*, 25 Mass. (8 Pick.) at 231-33.

159. *Baker*, 34 Mass. (17 Pick.) at 434.

160. *Cobb*, 35 Mass. (18 Pick.) at 345-46.

161. *Yale*, 35 Mass. (18 Pick.) at 359.

162. *Mabire*, 11 La. at 85.

163. *Id.* at 87.

164. *In re Kensington*, 2 Rawle at 448-49.

disputes in the cases raised the central questions that accompanied the development of a modern transportation civilization. The courts' decisions demonstrate a day to day familiarity with the core transportation framework issues identified by Harry Scheiber: allocation of responsibilities; prioritizing the goals of practicality versus fairness; financing; privileges, immunities and responsibilities; and legal considerations.¹⁶⁵ The state supreme courts that raised these issues were, in fact, a significant part of the development of a national transportation policy. This was a policy that supported the Transportation Revolution – a revolution of vital importance to the new nation.

These case decisions suggest that, while the state supreme courts of the Jacksonian decade were presented with a limited number of transportation related cases, they played a role in shaping the transportation policies of the times. In particular, the courts were supportive of transportation companies. However, this support appears to have been based on a concern for the public interest in transportation rather than a concern for the private business interests of the companies.¹⁶⁶ The decisions of these courts offered benefits to the transportation companies while at the same time limiting some of their actions, upholding their liability for most damage situations, and remaining mindful of just compensation claims from private landowners. It is noteworthy that almost all of these cases from the six different state supreme courts involved an effort by the courts to square the needs of society with existing legislative transportation policy. These decisions reveal a developing policy that was the product of the courts as well as legislators, executives and business entrepreneurs.

As indicated by this study, Scheiber's five framework categories were often key aspects to transportation related litigation in the states' courts. These general categories of issues, as presented in the specific disputes brought to the state supreme courts in litigation, highlight the state level transportation policy development of the Jacksonian decade. In addressing the often routine disputes between landowner and transportation entrepreneur, the courts necessarily faced the core transportation policy issues of the times: who has the authority to regulate transportation (Category 1); what is fair (Category 2); who pays (Category 3); who is responsible for what (Category 4); and what is the law (Category 5). The framework issues provide a means to examine the re-

165. Scheiber, *supra* note 27, at 18.

166. See generally William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, in *TRANSPORTATION AND THE EARLY NATION, PAPERS PRESENTED AT AN INDIANA AMERICAN REVOLUTION BICENTENNIAL SYMPOSIUM* (1982) (exploring in detail the concern for the public interest in transportation as opposed to the private interests of the companies).

sponses as revealed in the words of the decisions of the state supreme courts of the period.

Hopefully, this brief examination of transportation related state supreme court decisions from the Jacksonian decade offers some insight into what issues were brought to the courts as well as how those issues were addressed. The disputes were generated by a society caught up in rapidly changing times. They were based on clashes grounded in the transition towards new modes of transportation and the regulatory policies needed to ensure the public's welfare. The courts responded by reaching decisions that attempted to resolve the conflicting tensions of the times. In addition to dispute resolution, the courts' decisions also reflected society at large. Study of the written records of the resolutions and rationales of the judges in these cases serves as a useful framework for understanding the judiciary as well as changes within American society in general at that time. As this study shows, the state supreme courts of the Jacksonian decade were players in the phenomenon of change known as the American Transportation Revolution.