Transportation: A Legal History†

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"What do I care about the law? Hain't I got the power?"

—Cornelius Vanderbilt
Shipping and Railroad Baron

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I. INTRODUCTION

As the gateways to an increasingly global market, transportation corridors are the arteries through which everyone, and everything everyone consumes, flow. Transportation networks stimulate trillions of dollars in trade, commerce, and tourism. In a global economy, they enable specialization in the production of goods and services, which, under the law of comparative advantage, stimulates broader economic growth.

By shrinking the planet, transportation also facilitates the intermingling and integration of disparate economies and cultures. Cultural interaction enhances international understanding, thereby promoting global peace, which, in a thermonuclear world is essential for survival of the human species. It offers hope for the creation of a global village of friends and neighbors rather than antagonists and adversaries. Cultural interaction also stimulates intellectual, social, and artistic creativity, making the world a more interesting and richer place in which to live.

As a fundamental component of the infrastructure upon which economic growth is built—the veins and arteries of commerce, communications, and national defense—a healthy transportation system serving the public's needs for ubiquitous service at reasonable prices is vitally important to the region and the nation it serves. It is for this reason that governments the world over have promoted, encouraged, and facilitated its provision by providing essential infrastructure, research and development, protective regulation, subsidies and, on occasion, outright ownership. Historically, government has facilitated transportation by building the airports, the seaports, the rail and transit lines, subsidized their operations where necessary, and established the basic codes and rules pursuant to which the industry serves the public. If done thoughtfully and well,

government planning can facilitate creation of an efficient and productive transportation infrastructure better able to satisfy the broader needs of the public for safe, secure, seamless, expeditious, and reasonably priced transportation service.

The tourism and travel business is arguably the world's largest industry. It accounts for 5.5% of the world's gross national product [GNP], 12.9% of consumer spending, 7.2% of worldwide capital investment, and 127 million jobs, employing one in every fifteen workers.[1] The ripple effects of transportation activity—the indirect and induced economic and employment stimulation—is vastly larger than the prices paid directly by passengers or shippers. Transportation creates and transports wealth far in excess of its own facial value. In other words, the tacit benefits of economic stimulation created by transportation networks far exceed its costs.

In this sense, transportation has profound externalities, both positive and negative. For example, a city with abundant airline, motor carrier and railroad networks radiating from it like the spokes of a wheel enjoys a wide economic catchment area stimulating trade, commerce and wealth for its citizens. Conversely, a community with poor, declining or deteriorating access to the established and prevailing transportation networks will wither like a human limb or organ starved of oxygen by an artery made impassable by a tenacious blood clot.

On a macroeconomic level, these observations are true for all nations and all regions, and arguably, for all time. An expeditious, efficient, and economical transportation network will facilitate the public's need for mobility and will ordinarily advance economic productivity and growth. Conversely, a deteriorating transportation infrastructure will produce sluggishness in overall economic productivity and retard economic growth.

The progress of civilization is reflected in humankind's accomplishments in transportation: the invention of the wheel, the voyages of Leif Ericson and Christopher Columbus; Charlemagne's construction of the canal system of Europe; the driving of the golden spike into the tracks at Promontory Point, Utah, linking the American east and west; the construction of the Suez and Panama Canals; the Wright Brothers' flight at Kitty Hawk; the assembly lines of Henry Ford; the transatlantic flight of Charles Lindbergh; the construction of the German Autobahn and the American Interstate Highway System; and Neil Armstrong's "giant leap for mankind" onto the surface of the moon.[2]

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1. PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIRLINE MANAGEMENT: STRATEGIES FOR THE 21ST CENTURY 3 (1997) [hereinafter AIRLINE MANAGEMENT] (citing Gunter Eser, *Airlines Bleeding to Death*, IATA REV. 3 (1991)).

2. Paul Stephen Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The*

In the United States, the federal government has promoted the industry's growth, initially through grants for rail construction, and later through the building of highways, inland waterways, port facilities, and airports.[3] In addition, the government helped ensure its stability (by shielding the industry from destructive competition), and consumer equity (by protecting the public from the industry's monopolistic tendencies), so as to ensure its fundamental role as a catalyst for national economic growth.[4]

Transportation has been a fundamental element in the growth of civilization.[5] Most of the major cities of the world owe their location and their prosperity to their proximity to the trade routes. For example, Brugges, Belgium, was an important and prosperous member of the Hanseatic League during the Middle Ages, which ceased to thrive and became frozen in time when its canal linking it to the North Sea became clogged with silt and became impassable.[6] Rothenburg-ob-der-Tauber is today the only German City encircled by its original medieval walls.[7] It too was frozen in time when trade routes shifted east to Nürnberg.[8]

Transportation is also a fundamental component of economic growth. It is the infrastructure foundation upon which the rest of the economy is built.[9] Any region, which loses access to the system, and thereby the means to participate in the broader market for the exchange

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Genesis and Evolution of This Endangered Species, 32 AM. U. L. REV. 335, 335 (1983) [hereinafter *Genesis and Evolution*].

3. *Id.* at 337.

4. *See id.* at 336.

5. *Id.* at 335.

6. PAUL STEPHEN DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 5 (1989) [hereinafter SOCIAL & ECONOMIC CONSEQUENCES].

7. *Id.*

8. *Genesis and Evolution*, *supra* note 2, at 375 n.1. The birth of civilization in Mesopotamia has, to some extent, been attributed to the existence of trade routes crossing the Tigris and Euphrates, permitting intellectual exchange between people of different cultures. Many European cities, such as Rotterdam, Copenhagen, Vienna, Hamburg, and American cities, such as New York, Chicago, Atlanta, Denver, and New Orleans, owe much of their existence and economic growth to their geographic proximity to natural trade routes. For example, Atlanta was born when a rail line eventually extending from Chicago to Florida crossed another rail line extending from New York to New Orleans.

Many cities, however, owe their economic decline to the relocation of trade routes. For instance, Brugges, Belgium, Rothenburg ob der Tauber, Germany, and Venice, Italy, were important medieval centers for trade and commerce that since have been "frozen in time" because of changing trade patterns. Similarly, major American ports of the Colonial era, such as Alexandria, Virginia, Charleston, South Carolina, and Savannah, Georgia, experienced economic decline because of either the loss of traffic to other ports or the shift of traffic to non-maritime modes of transportation.

9. Paul Stephen Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445, 448 (1987) [hereinafter *The Dark Side of Deregulation*].

of goods and services, will wither on the vine.[10] Throughout history, it has been the recognition of the role transportation plays in social and economic development that has inspired a strong governmental presence in its promotion, facilitation, and regulation.

Long ago, people recognized the essential role of transportation and began to treat it differently from other industries, thereby allowing the public interest to prevail over individual economic interests.[11] Traditionally the transportation industry has been deemed too important to be left to the vicissitudes of the marketplace.

The regulation of American business began with the economic regulation of the transportation industry. Building upon principles of Roman Law, beginning in the Middle Ages, English courts imposed upon "common carriers" special duties to serve all without discrimination, and strict liability for loss and damage to goods in their care.[12] In 1887, the U.S. Government established the first independent regulatory agency, the Interstate Commerce Commission ["ICC" or "Commission"], and granted it jurisdiction to regulate the rates and practices of the railroads.[13] Currently several federal agencies, including the Surface Transportation Board, the Federal Maritime Commission, the Federal Energy Regulatory Commission, and the Department of Transportation, regulate rail, motor, air, and water carriage, as well as pipelines and freight forward-

10. *Id.* at 463.

11. *See* Paul Stephen Dempsey, *Erosion of the Regulatory Process in Transportation—The Winds of Change*, 47 I.C.C. PRAC. J. 303, 311-12 n.31 (1980) [hereinafter *Erosion of the Regulatory Process*].

> Several of these industries were natural monopolies (*e.g.*; the early railroads, telephone, telegraph, gas, and electric companies, and to some extent, television and radio), which if unregulated would produce in lower quantities and at higher prices than would industries in a competitive market. Regulation seeks to substitute what is lacking in the marketplace by insisting that such natural monopolies produce at a lower price and high volume than they otherwise might.
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> Recognizing this distinction, virtually every major industrial nation on the planet treats these industries in a manner significantly different from the rest. In most, the industries are owned and operated by the state. In transportation, most of the rail, motor, barge, and air carriers are socialized, even in Western Europe.
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> In the United States, the services of transportation, communications, and energy have largely been performed by the private sector, with government serving the role of a vigorous regulator of a wide variety of activities, weighing and balancing the public interest against what would otherwise be the economic laws of the marketplace. The government plays a dual and perhaps schizophrenic role—on the one hand, it seeks to stimulate the inherent economics and efficiencies of the regulated industries; on the other, it seeks to protect the public from the abuses which these industries might otherwise perpetrate. For the most part, the United States has been able to avoid nationalizing these industries, for private ownership thereof has, on the whole, proven successful. The major exception is rail passenger service.

12. Jurgen Basedow, *Common Carriers: Continuity and Disintegration in U.S. Transportation Law*, 13 TRANSP. L.J. 1, 14-15 (1983).

13. *Genesis and Evolution*, *supra* note 2, at 336.

ers.[14] Despite substantive differences between the kind and scope of regulation by the various agencies, each mode of transportation is in the business of moving passengers or commodities from one point to another.[15]

The policy objectives governing transportation regulation have changed significantly since 1887. Congress initially instituted regulation under the ICC in order to protect the public from the monopolistic abuses of the railroads.[16] Between 1920 and 1975, however, the goal of the national transportation policy was to protect the transportation industry from the deleterious consequences of unconstrained competition.[17] While contemporary regulatory policy has sought to stimulate competition in order to enhance the economy and efficiency of operations, federal regulation in the areas of entry and pricing diminished during the deregulatory movement of the last quarter of the 20th Century.[18] This article traces the rich history of the relationship between government and the market in one of the nation's most important industries.

II. Origins of Common Carrier Regulation

The Wright Brothers did not prove the feasibility of manned flight until December 17, 1903, and commercial aviation was not launched until the 1920s.[19] The foundations of aviation law and regulation were created by common law, statutes and governmental institutions that regulated the modes of transportation that preceded aviation in time, particularly the railroads. It is for that reason that we examine that history here.

Throughout civilization, transportation has been perceived as an industry imbued with a particular public interest.[20] The Romans were the

14. *Id.*

15. *Id.* The differences in regulation reflect the inherent economic differences among the modes of transportation, the legislative history of the regulation, the language of the specific statutory provisions, the philosophical and political composition of the individuals serving on the independent regulatory commissions, and the role of the judiciary in either circumscribing or encouraging regulatory activity.

16. *Id.* at 337.

17. *Id.*

18. *Id.*

19. Andreas F. Lowenfeld, Aviation Law § 1.1, at I-2 (1972); Paul Stephen Dempsey & Laurence Gesell, Air Transportation: Foundations for the 21st Century 10 (1997) [hereinafter Air Transportation Foundations].

20. It is difficult to delineate the precise point at which the regulation of transportation began. Some literature indicates that barge traffic on the Nile was regulated by the Pharaohs. *See* W.D. Brewer, *Regulation—The Balance Point*, 1 Pepp. L. Rev. 355, 356 n.2 (1974). The German robber barons regulated commerce on the Rhine and Moselle Rivers by demanding the payment of tolls. Common carriers were regulated in England during the reign of William and Mary. *See* Charles W. Braden, *The Story of the Historical Development of the Economic Regulation of Transportation*, 19 I.C.C. Prac. J. 659, 659 (1952); Paul Stephen Dempsey, *Congressional Intent*

first great road builders, laying military roads across Europe, North Africa, and East Asia.[21] Upon these early roads, trade and commerce flourished, and the Empire prospered. The Roman Empire codified laws of liability for common carriers around 200 B.C.[22] Bills of lading from the era are remarkably similar to those that exist today. Roman commercial law was passed on to the legal systems of every Western European nation, and served as the foundation for the rules of liability in the area of bailments and common carrier loss and damage, which exist today.[23] By 1088, law became the earliest discipline taught in the world's first University—the University of Bologna.[24]

During the Middle Ages, public callings and business occupations affecting the public interest, including transportation firms, were subjected to special obligations.[25] In English common law, these special duties stemmed from implied assumpsit—the "holding out" on their part was regarded as a general or universal assumpsit both of serving the general public and doing so carefully.[26] The common callings were narrowed in the 17th Century until, by the close of the 18th, they embraced only common carriers and innkeepers.[27] Concerns about the monopolistic tendencies of carriers were one rationale; another was the fact that carriers were an essential part of the economic infrastructure.[28] As one observer noted, "In economic terms, transportation generated positive external effects of a political, social, and economic nature which extended beyond the individual transport operation and were not sufficiently rewarded by the carrier's charges."[29] The obligation of common carriers to serve all without discrimination continued as a responsibility enforced by the Anglo-American common law courts until the late 19th Century, when the judicial system was replaced with a regulatory one.[30]

Yet the licensing and regulating of common carriers was not a new phenomenon. The English Parliament had passed such a law as early as

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and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980, 58 CHI.-KENT L. REV. 1, 48 n.211 (1981) [hereinafter *Congressional Intent*].

21. GEORGE NEWTON RAPER, RAILWAY TRANSPORTATION 2-3 (1912).

22. PAUL STEPHEN DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 255 (1986).

23. *Id.*

24. The University of Bologna began with the study of Roman Law under the Justinian Code. Later it became famous through the work of Irnerius, who codified canon law under the Corpus Juris of Gratian, *at* http://www.frame-uk.demon.co.uk/congress/history_of_university.htm. (last visited Aug. 10, 2004).

25. Basedow, *supra* note 12, at 5.

26. *Id.*

27. *Id.* at 6.

28. *Id.* at 7-9.

29. *Id.* at 9.

30. MARVIN L. FAIR & JOHN GUANDOLO, TRANSPORTATION REGULATION 4 (8th ed. 1979).

1694.[31] Earlier still, the Westminster Code of 1285 was Britain's first highway law, which protected transportation rights of way.[32]

III. Government Promotion of Transportation Infrastructure (The 19th Century)

A. Birth of a New Continent

With the European settlement of North America, towns and villages sprang up first along the Atlantic and Gulf coasts, at bays and rivers deep enough for navigation.[33] Settlers gradually moved inland, and towns began to spring up along rivers.[34] Away from the rivers, most roads were Indian trails, which could be traversed by only packhorses or mules.[35] A few private toll roads were constructed during the 18th Century, some with governmental assistance.[36] At the dawn of the 19th Century, it took a week to travel by stagecoach from New York to Boston, and nearly three weeks to reach Charleston.[37]

The first long major road on the American continent was built for military purposes. In 1758, British General Edward Braddock ordered 200 woodsmen to widen a narrow Indian trace into a twelve-foot wide road across streams and eight major mountains.[38]. Some 2,200 British and Colonial troops then marched from Fort Cumberland, at the head of the Potomac River, to drive the French from Fort Duquesne,[39]

With the adoption of the U.S. Constitution on July 2, 1788, Congress was given the responsibility "to establish Post Offices and post roads."[40] The States jumped into road-building quite early as well. For example, the hard-surfaced sixty-mile Lancaster Pike linking Philadelphia and Lancaster, Pennsylvania, was built between 1792 and 1795.[41] New York and

31. Basedow, *supra* note 12, at 19.

32. *Id.* at 5.

33. Social & Economic Consequences, *supra* note 6, at 6.

34. *Id.*

35. Air Transportation Foundations, *supra* note 19, at 5.

36. *See id.* at 5-6.

The first improved roads were primarily constructed through private enterprise, and therefore took the form of turnpikes or toll roads to provide a return on investment. Blocking access to these roads was a pole on a hinge. The pole was referred to as a pike, and once payment was made, the pike would be swung or turned (either upward or outward) to allow passage. Hence, derivation of the word "turnpike." By the 1800s, there were hundreds of turnpike companies.

37. Arthur T. Hadley, Railroad Transportation: Its History and Its Laws 24 (1903).

38. Tom Lewis, Divided Highways: Building the Interstate Highways, Transforming American Life 56 (1997).

39. *Id.*

40. Air Transportation Foundations, *supra* note 19, at 5.

41. Russell Bourne, Americans On the Move: A History of Waterways, Railways and Highways 27 (1995).

southern New England followed Pennsylvania in road building.[42] Many states, notably Pennsylvania and Kentucky, subsidized private turnpikes.[43]

It became increasingly apparent that transportation was essential to link the remote and sparsely settled nation together, to facilitate communications, trade, economic growth, and defense. Public sentiment for increased governmental support for infrastructure construction began to grow.

In 1808, Treasury Secretary Gallatin became the first national figure to urge a national system of roads.[44] His proposal included a road system stretching from Maine to Georgia, roads or canals linking the Atlantic Coast to the Mississippi River, and roads to Detroit, St. Louis, and New Orleans radiating from Washington, D.C.[45] President Thomas Jefferson championed the first federal highway, the National Road.[46] It followed the old Cumberland Road to the West, stretching from Cumberland, Maryland, to Vandalia, Illinois.[47] It was to be no steeper than a 4% grade, with a thirty-foot roadbed.[48] Construction began in 1808; nine years later it reached the Ohio border.[49] After that, high costs slowed down additional construction.[50] The National Road reached Columbus, Ohio, in 1833, and Vandalia, Illinois, in 1852.[51]

To assert his objection to the Constitutional principle involved, in 1822 President Monroe vetoed a bill for repairs on the Cumberland Road, though he subsequently reversed course.[52] But when State's rights-champion Andrew Jackson became President in 1832, national policy shifted against federal support of highways.[53] Though Jackson approved several bills to push the National Road further west, and was himself a

42. HADLEY, *supra* note 37, at 26.

43. *Id.* Pennsylvania paid about one thousand dollars a mile, about a third of the total cost.

44. *Id.* at 26.

45. *Id.* at 27-28.

46. BOURNE, *supra* note 41, at 7.

47. By purchasing the Louisiana Territory, Jefferson also may have made it inevitable that the federal government would play a role in building transportation corridors west, beyond the Mississippi River. As Professor Daniels observed, "When to the vast acreage of national land east of the Mississippi, the purchase of Louisiana added a continental principality of almost boundless extent west of the river, the public illusion of wealth 'beyond the dreams of avarice' was created, and the floodgates of legislative profusion were certain eventually to be opened." WINTHROP DANIELS, AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY 38 (1932).

48. BOURNE, *supra* note 41, at 7.

49. *Id.* at 7. Senator John C. Calhoun was also a major proponent of national aid to roads as early as 1818. HADLEY, *supra* note 37, at 27.

50. BOURNE, *supra* note 41, at 34.

51. *Id.* at 10.

52. HADLEY, *supra* note 37, at 27.

53. DANIELS, *supra* note 47, at 65.

major proponent of rail expansion,[54] he vetoed the Maysville Turnpike from Wheeling, West Virginia, to Maysville, Kentucky.[55] Presidents Tyler, Polk, and Pierce also vetoed federal aid to roads.[56] The National Road became important in settling the Midwest. But the structure Jackson established, of State primacy in road construction, albeit with federal support, became the model upon which America's roads and highways were developed through the remainder of the 19th Century.[57] It also laid the pattern for airport development in the 20th Century.[58]

B. The Canal System

George Washington was the first American leader to see the future of canal transportation, pointing to the possibility of running a canal westward from the Hudson River prior to the Revolutionary War.[59] In 1786, he became president of the Potomac Canal Company, an ill-fated venture that sought to run a canal along the Potomac River to Cumberland, Maryland.[60]

Despite road improvements, and the development of the steamboat in 1807, transportation costs remained high.[61] To link the nation's waterways, canal construction began during the early 19th Century.[62] Underwritten by the State of New York, the first major canal was the Erie Canal, begun in 1817 and completed in 1825, stretching some 360 miles from the Hudson River at Albany to Lake Erie at Buffalo, New York.[63] After it opened, the cost of shipping a ton of farm produce fell dramatically from $100 to $5.[64] It so significantly reduced shipping time and costs between New York City and the west as to make New York the largest city on the East Coast, surpassing Philadelphia and Baltimore.[65] Penn-

54. *Id.* at 65-66.

55. Bourne, *supra* note 41, at 35.

56. Daniels, *supra* note 47, at 37.

57. Air Transportation Foundations, *supra* note 19, at 6. Local jurisdictions also built roads. In 1879, the North Carolina legislature passed the Mecklenburg Road Law, permitting the county to levy a property tax to support road construction. The Act was repealed the following year, but reenacted in 1885. By 1902, Mecklenburg was acknowledged to have the best roads in the State. Other States adopted similar laws. But not until the 20th Century did the Federal government resume its role in building highways. Paul Stephen Dempsey & Laurence E. Gesell, Air Commerce and the Law 81 (2004) [hereinafter Air Commerce].

58. Air Transportation Foundations, *supra* note 19, at 6.

59. Hadley, *supra* note 37, at 29.

60. Daniels, *supra* note 47, at 64.

61. Air Transportation Foundations, *supra* note 19, at 5.

62. Dempsey & Thoms, *supra* note 22, at 4.

63. *Id.*

64. Bourne, *supra* note 41, at 47.

65. Dempsey & Thoms, *supra* note 22, at 4. Syracuse, Rochester and Buffalo also flourished as a result of construction of the Erie Canal.

sylvania responded by building a canal linking Philadelphia and Pittsburgh.[66] Another canal, earlier urged by George Washington, was built linking the Potomac and Ohio Rivers.[67] A canal linking the Mississippi River with the Great Lakes gave rise to the development of the City of Chicago.[68] Most canals were financed by the States, hoping to enhance their economic development.

In the 1850s, it was an even contest between the canals and railroads for dominance.[69] But soon, the interior canals were operating in the shadow of the railroads. Many canals were eventually abandoned.[70]

One canal, however, was not totally eclipsed by the railroads—the Panama Canal. The French began building a canal across the Isthmus of Panama in 1879.[71] A decade later, the effort collapsed, due to inadequate planning, disease, and bankruptcy.[72] In 1902, Congress passed the Spooner Act, which authorized purchase of the French holdings.[73] The U.S. Senate ratified the Hay-Herran Treaty allowing the canal to proceed, but the Colombian government balked.[74] The U.S. Navy sailed the *USS Nashville* into Colon, preventing Colombian troops from suppressing an uprising among Panamanians seeking independence.[75] The U.S. negotiated the Hay-Bunau-Varilla Treaty of 1903 with the new government in Panama, giving the United States exclusive use, occupation, control, and effective sovereignty of the Canal Zone.[76] The Panama Canal opened for traffic in 1914.[77]

C. Railroads

The first rail line was inaugurated between Wandsworth and Croydon, in the suburbs of London in 1801, when the first chartered horse-car

66. *Id.*

67. *Id.*

68. William L. Withuhn, Rails Across America: A History of Railroads In North America 19 (1993).

69. Hadley, *supra* note 37, at 30.

70. Dempsey & Thoms, *supra* note 22, at 5. The Baltimore & Ohio Canal functioned until 1924. The Main Line Canal across Pennsylvania was eventually bought out by the Pennsylvania Railroad. Bourne, *supra* note 41, at 51, 53.

71. Henry W. Bragdon & Samuel P. McCutchen, History of a Free People 482 (5th ed. 1964).

72. Samuel Eliot Morison, The Oxford History of the American People 824 (1965).

73. *Id.*

74. Bragdon & McCutchen, *supra* note 71, at 482.

75. *Id.*

76. *Id.*

77. Morison, *supra* note 77, at 826. President Jimmy Carter subsequently negotiated a treaty transferring sovereignty of the canal and zone to Panama effective January 1, 2000. *See* U.S. Dep't of State, Panama Canal Treaty, *at* http://www.state.gov/r/pa/ho/time/dr/17454.htm.

line was opened for service.[78] It would effectively lay the foundation upon which steam railroads were subsequently built.[79]

The first common carrier railroad in the United States, the Baltimore and Ohio, was chartered just two years after the Erie Canal was opened.[80] Beginning work in 1828, by 1834, the B&O linked Baltimore with Harpers Ferry, West Virginia, by 1852, the Ohio River at Wheeling, West Virginia, and by 1857, with St. Louis.[81] The New York & Erie Railroad opened in 1851; the Pennsylvania Railroad completed the line from Philadelphia to Pittsburgh in 1852; and the New York Central was born in 1853.[82] The Rock Island Railroad crossed the Mississippi River in 1854.[83] According to Daniel Drew, in the decade preceding the Civil War, railroads "were spreading all over the country like measles in a boarding school."[84] Though many rail lines existed, they were poorly connected. There was virtually no through passenger or freight traffic.[85]

Compared to canals, railroad construction was not as seriously challenged by topography. Moreover, many canals were frozen and inoperable during winter months. As a result, railroads were found to be a more economical, reliable, and expeditious means of transport, and many canals soon fell into decline and disuse.[86] In addition, railroads were far faster than roads. In 1832, it took three days for passengers and mail, and fifteen days for freight, to move from Wheeling to Baltimore on the National Road.[87] Two decades later, it took 1.5 and 3 days, respectively, to make the same journey on the B&O Railroad.[88] Passenger fares fell from $18.75 via stagecoach to $5 via rail; freight rates fell from $45 a ton via wagon to $25 a ton for railway express.[89]

Everywhere, railroads were creating towns and cities. Before two railroads crossed tracks in a city now called Atlanta (named after the Atlantic and Western Railroad), there was only a pine forest on the banks of the Chattahoochee River.[90] After the Moffat railroad tunnel was built through the Continental Divide, Denver became the largest city in the

78. HADLEY, *supra* note 37, at 9.

79. RAPER, *supra* note 21, at 7.

80. *Id.* at 180, 182. In 1825, England's Stockton & Darlington Railway had been the first to use a steam engine to pull a passenger train. *Id.* at 15.

81. WITHUHN, *supra* note 68, at 8, 19, 22.

82. *Id.* at 19.

83. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 7.

84. DANIELS, *supra* note 47, at 10.

85. RAPER, *supra* note 21, at 9.

86. DEMPSEY & THOMS, *supra* note 22, at 4-5.

87. WITHUHN, *supra* note 68, at 19.

88. *Id.*

89. *Id.*

90. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 7.

Rocky Mountain west.[91]

Replacing horses and omnibuses (enclosed horse-drawn carriages with multiple passengers), urban railroads also became a major mode of transit.[92] The steam-powered subway was introduced to London in 1843, the elevated railway in New York in 1867, the electric streetcar, or trolley, in 1888, and the first American subway in Boston in 1897.[93] The Paris subway opened in 1900 and the New York subway opened in 1904.[94]

Although the States built a few railroads, in the relatively densely populated eastern United States, railroads had little difficulty securing private capital for construction.[95] But private investment shied away from the sparsely settled west, particularly west of Chicago.[96] It soon became apparent that if America's hinterland were to be settled, developed, and enjoy economic growth, construction would have to be subsidized from public treasuries.

The growth, development, and expansion of the rail system into the Midwest and western United States in the 19th Century were for the most part attributable to governments and individual investors.[97] State and local governments provided construction capital through land grants, tax exemptions, stock subscriptions, loans, loan guarantees, and capital donations.[98] The first federal land grant for railroad construction was the Act of September 20, 1850, entitled, "An Act granting the Right of Way, and making a Grant of Land to the States of Illinois, Mississippi and Alabama, in Aid of the Construction of a Railroad from Chicago to Mobile."[99]

Sponsored by Senator Stephen A. Douglas, the Act granted to the railroads a right-of-way 200 feet wide and six sections of land for each mile of road completed.[100] These were to be alternate sections of land lying on either side of the tracks.[101] These land grants were conferred to

91. PAUL STEPHEN DEMPSEY, ANDREW R. GOETZ & JOSEPH S. SZYLIOWICZ, DENVER INTERNATIONAL AIRPORT: LESSONS LEARNED 152 (1997). Without the efforts of Denver's leaders to build a railroad linking the city with the transcontinental rail line to the north, Cheyenne might well be the economic capitol of the Rocky Mountain West. *Id.* at 150-53.

92. AIR TRANSPORTATION FOUNDATIONS, *supra* note 19, at 10.

93. *Id.* at 10-11. *See also* ROSS M. ROBERTSON, HISTORY OF THE AMERICAN ECONOMY 276 (3d ed. 1973).

94. AIR TRANSPORTATION FOUNDATIONS, *supra* note 19, at 10-11.

95. DEMPSEY & THOMS, *supra* note 22, at 5.

96. *Id.*

97. MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 77 (1962).

98. DEMPSEY & THOMS, *supra* note 22, at 7. Illinois granted land to a railroad as early as 1850. JOSEPHSON, *supra* note 97, at 77.

99. DANIELS, *supra* note 47, at 39.

100. *Id.*

101. *Id. See also* D. PHILIP LOCKLIN, ECONOMICS OF TRANSPORTATION 133 (7th ed. 1972).

the Illinois Central and Mobile & Ohio to build a line from the Great Lakes to the Gulf Coast.[102] The alternate-section provision was made in the expectation that, along with the railroad companies, the government would also share in the increased land values resulting from the developed transportation facilities.[103]

Following the precedent set by grants to the Illinois Central and Mobile & Ohio, between 1850 and 1871, hardly a session of Congress failed to make grants of public land to the railroads, with each succeeding grant being ever more generous than the one before.[104] During the decade preceding the Civil War, the States also granted thirty-two million acres of land to the rail industry.[105]

The federal government encouraged rail expansion and provided various incentives including loans, remissions of the duty on imported iron, and land grants.[106] While the War Between the States was in full swing,[107] President Lincoln signed the Pacific Railroad Act of 1862 which provided incentives for the creation of a rail line beginning at the 100th meridian, near Fort Kearney, Nebraska, and working westward across the Great

102. WITHUHN, *supra* note 68, at 31.

103. ROBERTSON, *supra* note 93, at 276.

104. DANIELS, *supra* note 47, at 4. *See also* LOCKLIN, *supra* note 101, at 133.

105. DEMPSEY & THOMS, *supra* note 22, at 7.

106. JOSEPHSON, *supra* note 97, at 77. The land grant system did not solely favor the railroads. Although the rail industry enjoyed substantial revenue from the sale of land and the exploitation of mineral and timber resources situated on it, the government also benefited: as the value of public land increased, economic development was encouraged, and the gross national product increased. In addition to land grants, huge sums of money, representing the largest industrial investment in the country before the Civil War, were spent to construct and maintain the railroads. Their development expanded the market for agricultural and manufactured products, increased the value of property, spurred the growth of the iron and steel industry, and supported the entire industrial economy. *Id. See also* RICHARD N. CURRENT, ALEXANDER DE CONDE & HARRIS L. DANTE, UNITED STATES HISTORY: SEARCH FOR FREEDOM 307 (1974). By 1890 English businessmen alone had invested more than $2 billion in U.S. railroad securities. R. WIEBE, THE SEARCH FOR ORDER 309 (1967). Legislative proposals occasionally have proposed requiring land grant railroads to include income derived from such real estate into their branch line balance sheets and forfeit land when they decide to abandon its corresponding line. H.R. 5114, 97th Cong. (1981); H.R. 5115, 97th Cong. (1981).

Water transportation, which received federal aid before the railroads, obtained $4 billion in federal aid between 1789 and 1945, not including early land grants for canals and river improvements. Between the Second World War and 1975, barge operators received an additional $10.6 billion in federal aid. Since 1975, the barge industry has received subsidies approximating $800 million annually. FRANK WILNER, COMPETITIVE EQUITY: THE FREIGHT RAILROADS' STAKE 53 (1981).

107. During the War Between the States, it was necessary for the Union military to destroy the Confederacy's transportation system in order to bring it to its knees. The U.S. Navy put on a coastal blockade to impede the flow of exported cotton and imported industrial material, and captured the Mississippi River to stop trade and cut the South in half. The U.S. Army aimed for the rail junction at Atlanta to impede commerce, cripple the economy, and cut the Confederacy in half again.

American Desert to the Pacific Ocean.[108] The Act offered the Pacific railroads ten sections (6,400 acres) on alternating sides of the track and a thirty year loan of government bonds, scaled at $16,000, $32,000, and $48,000 per mile of road built, depending upon the difficulty of the terrain.[109] The railroads would receive every alternate section of land—the odd numbered sections—for ten sections in width on either side of the track.[110] Two years later, Congress amended the Act to make it more generous still, doubling the land grant to 12,800 acres per mile of rail laid.[111] Also in 1864, the Northern Pacific Railroad was granted a 400-foot right-of-way as well as a grant of alternating sections twenty miles on either side thereof through the territories, and ten miles through the States.[112]

In a race for land, the Union Pacific Railroad laid track west from Omaha, and the Central Pacific built east from Sacramento.[113] Building from the east beginning in 1865, the Union Pacific was granted twelve million acres of land, and issued $27 million in bonds; building from the west beginning in 1863, the Central Pacific was given nine million acres of land, and issued $24 million in bonds.[114] On May 10, 1869, the nation was linked from coast to coast by a transcontinental rail system with the driving of the golden spike into the tie at Promontory Point, Utah.[115] The nation celebrated the completion of what was then the greatest railroad in the world, an iron bridge linking its two mighty oceans across a vast continent.[116] Actually, however, this route still required travelers to cross the Missouri River on boat.[117] A seamless transcontinental track did not

108. ROBERT G. ATHEARN, UNION PACIFIC COUNTRY 28 (1976). While Secretary of War, Jefferson Davis (by now the President of the rebel Confederate States of America) directed a 12-volume study and survey that recommended a southern route from Memphis, through Texas, across the Gadsden Purchase, to Los Angeles. In part, the 1962 Act may have been motivated to avoid a southern route linking the U.S. east and west. BOURNE, *supra* note 41, at 85-86. The North was fearful that any line running west from the slave states might spread slavery westward and upset the balance of power established by the Missouri Compromise. Thus, before the Civil War, the issue of where, or whether, a western rail line would be built, was deadlocked. WITHUHN, *supra* note 68, at 30.

109. ATHEARN, *supra* note 108, at 30. The Act also authorized the railroads to issue bonds in an amount equal to the government bonds, relegating the government to the rank of a second mortgage holder. *Id.*

110. KEITH L. BRYANT, JR., HISTORY OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY 10 (1982).

111. ATHEARN, *supra* note 108, at 32.

112. DANIELS, *supra* note 47, at 41.

113. JOSEPHSON, *supra* note 97, at 78.

114. *Id.*

115. *Id.* at 91.

116. *Id.*

117. Guy Kelly, *The Bold Move That Saved Denver Early City Leaders Engineered Rail Link to Cheyenne*, DENV. ROCKY MTN. NEWS, June 8, 1999, at 30A.

come together until 1870 at a place called Comanche Crossing, Colorado, subsequently re-named Strasburg in honor of John Strasburg of the Kansas Pacific Railway.[118]

Other major grants followed. The Northern Pacific bill of 1870 granted forty-seven million acres of land.[119] In 1871, Congress passed the last of the major land grant bills, handing the Texas & Pacific Railroad eighteen million acres.[120] Between 1862 and 1871, the States granted seventeen million acres of land to the railroads, and the federal government granted 130 million acres.[121] The railroads used the land grant system to help finance construction, by selling land along the rights of way, in some instances, promoting "chains of cities," laying out whole towns, and by using the land assets as a means of stimulating private investment in railroad stocks and bonds.[122]

Rail expansion continued robustly. Total trackage doubled to 70,000 miles within eight years after the end of the Civil War.[123] In the 1880s, some 70,000 miles of track were laid.[124] Much of it was built hastily and carelessly; within fifteen years, for example, a large portion of the Santa Fe track and roadbed had to be completely rebuilt.[125] One source conservatively estimated that three-fifths of the cost of building the railroads was borne by the government.[126] More than any other single factor, the rail network unified the nation. But the impact of enormous over-expansion was to haunt the rail industry for decades.

IV. The Robber Barons

A. Consolidation of the Rail Network

Along Europe's Rhine River stand a number of medieval castles, testament to the German Robber Barons who built them. The Rhine was the principal highway of commerce for medieval Europe.[127] The Barons would exact a toll from all the barge traffic on the Rhine, and sink the

118. *Id.*

119. Josephson, *supra* note 97, at 93, 96.

120. *Id.* at 79; Daniels, *supra* note 47, at 45.

121. Some sources put the figure at 158 million acres. Josephson, *supra* note 97, at 79. The federal government also lent $64 million in bonds. Daniels, *supra* note 47, at 46.

122. Josephson, *supra* note 97, at 77. For example, by 1880, the Union Pacific had sold nearly two million acres of its original 12 million acre original grant. By 1884, the Union Pacific had cold 5.5 million acres for $18 million, or about $3.31 per acre. Athearn, *supra* note 108, at 187.

123. John Chernow, Titan: The Life of John D. Rockefeller, Sr. 115 (1998).

124. *Id.*

125. Josephson, *supra* note 97, at 225.

126. *Id.* at 77 n.2.

127. *See Genesis & Evolution*, *supra* note 2, at 336 n.3.

barges that would not pay.[128] The toll would be set at whatever the market would bear.[129] In 19th Century America, a new group of Robber Barons emerged, who would attempt to gain control of the transportation network and exact a toll from all who passed.

Cornelius Vanderbilt began the string of consolidations that led to intensive competition among the railroads. He noted that in 1860, 30,000 miles of rail was carrying 70% of the freight, but that it was segmented among scores of small firms.[130] If a passenger wanted to travel from New York to Chicago, he or she would have to change trains 17 times, from one small line to another.[131] Although steamboats had made Vanderbilt the richest man in the nation (by 1865, he was reportedly worth $11 million),[132] between 1857 and 1862 he sold his steamboat interests and began buying railroads.[133] By 1868, he had done it, consolidating a number of smaller railroads[134] into the New York Central Railroad,[135] allowing a passenger to travel from New York to Chicago without changing trains, and reducing transit time from fifty hours to twenty-four.[136]

But others followed Vanderbilt's lead, and three additional railroads soon competed between New York and Chicago—the Pennsylvania, the Baltimore and Ohio and the Erie.[137] Without sufficient traffic to support multiple lines—a situation created by a combination of excessive expansion and a rash of consolidations—competition became intense, and was intensified further by the Panic of 1873 and the depression that followed.[138] The rate wars ignited by the Panic did not subside until 1877.[139]

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128. *Id.*

129. *Id.*

130. NATHANIEL PLATT & MURIEL JEAN DRUMMOND, OUR NATION FROM ITS CREATION 444 (1964).

131. *Id.*

132. JOSEPHSON, *supra* note 97, at 13-14. When Vanderbilt died in 1877, he was reportedly worth $105 million. As the master of sailing vessels, Vanderbilt lamented the introduction of the paddle-wheelers in 1807. When they proved their value in transporting passengers, Vanderbilt insisted they could never be used for freight "because the machinery would take up too much room." When they proved their worth there, Vanderbilt had the best steamboats built for his lines, becoming a dominant factor in the ocean and coastal trade. He even built a land bridge, by ship and stagecoach, across Nicaragua. By the 1850s, he had more than 100 vessels afloat. *Id.*

133. PLATT & DRUMMOND, *supra* note 130, at 444.

134. DANIELS, *supra* note 47, at 18. These included Harlem and Hudson River, described as "two streaks of rust."

135. JOSEPHSON, *supra* note 97, at 71. Vanderbilt captured the old New York Central, running from Albany to Buffalo, by refusing to connect its passengers or freight with his lines at Albany. The Central capitulated, selling the line to Vanderbilt, who amalgamated his lines into the New York Central trunk line, running from the seaboard to the Great Lakes.

136. PLATT & DRUMMOND, *supra* note 130, at 444.

137. RAPER, *supra* note 21, at 205-06.

138. BRAGDON & MCCUTCHEN, *supra* note 71, at 321, 402, 419, 426.

139. RAPER, *supra* note 21, at 206.

As one source described it:

> It brought ruin to the companies, and little advantage to the shippers as a whole. To some shippers it, to be sure, meant low rates. To others, notably those located at the intermediate non-competitive points, it brought the condition of still higher charges for transportation service; the chief burden of the maintenance and fixed charges rested upon these shippers, in favour of those at the great competitive points. It was, in fact, during these years of intense competition that abusive discriminations were at their worst. These were the "dark days" of the history of the American railways.[140]

Large shippers served by more than a single railroad enjoyed special low rates, underbilling and, in some instances, rebates, sometimes even on the shipment of competitors' traffic.[141] For example, on shipments of oil from western Pennsylvania to Cleveland, John D. Rockefeller's Standard Oil received a forty cent rebate on every barrel it shipped, plus another forty cents per barrel shipped by its competitors.[142] Standard Oil would also receive comprehensive information about the oil shipped by its competitors, proprietary information that was invaluable in underpricing them.[143] Such rebates were, indeed, one of the means by which Rockefeller managed to take over the refineries in Cleveland that competed with Standard Oil, and eventually, establish a national monopoly.[144] According to John's brother, Frank, the message was, "If you don't sell your property to us it will be valueless, because we have got the advantage with the railroads."[145] At the turn of the Century, Yale President Arthur Hadley observed, "the railroad is not merely an instrument fostering monopoly; it is itself an example of the tendency toward monopoly. Railroad consolidation has put the control of the country's business into the hands of a few large corporations."[146]

One example of the rate wars was that practiced between the New York Central and Erie railroads. After a series of price wars, which brought the price of moving cattle from Chicago to New York down to $1.00 a car, Jim Fisk, President of the Erie, bought all the cattle available and shipped them aboard Vanderbilt's New York Central.[147]

Rate wars in competitive markets drove down profits, leading carri-

140. *Id.* at 206-07.

141. Brewer, *supra* note 20, at 365-66.

142. CHERNOW, *supra* note 123, at 136.

143. *Id.* One biographer described these rebates as "an instrument of competitive cruelty unparalleled in industry." *Id.*

144. JOSEPHSON, *supra* note 97, at 118.

145. *Id.* at 119.

146. HADLEY, *supra* note 37, at 21. "The public sees no limit to the growing power of corporations, and it regards this growth with a kind of vague fear." *Id.* at 42.

147. Paul Stephen Dempsey, *Transportation Deregulation — On a Collision Course?*, 13 TRANSP. L.J. 329, 334 (1984).

ers to raise prices to shippers without alternative means of transport.[148] Often, a farmer located along an intermediate point served by only a single railroad would find the price he was charged to get his grain to market was higher than that shipped by another, even though the other farmer's grain would be moved a longer distance over the same line.[149] Hence, pricing became highly discriminatory.[150] Prices were generally low, but unstable, between points served by competing railroads, or having access to navigable waterways, and generally high at points between which shippers had no alternative means of transport.[151] Pricing began to reflect the level of competition in any market, rather than the cost of providing service.[152]

All of this occurred in an era prior to the existence of the antitrust laws. Ruinous rate wars, often of a predatory nature, designed to drive competitors out of business, were interspersed with price fixing and pooling agreements, whereby carriers in competitive markets would agree to raise prices and pool revenue and freight, whereupon rates soared.[153] For example, Jay Gould, owner of the Wabash, engaged in a cutthroat rate war with the Chicago, Burlington & Quincy between Nebraska and Denver. Each company extended parallel lines in a fit of wasteful duplication, finally compromising and combining against the "common enemy"—the traveling and shipping public.[154] Hence, there was tremendous rate instability, even in larger markets.

B. Rate Abuses

The most significant abuse prompting government to regulate the transportation industry was rate irregularities. Preferred shippers enjoyed special rates, under billing, and rebates.[155] According to one source:

148. Bragdon & McCutchen, *supra* note 71, at 419.

149. Solon Justus Buck, The Granger Movement: A Study of Agricultural Organization and Its Political, Economic and Social Manifestations 14 (1913).

150. *Id.*

151. U.S. Dep't of Transp., A Prospectus For Change In The Freight Railroad Industry 116 (1978) [hereinafter Prospectus for Change].

152. Bragdon & McCutchen, *supra* note 71, at 419.

153. Raper, *supra* note 21, at 207.

154. Josephson, *supra* note 97, at 201-02.

155. *Id.* at 113. For example, Standard Oil had a secret agreement with the railroads running out of Cleveland by which the rates on its products would be 25% to 50% below those charged other companies. Bragdon & McCutchen, *supra* note 71, at 389. John D. Rockefeller admitted:

> A public rate was made and collected by the railroad companies, but so far as my knowledge extends, was seldom retained in full; a portion of it was repaid to the shipper as a rebate. By this method the real rate of freight which any shipper paid was not known by his competitors, nor by other railroads, the amount being a matter of bargain with the carrying companies.

Josephson, *supra* note 97, at 113.

> Today an arcane, forgotten subject, the issue of railroad rebates generated heated debate in post-Civil War America since they directly affected the shape of the economy and the distribution of wealth. Railroads had obtained the power to produce either a concentrated economy, with progressively larger business units, or to perpetuate the small-scale economy of antebellum America. The proliferation of rebates hastened the shift toward an integrated national economy, top-heavy with giant companies enjoying preferential freight rates.[156]

Transportation rates from location points that a single rail carrier served were significantly higher than those rates charged at points where railroad competition existed.[157] This was true although points in the former group were often closer to the ultimate destination.[158] Indeed, it was common for transportation costs to be higher on a shorter haul than on a longer haul on the same line in the same direction.[159] Price competition among carriers serving common geographical points led to rampant rate wars.[160] Carriers handled many shipments at substantial losses in hopes of forcing other carriers out of business, thereby enabling the victorious carrier to service the particular location point on its own terms.[161]

C. Political Corruption and Financial Piracy

The enormous concentrations of wealth and power stemming from railroading led to political corruption, as railroad entrepreneurs bribed legislators and judges, sold them stock at less than fair market value, and gave them free passes, so as to avoid taxation and regulation.[162] Fraud, deceit, and corruption marked the era. The *New York Sun* in 1872 labeled Thomas Durant of the Credit Mobilier, through which much of the Union Pacific's public capital flowed, as "The King of Frauds."[163] The newspaper described "How the Credit Mobilier bought its way through Congress," listing the "Congressmen who have robbed the People and who

156. Chernow, *supra* note 123, at 115.

157. Platt & Drummond, *supra* note 130, at 445.

158. For example, it cost more to ship goods from Poughkeepsie to New York City on the only line available, the New York Central Railroad, than to ship goods from Chicago to New York City, where both the Pennsylvania and Erie Railroads competed with the New York Central Railroad. *Genesis & Evolution*, *supra* note 2, at 375 n.16.

159. Bragdon & McCutchen, *supra* note 71, at 419.

160. Platt & Drummond, *supra* note 130, at 445.

161. Oren Harris, *Introduction, Symposium on the Interstate Commerce Commission*, 31 Geo. Wash. L. Rev. 1, 5 (1962). In the late 1860s, cattle were moved from Buffalo to New York City at a cost of $1.00 per car. During this same period, the first-class rate for shipments from Chicago to New York City ranged from $.25 to $2.15 per hundred pounds. In the late 1870s, cattle were carried free of charge from Chicago to Pittsburgh and for $5.00 per care from Chicago to New York. *Id.*

162. Social & Economic Consequences, *supra* note 6, at 9.

163. Bourne, *supra* note 41, at 94.

now support the National Robber."[164] The paper alleged that Durant and his co-conspirators had "gobbled" more than $211 million of public money.[165] Ulysses S. Grant's campaign coffers were stuffed with railroad money.[166]

Many carriers also issued watered stock,[167] manipulating its price up or down to make quick profits.[168] One example involved Cornelius Vanderbilt's attempt to take over the Erie Railroad, which competed with Vanderbilt's New York Central.[169] The Erie was owned by Jim Fisk, Daniel Drew, and Jay Gould.[170] They got wind of the attempted takeover, and began issuing watered stock.[171] Drew, known as the "Great Bear," had prospered in the cattle trade by inaugurating the concept of "watered stock," whereby cattle were kept thirsty throughout the journey, then given drink only immediately before they were weighed for sale.[172] It was a concept he introduced to the securities industry as a stockbroker and head of the house of Drew, Robinson & Co.[173] Drew was described as "sallow, weazened, unfathomable, secretive and unprincipled."[174]

Jay Gould had developed the talent of buying up poor railroads, consolidating them, giving them a new name and prosperous image, then selling them off.[175] Should the new purchasers be unable to run it profitability and the line drop into liquidation, Gould would be around to pick the line up at a reduced price and begin the cycle again.[176]

"Jubilee Jim" Fisk was described as "blatant, vulgar, exuberant, of rollicking, cynical humor, with the natural endowment of a Barnum coupled with the audacity of a gunman."[177] Printing Erie stock ferociously to

164. *Id.* at 94-95. Professor Daniels observed, "The Credit Mobilier to which the construction of the Union Pacific was sublet at an outrageous profit still smolders as a Sodom and Gomorrah in the desert of financial desolation and Congressional venality." DANIELS, *supra* note 47, at 45.

165. BOURNE, *supra* note 41, at 95.

166. *Id.*

167. "Watered stock" is issued by a corporation as fully paid-up stock, when in fact the whole amount of the par value thereof has not been paid in. It is stock issued as bonus or otherwise without consideration or issued for a sum of money less than par value, or issued for labor, services, or property which at a fair valuation is less than par value. BLACK'S LAW DICTIONARY (5th ed. 1983).

168. PLATT & DRUMMOND, *supra* note 130, at 445.

169. JOSEPHSON, *supra* note 97, at 74.

170. *Id.* The three have been described as "the sanctimonious and treacherous Drew, the fearless Jim Fisk, the impassive, stealthy Jay Gould." *Id.*

171. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 9.

172. JOSEPHSON, *supra* note 97, at 18.

173. *Id.*

174. DANIELS, *supra* note 47, at 18.

175. JOSEPHSON, *supra* note 97, at 64.

176. *Id.* at 64-65.

177. DANIELS, *supra* note 47, at 18.

feed Vanderbilt's insatiable thirst, said Fisk, "If this printing press don't break down, I'll be damned if I don't give the old hog all he wants of Erie!"[178] Although Vanderbilt himself had issued watered stock from time to time,[179] he was taken.[180]

In the ensuing battle over the Erie, both sides bribed New York legislators and judges.[181] In 1868, a New York judge, in the Tweed ring, obliging to Vanderbilt enjoined the directors of the Erie from issuing additional securities, ordered them to return issued securities and bonds.[182] Gould had his own judges issue counter-injunctions.[183] Drew and Fisk quickly dumped a mass of Erie stock on the market, causing a riot on Wall Street "as though a mine [had] exploded . . . brokers poured out into the street shouting and gesticulating like madmen; and above their tumult sounded the mad roars of the Cyclopean Vanderbilt who, it appears, had been cheated once more out of an enormous sum of money. . . ."[184] Vanderbilt's judge ordered the arrest of Drew, Gould, and Fisk for contempt of court.[185] Gathering up all the funds they had accumulated, all the cash in the Erie's treasury, and all securities, documents and incriminating evidence, they threw themselves in a hack and flew at top speed to the Hudson River, boarded the Jersey City ferry, and in New Jersey set themselves up in the Taylor's Castle hotel.[186] Drew, Gould, and Fisk renamed the hotel "Fort Taylor," surrounding it with their armed guards.[187] The Jersey City chief of police supplemented the railroad detectives with a squad of police, adding three twelve-pound cannons to the wharves near Fort Taylor.[188] Vanderbilt offered a reward of $25,000 for kidnapping of the trio.[189] A group of forty New York toughs laid siege to Fort Taylor, retreating only when superior defensive forces appeared.[190]

Gould quietly went to Albany to try to persuade the New York legislature to pass legislation legalizing his Erie stock issuances.[191] He spent

178. JOSEPHSON, *supra* note 97, at 126.

179. *Id.* at 72. It was claimed that $50,000 of water had been poured for each mile of Vanderbilt's New York Central track between New York and Buffalo. *Id.*

180. PLATT & DRUMMOND, *supra* note 130, at 445.

181. *Id.*

182. JOSEPHSON, *supra* note 97, at 125-26.

183. *Id.* at 126.

184. *Id.*

185. *Id.*

186. JOSEPHSON, *supra* note 97, at 126-27.

187. *Id.* at 127.

188. *Id.* at 128.

189. *Id.* at 129.

190. JOSEPHSON, *supra* note 97, at 129.

191. *Id.* at 129-30.

about $1 million, and stock, bribing legislators.[192] Vanderbilt soon got wind of what was up and sent his own team to lobby the legislature.[193] But when it became known that Vanderbilt would pay no more, in a rage the legislature turned against him and passed the bill substantially as Gould had proposed it.[194] Concluding that the "Erie war has taught me that it never pays to kick a skunk," Vanderbilt called for peace with Drew, who accepted Vanderbilt's proposal of a partial repayment of $4.5 million.[195] In the end, Fisk had defrauded the public of $64 million by watering Erie's stock.[196] As a result of such stock manipulation, "[t]he railroad treasure was thus gutted for the benefit of the erstwhile combatants,"[197] and the Erie was unable to pay dividends for half a century.[198]

Jay Gould subsequently gained control of the Union Pacific and led it to purchase the inflated stock of other rail carriers he controlled—the Kansas Pacific and Denver Pacific, both land grant railroads emptied of their State subsidies and private capital, but now "streaks of rust" ending in the desert.[199] Adding the Wabash,[200] the St. Joseph & Denver, the Missouri Pacific[201] and the Missouri, Kansas & Texas to his portfolio,[202] he threatened the Union Pacific that if it did not buy his two parallel railroads he would stretch a competing line all the way to the Pacific Ocean.[203] Gould was given 200,000 shares of the Union Pacific, then worth about $10 million, for these worthless lines.[204] Long before, Daniel Drew had said of Gould, "His touch is death."[205] These actions injured both investors and the shipping public, for the carriers found it necessary to maintain high rates in order to pay dividends on these inflated stock issues.[206]

The Panic of 1873 gave fuel to the fire of wildly fluctuating rates.[207]

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192. *Id.* at 130.
193. *Id.*
194. *Id.* at 131.
195. *Id.* at 133.
196. BOURNE, *supra* note 41, at 95.
197. DANIELS, *supra* note 47, at 21-22.
198. PLATT & DRUMMOND, *supra* note 130, at 445.
199. JOSEPHSON, *supra* note 97, at 197.
200. *Id.* at 203. "[I]ts treasury empty, its stock maintained by secret loans at a high price – the poor Wabash was to crash in a sensational debacle, in which it appeared afterward that Jay Gould was in no way involved. He was simply not there when it happened." *Id.*
201. *Id.* at 199. Though $25 million had been lavished on the Missouri Pacific in subsidies, Gould acquired it for only $3.8 million. The railroad was to remain in the Gould family for generations. *Id.* at 202.
202. *Id.* at 199.
203. *Id.* at 201.
204. *Id.* at 198.
205. *Id.* at 201.
206. BRAGDON & MCCUTCHEN, *supra* note 71, at 419.
207. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 9.

The Panic was precipitated by the financial failure of James J. Hill, the financier of the Northern Pacific.[208] By the end of the year, nearly one fifth of the nation's railroad mileage was in bankruptcy.[209] A long depression followed.[210] During the decade of the 1870s, rail revenues fell by approximately one third.[211]

The environment left nearly everyone dissatisfied. The rate wars, rebates to favored shippers and predatory price wars in competitive markets rendered the railroads' returns on investment inadequate.[212] Farmers served by only a single railroad felt their rates were excessively high, and wanted protection against discriminatory rate practices.[213] Shippers in competitive markets desired greater rate stability and wanted some assurance that they would not be placed at a competitive disadvantage vis-a-vis those shipping like products.[214] As one source noted, "The generation between 1865 and 1895 was already mortgaged to the railways and no one knew it better than the generation itself."[215]

D. Labor Unrest

The monopoly power wielded by Rockefeller's Standard Oil led to such deep rebates as to result in massive revenue losses by railroads.[216] In 1877, Rockefeller insisted that the Pennsylvania Railroad cease oil refining or he would divert traffic to other roads.[217] In the wake of Rockefeller's onslaught, the Pennsylvania fired hundreds of workers, slashed wages 20%, and doubled the length of trains without expanding crews.[218]

Also that year, the four major eastern railroads—the Pennsylvania, New York Central, Erie and B&O—set up a rate control pool, and cut wages by 10%.[219] After the Baltimore & Ohio Railroad announced wage cuts, a general railroad strike ensued.[220] Wages had been reduced the prior year, yet dividends to stockholders were still being paid.[221] It was one of the bloodiest battles in American labor history, resulting in dozens

208. George M. Chandler, *The Interstate Commerce Commission—The First Twenty-Five Years*, 16 Transp. L.J. 53, 53 (1987).
209. *Id.*
210. *Id.* at 54.
211. *Id.*
212. Prospectus for Change, *supra* note 151, at 116.
213. *Id.*
214. *Id.*
215. Josephson, *supra* note 97, at 75.
216. *See* Chernow, *supra* note 123, at 201.
217. *Id.*
218. *Id.*
219. Withuhn, *supra* note 68, at 49.
220. Chernow, *supra* note 123, at 201.
221. Withuhn, *supra* note 68, at 49.

of fatalities.[222] Trainmen at Martinsburg, West Virginia, refused to handle freight trains; trains stopped at Grafton; fights broke out at Wheeling.[223] To quell the uprising, State governors ordered out their militias, which President Rutherford B. Hayes supplemented with federal troops.[224] For a week, nearly the entire railroad system ground to a halt.[225] Violence broke out in Baltimore, Chicago, St. Louis, St. Paul, Omaha, and San Francisco.[226] In Pittsburgh, a group of 20,000 strikers and supporters confronted 10,000 militiamen and police; 500 tank cars, 120 locomotives and twenty-seven buildings were torched by trade unionists; twenty-four people died.[227] After burning more than 2,000 freight cars, the revolt subsided.[228] Nonetheless, it inaugurated a new era of labor militancy in American industry.[229] It was the first great American industrial strike.[230]

Working conditions on the railroads were onerous. Workers complained of long hours, no overtime pay, the lack of job security, and dangerous workplace conditions.[231] In 1886, a bloody strike erupted on the Chicago, Burlington & Quincy Railroad.[232] The Brotherhoods began to amalgamate to form unions, as the country became convinced that the railroads needed regulating.[233]

V. The Birth of Economic Regulation

A. The Granger Movement

After America's young men returned to their farms following the Civil War, the production of cereal crops increased, and prices fell.[234] Moreover, rate discrimination and financial piracy became widespread.[235] Founded by Oliver Hudson Kelley, a government clerk, the "National Grange of the Patrons of Husbandry" (a sort of rural freemasons society,

222. Chernow, *supra* note 123, at 201.
223. Withuhn, *supra* note 68, at 49.
224. Chernow, *supra* note 123, at 202.
225. Withuhn, *supra* note 68, at 49.
226. *Id.*
227. *Id.*
228. *Id.*
229. Chernow, *supra* note 123, at 201-02.
230. Withuhn, *supra* note 68, at 106.
231. In 1888 alone, 2,070 railway workers were killed, and another 20,148 were injured. In 1894, Eugene V. Debs and the American Railway Union staged a bitter, but unsuccessful, strike against wage reductions. Bourne, *supra* note 41, at 108-09.
232. William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act With the Railway Labor Act*, 24 Transp. L.J. 241, 245 (1997).
233. Withuhn, *supra* note 68, at 106.
234. Social & Economic Consequences, *supra* note 6, at 9.
235. *Id.*

more commonly known as the Grangers), led the political charge for regulation.[236] They consisted of a powerful political organization of 1.5 million western farmers banded together in 20,000 lodges.[237]

As noted above, the desire for economic growth led both the federal and many State and local governments to provide economic incentives to railroads to build westward. The railroad promoters also turned to individuals located along the rights of way for investment capital.[238] Many farmers mortgaged their farms—starry eyed with the prospect of lucrative dividends and reasonably priced access to eastern markets.[239] They were disappointed on both counts.[240] Dividends were poor, or nonexistent.[241] As Professor Daniels observed, "The hectic overstimulation of premature construction, far in advance of the demand for traffic, submerged them eventually in hopeless, sometimes in repeated bankruptcies."[242] Many railroads went through bankruptcy and reorganization, and the value of their stock was wiped out.[243] Some had issued watered stock in order to raise money fraudulently.[244] Many farmers who would be served by the new roads mortgaged their farms and invested in rail stock in anticipation of lucrative dividends and reasonable transportation costs for shipping their crops to eastern markets.[245] Governments and farmers alike suffered as many railroads went through bankruptcy and reorganization, effectively wiping out the value of the stock sold to investors.[246]

State governments attacked the rail industry for its bribery of public officials,[247] sale of worthless securities,[248] and rate and service discrimination between places and persons.[249] In addition, farmers were left with mortgages, worthless stock, exorbitantly priced or nonexistent transportation, and increased taxes needed to cover local government invest-

236. BUCK, *supra* note 149, at 40; DANIELS, *supra* note 47, at 47.
237. BOURNE, *supra* note 41, at 109.
238. DEMPSEY & THOMS, *supra* note 22, at 7.
239. *Id.*
240. *Id.* at 7-8.
241. *Id.* at 8.
242. DANIELS, *supra* note 47, at 46-47.
243. DEMPSEY & THOMS, *supra* note 22, at 8.
244. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 9.
245. *See* PLATT & DRUMMOND, *supra* note 130, at 480-90.
246. DEMPSEY & THOMS, *supra* note 22, at 8.
247. *See* MORISON, *supra* note 77, 730-32. Motivated by private gain and unable to see any public interest, the "feudal chieftains" of the railroads bribed or coerced their way out of taxation and government regulation. *Id.* at 763-64.
248. *See* PLATT & DRUMMOND, *supra* note 130, at 445. The sale of watered stock, as in the takeover battle between the New York Central and Erie Railroads, injured both stock investors and the public, because the carriers found it necessary to keep rates high in order to pay dividends on the inflated stock issues. *See* BRAGDON & MCCUTCHEN, *supra* note 71, at 418-19.
249. PROSPECTUS FOR CHANGE, *supra* note 151, at 116.

ments.[250] Midwestern farmers, the primary victims of the rate abuses, assailed the excessively high and discriminatory rates that the railroads charged to carry agricultural products from points of origin, over which carriers had a monopoly, to eastern markets or processing areas.[251] They criticized the railroads' high rates, land grants, and political power.[252] In the meantime, their taxes were increased to cover the parallel investment made by their state and local governments.[253] This led to a blind antagonism toward the railroads.[254] Daniels noted, "they commonly incurred the lasting ill will of the communities they were built to serve, an ill will which the arrogance of supposed boundless power was destined to fan into a prairie fire."[255] Another source noted, "[w]hat made matters worse was that these capitalists were living in the Eastern States or in Europe, and were regarded by the farmer as the absentee landlord is regarded by the Irish tenantry."[256] The result was a political movement calling for regulation.[257] Economics Professor Charles Lee Raper noted the tenor of the times:

> Too long the railway manager has seen only one side of the situation; too long has he fancied his business a private one, when it should always be a public or quasi-public one. Too long has the state . . . permitted, by its charters and laws, the railway manager thus to think of himself. A great struggle finally came, as come it must under such circumstances, between two parties who should have from the nature of the relationship always been friends. The sanity of railway management and the wisdom of the people are always shown in the condition of the relationship between the railways and the state.[258]

B. The State Commissions

As early as 1836, the Massachusetts Legislature reserved to itself the authority to regulate rail rates.[259] But soon it became apparent that the legislatures had neither the time, the talent, nor the expertise to regulate so complex an industry as transportation, and they established regulatory commissions to perform the task.[260]

The first Commissions were those having only advisory powers, such

250. Dempsey & Thoms, *supra* note 22, at 8.
251. *Id.* at 9.
252. Bryant, *supra* note 110, at 161.
253. Dempsey & Thoms, *supra* note 22, at 8.
254. Buck, *supra* note 149, at 11.
255. Daniels, *supra* note 47, at 47.
256. Hadley, *supra* note 37, at 133.
257. Dempsey & Thoms, *supra* note 22, at 8.
258. Raper, *supra* note 21, at 12.
259. Social & Economic Consequences, *supra* note 6, at 9.
260. Harris, *supra* note 161, at 7.

as those established in eastern states like Rhode Island (1936), New Hampshire (1844), Connecticut (1853), New York and Vermont (1855), Maine (1858), Ohio (1867), and Massachusetts (1869).[261] These early commissions appraised the value of property committed to rail development under eminent domain powers and enforced rail safety standards, but lacked ratemaking power.[262]

Under the aegis of the "Patrons of Husbandry," the Granger movement, which lobbied for the political and commercial interests of farmers, persuaded numerous states to enact legislation restricting the activities of rail carriers.[263] In 1869, Illinois passed the first statute requiring the railroads to offer just, reasonable, and uniform rates.[264] In 1871, Minnesota enacted a law that regulated maximum rates and prohibited unjust discrimination.[265] During the subsequent fifteen years, Iowa, Wisconsin, Missouri, California, Nebraska, Kansas, Oregon, and several southern states passed similar legislation.[266] Because State legislators had other public business consuming their time, several States established independent commissions to develop expertise in order to adjudicate rate disputes, regulate the intricacies of their railroad industry, and protect the public interest in transportation matters.[267] In the west, these State commissions had the power to regulate rail rates, whereas in the east, they usually had only advisory powers.[268] But the railroad's army of lawyers was so adept at finding loopholes in the States' Granger Laws that many were repealed.[269]

C. The Movement Toward Federal Regulation

Abuses in the railroad industry were not unique to America. In Great Britain, advisory powers over railroads were given to a newly established Board of Trade in 1840.[270] In 1844, a commission was established to report to Parliament on applications for railroad charters.[271] It was clear that competition was not effectively regulating traffic and

261. Social & Economic Consequences, *supra* note 6, at 9.

262. William Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 432 (1979).

263. Harris, *supra* note 161, at 6.

264. *Id.* at 6.

265. *Id.* at 7.

266. *Id.*

267. *Id.*

268. Dempsey & Thoms, *supra* note 22, at 9. *See* Current, De Conde, & Dante, *supra* note 106, at 352.

269. Bourne, *supra* note 41, at 109.

270. Hadley, *supra* note 37, at 171.

271. *Id.*

rates.[272] Yet another commission was established in 1846.[273] In 1854, Parliament passed the Railway and Canal Traffic Act to protect local roads in through traffic, secure proper facilities, and prohibit discriminatory treatment of shippers.[274] But this proved inadequate.[275] A Royal Commission was established in 1865 to investigate the railroad industry.[276] Another committee was appointed by the British Parliament for the same purpose.[277] The result was the Act of 1873, which created the Railway and Canal Commission, by which the industry was regulated.[278] In contrast, Belgium, Prussia, France, Austria, and Italy responded to these concerns by nationalizing their railroads.[279]

In America, it took a bit longer, and socialism would be no part of the solution. The political pressure for regulation of the railroads was not just targeted at the states. The Granger movement also had an impact in Washington, D.C.

In 1872, President Grant requested a congressional investigation of the industry.[280] Two years later, the Windom Committee issued its report.[281] It found that the principal complaint against the railroads involved allegations of unreasonably high rates by the farmers.[282] The Committee recommended more competition as a solution to the problem, including construction of new canals and track, and federal or state railways in competition with the private railways.[283] This was, incidentally, the approach adopted by Canada to deal with the problem of monopoly railroads.[284]

Pressure mounted for rail regulation, and complaints expanded beyond rate levels to discrimination in pricing and service against persons, places and commodities, the loose financial practices characterizing railroad capitalization and construction, and the monopoly nature of the industry, including both the size of the railroads and their extensive pooling arrangements to suppress rate wars.[285]

In 1878, Congress created a bureau of railroad accounts to investigate irregularities, and ensure enforcement of the laws applicable to the

272. *Id.*
273. *Id.*
274. RAPER, *supra* note 21, at 21.
275. *Id.*
276. *Id.* at 22.
277. *Id.*
278. *Id.* at 23.
279. HADLEY, *supra* note 37, at 22.
280. WILLIAM K. JONES, REGULATED INDUSTRIES 44 (2d ed. 1976).
281. *Id.*
282. *Id.*
283. *Id.*
284. WITHUHN, *supra* note 68, at 108-09.
285. JONES, *supra* note 280, at 44.

indebted railroads.[286] In 1886, the Cullom Committee Report was issued, which recommended federal legislation prohibiting unreasonably high rates, discriminatory rates and rebates.[287] It also called for the creation of an impartial tribunal to adjudicate complaints against the railroads.[288] The *Wabash* decision was issued that same year.[289] In 1887, the U.S. Railway Commission examined the issue of political control, concluding that money and passes had been used to influence legislation.[290] The stage was now set for Congress to act.

D. Creation of the Interstate Commerce Commission

In 1887, Congress promulgated the Act to Regulate Commerce,[291] which established the nation's first independent regulatory agency—the Interstate Commerce Commission.[292] The Act succinctly established a comprehensive regulatory regime over the rail industry.[293] It granted the ICC authority to regulate the interstate rates charged by railroads, thereby ensuring that the rates would be just and reasonable.[294] Under the Act, rail carriers could no longer discriminate in rates or services between persons, localities, or traffic.[295] Furthermore, they could no longer charge a higher rate for a shorter distance that was included within a longer haul over the same line in the same direction.[296] Nor could the rail carriers pool freight or revenues.[297] Most importantly, the statute required the railroads to make their rates public, file them with the newly formed Commission, and adhere to the published tariffs.[298]

Although all but one of the rail industry witnesses favored regulatory legislation, it was still rather effective consumer legislation.[299] While it included provisions the industry favored (i.e., requirements that rates be just and reasonable, and that unjust discrimination, preference and prejudice be abolished), it also included provisions against which the railroads had lobbied (i.e., the prohibition against pooling, and charging more for a short haul than a longer haul over the same line in the same

286. Athearn, *supra* note 108, at 338-39.
287. Jones, *supra* note 280, at 44-45.
288. *Id.* at 44.
289. *Id.* at 45.
290. Athearn, *supra* note 108, at 340.
291. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).
292. Harris, *supra* note 161, at 1.
293. *Genesis & Evolution*, *supra* note 2, at 341.
294. Interstate Commerce Act, §§ 11-12.
295. *Id.* § 3.
296. *Id.* § 4.
297. *Id.* § 5.
298. *Id.* § 6.
299. Chandler, *supra* note 208, at 55.

direction).[300]

Never before had Congress established an independent regulatory commission to exercise the commerce power conferred under Article I Section 8 of the Constitution.[301] President Grover Cleveland appointed the distinguished jurist, Thomas Cooley, to the Interstate Commerce Commission, and Cooley was elected its first Chairman.[302] Cooley, a former Chief Justice of the Michigan Supreme Court, a law professor, and author of treatises in constitutional law, torts, and tax, was among the most prolific and gifted lawyers in the nation.[303]

E. The Birth of the Modern Regulatory Movement

The Interstate Commerce Act was the first comprehensive regulation of any industry in the United States.[304] It was the first time in American legal history that an industry was regulated by a structure outside the courts and the common law, which had theretofore inartfully attempted to prohibit discrimination and abuses by common carriers.[305] The Interstate Commerce Act preceded the Sherman Antitrust Act by three years.

Perhaps it was inevitable that government would come to play a role in protecting the public and the industry from the ravages of economic instability and exploitation. As a contemporary observer of the era in which economic regulation emerged remarked,

> The genesis of the public policy [in favor of economic regulation] lay in the significance of railroad transportation to the fastest growing nation in world history. The railroad dominated [the U.S.] economy and society in the 19th century. The domination existed from every standpoint, capitalization, employment, community impact or entrepreneurial opportunity. There was no force, industrial or religious which matched the societal impact of the railroad after the first third of the 19th Century.[306]

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300. *Id.*

301. *See* Dempsey & Thoms, *supra* note 22, at 11.

302. Chandler, *supra* note 208, at 55.

303. *Id.* Roscoe Pound, for two decades the Dean of the Harvard Law School, considered Cooley one of the top ten judges of all time. The New York Times referred to him as "the father of the Interstate Commerce Bill." Frank N. Wilner, Comes Now The Interstate Commerce Practitioner 102 (1993). Shortly after his appointment to the Interstate Commerce Commission, Cooley recommended creation of an association for state regulatory utility commissioners. It was he who is the father of National Association of Regulatory Utility Commissions [NARUC], established on March 5, 1889. NARUC held its first convention in Washington, D.C., on that date, the day after the inauguration of Benjamin Harrison as 23rd President of the United States.

304. David M. Warner, *To Hell on the Railroads: Why Our Technology and Law Encourage a Degrading Culture*, 26 Transp. L.J. 361, 382 (1999).

305. Roy J. Sampson, Martin T. Farris & David L. Schrock, Domestic Transportation: Practice, Theory, and Policy 213 (6th ed. 1990).

306. Joseph Auerbach, *The Expansion of ICC Administrative Law Activities*, 16 Transp. L.J. 92, 92 (1987).

Another observed, "[w]e know that with the introduction of the railway there came a new factor in the life of the nation, and of the world, which radically affected all phases of that life. The railway is both quantitatively and qualitatively different from other and earlier means of conveyance and communication."[307]

The creation of the ICC marked the birth of economic regulation in America. One commentator observed, "The ICC is one of the earliest instances we can point to where the federal government intervened directly in the economy to protect the economically weak from the economically strong."[308] Still another observed that, "[f]rom our own perspective a century later, the greatest significance of the 1887 Act to Regulate Interstate Commerce lies in its creation of the protypical federal regulatory agency."[309] Indeed, during the ensuing decades, the ICC became the model for economic regulation of a host of infrastructure industries, including commercial aviation, and the numerous federal and state agencies that emerged to perform the regulatory function.

F. Judicial Emasculation and Congressional Restoration of ICC Jurisdiction

Though Congress expanded the ICC's jurisdiction in the ensuing years, for example, giving it jurisdiction over rail safety in 1893,[310] decisions of the U.S. Supreme Court significantly reduced the ability of the nascent Commission to regulate rates effectively.[311] For example, in two cases involving Cincinnati, New Orleans & Texas Pacific Railway, the Court held that the ICC had no authority to prescribe rates for the future.[312] Although the Commission could conclude that an existing rate was excessive and unlawful, and therefore award reparations to the complaining party, it could not insist on a reduction in future rates, which would have protected others similarly situated or the general public.[313] In *Interstate Commerce Commission v. Alabama Midland Railway Co.*,[314]

307. Lewis H. Haney, 1 A Congressional History of Railways in the United States, 241 (Augustus M. Kelley 1968).

308. James C. Miller III, *Keynote Address to ICC Centennial Celebration*, 16 Transp. L.J. 40, 41 (1987).

309. Thomas K. McCraw, Prophets of Regulation 61-62 (1984).

310. Chandler, *supra* note 208, at 57. Congress passed the first Safety Appliance Act in 1893. *Id.*

311. *See e.g.*, Interstate Commerce Comm'n v. Cincinnati, N.O. & T. Pac. Ry. Co., 167 U.S. 479 (1897); Interstate Commerce Comm'n v. Ala. Midland Ry. Co., 168 U.S. 144 (1897).

312. *See Cincinnati, N.O. & T. Pac. Ry. Co.*, 167 U.S. at 506; Cincinnati, N.O. & T. P. Ry. Co. v. Interstate Commerce Comm'n, 162 U.S. 184, 196-97 (1896).

313. *Cincinnati, N.O. & T. Pac. Ry. Co.*, 167 U.S. at 509; *Cincinnati, N.O. & T.P. Ry. Co.*, 162 U.S. at 196-97.

314. 168 U.S. 144 (1897).

the U.S. Supreme Court effectively deprived the Commission of its ability to enforce the long- and short-haul provisions of the 1887 statute.[315] Thus, by the turn of the century, an essentially impotent ICC faced increasing rail rates, rail consolidations that were reducing competition, and rail carriers which were continuing jointly to fix rates.[316]

Given this situation, Congress expanded the Commission's jurisdiction through several Progressive Era reforms passed between 1903 and 1910.[317] In 1903, Congress enacted the Elkins Act,[318] which prohibited rail rebates and granted the Commission authority to impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs.[319] Three years later Congress passed the Hepburn Act,[320] giving the Commission jurisdiction over express, sleeping car, and steamship companies, as well as over fuel pipelines.[321] This Act also conferred on the ICC jurisdiction to determine and prescribe maximum rates.[322] Additionally, it gave the Commission the power to establish through-routes and joint rates among non-competing carriers and to prescribe their divisions,[323] and forbade the issuance of free passes except for clergy.[324]

Though the Elkins and Hepburn Acts were designed to prohibit rebates, in 1907 the ICC reported that Standard Oil was still "secretly accepting rebates, setting up bogus subsidiaries, and engaging in predatory pricing."[325] President Theodore Roosevelt and his cabinet were eager for a test case proving Standard Oil's collusion with the railroads.[326] Charged with taking rebates from the Chicago and Alton Railroad after the Elkins

315. *Id.* at 168-69.

316. I. L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 34-35 (1931).

317. DEMPSEY & THOMS, *supra* note 22, at 11. In 1903, Congress enacted the Elkins Act, which granted the Commission authority to impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs. Three years later Congress passed the Hepburn act, which gave the ICC jurisdiction over express, sleeping car, and steamship companies, as well as fuel pipelines. This act also conferred jurisdiction to determine and prescribe maximum rates for the future in those situations in which existing rates were deemed unlawful. Additionally, it gave the ICC the power to establish through routes and joint rates among noncompeting carriers and to prescribe their divisions. And in 1910, Congress passed the Mann-Elkins Act, which revitalized the long- and short-haul provisions, and established new rate procedures. Under this Act the Commission could, on its own motion, suspend tariffs pending an investigation of their lawfulness. *Genesis & Evolution*, *supra* note 2, at 342.

318. Elkins Act, ch. 708, 32 Stat. 847 (1903).

319. *Id.* § 1.

320. Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

321. *Id.* § 1.

322. *Id.* § 4.

323. *Id.*

324. WITHUHN, *supra* note 68, at 106.

325. CHERNOW, *supra* note 123, at 539.

326. *Id.*

Act prohibited them, the federal district court issued the largest fine in American corporate history up to that time, nearly $30 million.[327] Though reduced on appeal, the era of railroad rebates was coming to an end. Moreover, Standard Oil would fall to the antitrust laws in 1911.[328] Teddy Roosevelt was among the strongest presidential proponents of a strong Interstate Commerce Commission.[329]

In 1910 Congress passed the Mann-Elkins Act,[330] which revitalized the long- and short-haul provisions[331] and established new rate procedures.[332] Under this Act the Commission could, on its own motion, suspend tariffs pending an investigation of their lawfulness.[333] The Act also created a Commerce Court to review ICC decisions.[334] In 1911, it reviewed thirty ICC decisions and reversed twenty-seven of them, a reversal rate that led Congress to abolish the court in 1913.[335] During the period from 1889 until World War I, not only was the power of the Interstate Commerce Commission enhanced, but strong regulatory commissions also were established in a substantial majority of the states.[336]

Other legislation also reigned in the railroads. The Panama Canal Act of 1912 prohibited the railroads from owning ocean carriers traversing the canal.[337] The Clayton Act of 1914 prohibited interlocking railroad directorates.[338] The Adamson Act of 1916 gave labor the eight-hour workday.[339] According to Professor Daniels, "By this time the railroad Sampson had been rather effectively shorn by the Congressional Delilah."[340]

G. Water and Ocean Carrier Regulation

Maritime transportation was the first industry to be administered by a specialized tribunal.[341] In England, for centuries there were special courts to address "a thing done upon the sea."[342] At the dawn of the

327. *Id. at* 539-41.
328. *Id. at* 554.
329. *See* Daniels, *supra* note 47, at 70-80.
330. Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).
331. *Id.* § 8.
332. *Id.* § 9.
333. *Id.* § 13.
334. *Id.* § 1.
335. Chandler, *supra* note 208, at 57.
336. Social & Economic Consequences, *supra* note 6, at 14.
337. Daniels, *supra* note 47, at 55.
338. *Id.*
339. *Id.*
340. *Id.*
341. Dempsey & Thoms, *supra* note 22, at 29 (adapted from James Hardman, Transportation Law: An Introductory Study (1978)).
342. *Id.*

American republic, admiralty law was well developed. Article III of the U.S. Constitution extended the judicial power of the United States to "all cases of admiralty and maritime jurisdiction."[343] Thus, admiralty law became federal law, with federal courts deciding admiralty cases.[344]

Beginning in 1789, the U.S. government imposed a discriminatory tax on vessels operating in coastal trade.[345] In 1817, Congress completely banned foreign flag ships from interstate trade, reserving cabotage to U.S.-flag vessels, a requirement that continues to the present in the maritime and airline industries.[346] Though American shipping dominated the Clipper ship era of the early 19th Century, by the advent of the steamship in the mid-19th Century, British shipping and shipbuilding began to dominate, while the American industry declined.[347] By the dawn of the 20th Century, the American merchant marine was nearly insignificant.

Congress began regulating water transport with the Panama Canal Act of 1912.[348] The U.S. merchant fleet had shrunk after the Civil War, and by 1910 carried only 10% of the U.S. trade.[349] When World War I broke out, the European vessels withdrew from the U.S. trade, causing freight charges to soar.[350] For example, the price of moving grain from the U.S. to Britain rose from five cents to fifty cents per bushel.[351] World War I deprived the United States of much of the foreign tonnage upon which it had relied.[352]

In order to restore the health of the U.S.-flag fleet, Congress passed the Shipping Act of 1916.[353] This act created a regulatory agency, the U.S. Shipping Board, to regulate ocean vessel conference ratemaking activities, and a public corporation to build, buy, charter, and operate merchant vessels, the Shipping Board Emergency Fleet Corporation.[354] The Act also granted limited antitrust immunity to the conference's price-fixing activities, but subjected it to a regulatory scheme seeking to eliminate other anticompetitive abuses.[355] Although such price-fixing activities would otherwise have been inconsistent with existing antitrust laws, Congress recognized that shielding conference activity from antitrust attack

343. *Id.* at 29-30.
344. *Id.* at 30.
345. DEMPSEY & THOMS, *supra* note 22, at 30.
346. *Id.*
347. *Id.*
348. Basedow, *supra* note 12, at 29.
349. *Id.* at 31.
350. *Id.*
351. *Id.*
352. *Id.*
353. Shipping Act of 1916, ch. 451, 39 Stat. 728 (1916) (46 U.S.C. app. § 801).
354. *See generally id.*
355. *Id.* § 17.

would enable shippers to enjoy the benefits of more frequent and regular sailing, greater rate stability, and enhanced capital investment in new ships. Thus, carriers would be spared the economic injury inherent in the industry's "boom-to-bust cycle."[356]

The Merchant Marine Act of 1926[357] replaced the Shipping Board with the U.S. Maritime Commission, which was given the responsibility to foster U.S.-flag shipping to satisfy the domestic and international needs of commerce and national defense.[358] The Dennison Act of 1928 for Mississippi River navigation, and the Intercoastal Shipping Act of 1933 for the Panama Canal, imposed additional legislative controls over this industry.[359]

Economic and competition issues surrounding carriers and shippers today are governed by the Federal Maritime Commission, the successor to the U.S. Shipping Board, except for the non-contiguous domestic trade, which is governed by the Surface Transportation Board.[360] The Federal Maritime Administration provides subsidies to U.S. flag vessels.[361] The U.S. Coast Guard ensures navigational safety.[362] The Army Corps of Engineers maintains the intercoastal waterways, interior locks and canals.[363] In cooperation with the government of Canada, the St. Lawrence Seaway Commission maintains the river and canal system linking the Great Lakes with the Atlantic Ocean.[364] Additionally, numerous port authorities maintain the docks and harbors of our nation's port cities.[365] Internationally, the U.N. International Maritime Organization, headquartered in London, oversees safety and environmental issues on the high seas.[366]

VI. NATIONALIZATION OF THE RAIL SYSTEM

A. A BRIEF BOUT WITH SOCIALISM

American involvement in World War I flooded eastern ports with commodities, as rail lines and ports became clogged in gridlock.[367] The

356. *See* David K. Pansius, *Plotting the Return of Isbrandtsen: The Illegality of Interconference Rate Agreements*, 9 TRANSP. L.J. 337, 338 (1977).
357. 46 U.S.C. § 1101 (1926).
358. DEMPSEY & THOMS, *supra* note 22, at 31.
359. Basedow, *supra* note 12, at 29.
360. AIR COMMERCE, *supra* note 57, at 111-12.
361. *Id.* at 112.
362. *Id.*
363. AIR COMMERCE, *supra* note 57, at 112.
364. *Id.*
365. *Id.*
366. *See* Paul Stephen Dempsey, *Compliance and Enforcement in International Law – Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW. J. INT'L L. & BUS. 459, 461 (1984).
367. WITHUHN, *supra* note 68, at 107.

ensuing chaos led Congress to take over the national rail industry and run it as a single system.[368] With the Army Appropriations Act of 1916, Congress created the United States Railway Administration [USRA] to perform this task.[369] With the Possession & Control Act of 1917, the USRA ran the system from December 28, 1917, until March 1, 1920—twenty-one months after termination of the hostilities.[370] During the War, rolling stock was maintained in good condition, but the roadbed was allowed to deteriorate.[371] By the end of the War, it was apparent that the industry would need assistance in regenerating itself.

B. The Transportation Act of 1920 and the Railway Labor Act of 1926

After World War I, the policy of the federal government shifted from one of protecting the public from the market abuses of the transportation industry to one of preserving a healthy economic environment for common carriers.[372] This policy shift reflected a Congressional recognition that the rail industry was over-expanded and had suffered deferred maintenance.[373] This led Congress to promulgate the Transportation Act of 1920, also known as the Esch-Cummins Act.

The new legislation was preoccupied with the financial health of the industry. The ICC was given jurisdiction over minimum rates to supplement its existing authority over maximum rates, power to regulate entry and exit from markets by issuing certificates of public convenience and necessity, authority to regulate inter-corporate relationships and the issuance of securities to ensure a sound financial structure, mergers, and a

368. Robert L. Calhoun, *The Interstate Commerce Commission, 1912-1937*, 16 Transp. L.J. 59, 61 (1987).

369. Social & Economic Consequences, *supra* note 6, at 14.

370. Lucius Beebe & Charles Clegg, Rio Grande: Mainline of the Rockies 117 (1962); Dempsey & Thoms, *supra* note 22, at 13.

371. Dempsey & Thoms, *supra* note 22, at 12. Some sources have been quite critical of the period of federal control of the national railroad system:

> Knowing that great things were expected of him because of the enormous authority he had received, [Director General of Railroads William G.] McAdoo, in a veritable frenzy of activity, set about regulating, restraining and reorganizing so that chaos and confusion from being regional and sporadic, in brief order became endemic to the entire network of the nation. Passenger schedules were slashed, passenger runs merged, freight facilities pooled and, most drastic of all, stringent controls of the flow of freight over the mainline carriers were introduced on a sweeping scale. Out of all this fever of activity nothing very great resulted and from the almost total dislocation of a vast and important industry, the statistics when they were complied showed that McAdoo's hysterical administration had resulted in a microscopic increase of two percent in freight traffic between 1917 under private management and 1918 under government control.

Beebe & Clegg, *supra* note 370, at 117. Another described this period so "somewhere between unfortunate and disastrous." Withuhn, *supra* note 68, at 126.

372. *See* Dempsey & Thoms, *supra* note 22, at 12.

373. *Id.* at 12-13.

mandate to draft a plan of consolidating the multiple parallel rail companies into a more efficient and fewer number of larger firms.[374] But the effort to consolidate the rail system died stillborn for lack of support from the industry.

Title III of the Transportation Act of 1920 also created a new agency, the U.S. Railroad Labor Board, which attempted to avoid interruptions to commerce by negotiating disputes.[375] Title III was designed to deal with the, sometimes, violent confrontations between labor and management in the railroad industry, including the major strikes of 1877, 1886, 1888, and 1894, and the 105 railroad strikes that broke out between 1899 and 1904.[376] The railroad industry had pressed for the establishment of Army bases in major cities, whose soldiers could be called out to quell strikes with force.[377] Prior legislation, including the anemic Arbitration Act of 1888, the Erdman Act of 1898 and the short-lived Newlands Act of 1913, had failed to eliminate the conditions that gave rise to strikes.[378] A national strike in 1922 revealed that the 1920 Act still was not the solution.[379] So, in 1926 Congress promulgated the Railway Labor Act,[380] the first legislation to force management to recognize and bargain with employee representatives.[381] It would later be extended to the airline industry.

VII. Government Promotion of Transportation Infrastructure

A. Highways and the Motor Carrier Industry

The early 20th Century saw the emergence of a new form of competition, the motor carrier. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines.[382] The following year, the first scheduled bus service began in New York City.[383] But still, growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry.[384]

The first federal agency was the Office of Road Inquiry, established in 1893 within the U.S. Department of Agriculture.[385] Congress recog-

374. *Id.*
375. Mahoney, *supra* note 232, at 249-50.
376. *Id.* at 245-47.
377. Air Commerce, *supra* note 57, at 113.
378. *Id.* at 113-14.
379. Mahoney, *supra* note 232, at 250.
380. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (49 U.S.C. § 151).
381. For an excellent review of this history, *see* Mahoney, *supra* note 232, at 245-51.
382. Social & Economic Consequences, *supra* note 6, at 14.
383. *Id.*
384. Air Transportation Foundations, *supra* note 19, at 7.
385. Bourne, *supra* note 41, at 112.

nized the potential importance of motor carriage, and began to promote its growth with federal matching grants for highway construction, first with the Federal-Aid Road Act of 1916, which established the Bureau of Public Roads, and then the Federal Highway Act of 1921.[386] Soon dirt horse and wagon trails were extended, straightened and paved.[387] The 1916 Act set the basic pattern of federal/state relationships on road and highways and subsequently, airports.[388] Henceforth, the federal government would subsidize planning and funding of highway projects, while the States would construct, own, and maintain their highways.[389]

World War I demonstrated the potential for motor transport. Thousands of motor vehicles were produced for the Army.[390] On the fields of battle, they quickly proved their superiority over mules in transporting men and materiel to the front.[391] After the Great War, thousands of surplus Army trucks became the vehicles for growth of the commercial motor transport industry.[392]

By 1918, the nation had more than 600,000 trucks.[393] With the development of a national system of highways in the 1920s, motor carriers became an increasingly viable competitor to railroads.[394] The combination of the pneumatic tire, the internal combustion engine, assembly line production, and hard surface roads brought sensational growth to the industry.[395]

Soon, the nation had an extraordinary distribution system, which vigorously stimulated national economic growth. Manufacturers of apparel, of appliances, of hardware, and a thousand other commodities soon found that their markets were no longer limited to large cities.[396] The new distribution system of trucks taking merchandise to the farthermost corners of the nation meant that manufacturers could now sell their goods on Main Street of the thousands of small towns and hamlets sprinkled across the continent.[397]

And the complexion of Main Street itself changed. No longer would General Stores, which carried everything from fertilizer to soap, domi-

386. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 15.
387. *Id.*
388. AIR TRANSPORTATION FOUNDATIONS, *supra* note 19, at 7.
389. *Id.*
390. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 15.
391. *Id.*
392. *Id.*
393. *Id.*
394. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 15.
395. *Id.*
396. *Id.*
397. *Id.*

nate the market.[398] Specialized shops sprang up.[399] Consumer choices multiplied.[400] A lady on the plains of Kansas could now buy the same fashions on Main Street that were available on Park Avenue.[401] The distribution system of the trucking industry made possible tremendous expansion in production and sales, and thus served as a catalyst for one of the most significant periods of economic growth in the nation's history.

B. RAILROADS

During the first half of the 20th Century, railroads were the dominant means of intercity transport for passengers.[402] In 1915, American railroads carried over a million passengers and more than two million tons of freight.[403] That year, the industry ran 65,000 locomotives, 55,000 passenger cars, and 2.25 million freight cars, while employing 1,800,000 workers.[404] By 1929, there were still 20,000 passenger trains, though track mileage had dropped below a quarter of a million miles.[405] The growth of highways resulted in a corresponding decline of railroads, for though the government built and maintained roads, the railroad industry was in charge of keeping its roadbed in shape.[406] One source noted that the correlation began early on:

> Every week, evidence flowed into the offices of the Bureau of Public Roads that railroads were withering like a great and noble but diseased oak tree. The first symptoms had manifested themselves at the tips of the branches, and they were dying back, slowly in some parts, more rapidly in others . . . . Eventually the disease spread to the trunk, and it would fall or be left standing as a withered reminder of what once was great. Each time a railroad abandoned a line, it had to tell the bureau of the grade crossings on federal-aid roads that would be eliminated. Notice after notice flowed into the bureau's offices. . . .[407]

With the advent of the automobile, urban transit also began to decline. In 1917, electric streetcars carried eleven billion passengers.[408] But by 1923, fixed-guideway systems began to be replaced by buses, with their

398. *Id.*
399. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 15.
400. *Id.*
401. *Id.*
402. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 19.
403. *Id. See also* LEWIS, *supra* note 38, at 21.
404. LEWIS, *supra* note 38, at 21.
405. *Id.* at 22; *The Dark Side of Deregulation*, *supra* note 9, at 450.
406. *See* LEWIS, *supra* note 38, at 22.
407. *Id.*
408. EDWARD WEINER, URBAN TRANSPORTATION PLANNING IN THE UNITED STATES 10 (2d ed. 1999).

lower capital costs and greater operational flexibility.[409] All transit—bus and rail—began to experience a loss of ridership beginning in the mid-1930s, as roads improvements and automobile affordability created disbursed suburban housing patterns less conducive to transit.[410]

Automobile production stopped during World War II, as car factories turned to producing tanks, jeeps, and fighter and transport aircraft; fuel and rubber were rationed. Transit ridership grew by 65% to an all-time high of twenty-three billion trips annually between 1941 and 1946.[411] But after World War II, demand for rail service began to decline, as passengers chose alternative means to get them to destination—the bus, the airplane, or the automobile.[412] By 1953, transit had fallen to fewer than fourteen billion trips annually.[413]

In 1958, Congress passed legislation that allowed railroads to discontinue passenger trains with ICC approval.[414] Under the ICC's auspices, the number of passenger trains fell 60%, until by1970, only 360 intercity trains were left.[415] Congress filled the void by passing the Rail Passenger Services Act of 1970, which established Amtrak.[416] Today, Amtrak serves more American cities than all the airlines combined.[417]

C. Airports & Airlines

From its inception, the airline industry has been perceived as having tremendous potential as a catalyst for economic growth and an essential means for facilitating communications and national defense.[418] Early on, the U.S. government recognized its potential to serve the needs of a growing nation. As a consequence, the federal government has been active in promoting and encouraging its growth and development from the outset.[419]

The government's responsibility to carry the mail as an essential means of communications was recognized by the framers of the U.S. Constitution, and embraced by that document.[420] The compelling need for

409. *Id.*

410. Dempsey & Thoms, *supra* note 22, at 311.

411. Weiner, *supra* note 408, at 15.

412. *The Dark Side of Deregulation*, *supra* note 9, at 451.

413. U.S. Dep't of Transp., Urban Transportation Planning in the United States: An Historical Overview 17 (3d ed. 1988).

414. *The Dark Side of Deregulation*, *supra* note 9, at 452.

415. *Id.*

416. *Id.* at 452-53.

417. *Id.* at 453.

418. Dempsey & Thoms, *supra* note 22, at 26.

419. *Id.*

420. Paul Stephen Dempsey, *The State of the Airline, Airport & Aviation Industries*, 21 Transp. L.J. 129, 133 (1992) [hereinafter *State of the Airline*].

expeditious mail service led the Post Office Department to develop the Pony Express and to employ advanced technology as it emerged, beginning with the railroads.[421]

The United States air transport industry owes its initial development to subsidies for the carriage of the mail.[422] The route structures of America's largest airlines—United, American, TWA, and Eastern—were largely the product of airmail contracts awarded by the Post Office Department in the 1920s and 1930s.[423] Passengers rode on top, while mail was carried in the belly of aircraft.[424]

Airmail service was inaugurated by the Army in 1918, on a route from New York to Philadelphia to Washington, D.C.[425] By 1920, a transcontinental route from Hazelhurst Field, N.Y., to San Francisco, California, had been established.[426] By 1924, the Post Office Department had constructed nearly 2,000 miles of lighted airways, allowing pilots to make regular transcontinental night flights.[427] The first pilots were daredevils; sadly, 31 of the first 40 pilots in airmail service died in crashes.[428]

By the mid-1920s, Congress decided to privatize the carriage of mail. The Kelly Act, Contract Air Mail Act of 1925,[429] authorized the Postmaster General to award contracts for the carriage of mail to private carriers.[430] This marked the beginning of a viable private airline industry in the United States.[431]

The first five contracts were awarded to National Air Transport, Varney Lines, and Pacific Air Transport (all of which subsequently joined the United Airlines system), Colonial Airlines (later to become an important part of American Airlines), and Western Air Express (which would be merged into the TWA system).[432] The first air mail contracts established the route structure which would dominate air service for decades to

421. *Id.* at 133-34.

422. LOWENFELD, *supra* note 19, § 1-1, at I-2.

423. *Id.*

424. AIR TRANSPORTATION FOUNDATIONS, *supra* note 19, at 391.

425. *Id.*

426. WALTER J. BOYNE, THE SMITHSONIAN BOOK OF FLIGHT 126 (1987).

427. LOWENFELD, *supra* note 19, § 1-1, at I-2.

428. TRANSP. RESEARCH BOARD, WINDS OF CHANGE: DOMESTIC AIR TRANSPORT SINCE DEREGULATION 21 (1991) [hereinafter WINDS OF CHANGE].

429. Contract Air Mail Act of 1925, 43 Stat. 805 (1925).

430. LOWENFELD, *supra* note 19, § 1-1, at I-2. *See generally*, SAMUEL B. RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION 4 (1961); HUGH KNOWLTON, AIR TRANSPORTATION IN THE UNITED STATES ITS GROWTH AS A BUSINESS 4 (1941); CLAUDE E. PUFFER, AIR TRANSPORTATION 2-3 (1941); LUCILE SHEPPARD KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION 65 (1951); DEMPSEY & THOMS, *supra* note 22, at 26.

431. BOYNE, *supra* note 426, at 126.

432. LOWENFELD, *supra* note 19, § 1-1, at I-2.

come.[433]

The Air Commerce Act of 1926[434] vested jurisdiction over safety and maintenance of airways, airports and air navigation facilities in the Secretary of Commerce.[435] In fact, federal regulation of aviation safety owes its genesis to the Air Commerce Act of 1926,[436] which established a special investigation division in the U.S. Department of Commerce and gave the Secretary of Commerce power to investigate and publicize air navigation accidents.[437] Promulgated within six years of the end of World War I, in which the nascent new technology of aviation had demonstrated its military prowess, the 1926 Act also imposed restrictions on foreign ownership of U.S. airlines.[438]

After Col. Lindbergh crossed the Atlantic in the Spirit of St. Louis in 1927, the industry enjoyed explosive growth.[439] Even the stock of Seaboard Airline, a southeastern railroad, experienced an unprecedented increase because of speculators' belief that it was somehow connected to aviation.[440]

The McNary-Waters Act of 1930[441] established a formula for airmail payments based on the amount of mail transported.[442] Postmaster General Brown wanted to create a few large competing transcontinental airlines.[443] Rather than determining the issuance of routes on the basis of competitive bidding, they were actually determined at secret meetings in May and June of 1929—later called "spoils conferences" —of airline executives with Postmaster General Brown.[444] He also encouraged mergers and consolidations of smaller airlines into larger, consolidated companies.[445]

As a consequence, Northwest Airways served the northern tier states, though it lacked a transcontinental route.[446] United Air Lines, organized in December 1928, obtained control of National Air Transport, Boeing Air Transport, Varney Air Lines, and Pacific Air Transport, giving it a route system extending from New York to Chicago to San Francisco,

433. *Id.*
434. Air Commerce Mail Act of 1926, ch. 344, 44 Stat. 568 (1926).
435. DEMPSEY & THOMS, *supra* note 22, at 27.
436. Air Commerce Mail Act of 1926, ch. 344, 44 Stat. 568 (1926).
437. *Id.* § 2.
438. *Id.* § 3(a)(1).
439. LOWENFELD, *supra* note 19, § 1.1, at I-3.
440. *Id.*
441. McNary-Waters Act of 1930, 46 Stat. 258 (1930).
442. DEMPSEY & THOMS, *supra* note 22, at 27.
443. LOWENFELD, *supra* note 19, § 1.1, at I-3 – I-4.
444. *Id.* § 1.1, at I-5.
445. *Id.* § 1.1, at I-4.
446. *Id.*

and north and south along the Pacific coast.[447] Transcontinental and Western served the central United States, from New York to California via St. Louis and Kansas City.[448] Eastern, then affiliated with Transcontinental, served the principal north-south routes, although United also had a route from Chicago to Texas.[449]

Congressional discontent with the administration of the McNary-Waters Act led to an investigation of these practices by a special Congressional committee chaired by Senator Hugo Black.[450] The revelations of this investigation convinced President Franklin Roosevelt to terminate all existing air mail contracts on the grounds that there had been collusion between the airlines and the Post Office Department in route and rate establishment.[451] He directed the Army Air Corps to transport the mail.[452] A series of tragic crashes, killing about a dozen Army pilots, proved that the Army was inadequately trained in air navigation, inclement weather and night flying, and that the private carriers were technologically proficient.[453]

Congress responded by passing the Airmail Act of 1934, Black-McKellar Act,[454] which authorized the new Postmaster General to award mail contracts on the basis of competitive bidding, usually on an exclusive basis for a particular route.[455] The system was to be comprised of four transcontinental routes, and an eastern and western coastal route.[456] The legislation prohibited financial interests by airlines in other aviation companies, holding companies, and interlocking directorates.[457] After the initial contract term, postal rates were set by the Interstate Commerce Commission.[458] Also beginning in 1934, federal funds became a primary source of airport funding.[459] The 1934 Act was remedial in that it was intended to counteract the supposed collusion that had allegedly occurred during Postmaster Brown's administration.[460] It was at the same time

447. *Id.* § 1.1, at I-3 – I-4.

448. *Id.* § 1.1, at I-4.

449. *Id.*

450. DEMPSEY & THOMS, *supra* note 22, at 27. Roosevelt would subsequently appoint the Alabama Senator to fill the first vacancy arising on the U.S. Supreme Court during his presidency. Black served on Supreme Court from 1937 until 1971. FREDERICK C. THAYER, JR., AIR TRANSPORT POLICY AND NATIONAL SECURITY 10 (1965).

451. DEMPSEY & THOMS, *supra* note 22, at 27.

452. BOYNE, *supra* note 426, at 128.

453. *Id.* LOWENFELD, *supra* note 19, § 1.1, at I-5.

454. Black-McKellar Act, ch. 466, 48 Stat. 933 (1934).

455. LOWENFELD, *supra* note 19, § 1.1, at I-5.

456. *Id.*

457. *Id.*

458. *Id.*

459. *State of the Airline*, *supra* note 420, at 136.

460. AIR TRANSPORTATION FOUNDATIONS, *supra* note 19, at 209.

proactive, because it also created a Federal Aviation Commission to study U.S. aviation policy and to make recommendations leading to more permanent air transportation legislation.[461]

With promulgation of the Civil Aeronautics Act of 1938,[462] Congress established the Civil Aeronautics Authority, subsequently renamed the Civil Aeronautics Board, and created therein an Air Safety Board with jurisdiction to investigate accidents, determine probable cause, issue reports, and recommend additional safety measures.[463] These powers were augmented by the Federal Aviation Act of 1958.[464]

With the creation of the U.S. Department of Transportation in 1966, Congress established therein an independent National Transportation Safety Board [NTSB], giving it power to conduct investigations and hold hearings to determine "the cause or probable cause of transportation accidents and reporting the facts, conditions, and circumstances relating to such accidents."[465] The NTSB became truly independent and effectively autonomous from DOT with the Independent Safety Board Act of 1974.[466]

VIII. The Great Depression

The Great Depression was the most painful economic period in the history of the United States. It shook to the very core America's faith in *laissez faire*. The Missouri Pacific Railroad became the first to fall into bankruptcy; by 1939, one third of the nation's rail mileage was in receivership.[467] Congress believed that stability and growth of the essential industries – including banking, securities, communications, energy, and transportation – was essential if we were to have national economic recovery.[468] A sound economy could be built on top of a solid infrastructure foundation.

Hence, during the 1930s, Congress created a number of new federal agencies to regulate these important industries, including the Federal Power Commission (1930), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the National La-

461. Dempsey & Thoms, *supra* note 22, at 27-28.

462. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

463. John D. Clemen & Stephen R. Long, *Representing Potential Litigants As Parties to NTSB Public Hearings: Some Problems In Search of Solutions*, 56 J. Air L. & Com. 969, 973 (1991).

464. *Id.*

465. *Id.* (quoting Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966).

466. *Id.* (referring to 49 U.S.C. app. §§ 1901-1907 (1980)).

467. Withuhn, *supra* note 68, at 130-31.

468. Paul Stephen Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 Wash. & Lee L. Rev. 1, 14 (1989) [hereinafter *Market Failure*].

bor Relations Board (1935), and the Civil Aeronautics Authority (1938), reorganized as the Civil Aeronautics Board (1940).[469] Most were modeled on the first independent federal agency—the Interstate Commerce Commission, created in 1887 to regulate the railroads.[470]

The agencies' independence was of utmost importance—independent from the Executive Branch. They were to be shielded from the political winds that blow down Pennsylvania Avenue by making them relatively autonomous from the White House.[471] The independent regulatory commissions were, theoretically, an arm of Congress created under its powers to regulate interstate and foreign commerce pursuant to Article 1 Section 8 of the U.S. Constitution.[472]

IX. Economic Regulation of Motor Carriers

Following World War I, the trucking industry enjoyed tremendous growth.[473] But not all was well. The trucking industry itself was plagued by its own growth.[474] A down payment on a truck and a driver's license were all it took to get into the industry.[475] Many entrepreneurs were unsophisticated, had little idea what their costs were, and took freight for non-remunerative prices.[476] Sometimes they were victimized by shippers with monopoly power dictating excessively low rates.[477] Wages were poor.[478] Many firms fell into bankruptcy.[479] But used truck dealers simply recycled their trucks, and the capacity problems persisted.[480] Industry overcapacity drove trucking rates down to a level that made it impossible for many truckers to maintain their equipment and highway safety suffered.[481]

All of this led many states to regulate motor carriers, limiting entry and requiring that rates be reasonable.[482] By the mid-1920s, thirty-three states regulated motor freight transport and forty-three regulated bus companies.[483] But, in 1925, the U.S. Supreme Court handed down a decision that stripped the states of their ability to regulate interstate

469. *Id.*
470. *Id.*
471. Air Transportation Foundations, *supra* note 19, at 210.
472. *Id.* at 186.
473. Social & Economic Consequences, *supra* note 6, at 15.
474. *Id.*
475. Jones, *supra* note 280, at 499.
476. Social & Economic Consequences, *supra* note 6, at 15.
477. *Id.*
478. *Id.*
479. *Genesis and Evolution*, *supra* note 2, at 344.
480. Jones, *supra* note 280, at 499.
481. Social & Economic Consequences, *supra* note 6, at 16.
482. *Id.*
483. *Id.*

movement.[484]

At issue in *Buck v. Kuykendall*[485] was the denial by the state of Washington of a motor common carrier's application for operating authority on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam rail service.[486] Although the Supreme Court recognized that a state legitimately may constrain interstate transportation in order to promote safety or conservation of the highways, the Court concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition.[487] Prior to this decision, 40 states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity.[488] The ruling in *Buck* not only prohibited state controls on entry for motor carriers engaged in interstate commerce, it also invalidated insurance requirements and service standards.[489] Thus, the decision limited state regulation of interstate motor carriers to a state's remaining police powers—motor vehicle safety and highway construction.[490]

After that, uncontrolled rate wars broke out among interstate carriers.[491] Bankruptcies proliferated.[492] Safety problems were again exacerbated.[493] Unscrupulous truckers sometimes stole the freight that had been entrusted to them.[494] Unscrupulous bus companies and brokers sometimes absconded with the ticket revenues of unwary passengers.[495] Fraudulent practices became widespread.[496]

Even preceding the Great Depression, as early as 1926, the U.S. Department of Agriculture issued a report concluding that entry and rate stabilization of highway transport would be beneficial to prevent over expansion.[497] Beginning that year, Congress, in each session, considered bills for economic regulation of the motor carrier industry.[498]

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484. *See* Buck v. Kuykendall, 267 U.S. 307 (1925).

485. 267 U.S. 307 (1925).

486. *Id.* at 313.

487. *Id.* at 315-16.

488. Charles A. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 92 (1976).

489. *Id.*

490. *Id.*

491. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 16.

492. *Id.*

493. *Id.*

494. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 16.

495. *Id.*

496. *Id.*

497. WILLIAM T. JACKMAN, ECONOMIC PRINCIPLES OF TRANSPORTATION, 846-47 (1935).

498. Paul Stephen Dempsey, *Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*, 20 TRANSP. L.J. 185, 241 (1992) [hereinafter *Interstate Trucking*].

Several economists of the day also advocated the need for economic regulation. In 1928, at a meeting of the American Economic Association, William M. Duffus declared, "Most students of transportation will agree, I think . . . that there must be some sort of central planning looking toward the coordination of our various transportation agencies on a sound economic and financial basis."[499] Henry R. Trumbower argued that rail and motor carriage should be treated as a regulated monopoly.[500]

Other economists agreed. Shan Szto condemned excessive competition as of "no benefit to anybody," making the industry "unattractive to responsible business people."[501] Harold G. Moulton and his Brookings Institution associates criticized the waste and instability created by excessive competition and urged comprehensive coordination of transportation.[502] D. Philip Locklin summarized the inherent characteristics that warranted economic regulation: "[t]he ruinous type of competition does develop; discrimination in rates does appear; the condition of overcapacity does not correct itself automatically; and the struggle for survival in the face of inadequate revenues leads to deterioration of safety standards, evasion of safety regulations, financial irresponsibility, and generally unsatisfactory service."[503] Professor Paul Kauper noted that, "[t]he present demoralization of interstate motor transportation, due to unsound competitive practices, and the menace of such unrestricted competition to the integrity of the national transportation system as a whole create problems that call imperatively for federal legislation."[504] Even Adam Smith, the 18th Century proponent of *laissez-faire* economics, had conceded that Government has the obligation "of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it."[505]

The Wall Street stock market crash of 1929 exacerbated the problem. It set in motion the most prolonged and severe economic depression in

499. REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY 7 (John R. Felton & Dale G. Anderson eds., 1989) (quoting William M. Duffus, *Commercial Motor Transportation—Discussion,* AM. ECON. REV. 249, 249 (1929)).

500. *Id.*

501. *Id.* (quoting Shan Szto, Federal and State Regulation of Motor Carrier Rates and Services 24 (1934) (Ph.D. dissertation, University of Pennsylvania)).

502. *Id.* at 8 (citing H. MOULTON & ASSOC., THE AMERICAN TRANSPORTATION PROBLEM 889-90 (1933)). Sadly, by the end of the 20th Century, Brookings had become a bastion of *laissez faire* ideologues who attacked economic regulation at every opportunity and who insisted that deregulation has produced billions of dollars in consumer savings.

503. *Id.* (quoting LOCKLIN, *supra* note 101, at 670).

504. Paul G. Kauper, *State Regulation of Interstate Motor Carriers,* 31 MICH. L. REV. 1097, 1111 (1933). *See also* Paul G. Kauper, *Federal Regulation of Motor Carriers,* 33 MICH. L. REV. 239 (1934).

505. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 309 (Encyclopedia Britannica, Inc. 1952) (1776).

modern history.[506] It had a profound impact upon economic and political policy in the United States. The prevailing view soon became that the market had failed to serve society's needs and failed badly.[507] Only enhanced government involvement in the national economy could restore the stability required for economic growth.[508] With 3.5 million trucks on the highway, and with thousands of factories shutting down, there was less freight to fill empty trucks.[509] The economic condition of the industry spiraled downward.

Congress first attempted to restore stability by promulgating the National Industrial Recovery Act, allowing industries to establish "Codes of Fair Competition" to diminish the heated level of competition between them.[510] Such codes were adopted by many industries, including motor carriers.[511] But in 1935, the U.S. Supreme Court struck down the legislation on Constitutional grounds.[512] Recall that it had earlier prohibited the States from regulating interstate motor carrier operations, so the net result was that such activities were once again unregulated.

In 1933, President Franklin Roosevelt appointed the distinguished ICC Commissioner, Joseph Eastman, to the new position of Federal Coordinator of Transportation, with the responsibility to recommend legislation "improving transportation conditions throughout the country."[513] The National Association of Railroad and Utility Commissioners had sponsored a bill, the "Rayburn Bill," calling for economic regulation of the trucking industry.[514] The position was quickly endorsed by Eastman and the Interstate Commerce Commission [ICC].[515]

During the Great Depression, the motor carrier industry was plagued with an oversupply of transportation facilities.[516] Intensive competition among truckers depressed freight rates excessively and caused hundreds of bankruptcies.[517] Entry into the industry was easy. The ranks of the unemployed provided an endless pool of drivers; with a driver's license and a used truck they could haul goods for hire.[518] Not knowing what their costs were, or victimized by shippers with greater market

506. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 16.
507. *Id.*
508. *Id.*
509. *Id.*
510. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 16.
511. *Id.*
512. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
513. JONES, *supra* note 280, at 499.
514. *Id.*
515. *Id.*
516. *Id.*
517. *Genesis and Evolution*, *supra* note 2, at 344.
518. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 16-17.

power, they frequently took traffic at below-cost rates.[519] They drove for gas money, or to cover their monthly payments on the truck, and kept rolling until needed repairs brought the truck to a halt.[520] Soon they were bankrupt, while their truck was sold to yet another entrant, and the cycle repeated itself.[521] All the while, efficient and productive trucking companies and railroads were also hemorrhaging dollars.

The Great Depression exacerbated the problems that had surfaced in transportation. In 1933, the Interstate Commerce Commission concluded that the ease of entry and the inadequate knowledge by unsophisticated entrepreneurs of their costs "condemned the industry to chronic instability and excessive competition."[522] Specifically, the ICC found that rate instability resulted in "widespread and unjust discrimination between shippers. . . .The loss of much capital invested. . . . [a] tendency to break down wages and conditions of employment . . . [and an] [i]ncrease in the hazard of use of the highways."[523] Two years later, the Federal Coordinator of Transportation, Joseph B. Eastman, expressed even greater concern over the economic chaos plaguing the industry, which was caused by unlimited entry and exacerbated by the Great Depression.[524]

It was feared that a continuation of such unrestrained market forces might lead to a loss of service or higher prices for small shippers and small communities, leaving the surviving carriers to concentrate on high-revenue traffic.[525] Thus, as Joseph Eastman said, "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it."[526] The destructive potential of excessive competition was everywhere apparent.[527]

In his book, *Economic Principles of Transportation*, published in

519. JONES, *supra* note 280, at 500.

520. William E. Thoms, *Rollin' On . . . To a Free Market Motor Carrier Regulation 1935 - 1980*, 13 TRANSP. L.J. 43, 48 (1983).

521. JONES, *supra* note 280, at 499-500.

522. REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY, supra note 499, at 5 (citing Coordination of Motor Transp., 182 I.C.C. 263, 362-63 (1932)).

523. *Id.*

524. *Id.* (citing S. DOC. NO. 73-152 (1934)).

525. *Id.* at 5-6.

526. Thoms, *supra* note 520, at 48.

527. The Senate Report, which accompanied the new legislation, has this to say:

> Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to such an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers or the carriers themselves.

S. REP. NO. 74-482 (1935).

1935, economist W. T. Jackman summarized the pre-regulatory problem posed by the ease of entry into trucking by unsophisticated entrepreneurs:

> In most cases the truck owner has no knowledge of his costs and keeps inadequate, if any, accounts. He takes whatever business he can get at a rate which the shipper will pay, in the hope that in the aggregate the financial returns will be favourable. But the mortality in the motor truck field is very heavy.
>
> . . . .
>
> . . .The shipper wants a small shipment taken . . . and the motor carrier takes this, even if he has nothing else to make up a load, in the hope that by this service he may ingratiate himself with the shipper so as to get future traffic, and also anticipating that he may get something more along the route. On account of the many carriers, however, he may not get anything more, for there is not enough traffic to provide loads for all the operators. However, "hope springs eternal" and the operator continues to run his vehicle, even though he cannot get enough traffic to be reasonably remunerative.
>
> . . . .
>
> . . .Then, too, a man can get a truck, especially a second-hand one, for a small cash payment, and may intend to make it pay the balance of the cost by its use. Consequently, it is better for him to get a small amount of business than none at all; and, if traffic is scarce, he will cut his rates very low rather than see his truck lying idle. When others see such men operating trucks upon the highway, the normal inference is that there must be some profit in it, and they likewise enter the service.
>
> . . . .
>
> . . .As a result, the number of trucks in operation greatly exceeds the traffic needs, thus causing continuous, widespread, and discriminatory rate cutting, with other unwholesome competitive conditions, which have created serious problems for producers, the public at large, and the railways.
>
> . . . .
>
> Probably the greatest defect, is. . .the endless rate-cutting by a mass of carriers, each of which wants as large a share as possible of the business. The truck operators bid against one another for the available traffic and many shippers take advantage of this condition to beat down the rate to the lowest point, thus securing a rate which is wholly unreasonable.[528]

One can dust off the history books of the 19th Century and find that many of these conditions existed in the railroad industry before it was regulated in 1887. For example, the unregulated railroads were beset with fierce price wars in competitive markets while exacting highly discriminatory monopoly rates in markets in which they enjoyed market power.[529] Destructive competition produced economic anemia, which encouraged consolidations and monopolization.[530] Federal economic regulation was

528. JACKMAN, *supra* note 497, at 842-44.

529. *See* JOSEPHSON, *supra* note 97, at 201-02.

530. *Interstate Trucking*, *supra* note 498, at 194.

able to protect the public against widespread pricing and service discrimination, and alleviate the dire financial straits in which the railroads found themselves.[531] As stated by Alfred Kahn, "[t]he essence of regulation was that it was protectionist."[532]

Congress was also motivated by the need to achieve equality in the regulatory scheme (railroads were regulated, while their trucking competitors were not), to protect wages and working conditions (which were severely depressed), to provide stable service and reasonable rates for shippers, and to ensure that carriers operated safely and were financially responsible.[533]

Bus operations were also of significant concern. "Wildcatters" were cutting rates below compensatory levels and victimizing customers.[534] Shippers were also subjected to the unscrupulous practices of trucking companies, who sometimes stole the freight entrusted to them.[535]

The need for legislative relief was manifest. With the support of the ICC, most of the State Public Utility Commissions [PUCs], the truck, bus and rail industries, and many shippers, Congress promulgated the Motor Carrier Act of 1935, adding bus and trucking companies to the jurisdiction of the Interstate Commerce Commission.[536] It gave the ICC authority over entry and rates of motor carriers of passengers and commodities.[537] Safety was also a principal concern. The new legislation gave the ICC power to establish requirements for the qualifications of drivers, maximum hours of service, and standards of equipment.[538]

As Representative Sadowski, a principal sponsor, noted, "the purpose of the bill is to provide for regulation that will foster and develop sound economic conditions in the industry . . . ."[539] Economic stability and enhanced safety were its major purposes.

Under economic regulation, the industry grew and prospered. Motor carriers became responsible, reliable and safe enterprises.[540] Competition became healthy with modest government oversight of rate levels and en-

531. *Id.*

532. Interview by Ben Wattenberg with Alfred Kahn, Professor Emeritus, Cornell University, New River Media, *available at* http://www.pbs.org/fmc/interviews/kahn.htm. According to economist George Stigler, according to one view "regulation is instituted primarily for the protection and benefit for the public at large or some large subclass of the public." George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

533. *Genesis and Evolution*, *supra* note 2, at 344.

534. Thoms, *supra* note 520, at 49.

535. *Id.*

536. Daniel W. Baker & Raymond A. Greene, Jr., *Commercial Zones and Terminal Areas: History, Development, Expansion, Deregulation,* 10 TRANSP. L.J. 171, 176 (1978).

537. *Id.* at 174 n.13.

538. *Id.*

539. *Id.* at 178.

540. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 18.

try.[541] Efficient and well-managed carriers earned a reasonable return on investment.[542] The stability of the motor carrier industry provided a foundation for national economic recovery.

X. The Civil Aeronautics Board

A. Genesis of the CAB

In 1934, Congress established a Federal Aviation Commission [FAC] to study the entire field of aviation and report to Congress.[543] The FAC submitted 102 recommendations on January 30, 1935.[544] It contended that the orderly development of air transportation required two fundamental ingredients.[545] First, in the interest of safety, certain minimum standards of equipment, operating methods, and personnel qualifications should be maintained.[546] Second, "there should be a check in development of any irresponsible, unfair, or excessive competition such as has sometimes hampered the progress of other forms of transport."[547]

When the Great Depression emerged, airlines were in their infancy. Congress was confronted with a national economic disaster, one that had hit the infrastructure industries particularly hard.[548] Congress held hearings on the state of the airline industry, concluding that the economic condition of the airlines was unstable and that a continuation of its anemic condition could imperil its potential to satisfy national needs for growth and development.[549] The legislative history of the Civil Aeronautics Act of 1938 is replete with concerns over excessive and destructive competition and the adverse effect that the economic crisis was having upon the industry and its ability to attract capital and maintain safe and adequate operations.[550] Demand for air services had softened significantly during the Great Depression, and carriers were spiraling downward into a sea of red ink.[551] Without governmental protection, bankruptcies proliferated.[552] Colonel Edgar S. Gorrell, president of the Air Transport Association, observed:

541. *Id.*
542. *Id.*
543. Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 Transp. L.J. 91, 102 (1979) [hereinafter *Rise and Fall*].
544. *Id.*
545. *Id.*
546. *Rise and Fall*, *supra* note 543, at 102.
547. *Id.*
548. *Interstate Trucking*, *supra* note 498, at 251.
549. *Rise and Fall*, *supra* note 543, at 96.
550. *Id.* at 97.
551. *Interstate Trucking*, *supra* note 498, at 251.
552. *Id.*

> Since air transport was launched into meteoric growth, approximately $120,000,000 of private capital has been devoted to it, but, of that sum, there remains today scarcely 50 percent. Since the beginning of air transport, a hundred scheduled lines have traversed the airways in a struggle to build this newest avenue of the sky. But today scarcely more than a score of those companies remain. The industry has been reduced to the very rock bottom of its financial resources. . . .
>
> There are only two ways whereby the necessary capital can be provided to this industry. One is the way toward which the governments of foreign lands increasingly tend—the way of mounting governmental subsidies, whereby public funds are poured without stint into a [sic] air transport. The other way is the traditional American way, a way which invites the confidence of the investing public by providing a basic economic charter that promises the hope of stability and security, and orderly and intelligent growth under watchful governmental supervision.[553]

Not only had private entrepreneurs invested considerable capital in the airline industry, but the federal and local governments had as well.[554] That investment needed protection.[555] In order to avoid the deleterious impact of competition described with pejorative adjectives such as "intensive," "extreme," "destructive," "cutthroat," "wasteful," "excessive," and "unrestrained," and to avoid the economic "chaos" that had so plagued the rail and motor carrier industries, Congress established a regulatory structure similar to that which had been devised for an orderly development of those industries which had also been perceived to be "public utility" types of enterprises—the railroads and motor carriers.[556]

Transportation was also viewed as different from other industries, with necessity characteristics making it in the nature of a "public utility," essential to the national economy and the national defense, therefore warranting protection of the "public interest" by government.[557] ICC Chairman Joseph Eastman noted:

> [I]mportant forms of public transportation must be regulated by the government. That has been accepted as a sound principle in this country and . . . in practically every country in the world. . . .
>
> Transportation is of such vital importance to the public welfare and the business is so affected with a public interest that some measure of government regulation is. . .necessary.[558]

The FAC recommended an independent agency be vested with jurisdiction to regulate airline entry, rates, service, consolidations, and gov-

553. *Rise and Fall*, *supra* note 543, at 97 n.14.
554. *Interstate Trucking*, *supra* note 498, at 251.
555. *Rise and Fall*, *supra* note 543, at 102.
556. *Id.* at 95-96.
557. *Id.* at 96 n.11.
558. *Id.* at 100.

ernment subsidies.[559] President Franklin Roosevelt preferred vesting these powers in the existing transportation regulatory agency, the ICC, which had been established in 1887 to regulate the railroads, and whose jurisdiction had been expanded in 1935 to regulate the motor carriers and busses.[560] But the airline industry feared that the ICC would protect the interests of the railroads, which were the dominant passenger carriers of the day, and sought creation of their own aviation regulatory agency.[561]

Three years after motor carriers were brought under the regulatory umbrella, Congress added airlines to the regulatory scheme, promulgating the Civil Aeronautics Act of 1938.[562] In so doing, Congress created a new regulatory body to regulate this industry, the Civil Aeronautics Authority, folding into it the existing Bureau of Air Commerce and the Bureau of Air Mail.[563] The following year, the Civil Aeronautics Authority was reorganized as the Civil Aeronautics Board.[564] Like so many agencies created to engage in economic regulation, the CAB was modeled after its older sibling, the ICC.[565]

The CAB was a relative small institution by Washington standards, comprised of five members (no more than a simple majority of whom could be members of a single political party) appointed by the President with the advice and consent of the Senate, for staggered terms of office.[566] It was given jurisdiction over three major aspects of airline operations: (1) entry (where a carrier could fly), (2) rates (what it could charge),[567] and (3) antitrust and business practices.[568] Additional powers were conferred to the CAB over such things as subsidies, consumer protection, and, initially, the establishment and maintenance of airports and airway navigational aids.[569] But there were many significant aspects of airline operations over which it had no jurisdiction, including scheduling capacity, frequency, type of aircraft, or level of service.[570] The governing legislation encouraged the CAB to take several goals into account:

559. *State of the Airline*, *supra* note 420, at 138.

560. *Id.*

561. *Id.*

562. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 18.

563. The agency was initially named the Civil Aeronautics Authority. ROBERT M. HARDAWAY, AIRPORT REGULATION, LAW, AND PUBLIC POLICY 13 (1991) [hereinafter AIRPORT REGULATION].

564. *See* SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 18.

565. *Id.*

566. *State of the Airline*, *supra* note 420, at 139.

567. *Id.* Actually, airlines proposed rates in tariffs filed with the CAB, which reviewed them to determine whether they were just, reasonable, and nondiscriminatory.

568. *Id.*

569. AIRPORT REGULATION, *supra* note 563, at 13.

570. *State of the Airline*, *supra* note 420, at 139.

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
(b) The regulation of air transportation in such manner as to . . . assure the highest degree of safety in, and foster sound economic conditions in, such transportation . . . ;
(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; [and]
(d) Competition to the extent necessary to assure the sound development of [the] air-transportation system . . . .[571]

B. Regulation by the Civil Aeronautics Board

The CAB began by "grandfathering" in the existing airlines, or stated differently, issuing certificates of "public convenience and necessity" authorizing operations commensurate with the incumbents' existing operations (most of which were coterminous with their outstanding air mail contracts).[572] In its first full year of operation, the CAB issued certificates of public convenience and necessity to 16 carriers:[573]

- American
- Braniff
- Chicago & Southern (subsequently merged with Delta)
- Colonial (subsequently merged with Eastern)
- Continental
- Delta
- Eastern
- Inland (subsequently merged with Eastern)
- Mid-Continent (subsequently merged with Braniff)
- National
- Northeast
- Northwest
- Penn Central (name changed to Capital; merged with United)
- Transcontinental and Western (name changed to Trans World Airlines)
- United
- Western[574]

The federal regulatory regime, coupled with subsidies, brought sta-

571. *Id.* (citing Federal Aviation Act of 1958, Pub. L. No. 85-726, § 102, 72 Stat. 737 (1958)).
572. Air Transportation Foundations, *supra* note 19, at 105.
573. James Callison, *Airline Deregulation—A Hoax?*, 41 J. Air L. & Com. 747, 758 (1975). Many, of course, have since disappeared or merged with surviving airlines because of an inability to sustain profitability. *Id.*
574. *State of the Airline*, *supra* note 420, at 139-40.

bility to this important industry which had been so plagued by economic losses.[575] But soon the United States entered World War II and much of her civilian fleet was dedicated to military service.[576]

After the War, the CAB began to authorize new "local service airlines" to provide feeder service to the "trunks" (grandfathered long-haul carriers) at regional gateways.[577] Eventually, these local service carriers would grow to become regional airlines, with CAB authorization of their entry into denser and longer routes beginning in the 1960s, encouraging their competition with the trunk airlines.[578] By 1972, there were nine such carriers: Allegheny, Air West, Hughes, Frontier, North Central, Ozark, Piedmont, Texas International, and Southern.[579]

The CAB also exempted several thousand air taxis (originally termed "small irregular carriers").[580] Commuter airlines (which flew aircraft seating no more than nineteen passengers, later sixty passengers) were exempted.[581] This expanded service geographically and added a new group of airlines to the system. Between 1939 and 1975, the Civil Aeronautics Board certificated some eighty-six new airlines to compete with the sixteen original carriers and exempted hundreds more from the certification requirements.[582] In addition, several intrastate airlines existed exempt from CAB requirements, including Southwest, Pacific Southwest, Air California, and Air Florida.[583]

XI. Structure of Economic Regulation

Economic regulation of transportation, whether by the Interstate Commerce Commission of the surface modes, or by the Civil Aeronautics Board of airlines, embraced three principal clusters of activities:

- *Entry and Exit*—The agency prescribed what routes could be served, designating which among the applicants would be allowed to serve proposed city-pairs or territories.[584] Once a carrier served a market, it ordinarily could not cease service unless it received governmental approval to exit.[585] In granting either entry or exit,

575. *Id.* at 140.

576. *Id.*

577. Winds of Change, *supra* note 428, at 26.

578. *State of the Airline*, *supra* note 420, at 140.

579. Winds of Change, *supra* note 428, at 27; Lowenfeld, *supra* note 19, § 1.4, at I-17.

580. Lowenfeld, *supra* note 19, § 1.4, at I-17. By 1971, more than 3,500 air taxis served the United States. *Id.*

581. Winds of Change, *supra* note 428, at 27.

582. Callison, *supra* note 573, at 758. These eighty-six include U.S. firms given scheduled or supplemental authority to enter domestic, territorial and international markets. *Id.* at 758 n.36.

583. *State of the Airline*, *supra* note 420, at 141.

584. *See Rise and Fall*, *supra* note 543, at 93.

585. *See Market Failure*, *supra* note 468, at 7.

the agency would issue a certificate of "public convenience and necessity."[586] Typically, service offerings were also regulated in a manner in which carriers were expected to provide adequate service in the territories described by their operating certificates.[587] Finally, carrier safety, financial and managerial ability, and compliance disposition were regulated in certification proceedings in which the agency was required to find the applicant "fit, willing and able" to perform the proposed service.[588]

- *Rates*—The agency would prescribe the appropriate price for transport services, determining whether rates in carrier filed tariffs were "just and reasonable" and nondiscriminatory.[589] The agency protected the public against the extraction of monopoly rents, and pricing discrimination.[590] Efficient and well-managed carriers were allowed the opportunity to earn a reasonable return on investment.[591]
- *Antitrust*—The agency would review proposed carrier mergers, acquisitions and consolidations, interlocking relationships, and intercarrier agreements, to determine whether they were in the public interest.[592] Approval generally shielded these arrangements from the Sherman and Clayton antitrust acts.[593]

Throughout the 20th Century, most state Public Utility Commissions regulated the intrastate aspects of these industries in essentially the same areas of oversight.[594]

XII. World War II

The Transportation Act of 1940 added a national statement of transportation policy to the Interstate Commerce Act. In it, Congress provided for "the impartial regulation of the modes of transportation" and in regulating those modes:

- To recognize and preserve the inherent advantage of each mode of transportation;
- To promote safe, adequate, economical, and efficient transportation;

586. *See Rise and Fall*, *supra* note 543, at 93.
587. *Interstate Trucking*, *supra* note 498, at 233.
588. Social & Economic Consequences, *supra* note 6, at 226.
589. *Id.* at 223.
590. *See State of the Airline*, *supra* note 420, at 207.
591. Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 Transp. L.J. 73, 117 (1996).
592. *See Genesis & Evolution*, *supra* note 2, at 356.
593. *See Rise and Fall*, *supra* note 543, at 93.
594. Social & Economic Consequences, *supra* note 6, at 224-25.

- To encourage sound economic conditions in transportation, including sound economic conditions among carriers;
- To encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
- To cooperate with each State and the officials of each State on transportation;
- To encourage fair wages and working conditions in the transportation industry.[595]

The 1940 Act also extended the jurisdiction of the ICC to water carriers, and relieved the land-grant railroads of giving the federal government a discount on non-military traffic, provided they surrendered their claims to unpatented lands.[596] Freight forwarders were brought under the ICC's jurisdiction with the Transportation Act of 1942.[597]

World War II again saw the rail, motor carrier, and airline industries mobilized to supply the logistical needs of the nation. After the War, the nation had some seven million trucks and a healthy transportation industry.[598]

XIII. Antitrust Immunity for Collective Ratemaking

Rate bureaus, associations of two or more carriers, disseminate information regarding rates charged for transportation between various points and collectively consider the prices to be charged by participating rate bureau members.[599] Collective ratemaking dates back to early railroad development in the United States. Indeed, rate bureaus were formally established in the mid-19th Century and grew in size and number as the rail network expanded.[600] By the time of deregulation, there were ten

595. 49 U.S.C. § 10101(a) (Supp. IV 1980).

596. Bryant, *supra* note 110, at 270-71.

597. Act of May 16, 1942, 56 Stat. 285 § 403(e). Congress again regulated freight forwarders with the Act of December 20, 1950, 64 Stat. 1113 § 409(b).

598. Social & Economic Consequences, *supra* note 6, at 18.

599. James W. McFadden, Jr., *Competitive Ratemaking*, 12 Transp. L. Inst. 71 (1979). The rate bureaus essentially have three functions:

1. *To process* proposals for changes in rates and other tariff matters, including specified conditions under which the rates apply;
2. *To publish* the rates and related matter in tariff form in accordance with rules and regulations issued by the ICC;
3. *To justify and defend* the collective actions of the carriers before the ICC and the Federal courts, if necessary; and to serve the carriers by developing management information useful in the decision-making process as well as in defense of actions taken.

M. A. Godecker, *Operations of a Rate Bureau*, Regular Common Carrier Conf., Issues in Am. Trucking 37 (1981).

600. *Development of Rate Bureaus*, Regular Common Carrier Conf., Issues in Am. Trucking 29 (1981).

major regional motor carrier general commodity bureaus and many specialized bureaus for other sectors of the industry.[601] Additionally, the National Classification Board allowed carriers to agree collectively regarding the specific classifications of particular commodities to which particular rates will apply.[602]

As enacted in 1887, the Interstate Commerce Act was silent on the issue of collective ratemaking, although it specifically prohibited pooling of traffic or revenue.[603] Only three years later, however, Congress passed the Sherman Act.[604] Section 1 of the Sherman Act provides that contracts, combinations, and conspiracies in restraint of trade or commerce are illegal,[605] whereas section 2 proscribes monopolies and attempts to monopolize, combine, or conspire to monopolize trade or commerce.[606] Such violations constitute felonies punishable by a fine of not more than $100,000 for individuals and $1 million for corporations, imprisonment for not more than three years, or both.[607]

Despite early indications from the Supreme Court that collective ratemaking activities by common carriers violated the Sherman Act,[608] for almost fifty years there were no significant federal efforts to constrain carrier rate bureaus or their collective ratemaking activities. The Department of Justice did not enforce the antitrust law with respect to rate bu-

601. *Id.* at 83. Motor carrier rate bureaus have been supported for many reasons. *See* Jesse J. Friedman, *Collective Rainmaking by Motor Common Carrier: Economic and Public Policy Considerations*, 10 TRANSP. L.J. 33, 40-41 (1978).

602. *See* 49 U.S.C. § 10706(a)(2)(A) (Supp. IV 1980).

603. DEMPSEY & THOMS, *supra* note 22, at 208.

604. Sherman Act, ch. 647, 26 Stat. 209 (1890) (15 U.S.C. § 1).

605. *Id.* § 1.

606. *Id.* § 2.

607. *Id.*

608. In United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897), the Court concluded that the collective ratemaking activities of rail carriers were within the prohibition of the Sherman Act. *Id.* at 312-13. The Court also noted that the Interstate Commerce Act did not authorize anticompetitive activities to which the Sherman Act was directed, the Court recognized:

> [R]ailways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen in invitum is not the least . . . many of them are the donees of large tracts of public lands, and of gifts of money by municipal corporations . . . they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community,—the farmer, the artisan, the manufacturer, and the trader.

Id. at 332-33 (citation omitted). The following year in United States v. Joint-Traffic Ass'n, 171 U.S. 505, 574 (1898), the Court reaffirmed the conclusion that the collective price-fixing activities of common carriers violated the antitrust laws. The Court emphasized its position in United States v. Trenton Potteries Co., 273 U.S. 392 (1927), when it stated that "uniform pricefixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." *Id.* at 398.

reaus[609] principally because the bureaus afforded their members the right of independent action.[610] Furthermore, the Court adopted a rule of reason in interpreting antitrust violations, concluding that only unreasonable restraints of trade fell within the proscriptions of the Sherman Act.[611]

The Clayton Act,[612] enacted in 1914, contains several sections relevant to common carrier ratemaking, including prohibitions against discrimination in prices, services, or facilities,[613] as well as prohibitions against rebates and price fixing.[614] The ICC was given jurisdiction to enforce section 7 of the Clayton Act, a prohibition against mergers that might substantially lessen competition, insofar as it involved rail mergers.[615] Further, although Congress included a provision for private relief in section 16 of the Clayton Act, it denied private parties a remedy with respect to any matter subject to the jurisdiction of the ICC.[616]

By the early 1940's the Department of Justice was no longer reticent in pursuing antitrust remedies against regulated common carriers. In 1942 the Department convened a grand jury, which was interrupted by the war, to investigate the issue.[617] In 1944 the Department resumed its efforts and initiated litigation, contending that rate bureau activity violated the Sherman Act.[618] That same year the State of Georgia brought an action against several northern railroads alleging rate discrimination and antitrust violations in price fixing.[619]

In *Georgia v. Pennsylvania Railroad*[620] the Supreme Court held that

609. McFadden, *supra* note 599, at 72. The Sherman Act, however, was enforced against other combinations and conspiracies in restraint of trade. *See, e.g.,* United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 102 (1913) (White Pass & Yukon Railroad violated the antitrust laws by refusing to do business with any steamship company except the Wharves Company).

610. McFadden, *supra* note 599, at 72. For examples of independent action opportunities available to rate bureau members, see Ajayem Lumber Corp. v. Penn Cent. Transp. Co., 487 F.2d 179, 179 (2d Cir. 1973), *cert. denied*, 419 U.S. 884 (1974); United Van Lines, Inc. v. United States, 353 F.2d 741, 744 (Cl. Ct. 1965); Axinn & Sons Lumber Co. v. Long Island R.R. Co., 466 F. Supp. 993, 995 (E.D.N.Y. 1978); Balt. & Ohio R.R. v. N.Y., New Haven & Hartford R.R., 196 F. Supp. 724, 730 (S.D.N.Y. 1961).

611. McFadden, *supra* note 599, at 72. *See* United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

612. 15 U.S.C. §§ 12-27.

613. *Id.* § 13.

614. *Id.* § 14.

615. *Id.* § 21(a).

616. *Id.* § 26. As late as 1933 the Court upheld the prohibition in section 16 of the Clayton Act against private suits. Cent. Transfer Co. v. Terminal R.R. Ass'n of St. Louis, 288 U.S. 469, 475 (1933). The Court viewed the purpose of section 16 as protecting interstate carriers from disruptions resulting from injunctions sought by parties other than the government. *Id.*

617. McFadden, *supra* note 599, at 78.

618. *Id.*

619. Georgia v. Pa. R. Co., 324 U.S. 439 (1945).

620. 324 U.S. 439 (1945).

a conspiracy "to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed"[621] stated a cause of action under the antitrust laws.[622] Justice Douglas, writing for the majority, was particularly disturbed by the allegation that the activities of the rate bureau had led to regional price discrimination.[623]

Although a bill intended to shield collective ratemaking activities from such litigation had been introduced in the U.S. Senate before the Court's decision in *Georgia v. Pennsylvania Railroad*, the decision—to a large extent—prompted Congress to promulgate the Reed-Bulwinkle Act over President Truman's veto.[624] The Act shielded ICC-approved rate bureau from the application of the antitrust laws.[625] The ICC thus be-

621. *Id.* at 462.

622. *Id.*

623. *Id.* at 450-51. Justice Douglas specifically addressed the illegality of such activity:

> [W]e find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making. . . . The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates.

Id. at 458-59. Because the relief sought was an injunction against the rate-fixing combination and conspiracy among the carriers, and not against the continuance of any tariff, the case was not within the jurisdiction of the ICC. *Id.* at 455. The Court suggested that had Georgia sought an injunction against the continuation of the tariff, or to have a tariff provision cancelled, relief would have been barred under section 16 of the Clayton Act. *Id.* Section 16 of the Clayton Act, therefore, did not bar Georgia from bringing the action. *Id.* Nevertheless, the dissenters argued that section 16 barred suits concerning "any matters" within the jurisdiction of the Commission. *Id.* at 484. They believed the purpose of that provision was to prevent the maintenance of individual suites that would lead to the breakdown of the Commission's nationwide rate structure. *Id.*

624. McFadden, *supra* note 599, at 78. *See* 49 U.S.C. § 10706 (Supp. IV 1980).

625. 49 U.S.C. § 10706. *See* Marnell v. United Parcel Serv. of Am., Inc., 260 F. Supp. 391, 399 (N.D. Cal. 1966). This legislation passed with the unanimous support of the shippers and carriers who testified before Congress, *see* H.R. REP. NO. 80-1100, at 2-3 (1947). The Senate report described the purposes of the Act as "harmonizing and reconciling the policy of the antitrust laws, as applicable to common carriers, with the national transportation policy in such a manner as to protect the public interest." S. REP. NO. 80-44, at 3 (1947). The Senate reaffirmed these purposes almost three decades later in its report on the Railroad Revitalization Reform Act of 1976 (4R Act). The report noted that "cooperation and collective action by and among common carriers is necessary if the national transportation (policy) is to be effectuated and the public is to receive the kind of transportation service to which it is entitled and if the rates are to be reasonable and nondiscriminatory." Atchison, Topeka. & Santa Fe Ry. Co. v. United States, 597 F.2d 593, 594 n.2 (7th Cir. 1979) (citing S. REP. NO. 94-499, at 14 (1975)). *See* Motor Carriers Traffic Ass'n v. United States, 559 F2d 1251, 1253 (4th Cir. 1977) (history of collective ratemaking for transportation carriers has been long and controversial); Atchison, Topeka & Santa Fe Ry. Co. v. Aircoach Transp. Ass'n, 253 F.2d 877, 882-83 (D.C. Cir. 1958) (ICC controls rates to avoid inconsistency with congressional policy). Congress recognized that it was not breaking new ground in establishing such antitrust immunity, but rather was extending immunity beyond those areas that

came the sole arbiter of whether collective ratemaking agreements served the public interest.[626] If such agreements satisfied the Commission, they were free from judicial challenge.[627]

XIV. Constitutionality of Economic Regulation

Economic regulation of an industry such as transportation potentially can be circumscribed by the U.S. Constitution in three ways:

- Federal or state regulation may conceivably violate the 5th or 14th Amendment prohibition, respectively, against deprivation of life, liberty or property without "due process" of law;[628]
- State regulation can sometimes be inconsistent with Article 1 section 8 of the Constitution—the Commerce Clause—which vests in Congress the power to regulate interstate and foreign commerce;[629] or
- Federal or state discrimination limiting the economic activities of non-residents may potentially run afoul of the Privileges and Immunities Clause of Article IV and the 14th Amendment of the Constitution.[630]

A. State Police Powers

Opposite these three potential prohibitions against state action lies the inherent police power of the states. As one state court described it, "[t]he police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union, and is not a grant derived from or under any written Constitution."[631] Another court said:

> The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conductive to the public interest, and, under our system of government, is vested in the legislatures of the several

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it had already designated as within the exclusive jurisdiction of the ICC. *See* S. Rep. No. 80-44, at 3 (1947).

626. Dempsey & Thoms, *supra* note 22, at 209.

627. *Id.*

628. *See Ex Parte Tindall*, 229 P. 125, 129 (Okla. 1924).

629. Paul Stephen Dempsey, *Trade & Transport Policy in Inclement Skies—The Conflict Between Sustainable Air Transportation and Neo-Classical Economics*, 65 J. Air L. & Com. 639, 679 (2000).

630. *Ex Parte Tindall*, 229 P. at 128.

631. *Id.* at 130.

> While the term "police power" has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

Id.

states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the federal constitution, or laws made under its delegated powers.[632]

The U.S. Supreme Court described the police power as, "the power of the state, . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."[633]

B. The Due Process Clause

The question of whether a state may regulate business practices consistent with the due process obligations of the 14th Amendment early on was addressed by the U.S. Supreme Court in *Munn v. Illinois,*[634] in which the court upheld state regulation of grain elevator rates.[635] *Munn* addressed the fundamental issue of whether private property was under the exclusive control of its owners, or whether certain enterprises were of such character as to become quasi-public institutions in which the public has an interest.[636] The case involved the question of whether Illinois could properly regulate the rates of grain storage elevators within the state.[637]

In *Munn,* managers and lessees of grain storage elevators in Chicago were prosecuted for ignoring state licensing and rate setting statutes.[638] The defendants argued that the state had no right to infringe on their economic freedom through such regulations and that the state law was inconsistent with the commerce clause of the U.S. Constitution.[639] The Supreme Court stated that private property used in a manner affecting the general community becomes "clothed with a public interest" and subject to control "by the public for the common good."[640] Hence, a state

632. Bagg v. Wilmington, Columbia & Augusta Railroad Co., 14 S.E. 79, 80 (N.C. 1891). So long as the state legislation is not in conflict with any law passed by congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce, and to expedite, instead of hindering, the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the constitution . . . . *Id.*

633. Barbier v. Connolly, 113 U.S. 27, 31 (1884).

634. 94 U.S. 113 (1876).

635. *Id.* at 135-36.

636. *Id.* at 135.

637. 94 U.S. at 123.

638. *Id.* at 117.

639. *Id.* at 119.

640. *Id.* at 126. Although *Munn* did not directly involve rail carriers, subsequent decisions applied this principle to railroads. *See, e.g.,* Winona & St. P.R.R. v. Blake, 94 U.S. 180 (1876) (railroad rates subject to regulation by Minnesota legislature); Peik v. Chi. & Nw. Ry., 94 U.S. 164 (1876) (railroad rates subject to ceilings prescribed by Wisconsin legislature); Chi., B. & Q.

government could regulate private property dedicated to a public use. The Court also noted that the regulation of the grain elevators was of domestic concern, and therefore found that the state was free to exercise its governmental powers over such a concern, "even though in so doing it [might] indirectly operate upon commerce outside its immediate jurisdiction."[641] Thus, the state's power to regulate would be restricted only when Congress itself enacted legislation dealing with interstate rate regulations. Said the court:

> [I]t has . . . been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, [and] of common carriers . . . and, in so doing, fix a maximum charge to be made for services rendered. . . .
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> . . .[W]hen private property is "affected with a public interest, it ceases to be *juris privati* only.". . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.
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> . . . .
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> . . .[Common carriers stand] in the very "gateway of commerce," and take a toll from all who pass. Their business most certainly "tends to a common charge, and is becoming a thing of public interest and use."[642]

Hence, a state government may regulate private property dedicated to a public use. Other courts have noted that, "[i]t is laid down as a fundamental principle that persons . . . engaged in occupations in which the public have an interest or use may be regulated by statute."[643]

Lochner v. New York,[644] a decision that struck down maximum hours regulations for bakers, inaugurated an aberrational period from 1905 until 1934, during which the Supreme Court invalidated approximately 200 economic regulations, principally under the due process clause of the 14th Amendment.[645] Under the doctrine of substantive or economic due process, the Supreme Court reviewed the Constitutionality of state and federal legislation against claims that it arbitrarily, unnecessarily, or unwisely interfered with the right of the individual to liberty of person and free-

R.R. v. Iowa, 94 U.S. 155 (1876) (railroads engage in public employment and affect public interest; rates subject to legislative control).

641. *Munn*, 94 U.S. at 135.

642. *Id.* at 113, 126, 132. Although Munn dealt with grain elevators, the principle announced therein was subsequently extended to railroads. *See Chi., Burlington & Quincy R.R. Co.*, 94 U.S. 155 (1876); Ruggles v. Illinois, 108 U.S. 526 (1883); Ill. Cent. R. Co. v. Illinois, 108 U.S. 541 (1883).

643. *Ex Parte Tindall,* 229 P. at 131.

644. 198 U.S. 45 (1905).

645. Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN. ST. ENVTL. L. REV. 1, 12 n.72 (2002).

dom of contract.[646] Justice Oliver Wendall Holmes dissented, saying

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. . . .
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> . . . .
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> . . .But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the state or of *laissez faire*.[647]

During the *Lochner* era, the Court upheld regulation if it subjectively believed the regulation truly necessary to protect the health, safety or morals of the public, but struck down the regulation if the Court perceived it designed to readjust the market in favor of one party over another.[648] By depriving the state legislatures of the freedom to adopt means suited to local needs, *Lochner* became "one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse."[649]

Ultimately, the Court would conclude that Holmes had it right. The *Lochner* era came to an abrupt end with the Supreme Court's decision in *Nebbia v. New York*.[650] In *Nebbia,* the Court upheld a law, which set minimum prices for milk in order to ensure that producers received a reasonable return for their labor and investment, as a prophylactic against milk contamination.[651] Referring to *Munn's* insistence that property can be regulated only if "affected with a public interest," the Court observed that this phrase "mean[s] no more than an industry, for adequate reason, is subject to control for the public good."[652] The Court reasoned:

> Under our form of government the use of property and making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.
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> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government.
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> . . . .

646. *Lochner*, 198 U.S. at 62.

647. *Id.* at 75.

648. *See* GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 741 (1986).

649. BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980).

650. 291 U.S. 502 (1934).

651. *See id.* at 517.

652. *Id.* at 536.

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . .
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> The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.
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> So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it . . . If the legislative policy be to curb unrestrained and harmful competition . . . it]does not lie with the courts to determine that the rule is unwise . . . Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[653]

Since the end of the *Lochner* era, courts have been extremely deferential to legislative decisions in areas of economic regulation. Where neither a fundamental right nor a suspect class is involved, the legislative decision withstands constitutional assault where the "classification is based on rational distinctions and bears a direct and real relation to the legitimate object or purpose of the legislation."[654] Thus, the Supreme Court has held, "if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision."[655]

Many states began to regulate railroads in the 19th Century and motor carriers in the 1920s. In the early 20th Century, such economic regulation was challenged in many states on due process grounds. But virtually every state appellate court upheld the economic regulation of common carriers as a legitimate exercise of the police powers by the state legislature.[656]

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653. *Id.* at 523, 524-25, 527-28, 537-38.

654. Old S. Duck Tours, Inc. v. Mayor of Savannah, 535 S.E.2d 751, 755 (2000) (citing Love v. State, 517 S.E.2d 53 (Ga. 1999)).

655. Day-Brite Lighting, Inc., v. Missouri, 342 U.S. 421, 425 (1952).

656. The following cases illustrate the overwhelming trend. For example, the California Supreme Court upheld the power of the legislature to enact economic regulation of common carriers broadly:

> [C]ommon carriers are subject to regulation by the state because the fact that they are engaged in public service causes their business to be affected with public interests, and thus justifies the regulation thereof by public authority. . . . [I]t is universally conceded

The U.S. Supreme Court has upheld economic regulation where "any state of facts either known or which could reasonably be assumed affords support for it."[657] The Court has resorted to wholly hypothetical facts to uphold the legislation, concluding that the "day is gone when this Court uses the Due Process Clause . . . . . to strike down state laws,

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that the state does have the power and the right to completely prohibit the use of its public highways by a common carrier. . . . [This conclusion] is based upon the power of the state *to prohibit the private use* of its highways or in its discretion to grant the privilege of such private use upon such conditions as it may see fit to impose. By the statute here in question the state says in effect to the citizen: "I will grant you the special privilege of using my highways for your private business upon condition that you in turn submit yourself and your property to such regulations as I impose. I will not compel you to submit to these regulations, but, if you are not willing to do so, I shall not grant you this special privilege."

Holmes v. R.R. Comm'n of Cal., 242 P. 486, 488 (Cal. 1925). Similarly, the Oklahoma Supreme Court upheld the constitutionality of its state's economic regulation of motor carriers:

It is within the police power of the state to grant a privilege to render any character of public service, which will materially benefit the public, and equally within such power to restrict or deny such privilege, whenever it would result in detriment to the public.

. . . .

[T]he advent of throngs of automobiles and motor vehicles has necessitated the building of paved roads at a burdensome expense to the public. The public, as such, is therefore vested with a property right in such highways, and it is folly to argue that the public has no voice as to who shall appropriate its highways to their own free use and then charge the public a profit for such use.

Ex Parte Tindall, 229 P. at 132-33.

The principle applied in the regulation of the use of the highways for private enterprise rests upon public convenience and public necessity, a principle recognized and in a large degree applied by the national government in placing the control and regulation of the railroads of the country in the hands of the Interstate Commerce Commission.

. . .

[We have repeatedly held that] the state was within the rightful exercise of its police power in the regulation of the use of the highways in sustaining the constitutionality of the law here again challenged, and denied that it in any wise was in contravention of either the Fourteenth Amendment to the federal Constitution as in abridgment of any right or privilege of the citizen, or in deprivation of property without due process of law, or in denial to the citizen of the equal protection of the law. . . .

Barbour v. Walker, 259 P. 552, 554 (Okla. 1927).

The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control. . . .

Id. at 555 (citing Barbier v. Connolly, 113 U.S. 27 (1884)).

The Virginia Supreme Court agreed with the notion that states may lawfully prescribe the use of its highways, saying,

notwithstanding the constitutional guarantees . . . no private individual, firm, or corporation, has any right to use the public highways in the prosecution of the business of a common carrier for hire without the consent of the state; that such consent may be altogether withheld, or granted as a privilege upon such terms and conditions as the state may prescribe in the exercise of its police power; and that in such exercise of the police power there may be limitations and conditions, and thereby discriminations made between those to whom the privilege is granted and denied, provided the discriminations are based on some reasonable classification, which is not purely arbitrary, does not disclose personal favoritism or prejudice, and is fair and just.

Gruber v. Commonwealth, 125 S.E. 427, 429 (Va. 1924).

657. United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[658] Under the rational basis test, courts have upheld economic regulation where any facts actually exist, or would convincingly justify the classification if they did exist, or have been urged in the classification's defense by those who either promulgated it or argued for its support.[659] Applying the rational basis test, the Supreme Court has held that a statutory classification is to be struck down only if the means chosen by the legislature are "wholly irrelevant to the achievement of the State's objective."[660]

Where a state has decided to regulate a business, the judicial focus is on the application of the regulation—whether the regulation is reasonable and its decision not arbitrary or capricious.[661] "The exercise by a state of its police powers will not be interfered with by the Courts unless such exercise is of an arbitrary nature having no reasonable relation to the execution of lawful purposes."[662] Where a regulation is subject to rational basis review, most states accord it a "strong presumption of constitutionality and a reasonable doubt as to its constitutionality is sufficient to sustain it."[663]

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658. Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955). The Nevada Supreme Court has echoed this holding, concluding "[i]t is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action." Boulder City v. Cinnamon Hills Assocs., 871 P.2d 320, 327 (Nev. 1994).

659. *See* Briscoe v. Prince George's County Health Dep't, 593 A.2d 1109, 1113-15 (Md. 1991); Dep't of Transp., Motor Vehicle Admin. v. Armacost, 474 A.2d 191, 201 (Md. 1984). Similarly, the U.S. Supreme Court has concluded:

> [I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.
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> [The *Lochner* doctrine] has long since been discarded. . . .
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> [It] is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition. . . .'

Ferguson v. Skrupa, 372 U.S. 726, 729-31 (1963).

660. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

661. *See* Bluefield Tel. Co. v. Pub. Serv. Comm'n, 135 S.E. 833 (W.Va. 1926); Long Motor Lines, Inc. v. S.C. Pub. Serv. Comm'n, 103 S.E.2d 762 (S.C. 1958).

662. *Long Motor Lines*, 103 S.E.2d at 765 (citing Jones v. City of Portland, 245 U.S. 217, 224 (1917)). *See also In re* Dakota Transp., Inc. of Sioux Falls, 291 N.W. 589, 593 (S.D. 1940) ("[T]he reviewing court cannot substitute its judgment for that of the Commission and disturb its finding where there is any substantial basis in the evidence for the finding or where the order of the Commission is not unreasonable or arbitrary.").

663. *Briscoe*, 593 A.2d at 1113.

C. The Equal Protection Clause

Historically, the states have held certain inherent power to regulate activities designed to improve the health, safety, and welfare of their inhabitants.[664] The need to regulate interstate commerce was one of the principal reasons the nation came together to replace the Articles of Confederation with the Constitution.[665] Article I Section 8 of the United States Constitution vests in Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[666] Several 19th Century decisions of the U.S. Supreme Court were instrumental in defining Congress' power over interstate commerce, and gave impetus to federal economic regulation.

Gibbons v. Ogden[667] addressed the question of whether the state of New York could grant a monopoly franchise to operators of steamboats in New York waters, and prohibit others from entering the trade.[668] Aaron Ogden, who had been assigned the monopoly franchise (earlier granted to Robert Livingston and Robert Fulton) argued that the Constitutional phrase "commerce" referred only to the purchase and sale of goods, and did not comprehend navigation.[669] The court disagreed, concluding that commerce included "every species of commercial intercourse" between states, or between the United States and foreign nations, including navigation, and that such commerce was subject to the exclusive regulatory province of Congress.[670]

In *Cooley v Board of Port Wardens,*[671] the Supreme Court upheld a Pennsylvania law requiring that all ships entering or leaving the port of Philadelphia use a local pilot or pay a fine to support retired pilots and

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664. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829). As the U.S. Supreme Court has noted,

> [While a] state may provide for the security of the lives, limbs, health, and comfort of persons and . . . property . . . yet a subject-matter which has been confided exclusively to congress [sic] . . . is not within the . . . police power of the state, unless placed there by congressional action. . . .The power to regulate commerce among the states is [conferred by the Constitution to Congress] but, if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until congress [sic] otherwise directs. . . .The power to pass laws in respect to internal commerce . . . belongs to the class of powers pertaining to locality . . . and [to] the welfare of society, originally . . . belonging to, and upon the adoption of the constitution [sic] reserved by, the states, except so far as falling within the scope of a power confided to the general government.

Leisy v. Hardin, 135 U.S. 100, 108 (1890) (citations omitted).

665. *Wabash*, 118 U.S. at 573.

666. U.S. Const. art. I, § 8, cl. 3.

667. 22 U.S. 1 (1824).

668. *Id.* at 8.

669. *Id.* at 9-11.

670. *Id.* at 3.

671. 53 U.S. 299 (1851).

their dependents.[672] The Court recognized that some areas require diversity of local regulation, rather than a unified national system, to meet as here, for example, "the local necessities of navigation."[673]

As noted above, in *Munn v. Illinois*, the U. S. Supreme Court observed that the critical test was whether the "private property is 'affected with a public interest,'. . . .When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . ."[674] Under *Munn,* once business was determined to be "'clothed with a public interest," the legislature was free to impose whatever rate regulations seemed to it desirable."[675]

But the real catalyst for federal legislation establishing economic regulation over common carriers was the case of *Wabash, St. Louis and Pacific Railway v. Illinois*, issued in 1886.[676] In *Wabash*, the U.S. Supreme Court struck down an Illinois law regulating interstate rail rates as unconstitutional.[677] Although numerous bills involving rail regulation were introduced into Congress prior and subsequent to *Munn*,[678] Congress did not feel compelled to act until the Court decided *Wabash*.[679]

In *Wabash* the Court held unconstitutional an Illinois law that prohibited a rail carrier from charging the same or higher rate for transporting the same commodity over a lesser distance than over a greater distance in the same direction.[680] The Supreme Court of Illinois had conceded that the statute might affect interstate commerce, but ruled that the state legislature was free to act until Congress exercised its power to regulate interstate rail traffic.[681] In overturning the lower court's ruling, the U.S. Supreme Court recognized that Congress had not enacted legislation in this area, yet focused on the oppressive conditions that would be imposed on carriers if the individual states regulated interstate transportation within their borders.[682] The Court emphasized that the framers of the Constitution had vested in Congress the sole authority to regulate interstate commerce.[683]

672. *Id.* at 311-12 .
673. *Id.* at 319.
674. *Munn*, 94 U.S. at 126.
675. DAVID BOIES & PAUL R. VERKUIL, PUBLIC CONTROL OF BUSINESS 103 (1977).
676. 118 U.S. 557 (1886).
677. *Id.* at 577.
678. Between 1868 and 1886, Congress considered approximately 150 bills and resolutions. Harris, *supra* note 161, at 11.
679. *Genesis and Evolution*, *supra* note 2, at 340.
680. 118 U.S. at 577.
681. *Id.* at 566.
682. *Id.* at 572.
683. *Id.* at 572-73.

Wabash appeared to express a conclusion contrary to that stated in *Munn*. The Court was expressly holding that even when Congress had not exercised its jurisdiction under the Commerce Clause of the Constitution, the state could not regulate businesses operating in interstate or foreign commerce.[684] Under the dormant Commerce Clause, the Court held that even in the absence of federal regulation, the states could not regulate the interstate rates of the railroads: "the right of continuous transportation from one end of the country to the other, is essential, in modern times, to that freedom of commerce, from the restraints which the state might choose to impose upon it. . . ."[685] Because nearly three fourths of the commodities shipped at the time were transported in interstate commerce, and were rendered immune from state control by the *Wabash* decision,[686] it became a powerful catalyst for federal legislation, leading to the creation of the Interstate Commerce Commission in 1887.[687] Initially, Congress conferred upon the ICC the power to ensure that rail rates were "just and reasonable" and in 1920 added a requirement that no new rail lines should be built unless the applicant satisfied the "public convenience and necessity."[688]

By the mid-1920s, thirty-three states regulated motor freight transport, and forty-three regulated bus companies.[689] But the U.S. Supreme Court in 1925 handed down a decision that stripped the states of their ability to regulate interstate movements.[690]

Under the notion that congressional power was plenary and exclusive, the dormant Commerce Clause continued to preempt state regulation of interstate commerce for some time.[691] At issue in *Buck v. Kuykendall* was the denial by the state of Washington of a motor common carrier's application for operating authority between Seattle, Washington, and Portland, Oregon, on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam

684. *Id.* at 577.
685. *Id.* at 572-73.
686. Harris, *supra* note 161, at 15.
687. *Genesis & Evolution*, *supra* note 2, at 341.
688. DEMPSEY & THOMS, *supra* note 22, at 11, 13.
689. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 16.
690. *See* Buck v. Kuykendall, 267 U.S. 307 (1925).
691. The Supreme Court held:

> Whenever . . . a particular power of the general government is one which must necessarily be exercised by it, and congress remains silent. . . .[T]he only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as . . . the transportation . . . of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammeled.

Leisy,135 U.S. at 109-10.

rail service.[692] Although the Supreme Court recognized that a state legitimately may constrain interstate transportation in order to promote safety or conservation of the highways, the Court concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition.[693] Prior to this decision, forty states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity.[694] The ruling in *Buck* prohibited state controls on entry for motor carriers engaged in interstate commerce.[695]

In 1935, Congress subjected motor carriers to economic regulation, including the requirement that rates be "just and reasonable," that entry be consistent with the "public convenience and necessity," and that applicants be "fit, willing, and able" to lawfully and financially perform the proposed operations, though exempting intrastate activities from federal regulation.[696] Other interstate modes of transport (including airlines, water carriers and freight forwarders) were also subjected to the federal "just and reasonable," "public convenience and necessity," and "fitness, willingness, and ability" requirements between 1938 and 1940.[697] The states continued to regulate their intrastate activities.

The purposes of such legislation was, *inter alia,* to

> promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . . to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . and to encourage fair wages and equitable working conditions.[698]

Such economic regulation was challenged on due process grounds. Applying the rational basis test, these statutes were almost universally upheld.[699]

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692. *Buck*, 267 U.S. at 313.

693. *Id.* at 315.

694. Webb, *supra* note 488, at 92.

695. *See, e.g.*, Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n, 44 N.W.2d 324, 331 (Mich. 1950).

696. DEMPSEY & THOMS, *supra* note 22, at 11, 13.

697. *See Market Failure, supra* note 468, at 7; *Intermodal Transportation, infra* note 780, at 377; Paul Stephen Dempsey, *The Interstate Commerce Commission—Disintegration of an American Legal Institution*, AM. U. L. REV. 1, 7 (1984) [hereinafter *Institution Disintegration*]

698. Interstate Commerce Act, 54 Stat. 899 (1940).

699. The rationale for economic regulation of common carriers was expressed by one court as follows:

> The primary consideration for requiring motor carriers to secure . . . certificates [of public convenience and necessity] is 'to promote good service by excluding unnecessary competing carriers.' . . . The practical necessity for regulation of this and similar business affected with a public interest . . . 'is to promote public interest by preventing

> waste. . . . The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied.' .. . . It is true that certified carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service by the avoidance of useless duplication with its consequent impairment of service and increase of rates charged the public. The public interest is paramount.

In re Dakota Transp., Inc. of Sioux Falls 291 N.W. at 593 (citations omitted).

In *South Carolina Highway Dep't v. Barnwell Bros. Inc.,* 303 U.S. 177, 185 (1938), the Supreme Court addressed state size and length restrictions on trucks. It found that "there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states. . . ." The court held that "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways." *Id.* at 187. "[T]he Court has been most reluctant to invalidate under the Commerce Clause 'state regulation in the field of safety where the propriety of local regulation has long been recognized.' In no field has this deference to state regulation been greater than that of highway safety regulation." Raymond Motor Transp. v. Rice, 434 U.S. 429, 443 (1978) (citations omitted). In determining whether a state regulation is Constitutional, the test is "whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." *Barnwell Bros.*, 303 U.S. at 190. In resolving the latter inquiry, "courts do not sit as Legislatures [to weigh] all the conflicting interests. . ..[F]airly debatable questions as to [a regulation's] reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body. . . ." *Id.* at 190-91. The court must assess, "upon the whole record whether it is possible to say that the legislative choice is without rational basis." *Id.* at 191-92.

The Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce, the Court nevertheless observed:

> [T]he states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945)

The Court noted that in *Barnwell* "The fact that [the regulation of highways] affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses." *Id.* at 783.

The Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce, the Court nevertheless acknowledged that a

> State's power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety—especially highway safety—are those that 'the Court has been most reluctant to invalidate.' Indeed 'if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.' Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of validity.'"

Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 670 (1981) (citations omitted) (quoting *Raymond Motor Transp., Inc.*, 434 U.S. at 443, 449; Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959)).

This deference to state action in regulating the highways stems from a recognition that the states shoulder primary responsibility for their construction, maintenance and policing, and that highway conditions can vary from state to state. *See Bibb*, 359 U.S. at 523-24. "The power of a

The U.S. Supreme Court has also upheld state regulation designed to favor one group of competitors (in this case, independent gasoline retailers over refiner owned retail outlets) over another against commerce clause challenges that the state interfered "with the natural functioning of the interstate market."[700] The Court held, "We cannot . . . accept [the argument] that the Commerce Clause protects the particular structure or methods of operation in a retail market."[701]

As can be seen, with the gradual recognition of the legitimacy of state police powers, and deferential "rational basis" analysis, the Supreme Court began to retreat from dormant commerce clause preemption. Instead, today the court focused on:

- Whether Congress explicitly preempted the states;[702]
- Whether the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it;[703] or
- Whether the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.[704]

D. The Privileges & Immunities Clause

Related to the Commerce Clause, and its protection of a national economic system, is the Privileges and Immunities Clause—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[705] Both Article IV and the 14th Amendment[706] guarantee the citizens protection against state deprivation of their "privi-

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state to regulate the use of motor carriers on its highways has been . . . broadly sustained" by the U.S. Supreme Court. *See* Kane v. New Jersey, 242 U.S. 160, 167 (1914). State regulation of the highways has long been recognized as "an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens . . . ." Hendrick v. Maryland, 235 U.S. 610, 622 (1915).

In a case challenging the power of a Missouri regulatory agency to revoke a motor carrier's certificate of public convenience and necessity, the U.S. Supreme Court held, "The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question." Eichholz v. Pub. Serv. Comm'n of Mo., 306 U.S. 268, 273 (1939). In a case challenging California's economic regulation of motor carriers, the Supreme Court held that "we no longer limit the states to their 'traditional' police powers in considering a statute's validity under the Fourteenth Amendment. . . . [C]onsistent with the many cases giving the State's interest in its own highways more weight than the national interest against 'burdening' commerce, we have held that the highway regulation involved in this case is allowable State action before Congress has acted." California v. Zook, 336 U.S. 725, 734-35 (1949) (citations omitted).

700. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978).

701. *Id.*

702. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

703. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

704. Pac. Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983).

705. U.S. Const. art. IV, § 2, cl. 1.

leges and immunities" of national citizenship by either the federal or state government, respectively.[707]

In an early decision, a court noted that the clause protects interests

> which are, . . . fundamental; which belong, of right, to the citizens of all free governments. . . . [These may be] comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may prescribe for the general good of the whole.[708]

It is the last phrase— "such restraints as the government may prescribe for the general good of the whole"—which allows states to impose regulation upon its citizens, so long as it not provide preferential treatment to in-state, as opposed to out-of-state, citizens, unless there is a "substantial reason" for the difference in treatment.[709]

Application of the Privileges and Immunities Clause initially involves an inquiry into whether the discrimination against out-of-state residents is sufficiently "fundamental" to promotion of interstate harmony to fall within its purview.[710] The Supreme Court has held that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."[711] For example, under the Privileges and Immunities Clause, the Supreme Court has struck down a state fee of $2,500 for non-resident commercial fisherman when residents were charged only $25.[712] The Court has also held that limiting bar admission to local residents violated the clause.[713] But again, there must be discrimination against non-residents to trigger the clause.[714]

Further, the Supreme Court has noted that the "privileges and immunities clause is not an absolute."[715] The Court has held, "[e]very inquiry under the Privileges and Immunities Clause 'must . . . be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[716]

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706. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

707. U.S. CONST. art. IV, § 2, cl. 1; amend. XIV, § 1.

708. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).

709. Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 288 (1985).

710. *Corfield*, 6 F. Cas. at 552.

711. United Bldg. & Constr. Trades Council of Camden v. Camden, 465 U.S. 208, 219 (1984).

712. Toomer v. Witsell, 334 U.S. 385, 389 (1948).

713. *Piper*, 470 U.S. at 288.

714. *Id.* at 284.

715. *Toomer*, 334 U.S. at 396.

716. *Camden*, 465 U.S. at 222-23.

XV. A Mature Transportation Network

A. Development of the Modern Airline System

In the 1950s, new generations of turboprop, then jet, aircraft spurred efficiency, productivity and speed, thereby reducing costs to consumers, while enhancing the margin of safety.[717] Military research and development was a catalyst for technological development, for the two World Wars had revealed the proficiency of aircraft at delivering bombs and soldiers.[718] Each generation of aircraft was superior to its predecessor in its abilities and its economics.[719]

In the mid-1950s, a series of accidents brought to surface an underlying need for significant safety enhancement in aviation. In 1956, a Trans World Airlines Constellation collided with a United Airlines' DC-7 over the Grand Canyon.[720] In early 1957, a Douglas Aircraft company-owned DC-7 collided with an Air Force F-89 over Sunland, California.[721] The DC-7 crashed into a junior high school, killing three and injuring seventy others.[722] In 1958, a third significant accident involved the collision of a United Airlines' DC-7 and an Air Force F-100 near Las Vegas, Nevada.[723] Congress responded by promulgating the Federal Aviation Act of 1958,[724] and creating of the Federal Aviation Agency, later to become the Federal Aviation Administration [FAA] under the Department of Transportation Act of 1966.[725]

The Civil Aeronautics Act was recodified and restructured by the Federal Aviation Act of 1958,[726] which spun off the navigation and safety responsibilities of the CAB into the newly created FAA, originally a subsidiary of the U.S. Department of Commerce, and with the creation of DOT in 1966, a subsidiary of it.[727] The accident investigation and recommendation responsibilities of the CAB were transferred to the FAA initially, and were re-delegated to the National Transportation Safety Board, made independent in 1974.[728]

Under economic regulation, America enjoyed the world's finest system of air transport, one envied by every other nation.[729] The time and

717. *State of the Airline*, *supra* note 420, at 141.
718. *Id.*
719. *Id.*
720. H.R. Rep. No. 85-2360, at 3742 (1958).
721. Air Commerce, *supra* note 57, at 61.
722. *Id.*
723. *Id.*
724. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.
725. H.R. Rep. No. 85-2360, at 3741 (1958).
726. Federal Aviation Act of 1958, § 101.
727. Airport Regulation, *supra* note 563, at 19.
728. *Id.* at 19, 21.
729. *State of the Airline*, *supra* note 420, at 141.

space continuum, and indeed the planet, was shrinking. Service and safety were improving.[730] When adjusted for inflation, prices were falling.[731]

But by the early 1970s, the industry was in a state of crisis. Excessive investment in wide-bodied aircraft (B-747s, DC-10s and L-1011s) had created excessive fleet capacity.[732] That was coupled with an economic recession that suppressed passenger demand, as well as a fuel crisis stimulated by the Arab Oil Embargo of 1973.[733] These events converged to create severe financial turbulence for the industry.[734] The CAB believed that only a stiff dose of regulatory medicine would save the industry from disintegration.[735]

In the early 1970s, the CAB took a number of steps to shore up the economic health of the airlines and avert catastrophe. First, the CAB tacitly began a "route moratorium," during which no new route application was granted.[736] Second, the CAB allowed a number of major carriers to enter into capacity limitation agreements whereby the number of aircraft flown in major markets was reduced.[737] Third, the major international carriers, Pan Am and TWA, were allowed to swap routes, with TWA exiting the transpacific market, and Pan Am ceding southern Europe.[738] Finally, the CAB allowed carriers to pass on their increased fuel costs to passengers in their ticket prices.[739]

Thus, the pendulum was pulled sharply toward greater governmental involvement in the airline market. This would be perceived as an anti-consumer movement and opposed by the antitrusters.[740] Sir Isaac Newton noted that for every action, there is an equal and opposite reaction. The pendulum of public policy, having been pulled so sharply toward the regulatory end of the spectrum, would soon come roaring back in the other direction.

B. The Emergence of Interstate Highways

Several major separated highways were built before World War II. Notable among them were the Pennsylvania Turnpike, and Robert

730. *Id.*
731. *Id.*
732. *Rise and Fall*, *supra* note 543, at 117.
733. *Id.*
734. *Id.*
735. *Id.* at 118.
736. *Id.* at 115.
737. *Id.* at 117-18.
738. *See* Paul Stephen Dempsey, *The International Rate and Route Revolution in North Atlantic Passenger Transportation*, 17 COLUM. J. TRANSNAT'L L. 393, 416 (1978).
739. *See Erosion of the Regulatory Process*, *supra* note 11, at 306 n.11.
740. *State of the Airline*, *supra* note 420, at 142.

Moses' network of parkways on Long Island.[741] During the 1950s, it was President Dwight Eisenhower who saw the need to build a national system of interstate highways to link the country for, *inter alia*, purposes of national defense.[742] In 1919, as a young Army officer, Eisenhower had participated in a transcontinental caravan of cars and trucks from the White House in Washington, D.C., to Union Square in San Francisco.[743] Averaging only five miles an hour, the trip took 62 days.[744] As the leader of Allied Forces in Europe, General Eisenhower became acquainted with Adolf Hitler's great public works project of the Third Reich—the Autobahn—highways that facilitated the expeditious movement of the Wehrmacht to invade nearly every nation that bordered Germany, a transport network relatively impervious to air attack.[745]

As President, Eisenhower began a seventeen year construction period of the U.S. Interstate Highway program.[746] The Federal Highway Act of 1956 launched the largest public works project ever undertaken—the 43,000-mile National System of Interstate and Defense Highways.[747] The companion Highway Revenue Act of 1956 created the Highway Trust Fund comprised of revenue from user charges (sales of gasoline, diesel, tires, and a weight tax for heavy trucks and buses)—the first time Congress had earmarked taxes for specific purposes.[748] As the Interstate Highways grew, the market share of freight transported by trucking companies enjoyed a corresponding growth.[749]

C. The Interstate Commerce Commission at its Zenith

Until the demise of the northeast railroads in the 1970s, the Interstate Commerce Commission—the nation's first independent agency—was regarded as a model of good government. At the agency's fiftieth anniversary, the Interstate Commerce Commission was praised for its "vigor, spirit, and statesmanlike administration."[750] A Congressman said of the ICC, "Without desire to aggrandize itself, but actuated by what it believed to be in the public interest, free from partisanship or politics and

741. Lewis, *supra* note 38, at 53.

742. *Id.* at 88-89.

743. *Id.* at 89.

744. *Id.* at 90.

745. *Id.*

746. Air Commerce, *supra* note 57, at 164.

747. *Id.*

748. *Id.* (citing Mark Solof, History of Metropolitan Planning Organizations – Part II 6 (1998)).

749. *Market Failure*, *supra* note 468, at 14.

750. Clyde B. Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 Geo. Wash. L. Rev. 289, 321 (1937).

resisting pressure from whatever source, it does its work."[751]

At the Commission's seventy-fifth anniversary, Supreme Court Justice Felix Frankfurter eloquently summarized the agency's strengths:

> [T]he Commission illustrates, throughout its life, unblemished character. . .character meaning a fastidious regard for responsibility, a complete divorcement between public and private interest, and all other concomitants of a true and worthy conception of public duty. Alas, that cannot be said of all public bodies, but it can be said that this Commission throughout its seventy-five years has had a career of unblemished character.
> Secondly, . . . we are here to celebrate as striking a manifestation of competence in government as any I know of in the three branches of government.
> . . . .
> Thirdly, it is a necessary condition, before a Commission can effectively act, that it be independent.
> . . . .
> It has maintained not merely formal independence, but actual independence of word and deed, and has been a laboratory demonstration of how economic problems may be worked out by trial and error. Finally, by virtue of all these considerations, the Commission has been a pacemaker, a model, for the subsequent commissions which, in turn, have been created in response to economic and social demands in their fields of activity.[752]

D. Racial Desegregation

Federal efforts to arrest discrimination in the provision of transportation services began in the 19th Century. As early as 1887, the ICC had found that racial discrimination by railroads violated the anti-discrimination provisions of the Interstate Commerce Act.[753] The ICC attempted to devise a policy requiring all passengers to be treated equally, though served separately. Thus was born the concept of "separate but equal" endorsed by the U.S. Supreme Court in 1896 in *Plessy v. Ferguson*.[754] When blatant acts of discrimination and inequality arose, the ICC took action to assure substantial equality in treatment of passengers.[755] As the motorbus industry grew, it followed a similar pattern.[756] Many states passed "Jim Crow" laws mandating racially separate but equal facilities.[757] Yet it be-

751. Honorable John J. Esch, *The Interstate Commerce Commission and Congress-Its Influence on Legislation,* 5 Geo. Wash. L. Rev. 462, 502 (1937).

752. Felix Frankfurter, Of Law and Life & Other Things That Matter 236-37, 239, 244 (Philip B. Kurland ed., 1965). Justice Frankfurter also prophetically foresaw the things which could cause the demise of the ICC. *Id.* at 245.

753. Councill v. W. & Atl. R.R. Co., 1 I.C.C. 339, 347 (1887). *See also* Heard v. Ga. R.R. Co., 1 I.C.C. 428, 435-36 (1888).

754. 163 U.S. 537, 548 (1896).

755. *See* Mitchell v. United States, 313 U.S. 80, 91 (1941).

756. *See* Day v. Atl. Greyhound Corp., 171 F.2d 59, 62-63 (4th Cir. 1948).

757. *See e.g.*, Corp. Comm'n v. Transp. Comm. of the N.C. Comm'n on Interracial Cooperation, 151 S.E. 648, 651 (N.C. 1930).

came increasingly apparent that separate transportation accommodations inherently could not be equal.[758]

Relying on the U.S. Supreme Court decision in *Brown v. Board of Education*,[759] which struck down the "separate but equal" doctrine in public education,[760] the ICC held that providing separate but equal transportation facilities could be countenanced no longer.[761] In 1961, the ICC promulgated regulations prohibiting carriers under its jurisdiction from separating their facilities so as to segregate patrons on the basis of race or color.[762]

The U.S. Supreme Court affirmed and expanded these actions, concluding that it was an "undue or unreasonable prejudice" under the Interstate Commerce Act for a railroad to divide its dining car by curtains, partitions, and signs in order to segregate passengers according to race.[763] Further, the Court extended the Act's discriminatory prohibition not only

758. In 1955, Rosa Parks took a seat in the "colored" section of a Montgomery City Lines bus in Montgomery, Alabama. The bus driver subsequently demanded that Ms. Parks and several other Negro patrons on the row surrender their seats to a recently boarded white patron. Ms. Parks refused, and was arrested. The arrest and trial of Rosa Parks led the African American community of Montgomery to stage a 382-day boycott of the bus company beginning December 5, 1955. The boycott was led by Martin Luther King, Jr. . Since 70% of the bus patrons were black, and most of them honored the boycott, the impact was profound. To deal with the losses, the bus company cut service, then distanced itself from its earlier embrace of segregation. In April 1956, the bus company president declared "We would be tickled if the [Alabama and Montgomery Jim Crow discrimination laws] were changed. We are simply trying to do a transportation job, no matter what the color of the rider." It then directed its drivers to discontinue enforcing segregation, a move met by fierce opposition by the Montgomery city and Alabama state governments. Ultimately, the federal courts invalidated the city ordinance and state statute compelling segregation of intrastate passenger transportation. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1016-24, 1044 (1989); CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 108-13 (1983). *See also* Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085 (1995); Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185 (1994).

759. 347 U.S. 483 (1954).

760. *Id.* at 494.

761. NAACP v. St. Louis-S.F. Ry. Co., 297 I.C.C. 335, 347 (1955). Examining this history, the Commission concluded:

> [I]n the early days of regulation this Commission went to great lengths in attempting, within the confines of the prevailing social and legal philosophy, to end racial discrimination in services, and facilities in the transportation industry. We are proud of the fact that our policy, once plainly enunciated and firmly established, has resulted in prompt and effective compliance by all phases of the industry. Subsequently, over the years complaints alleging racial discrimination in services and facilities have been virtually nonexistent.

Equal Opportunity in Surface Transp., 353 I.C.C. 425, 440-41 (1977).

762. United States v. City of Shreveport, 210 F. Supp. 708, 709 (D. La. 1962).

763. Henderson v. United States, 339 U.S. 816, 818 (1950).

to interstate bus common carriers, but to unaffiliated restaurants at which interstate buses stopped.[764] The "separate but equal" doctrine came crashing down in public and private transportation venues.[765] State and local laws mandating segregation in transportation facilities were struck down, and injunctions were issued prohibiting their enforcement.[766] Transit and municipal and intercity companies were ordered to desegregate on Constitutional equal protection and commerce clause grounds.[767] Both public and private facilities were desegregated under the Civil Rights Act of 1964.[768]

E. Intermodalism and Transportation Planning

As the Interstate Highway System neared completion in the early 1990s, the focus in transportation priorities shifted away from new highway construction. Congressional attention turned instead to alternatives to the single-occupancy vehicle [SOV] to satiate the public's desire for mobility.[769] Concerns over congestion, sprawl, and pollution, all of which defied political jurisdictional boundaries, emerged as political issues.[770] Congress also recognized that the separate and isolated modal networks were not linked together well.[771] Seamless connectivity between modes might well allow Americans to enjoy the inherent advantages of all modes.[772] With a conclusion that the Interstate Highway System would not be further expanded, transportation development would transition to a more regional or local focus.[773] Devolution of power, from the federal

764. Boynton v. Virginia, 364 U.S. 454, 462-63 (1960).

765. *See* Morgan v. Virginia, 328 U.S. 373, 386 (1946); Browder v. Gayle, 142 F. Supp. 707, 717 (N.D. Md. 1956), *aff'd*, 352 U.S. 903 (1956). The "Separate but Equal" doctrine was rejected in Brown v. Board. of Education, 347 U.S. at 494.

766. *See e.g.*, *City of Shreveport*, 210 F. Supp. at 710-11.

767. *See e.g.*, Boman v. Birmingham Transit Co., 280 F.2d 531, 535-36 (5th Cir. 1960); *Morgan*, 328 U.S. at 386; Lewis v. Greyhound Corp., 199 F. Supp. 210, 215 (D. Md. 1961).

768. Title VI of the Civil Rights Act of 1964 became the legislative authority for DOT regulations prohibiting discrimination. DOT regulations provide that "No person or group of persons shall be discriminated against with regard to the routing, scheduling or quality of service . . . on the basis of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color or national origin." Sandra Van De Walle, *The Impact of Civil Rights Legislation Under Title VI and Related Laws on Transit Decision Making*, TCRP Legal Research Digest 17 (1997). Affirmative action, and elimination of disparate impact discrimination are also required by the regulations. *Id.*

769. *See* Andrew R. Goetz, Paul Stephen Dempsey & Carl Larson, *Metropolitan Planning Organizations: Findings and Recommendations for Improving Transportation Planning*, 32 Publius: J. Federalism 87, 89 (2002) [hereinafter *Metropolitan Planning*].

770. *Id.*

771. *Id.*

772. *Id.*

773. *Metropolitan Planning*, *supra* note 769, at 89.

government to the States, the regions and the local jurisdictions, would empower institutions closer to the people.[774]

Enactment of the Intermodal Surface Transportation Efficiency Act of 1991 [ISTEA] reflected these concerns.[775] Significantly, it was the first highway bill in the nation's history to have expunged the word "highway" from its title.[776] This legislation provided enhanced flexibility for state and local governments to redirect highway funds to accommodate other modes and modal connections.[777] It significantly enhanced the role of Metropolitan Planning Organizations [MPOs] in transportation planning by giving the larger MPOs[778] principal authority to select projects for certain "pots" of federal money in consultation with the State, while requiring the State to cooperate with the MPO on allocating federal money in those "pots" over which the State had primary jurisdiction, and the local transit provider to do the same.[779] The MPO was required to engage in formalized planning of two types—a twenty-year long-range plan [LRP], and a short-term Transportation Improvement Program [TIP], covering transportation projects to be implemented over at least a three-year period.[780] The TIP must be updated at least every two years.[781]

Two important structural changes were added by ISTEA. First, it required MPOs to include several new types of stakeholders (including transportation providers and the public) in the planning process.[782] Second, it required an expansion of the boundaries of the planning area to include space for the next 20 years of expected urban growth, and to en-

774. *Id.*

775. *Id.*

776. *Metropolitan Planning*, *supra* note 769, at 89.

777. *Id.*

778. Those classified as Transportation Management Areas, or generally, those with a population of 200,000 or more. *Id.* at 87 n.1.

779. *Id.* at 89-90. The MPO has responsibility for allocating STP-metro, and in some states, Congestion Management and Air Quality [CMAQ], and enhancement (e.g., bicycle, pedestrian) funds in "consultation" with the State DOT; the State has jurisdiction over the National Highway System, Bridge, and Interstate Maintenance funds, which it selects in "cooperation" with the MPO. CMAQ fund allocation is the responsibility of the State DOT. Project selection should occur cooperatively between the MPO and the State DOT. *Id.* at 90.

780. *Id.* The LRP and the TIP must be financially constrained (meaning they should only include projects for which full funding can reasonably be expected). They must also include public participation in their preparation, including participation by citizens and transportation providers. In air quality non-attainment areas, the LRP and TIP must conform with the State's air quality implementation plan. The TIP incorporates all federally-supported projects in the metropolitan area, including those for which the State has primary responsibility. Once the TIP is approved by the MPO, it must be approved by the state Governor, and incorporated into the State Transportation Improvement Program [STIP]. Paul Stephen Dempsey, *The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be*, 27 TRANSP. L.J. 367, 397 n.165 (2000) [hereinafter *Intermodal Transportation*].

781. *Metropolitan Planning*, *supra* note 769, at 90.

782. *Intermodal Transportation*, *supra* note 780, at 397 n.163.

compass the area in the air quality region, if the region experiences air quality problems.[783]

The Transportation Equity Act for the 21st Century of 1998 [TEA-21] further enhanced the importance of the MPOs by increasing the amount of federal money over which they have primary responsibility.[784] TEA-21 also simplified the criteria to be considered in TIP preparation, reducing ISTEA's 15 factors, to just seven: (1) economic vitality; (2) safety and security; (3) accessibility and mobility; (4) the environment, energy conservation, and quality of life; (5) integration and connectivity between transport modes; (6) efficiency; and (7) preservation of the existing system.[785] It also strengthened the linkage between land use and transportation planning.[786]

Thus, beginning in 1991, MPOs were transformed from advisory institutions, into institutions that actually have direct influence over the distribution of money—from voluntary planning organizations, to organizations that have their fingers on some of the purse strings.[787] In ISTEA, and expanded in TEA-21, MPOs were empowered with the ability to directly designate projects for the federal dollars under their primary jurisdiction.[788] Though the "pots" of federal money over which the MPOs exercise jurisdiction are small relative to those controlled by the states, it is clear that such empowerment over money caused many local jurisdictions to take the MPO process and their participation therein far more seriously than they had theretofore.[789]

All this gave transportation planning a new perspective. The interstate and inter-regional "top-down" highway planning process of the federal and state governments, respectively, and the localized "bottom-up" street and road planning process of the cities and counties, would now be coupled with a third regional process which was a bit of both, expanded beyond highways, streets and roads into a comprehensive transportation planning process that took into account all modes, as well as a number of related social, economic, and environmental issues.[790]

XVI. The U.S. Department of Transportation

Discussions about creating a federal Department of Transportation

783. *Id.*
784. *Metropolitan Planning*, *supra* note 769, at 90.
785. *Intermodal Transportation*, *supra* note 780, at 394.
786. *See id.* at 393.
787. *Metropolitan Planning*, *supra* note 769, at 90.
788. *Intermodal Transportation*, *supra* note 780, at 392.
789. *Metropolitan Planning*, *supra* note 769, at 90.
790. *Id.*

began as early as 1940.[791] In the 1960s, the Landis Report[792] cited the need for an office to coordinate and develop a national transportation policy, which led President Kennedy to ask his aides to offer suggestions concerning transport policy.[793] Legislation passed by Kennedy in 1961 provided the first federal program of urban transit support.[794] With Kennedy's assassination, the task force on transportation advised President Lyndon Johnson that no focal point for transportation existed in the Executive Branch, and that therefore a cabinet-level Department of Transportation should be created.[795] The bill creating the DOT was signed on October 15, 1966, and the agency was established on April 1, 1967, with Alan S. Boyd as the first Secretary of Transportation.[796]

The DOT was essentially created from an amalgamation of several pre-existing governmental agencies.[797] From the Interstate Commerce Commission was transferred the Bureau of Railroad Safety (which formed a part of the Federal Railroad Administration [FRA]), and the Bureau of Vehicle Safety (which formed a part of the Federal Highway Administration [FHA]).[798] The independent Federal Aviation Agency (which had earlier been split off from the Civil Aeronautics Board) became DOT's Federal Aviation Administration.[799] The Commerce Department gave DOT the St. Lawrence Seaway Development Corporation,[800] surrendered to the FHA the National Highway Safety Bureau,[801] and gave the FRA the Office of Groundspeed Transportation.[802] The Treasury Department gave it the Coast Guard.[803] The Department of Interior gave the FRA the Alaska Railroad.[804] A new quasi-independent agency, the National Transportation Safety Board, was also

791. DONALD R. WHITNAH, U.S. Department of Transportation: A Reference History 6 (1998).

792. *See generally* CHAIRMAN OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (James M. Landis) (Comm. Print 1960).

793. WHITNAH, *supra* note 791, at 10.

794. *Intermodal Transportation*, *supra* note 780, at 389. Congress created a comprehensive program of transit assistance in the Urban Mass Transit Act of 1964. *See* H.R. REP. NO. 88-204 (1963). The first long-term commitment for transit was the Urban Mass Transportation Assistance Act of 1970. The Federal Highway Act of 1973 opened the highway trust fund to transit, while the National Mass Transportation Assistance Act of 1974 made operating expenses eligible for federal funding. *Intermodal Transportation*, *supra* note 780, at 389 n.111.

795. WHITNAH, *supra* note 791, at 10.

796. *Id.* at 11.

797. *Id.*

798. *Id.*

799. WHITNAH, *supra* note 791, at 11.

800. *Id.*

801. *Id.*

802. *Id.*

803. WHITNAH, *supra* note 791, at 11.

804. *Id.*

housed within DOT.[805]

At the dawn of the 21st Century, the U.S. Department of Transportation consisted of the following agencies:

- Bureau of Transportation Statistics
- Coast Guard
- Federal Aviation Administration
- Federal Highway Administration
- Federal Railroad Administration
- Federal Transit Administration
- Maritime Administration
- National Highway Traffic Safety Administration
- Office of the Secretary of Transportation
- Research and Special Programs Administration
- Saint Lawrence Seaway Development Corporation
- Transportation Administrative Service Center[806]

XVII. Environmental & Safety Regulation

Recognizing that the automobile was choking American cities, Congress first required the promulgation of automobile emission standards with the Motor Vehicle Air Pollution Control Act of 1965.[807] The National Environmental Policy Act of 1969[808] established comprehensive requirements for the preparation of environmental assessments and environmental impact statements for major federal actions that significantly affect the quality of the human environment, and required federal agencies to use all practicable means to assure Americans healthy and safe surroundings.[809] The following year, the Environmental Protection Agency was created.[810] It set emission standards for automobiles and banned lead in gasoline.[811]

In 1970, Congress also enacted the first of what would be several major environmental bills that would require transportation planning focused on arresting the problem of automobile air pollution.[812] Environmental issues became a strong focus of transportation planning.[813] Today, in non-attainment areas, air quality issues have become among the domi-

805. *Id.*

806. Air Commerce, *supra* note 57, at 171.

807. Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure To Effectuate and Recommendations for the Future*, 3 N.Y.U. Envtl. L.J. 156, 162 (1994) (citing Pub. L. No. 87-272, §§ 201-209, 79 Stat. 992 (1965)).

808. 42 U.S.C. § 4321.

809. *Id.*

810. *See* Mintz, *supra* note 807, at 165.

811. *See id.* at 164.

812. *See id.* at 163-64.

813. *See id.* at 184.

nant concerns of metropolitan transportation planning.[814] A long-term commitment of federal support to transit was also begun that year and expanded in 1973 with both an increase in the federal share for transit construction as well as opening the Highway Trust Fund for transit, high-occupancy-vehicle [HOV] lanes, bus shelters and parking facilities.[815] The Clean Air Act Amendments of 1977 fortified automobile emission strategies requiring better metropolitan planning to reduce emissions.[816]

XVIII. Security Regulation

The United States has promulgated comprehensive legislation dealing with aerial terrorism and hijacking. Until 1961, there were no domestic United States laws specifically addressing the 20th Century crime of aircraft hijacking.[817] After defining the crime in that year, the United States discovered that the solution to this new type of terrorism was not to be realized by the imposition of penalties.[818]

The Antihijacking Act of 1974[819] imposed a penalty of 20 years imprisonment or death if a passenger is killed during a hijacking[820] and authorized the President to suspend the landing rights of any nation that harbors hijackers.[821] The Aircraft Sabotage Act of 1984,[822] imposed penalties of up to $100,000 or twenty years imprisonment, or both, for hijacking, damage, destruction, or disabling an aircraft or air navigation facility.[823] The Security and Development Act of 1985 authorized expenditures for enhancing security at foreign airports.[824] The Act required the DOT Secretary to assess security at foreign airports and notify the

814. *See id.* at 191-92.

815. Air Commerce, *supra* note 57, at 172.

816. Mintz, *supra* note 807, at 175.

817. On September 5, 1961, Congress amended section 902 of the Federal Aviation Act of 1958 to impose criminal penalties upon persons convicted of hijacking. *See* Pub. L. No. 87-197, § 1, 75 Stat. 466 (1961). Prior to 1961, hijacking an aircraft in the U.S. was usually held to be kidnapping or obstruction of commerce. *See* Bearden v. United States, 304 F.2d 532, 534-35 (5th Cir. 1962), *vacated on other grounds*, 372 U.S. 252 (1963), *obstructing commerce aff'd*, 320 F.2d 99, 104 (5th Cir. 1963), *cert. denied*, 376 U.S. 922 (1964). However, the Federal Aviation Act of 1958 § 103(a), had authorized the Federal Aviation Administration to issue such rules and regulations as necessary to provide for national security and safety in air transportation. It also prohibited the transportation of explosives or other dangerous articles in violation of FAA rules.

818. Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 Colum. J. Transnat'l L. 649, 695-96 (2003) [hereinafter *Aviation Security*]. During the decade following the 1961 hijacking legislation, over one hundred twenty-five attempts were made to hijack U.S. aircraft. *Id.* at 696 n.230.

819. Pub. L. 93-366, tit. I, 88 Stat. 409 (1974).

820. 49 U.S.C. § 49502(a) (2002).

821. *Id.* § 40106(b).

822. Pub. L. No. 98-473, tit. II, ch. XX, pt. B, §§ 2011-2015, 98 Stat. 2187 (1984).

823. *Aviation Security*, *supra* note 818, at 703.

824. Pub. L. No. 99-83, tit. V, pt. A, § 501(a), 99 Stat. 219 (1985).

public if a foreign airport fails to correct a security breach.[825]

The Aviation Security Improvement Act of 1990[826] established a Director of Intelligence and Security in the Office of the DOT Secretary, and an Assistant FAA Administrator for Civil Aviation Security, and gave the FAA responsibility to oversee security at major airports.[827] FAA security managers were directed to supervise security arrangements.[828] The FAA carried out periodic threat and vulnerability assessments and published guidelines on such topics as airport design and construction, screening of passengers and property, public notification of threats, security personnel investigation and training, cargo and mail screening, research and development activities, security standards at foreign airports, and international security negotiations.[829]

On the morning of September 11, 2001, 19 suicide terrorists hijacked four aircraft in flight.[830] American Airlines flight 11 and United Airlines flight 175 crashed into New York's World Trade Center.[831] American Airlines flight 77 crashed into the Pentagon.[832] And United Airlines flight 93 crashed in rural Pennsylvania, a suicide mission apparently aborted by vigilante passengers.[833]

The tragic events of September 11, 2001, revealed that the airport and airway security umbrella was far more porous than theretofore widely recognized. Within weeks of that catastrophe, Congress passed two pieces of legislation—the Air Transportation Safety and System Stabilization Act[834] and the Aviation and Transportation Security Act [ATSA].[835]

Recognizing that a competitive airline industry is essential to national commerce and that the three-day shut down of the industry had caused it significant economic harm, Congress promulgated the Air Transportation Safety & System Stabilization Act.[836] That legislation provided the U.S. airline industry with $15 billion in relief ($5 billion imme-

825. 88 Stat. 409 § 1115(e)(2)(A) (1974).

826. Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 49 U.S.C. § 44931.

827. *Id.* §§ 44931-32.

828. *Aviation Security*, *supra* note 818, at 708.

829. *Id.*

830. *Id.* at 712 (citing Yilu Zhao, *A Nervous State Looks to Limit Licenses*, N.Y. TIMES, Apr. 6, 2003, at 14CN).

831. *Id.*

832. *Id.*

833. *Id.*

834. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

835. Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597 (2001).

836. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

diately, and up to $10 billion in loans).[837] It capped the liability of the two airlines involved—United Airlines and American Airlines—at their insurance limits and eliminated punitive damages.[838] To deal with the human tragedy, it established a no-fault September 11th Victims' Compensation Fund directed by a Special Master who would determine compensation, as reduced by payments from collateral sources.[839] Injured parties or estates that choose to forego the Compensation Fund could bring suit in the federal district court for the southern district of New York.[840] If they decide to litigate they will have to establish traditional common law negligence and proximate cause, both of which may be formidable barriers to recovery.[841]

In order to restore the public's confidence in flying, three days before Thanksgiving, 2001, Congress passed the Aviation & Transportation Security Act, which included ninety-one new measures, fifty-five of which had designated implementation deadlines.[842] The most significant of ATSA's mandates included federalizing the airport security function (which had theretofore been performed by the airlines, under FAA regulations),[843] imposing minimum job qualifications upon security employees, imposing background checks on airport employees, requiring impregnable cockpit doors.[844] Having concluded that the FAA had been historically slow to implement its wishes, Congress created a new multimodal Transportation Security Administration [TSA] within the U.S. Department of Transportation.[845]

Fourteen months after the terrorist attacks on the World Trade Center and Pentagon, Congress passed the Homeland Security Act of

837. Air Transportation Safety and System Stabilization Act, §§ 101(a)(1) – 101(a)(2) (2001). It is ironic that the airline industry faired so poorly under deregulation that government economic assistance was required. Government infusion of capital is the antithesis of a free market. *See* Hon. Richard D. Cudahy, *Full Circle in Formerly Regulated Industries,* 33 LOY. U. CHI. L.J. 767, 781-82 (2002).

838. Air Transportation Safety and System Stabilization Act § 408. Subsequent legislation also capped liability for the aircraft manufacturers, the Port Authority, the airports and the owners of the World Trade Center. *Aviation Security*, *supra* note 818, at 713 n.311.

839. *See* Air Transportation Safety and System Stabilization Act § 405(c)(3)(B)(i) – 405(c)(3)(B)(ii).

840. *See id.* §§ 405, 408(3).

841. *Aviation Security*, *supra* note 818, at 713.

842. *See* 49 U.S.C. § 44903 (2001).

843. *Aviation Security*, *supra* note 818, at 714. TSA may establish a pilot program at up to five airports to have a private company perform the screening function. *Id.* at 714 n.315.

844. *Id.* at 714. In order to ensure intragovernmental communication and cooperation, a Security Oversight Board (comprised of the cabinet secretaries or their designees from the National Security Council, the Office of Homeland Security, the Central Intelligence Agency, and the Secretaries of Defense and Treasury, and Chaired by the Secretary of Transportation) was established to oversee TSA. *Id.* at 714 n.316.

845. *Id.* at 714.

2002 [HSA],[846] which established a new cabinet-level executive branch agency, the Department of Homeland Security [DHS],[847] headed by a Secretary of Homeland Security.[848] It was the most sweeping overhaul of federal agencies since President Harry Truman asked Congress to create the Central Intelligence Agency and unify the military branches under the Department of Defense in 1947.[849]

In creating DHS, Congress consolidated twenty-two existing agencies that had combined budgets of approximately $40 billion and employed some 170,000 workers.[850] Several of the agencies historically have been involved in airport and airline passenger and cargo review, including the Customs Service, Immigration and Naturalization Service, Animal and Plant Inspection Service of the Department of Agriculture, and the nascent Transportation Security Administration.[851]

XIX. Railroad Regulatory Reform

The growth of interstate highways led to a shift of traffic from rail to the motor carrier industry. That, coupled with the move of industry out of the northeastern "rust belt" into the southeastern and western "sun belt," led to a decline of railroad profitability.[852] Conrail was formed in 1973 with the merger of the bankrupt Penn Central (formerly the Pennsylvania and New York Central railroads) and five smaller railroads.[853] The bankruptcy of the Penn Central, the Rock Island, and, later, the Milwaukee, made Congress fearful that it would end up owning and operating the nation's rail system.[854] As it had earlier bailed out railroad passenger service with the creation of Amtrak (and would later bail out the airline industry after the catastrophic impact of September 11th), Congress stepped in to bail out Conrail with a massive infusion of federal capital.[855]

By the mid-1970s, the political mood in Washington had shifted

846. Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002). In November, 2002, legislation approving creation of DHS passed in the House of Representatives, 299-121, and in the Senate 90-9. *Aviation Security*, *supra* note 818, at 717 n.342.

847. Homeland Security Act, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).

848. Several Under Secretaries are created as well, including an Under Secretary for Border and Transportation Security. *Id.* § 103.

849. Mimi Hall, *Deal Set on Homeland Department Post- Election Compromise Another Victory for Bush,* USA Today, Nov. 13, 2002, at 1.

850. *Id.*

851. *Aviation Security*, *supra* note 818, at 718.

852. Paul Stephen Dempsey, *Antitrust Law and Policy in Transportation: Monopoly is the Name of the Game*, 21 Ga. L. Rev. 505, 565 (1987) [hereinafter *Antitrust Law*].

853. *Id.* at 547.

854. William E. Thoms & Sonja Clapp, *Labor Protection in the Transportation Industry*, 64 N.D. L. Rev. 379, 387-89 (1988).

855. Laurence E. Tobey, *Costs, Benefits, and the Future of Amtrak*, 15 Transp. L.J. 245, 285 (1987); Thoms & Clapp, *supra* note 854, at 387.

against economic regulation. Regulatory failure took much of the blame for the anemic state of the rail industry.[856] In order to restore the health of the rail industry, Congress passed the Regional Rail Reorganization [3R] Act of 1973,[857] the Rail Road Revitalization and Reform [4R] Act of 1976,[858] and the Staggers Rail Act of 1980.[859] Collectively, the legislation limited the ICC's jurisdiction over rail ratemaking, circumscribing its ability to regulate rates unless the traffic in question was "market dominant."[860] Rail exit from unprofitable markets also became easier.[861] The legislation also partially preempted State jurisdiction over rail rates and operations.[862]

The Staggers Rail Act had reduced the ICC's jurisdiction over rates significantly by providing that the Commission had jurisdiction over them only if the traffic was "market dominant" and the proposed rates were more than 170% of variable costs.[863] Railroads were free to raise or lower rates at will unless, with respect to an increase, the carrier had market dominance over the traffic, or with respect to a decrease, the rates would be lowered below a "reasonable minimum" (if the rate was above the variable costs of providing the service, it was conclusively presumed to contribute to "going concern value" and therefore above a reasonable minimum).[864] Staggers also freed railroads to enter into contracts with shippers covering rates and levels of service.[865]

With the appointment of pro-deregulation commissioners, the ICC defined "market dominance" in such a way that it was rarely deemed to exist.[866] According to the commission's interpretation, it did not exist if there was intermodal competition, intramodal competition, product competition, or geographic competition.[867] Subsequently, the commission took the position that carriers should be generally free to raise rates until either they become "revenue adequate" or "stand alone costs" were

856. G. Kent Woodman & Jane Sutter Starke, *The Competitive Access Debate: A 'Backdoor' Approach to Rate Regulation*, 16 TRANSP. L.J. 263, 266-67 (1988).

857. 45 U.S.C. § 719 (1973).

858. 45 U.S.C. § 801 (1976).

859. 49 U.S.C. § 10101 (1980).

860. *Genesis and Evolution, supra* note 2, at 351.

861. Robert M. Hardaway, *Transportation Deregulation (1976-1984): Turning the Tide*, 14 TRANSP. L.J. 101, 126 (1985) [hereinafter *Transportation Deregulation*].

862. Paul Stephen Dempsey, *The Deregulation of Intrastate Transportation: The Texas Debate*, 39 BAYLOR L. REV. 1, 1 (1987).

863. *Intermodal Transportation, supra* note 780, at 387-88.

864. *Id.* at 388.

865. *Id.*

866. *Id.*

867. W. Coal Traffic League v. United States, 719 F.2d 772, 777 (5th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984).

achieved.[868]

XX. THE POLITICS OF DEREGULATION

It should be noted that regulatory reform and deregulation are not the same thing, although the political movement for the former probably served as a catalyst for the latter.[869] But regulatory reform, as originally conceived, consisted of a modest political agenda for improvement of the regulatory process.[870] There were valid criticisms of government, which demanded relief.[871]

It was argued that government had become bloated, fat, and lazy.[872] Agencies were headed by political cronies rather than professional managers.[873] Lethargy snuffed out innovation.[874] The agencies had allegedly been "captured" by the industries they regulated.[875] Ralph Nader, a consumer advocate, assembled a team of law students who wrote a scathing 1,200-page critique of the ICC, *The Interstate Commerce Omission*, which described the agency as an Elephant's graveyard of political hacks, who enjoyed "deferred bribes" in the form of a "revolving door" of subsequent employment in the industry they regulated.[876]

The time and resources expended in complying with the regulatory labyrinth were perceived as excessive, as were the costs to taxpayers.[877] Following the enactment of the Administrative Procedure Act of 1946, the ICC was the largest employer of administrative law judges.[878] But in

868. Potomac Elec. Power Co. v. Interstate Commerce Comm'n, 744 F.2d 185, 189 (D.C. Cir. 1984). Stand-alone costs are essentially what it might cost an electric utility, for example, to lay its own rail line to a coal mine. Producers of coal and electric utilities called for legislative relief from this administrative deregulation. *Intermodal Transportation*, *supra* note 780, at 388.

869. *State of the Airline*, *supra* note 420, at 142.

870. *Id.*

871. *Id.*

872. *State of the Airline*, *supra* note 420, at 142.

873. *Id.*

874. *Id.*

875. *Id.* In analyzing the motives and behavior of administrative agencies, some commentators have suggested that after an initial developmental period, an agency inevitably falls captive to the industries it regulates. *See* MARVER H. Bernstein, Regulating Business by Independent Commission 294 (1955) (arguing that commissions tend to become protective representatives for agencies regulated); James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1055-56 (1975) (stating that regulated groups exert pressure on administrative agency in proportion to their economic importance); Louis L. Jaffe, *The Elective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1109-10 (1954) (finding that Congress' failure to provide clear statutory standards leads to control of agencies by private groups). Nevertheless, the "captive theory" has received serious criticism. *See* Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1187 (1973).

876. *See generally* ROBERT FELLMETH ET AL., The Interstate Commerce Omission (1970).

877. *Market Failure*, *supra* note 468, at 26.

878. WILNER, supra note 303, at 98.

fact, the ICC was a *tiny* federal agency, with only five Commissioners, eight clerks, and two messengers in 1887, growing to eleven Commissioners and 2,700 government servants at its high water mark, in 1946.[879] Contrast that with the U.S. Department of Transportation, which by 1980 had 115,000 employees.[880]

The *Yak Fat Controversy* was an example of what was wrong with the excessive procedural morass into which the ICC had degenerated. Fed up with railroad opposition to every trucking rate filed, Robert Hilt II of Hilt Truck Line of Omaha, Nebraska, filed a tariff seeking to haul 80,000 pound truckload lots of yak fat from Omaha to Chicago at forty-five cents per hundred pounds.[881] A number of railroads objected on grounds that the rate was non-compensatory; Hilt's tariff was suspended pending investigation.[882] In truth, there was "not a single yak within 10,000 miles of [Omaha]—not even in zoos."[883]

The regulatory reform movement, on the whole, seemed to appreciate the important public benefits that government was performing, but advanced a belief that the governmental function could be performed better, more expeditiously, and economically.[884] The regulatory reform movement focused largely on *means*.[885] It called for greater regulatory flexibility to allow the industry to respond to market forces.[886]

In contrast, the deregulation movement focused largely on *ends*.[887] Deregulators wanted the very heart of the regulatory function amputated from the body politic, and free-market economists provided the intellectual cannon fodder, insisting that transportation firms were not public utilities, as they had been commonly perceived.[888]

The generation of Americans, who grew up during the Great Depression and World War II, saw government as an essential companion—a mechanism for achieving greater social good, protecting the country from threats without and within.[889] For most Americans, the Depression shattered confidence in the theory of *laissez faire*.[890]

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879. *See id.* at 10.

880. 1980 U.S. DEP'T OF TRANSP., 14TH ANN. REP. 87.

881. WILNER, *supra* note 303, at 151.

882. *Id.*

883. *Id.* at 152.

884. *State of the Airline*, *supra* note 420, at 142.

885. *Id.* (emphasis added).

886. *Id.*

887. *Id.* (emphasis added).

888. *Id. See generally* RICHARD E. CAVES, Air Transport and its Regulators: An Industry Study (1962); George W. Douglas & James C. Miller III, Economic Regulation Of Domestic Air Transport: Theory And Policy (1974).

889. *State of the Airline*, *supra* note 420, at 143.

890. *Id.*

The free market had produced the worst economic collapse in history, and millions of Americans lost their jobs, their homes, their self-esteem, and their faith in the philosophy of *laissez-faire*.[891] They turned to government to find a solution.[892] It was during this era that many of the independent regulatory agencies were born.[893] Most were modeled after the first of these, the Interstate Commerce Commission, created in 1887 to reign in the monopoly railroads.[894]

But the generation that grew up in the 1960s and 1970s, grew up cynical, perceiving government to be a malignant sore.[895] Those on the left abhorred Watergate and the war in Vietnam.[896] Those on the right were offended by the Great Society and high taxes.[897] "Both converged on a common path that viewed government with hostility."[898] That provided the foundation for a bipartisan political movement supporting radically less government.[899]

In the 1960s and 1970s, a number of economists also published literature critical of economic regulation.[900] "They criticized the CAB as being captured by the industry it regulated."[901] Wrote George Stigler, "every industry or occupation that has enough political power to utilize the state will seek to control entry."[902] They argued that regulation had made air transport more expensive than it need be and that the level of service, although exemplary, was excessive.[903] Principal among their criticisms was that pricing and entry restrictions gave consumers excessive service and insufficient pricing competition, inflated airline costs, and thereby made the industry's profits unsatisfactory.[904] Arguably, deregulation would give consumers the range of price and service options they pre-

891. *Interstate Trucking*, *supra* note 498, at 188.

892. *Id.*

893. *Id.*

894. *Id.*

895. *Id.* The political movement in favor of a reduced governmental presence found support on both ends of the political spectrum. It was a mass psychology of antagonism toward government that was stimulated on the right by the Great Society, the growth of government and taxation, and on the left by Watergate and the War in Vietnam. For once, both sides viewed government as an enemy, rather than a friend. SOCIAL & ECONOMIC CONSEQUENCES, supra note 6, at XV.

896. *Id.*

897. *Id.*

898. *Id.*

899. *Id.*

900. *State of the Airline*, *supra* note 420, at 143.

901. *Id.*

902. Stigler, *supra* note 532, at 5.

903. *See Transportation Deregulation*, *supra* note 861, at 136; *Rise and Fall*, *supra* note 543, at 119.

904. As CAB Chairman John Robson observed, "Only three times in the past 26 years, and never in the past decade, has the industry earned the . . . allowable return on investment."

ferred, casting dollar votes of approval to firms which satiated their wants, as Adam Smith's invisible hand did its work.[905] The market would define not only the dividing lines between price and service, but also how many and which airlines would serve individual city-pair markets.[906]

But the industry was hardly devoid of competition.[907] By the early 1970s, nearly 80% of the nation's scheduled passenger traffic was already competitively served, and in many markets, multiple carriers had been certificated.[908] Although the big four airlines, United, American, TWA and Eastern, controlled 82% of the market in 1938, their share declined to 68% by 1950, 66% in 1960, and 62% in 1970.[909] By 1978, the market share of the top four had fallen to 59%.[910] Although pricing competition was somewhat constrained, airlines were free to compete in terms of schedules, equipment, capacity, and facilities in response to consumer choices.[911]

During the 1970s and early 1980s, deregulation became a bipartisan movement, one that swept America profoundly and provided a new order of radically less government intervention in the market.[912] In Congress, liberal Democratic Senator Teddy Kennedy and conservative Republican Senator Bob Packwood locked arms in a war with transportation.[913] All fronts were determined to kiss regulation goodbye. At the White House, Democratic President Jimmy Carter and his successor, Republican President Ronald Reagan, led the crusade for significant deregulation of major industries—broadcasting, banking, telecommunications, oil and gas, air, rail, bus, and trucking.[914] That movement was coupled with deregulation in less industry-specific areas such as antitrust enforcement, and environmental, safety and health standards.[915]

On Capitol Hill, the opening salvo was fired by Teddy Kennedy in hearings he conducted as Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure.[916] These hearings served

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Transportation Deregulation, *supra* note 861, at 137. *See also* AIRPORT REGULATION, *supra* note 563, at 24; STEPHEN BREYER, REGULATION AND ITS REFORM 200 (1982).

905. *State of the Airline*, *supra* note 420, at 143.

906. *Rise and Fall*, *supra* note 543, at 122.

907. *State of the Airline*, *supra* note 420, at 144.

908. James W. Callison, *Airline Deregulation—Only Partially a Hoax: The Current Status of the Airline Deregulation Movement*, 45 J. AIR L. & COM. 961, 967 (1980) [hereinafter *Deregulation Movement*].

909. LOWENFELD, *supra* note 19, § 1.4. at I-21.

910. *Transportation Deregulation*, *supra* note 861, at 143. It would fall to 56% by 1983. *Id.*

911. *State of the Airline*, *supra* note 420, at 144.

912. *Interstate Trucking*, *supra* note 498, at 188-89.

913. AIR COMMERCE, *supra* note 57, at 185.

914. *Interstate Trucking*, *supra* note 498, at 189.

915. *Id.*

916. *Id.* Jurisdictionally, it was an odd thing for a Judiciary subcommittee to take up airlines

as the political genesis of Congressional reform, jumping the gun on bills pending before the Senate Commerce Committee, the committee that actually had appropriate subject matter jurisdiction.[917] Coached by law professor, and later Supreme Court Justice, Stephen Breyer,[918] Kennedy began the hearings by saying, "Regulators all too often encourage or approve unreasonably high prices, inadequate service, and anticompetitive behavior. The cost of this regulation is always passed on to the consumer. And that cost is astronomical."[919]

Free market economists, who for years had attacked the phenomenon of economic regulation, provided the intellectual justification.[920] They insisted that government distorted the competitive equilibrium, created a misallocation of resources, and was "in bed with" or "captured by" the industries it regulated.[921] The neo-classical market economists also argued that the costs of regulation were exorbitant.[922] Thus, they argued, society would be better off if the "dead hand" of regulation was amputated and replaced with Adam Smith's "invisible hand," clearing the way for marginal cost pricing and near-perfect competition in a healthy competitive environment.[923] The discipline of economics had not embraced an ideology with such religious passion since the Bolshevik Revolution.[924]

After extensive hearings in 1974 and 1975, the Kennedy staff released a comprehensive report on the Subcommittee's behalf.[925] The Kennedy Report concluded that deregulation would allow pricing flexibility which would stimulate new innovative service offerings, increase industry health, allow passengers the range of price and service options dictated by consumer demand, enhance carrier productivity and effi-

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or their regulation, for there was an aviation subcommittee already established under the Senate Commerce Committee chaired by Howard Cannon. Nevertheless, Kennedy charged ahead. *State of the Airline*, *supra* note 420, at 144 n.68.

917. *Deregulation Movement*, *supra* note 908, at 963 n.4. Senator Howard Cannon, Chairman of the Senate Commerce Committee, introduced a number of bills considered in committee beginning in 1976. *Id.*

918. *See* MARTHA DERTHICK & PAUL J. QUIRK, The Politics of Deregulation 40 (1985). Kennedy had been persuaded by subcommittee counsel Stephen Breyer that airline regulation was ripe for attack on behalf of consumers. Breyer had previously been a Harvard Law Professor, and Brookings had published his book calling for natural gas deregulation. *See generally* STEPHEN G. BREYER & PAUL W. MACAVOY, Energy Regulation By The Federal Power Commission (1974). Breyer would go on to become a federal judge; but for the moment, airline deregulation was his crusade, and the Civil Aeronautics Board was his enemy.

919. DERTHICK & QUIRK, *supra* note 918, at 41.

920. *Interstate Trucking*, *supra* note 498, at 189.

921. *Id.*

922. *Market Failure*, *supra* note 468, at 26-28.

923. *Interstate Trucking*, *supra* note 498, at 189.

924. *Id.*

925. *State of the Airline*, *supra* note 420, at 144.

ciency, and result in a superior allocation of society's resources.[926] Regulated prices were estimated to be some 40% to 100% higher than they should be.[927] Deregulation, it was asserted, should drive prices down to costs.[928] Many carriers and observers argued that the net result of deregulation would be deleterious to the industry in the short term, and in the long run injure the public it serves.[929] The Kennedy Subcommittee disagreed:[930]

> The major arguments against allowing freer entry and greater price competition rests upon the fear of: 1) predatory pricing; 2) destructive competition; 3) monopolization; 4) reduced service to small communisms [sic]; 5) destruction of the existing air service network; 6) reduced safety standards; and 7) greater financing difficulties. The subcommittee examined each of these claims.
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> In the subcommittee's view there is no substantial historical, empirical, or logical reason for believing that increased reliance upon competition would lead to predatory pricing, destructive competition, or risk of monopolization.[931]

With Richard Nixon's resignation in 1974, Gerald Ford became President.[932] After pardoning Nixon, Ford's immediate domestic problem was inflation.[933] He believed that government was a major contributor to inflation.[934] Ford embraced deregulation in his presidential campaign:[935]

> By the spring of 1975, Ford was speaking of regulatory reform as if it were an end in itself, not just one element in an anti-inflation program, and he was rationalizing it on grounds that mixed popular culture, individual psychology and economics . . . .
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> . . . [W]hereas Senator Kennedy had hewed consistently to a proconsumer theme, Ford's criticisms of regulation were variously addressed to consumer interests, business interests, the traditional American attachment to free en-

926. *Id.* at 144-45.

927. *Id.* at 145 (citing CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, REPORT OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE JUDICIARY COMM. 94th Cong., 1st Sess. 189 (1975)). Another study asserted that prices were between 45% and 84% higher than they would be without regulation. *State of the Airline*, *supra* note 420, at 145 n.72 (citing Theodore E. Keeler, *Airline Regulation and Market Performance*, 3 BELL J. ECON. & MGT. 399, 421 (1972)).

928. *Transportation Deregulation*, *supra* note 861, at 145.

929. *State of the Airline*, *supra* note 420, at 145.

930. *Id.*

931. *Id.* (quoting CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, REPORT OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE JUDICIARY COMM. 94th Cong., 1st Sess. 4 (1975)).

932. *State of the Airline*, *supra* note 420, at 145.

933. *Id.*

934. DERTHICK & QUIRK, *supra* note 918, at 46.

935. *State of the Airline*, *supra* note 420, at 145.

terprise, and popular hostility to big government. Mass distrust of government was growing, and so was resentment of the costs of supporting it and bearing its intrusion on private activity. A policy stance that promised to reduce government activity therefore had some potential for mass appeal (and some potential utility for a president who would soon be asking the national electorate to return him to office).[936]

The politicians saw it as a rallying point against inflation and high taxes, attacking "big government," "red tape," and "federal bureaucrats."[937] Deregulation and the free market became as American as motherhood, apple pie, and Chevrolet.[938]

XXI. Airline Deregulation and the Sunset of the Civil Aeronautics Board

With the inauguration of Jimmy Carter as President in 1976, the movement had a firm disciple in the White House.[939] Convinced by his staff that he could exploit the deregulation movement and make a "quick hit" politically, Carter embraced the deregulation movement even more strongly than his predecessor.[940] Carter appointed former Portland, Oregon mayor, Neil Goldschmidt, Secretary of Transportation.[941] The first time they met, Goldschmidt brought with him a list of fourteen goals he sought to accomplish as DOT Secretary.[942] Carter read the list, then penciled in at the top: "1) Trucking deregulation; 2) Railroad deregulation."[943]

Carter became a true believer in the deregulation of airlines, trucking and railroads.[944] It was he who championed and then signed into law the Air Cargo Deregulation Act of 1977, the Airline Deregulation Act of 1978, the Staggers Rail Act of 1980, and the Motor Carrier Act of 1980.[945] It was he who appointed individuals strongly wedded to deregulation to the regulatory agencies—Alfred Kahn, Elizabeth Bailey, and Marvin Cohen to the CAB, and Darius Gaskins, Marcus Alexis, and Tad Trantum to the ICC—known affectionately in each agency as the Three Marketeers.[946]

In 1977, Jimmy Carter tapped economist Alfred Kahn to serve as

936. Derthick & Quirk, *supra* note 918, at 46-47.
937. *Interstate Trucking*, *supra* note 498, at 189.
938. *Id.*
939. *State of the Airline*, *supra* note 420, at 145-46.
940. *Deregulation Movement*, *supra* note 908, at 963-64 n.4.
941. Wilner, *supra* note 303, at 183.
942. *Id.*
943. *Id.*
944. *State of the Airline*, *supra* note 420, at 146.
945. *Id.*
946. *Id.*

Chairman of the CAB.[947] As Chairman of the New York Public Utilities Commission, Kahn had advocated deregulation before the Kennedy Subcommittee.[948] Kahn criticized traditional CAB regulation as having "(a) caused air fares to be considerably higher than they otherwise would be; (b) resulted in a serious misallocation of resources; (c) encouraged carrier inefficiency; (d) denied consumers the range of price/service options they would prefer, and; (e) created a chronic tendency toward excess capacity in the industry."[949]

Being an economist, he was free of the fidelity to law held by his predecessor at the CAB, John Robson.[950] The legislation would allow modest liberalizations, but no more.[951] As CAB Chairman, Kahn would proceed a great deal farther down the path of *laissez faire* than could Robson.[952]

As CAB Chairman, Kahn implemented a number of revolutionary deregulatory initiatives that liberalized entry and pricing.[953] Soon carriers were authorized to enter new markets, and offer consumers significant discounts over previous levels.[954] The immediate results appeared overwhelmingly successful, with carriers in the late 1970s stimulating new demand by offering low fares, filling capacity, and enjoying robust profits.[955]

This was the first taste of regulatory reform for the airline industry, and it appeared to be an immediate success.[956] The rigid regulatory structure of the proceeding decade had so shackled carriers that they were unable to tap the elasticities of demand to fill seats that otherwise would

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947. *Id.*

948. *Id.* Kahn had previously, and would subsequently, serve as a free-market economics professor at Cornell. He would subsequently serve as a member of the board of New York Air, a subsidiary of Frank Lorenzo's Texas Air. *Id.* at 146 n.79.

949. *Id.*

950. *Id.* Robson was Gerald Ford's CAB Chairman, and a lawyer. Being a lawyer, Robson felt constricted by his oath of office to roam only within the perimeters of the governing legislation, the Federal Aviation Act of 1958. *Id.*

951. *State of the Airline*, *supra* note 420, at 146.

952. *Id.* Kahn loved to hold court. He used the opportunities of the Sunshine Act to hold most CAB meetings public, and the media loved his performance. *Id.* 146 n.81.

> Kahn made sessions at the CAB more than the public meetings that by law they now must be; he consciously made them public performances, a form of theater, at which the audience - the general press, the trade press, the industry, the CAB staff - watched him pursue with his pedagogue's passion for reasoned inquiry the question of why airline regulation was as it was and why it could not be done differently.

Id.

953. *Id.* (referring to Oakland Service Case, 78 C.A.B. 753 (1978), Improved Authority to Wichita Case, 76 C.A.B. 766 (1978)).

954. *State of the Airline*, *supra* note 420, at 147.

955. *Id.*

956. *Id.*

fly empty.[957] As a consequence, capacity was not being filled, and airline profitability was weak.[958]

Regulatory reform would change that.[959] By lowering prices, airlines were able to lure discretionary (vacation) travelers to fill seats, which had theretofore flown empty.[960] Consumers enjoyed a bonanza of lower fares.[961] Airlines were able to fill empty capacity, and with an upturn in the economy, enjoyed higher profits.[962] Regulatory reform appeared to be a win-win proposition.[963] Politicians from both parties and from a wide spectrum of ideologies jumped on the deregulation bandwagon.[964] If some regulatory reform was good, it was thought, then more will be better.[965]

Kahn was quick-witted, articulate, and could charm an overcoat off a freezing man.[966] Working with the White House, Kahn put his charismatic personality solidly behind the legislative effort for reform.[967] Kahn found allies in Federal Express and United Airlines, the latter the largest airline in the free world.[968]

Federal Express had been held back for years by the CAB's desire to protect the passenger carriers, which enjoyed incremental profits on cargo carried in the belly.[969] Operating largely under exemptions for small aircraft, FedEx had been prohibited from flying the larger aircraft that could reduce its unit costs.[970] Congress responded by promulgating the Air Cargo Deregulation Act of 1977,[971] known in Washington as the "Federal Express Act," both for the speed by which it flew through Capitol Hill and the identity of its principal sponsor, and, in the closing hours

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957. *State of the Airline*, *supra* note 420, at 147.
958. *Id.*
959. *Id.*
960. *State of the Airline*, *supra* note 420, at 147.
961. *Id.*
962. *Id.*

> These CAB actions happened to coincide with an upturn in the economy and the consequent return of prosperous times to the airline industry–a rapid traffic growth and increasing profits. This quasi-deregulation by the CAB was given credit by many for this airline prosperity. There is good reason to question the causal connection between these CAB policies and the favorable economic results which the industry experienced at that time, but the conditions helped Senator Cannon move a strong deregulation bill through the Senate in early 1978.

Deregulation Movement, *supra* note 908, at 964 n.4.
963. *State of the Airline*, *supra* note 420, at 147.
964. *Id.*
965. *Id.*
966. *Id.*
967. *State of the Airline*, *supra* note 420, at 147.
968. *Id.*
969. *Id.*
970. *Id.*
971. Pub. L. 95-163; 91 Stat. 1278 (1977).

of the 95th Congress, the Airline Deregulation of 1978.[972]

The Air Cargo Deregulation Act included a rather clever provision allowing established air cargo companies a one-year moratorium, from November 1977 to November 1978, during which they were free to enter any domestic markets of their choice; new entrants would be free to enter only after that period.[973] Thus, established carriers like Federal Express expanded during that year to dominate the industry.[974] Although "fitness" remains a requirement of entry, tariff-filing requirements were eliminated in 1979.[975]

United, the largest airline before and during the four decades of regulation, but whose market share had fallen under regulation, from 22.9% in 1938 to 22.0% in 1976, felt that the CAB nurtured the health and well being of the smaller airlines to its detriment.[976] The CAB had effectively stopped granting new routes to the largest trunk airlines by the 1970s.[977] United perceived itself big enough to grow and prosper in a deregulated regime.[978]

The Airline Deregulation Act of 1978 called for a gradual transition from regulation to competition, eliminating most entry controls, except "fitness" on December 31, 1981, and domestic rate regulation on December 31, 1982.[979] The Act also included an unprecedented provision mandating the extermination (a/k/a "sunset") of the U.S. Civil Aeronautics Board on December 31, 1984—the first major federal agency to be obliterated in the nation's history.[980] The ICC would be the second.[981]

The legislation received overwhelming bipartisan support, which was surprising, in that the bills were advanced from the top down;[982] they had no widespread grass-roots support among the people.[983] Indeed, public

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972. Pub. L. 95-504; 92 Stat. 1705 (1978).

973. *State of the Airline*, *supra* note 420, at 148.

974. *Id.*

975. ROY J. SAMPSON, MARTIN T. FARRIS & DAVID L. SHROCK, Domestic Transportation: Practice, Theory, and Policy 294 (1990).

976. *Rise and Fall*, *supra* note 543, at 147.

977. WINDS OF CHANGE, *supra* note 428, at 50 (1991).

978. *State of the Airline*, *supra* note 420, at 148.

979. DEMPSEY & THOMS, *supra* note 22, at 29.

980. *Deregulation Movement*, *supra* note 908, at 964 n.4. This was the work of Rep. Elliot Levitas of Georgia, described as "the staunchest advocate of real deregulation on either side of the Congress." *Id.*

981. *See Intermodal Transportation*, *supra* note 780, at 389.

982. *State of the Airline*, *supra* note 420, at 148. The Ford Foundation plopped $1.8 million on the Brookings Institution between 1967 and 1975 to study economic regulation, and virtually all of the free-market literature which emanated from it advocated deregulation. After the Ford money dried up, the emerging right-wing Washington think tanks picked up the gauntlet, including the American Enterprise Institute. DERTHICK & QUIRK, *supra* note 918, at 36-37.

983. *State of the Airline*, *supra* note 420, at 148. "The absence of a significant public role throughout this period is a most interesting facet of the airline deregulation movement. The

opinion polls revealed that in 1978 Americans ranked airlines among the very top of all industries in terms of customer satisfaction and confidence.[984] One industry executive who supported immediate deregulation conceded that four decades of regulation "did produce the world's foremost air transportation system, with more service in more markets by more carriers with more competition with greater variety at lower rates and fares than existed anywhere else on earth."[985] The predictions as to what deregulation would bring were quite optimistic, in spite of strong misgivings by most industry executives.[986] CAB Chairman Alfred Kahn characterized the opposition as follows:

> [t]he most general fear about [deregulation] is that when the CAB withdraws its protective hand from the doorknob, the door will open to destructive competition - to wasteful entry and cut-throat pricing - that will depress profits, render the industry unable to raise capital, and so cause a deterioration in the service it provides - on the whole, it must be admitted good service.[987]

Kahn saw the fear as unrealistic.[988]

What about the prediction by many industry experts that deregulation would depress industry profits, discourage investment and the introduction of more technologically sophisticated aircraft, and lead to a deterioration of service, causing the industry ultimately to gel into a national oligopoly, or in many markets, a monopoly?[989] Deregulation's proponents saw destructive competition as limited to circumstances where "capital is long-lived and immobile, and through miscalculation competitors irretrievable commit too much capital to a particular market. . . .," a situation not thought to exist in the airline industry because of the mobility of its resources.[990] Concentration was also thought unlikely because: (1) barriers to entry were perceived low; (2) economies of scale were relatively insignificant; and (3) markets would be contestable—the three legs of the theoretical stool.[991]

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impetus for change came almost entirely from the academics and politicians; the public never did call for deregulation of the airline industry." *Deregulation Movement*, *supra* note 908, at 964 n.4.

984. *Id.*

985. *Id.* at 968.

986. *State of the Airline*, *supra* note 420, at 149.

987. *Id.* (quoting Alfred Kahn, Talk to the New York Society of Security Analysts (Feb. 2, 1978)).

988. *State of the Airline*, *supra* note 420, at 149.

989. *Rise and Fall*, *supra* note 543, at 130-31.

990. *Id.* (quoting Oakland Service Case, 78 C.A.B. 753 (1978)).

991. *State of the Airline*, *supra* note 420, at 132. Others disagreed, arguing that given the capital requirements of air transportation and the interrelationship of traffic flows which place a premium on the ability of a carrier to marshal traffic support from as many sources as possible, incumbent airlines could deter new entry by demonstrating they would respond sharply and swiftly to the inauguration of new service. Because potential entry could be deterred by potential

According to Alfred Kahn,

> almost all of this industry's markets can support only a single carrier or a few: their natural structure, therefore, is monopolistic or oligopolistic. This kind of structure could still be conducive to highly effective competition if only the government would get out of the way; the ease of potential entry into those individual markets, and the constant threat of its materializing, could well suffice to prevent monopolistic exploitation.[992]

Kahn and his free market brethren saw few economies of scale or economic barriers to entry in the airline industry.[993] The CAB staff noted, "There are no structural traits inherent in domestic air transportation which indicate superior performance by large-size firms; nor are there traits which would significantly inhibit the entry of new firms into the industry."[994] Deputy DOT Secretary John Snow agreed: "The evidence suggests very strongly that the optimal size of firms will be sufficiently small so that there will be room for a considerable number of competitive firms in the industry."[995] Hence entry, or the threat of potential entry, would keep monopolists from extracting monopoly profits.[996] This was the theory of contestable markets, upon which deregulation was largely premised.[997] Essentially, should a monopolist or oligopolist begin to earn supercompetitive profits, new entrants should be attracted like

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response, the elimination of competition through the employment of predatory tactics would be economically rational. *Rise and Fall*, *supra* note 543, at 132. All three of these assumptions—inconsequential barriers to entry, insignificant economies of scale and contestability—have since been repudiated. *See* AIRLINE MANAGEMENT, *supra* note 1, at 69-93.

992. *State of the Airline*, *supra* note 420, at 149 (quoting Alfred Kahn, Talk to the New York Society of Security Analysts (Feb. 2, 1978)).

993. *Id. See generally* CAVES, *supra* note 888; DAVID W. GILLEN, TAE HOON OUM & MICHAEL W. TRETHEWAY, Airline Cost and Performance: Implications For Public and Industry Policies (1985). Predictions that the industry would become more highly concentrated under deregulation

> "rest on two false assumptions: 1) barriers to entry are relatively high, and 2) there are significant economies of scale and decreasing costs. Economic barriers to entry are relatively low in the airline industry. The most important barriers have been legal barriers enforced by the CAB. Economic barriers pale by comparison.
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> . . . .
>
> Economies of scale are relatively low in the airline industry; in fact, there are significant diseconomies of scale.

Transportation Deregulation, *supra* note 861, at 141-42.

994. *State of the Airline*, *supra* note 420, at 150 (quoting STAFF OF CIVIL AERONAUTICS BOARD, REGULATORY REFORM 125 n.1 (1975)).

995. John W. Snow, *Aviation Regulation: A Time for Change*, 41 J. AIR L. & COM. 637, 663 (1975).

996. *Id.* at 648.

997. *See* Elizabeth E. Bailey & John C. Panzar, *The Contestability of Airline Markets During the Transition to Deregulation*, 44 LAW & CONTEMP. PROBS. 125, 129 (1981); Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 111 (1984).

sharks to the smell of blood.[998] The absence of barriers to entry would also subdue incentives for larger airlines to engage in predatory pricing to drive their weaker or smaller rivals out.[999] It was believed irrational for a carrier to engage in predatory pricing.[1000] Or so the theory went.

Kahn was optimistic that the benefits of deregulation would be universally shared:

> I am confident that . . . consumers will benefit; that the communities throughout the nation - large and small - which depend upon air transportation for their economic well being will benefit, and that the people most closely connected with the airlines - their employees, their stockholders, their creditors - will benefit as well.[1001]

In the late 1970s, the immediate results of deregulation seemed quite positive, and created a general euphoria in Washington and in the media that Congress had chosen the right path.[1002] In the short term, airfares plummeted (a bonanza for consumers) while carrier profits soared as low fares led discretionary travelers to fill seats which otherwise might have flown empty.[1003] But in the fourth quarter of 1978, long before the recession of the 1980s, carrier profits began to plummet into a sea of red ink; the airline industry suffered the worst losses in the history of domestic aviation.[1004]

As noted above, the Airline Deregulation Act of 1978 was intended to provide a gradual transition to deregulated domestic entry and rates, with entry regulation ending on January 1, 1982, and entry regulation ending January 1, 1983.[1005] But the CAB quickly dropped any notion of "gradual" deregulation under Chairman Marvin Cohen.[1006] Implementation of the new policy was immediate and comprehensive.[1007]

The Airline Deregulation Act also called for the "sunset" of the CAB on January 1, 1985, when its remaining responsibilities were trans-

998. *State of the Airline*, *supra* note 420, at 150.

999. *Id.*

1000. BREYER, *supra* note 904, at 30; *Transportation Deregulation*, *supra* note 861, at 142.

1001. *State of the Airline*, *supra* note 420, at 150 (quoting *Hearing on H.R. 11145 Before the Aviation Subcomm. of the House Public Works & Transp. Comm.*, 95th Cong. 8 (1978) (statement of Alfred Kahn). Kahn had left the CAB to become President Carter's "Inflation Czar," where he presided over the highest levels of inflation in peacetime history. *Id.* at 151 n.107.

1002. *Id.* at 150.

1003. *Id.* at 150-51.

1004. *Id.* at 151.

1005. *Id.*

1006. *Id.*

1007. *Id.* Authority over antitrust was scheduled to vest in the Justice Department in 1985 under the terms of the Airline Deregulation Act of 1978. However, the CAB Sunset Act of 1984 gave it to the DOT. That lasted until 1989, when Congress took it from DOT and gave it to DOJ. WINDS OF CHANGE, *supra* note 428, at 30.

ferred to the U.S. Department of Transportation.[1008] Those primarily involved the regulation of international routes and rates, small community subsidies, and mergers.[1009] The latter was transferred from DOT to the U.S. Department of Justice in 1989, following serious public criticism of DOT's approval of each of the 21 merger proposals that had been submitted to it during its brief reign over the matter.[1010]

XXII. Motor Carrier Deregulation

A. The Motor Carrier Act of 1980

The largest number of proceedings before the ICC involved motor carriers, which numerically comprised the most substantial single mode of transport subject to ICC regulation.[1011] Federal regulation of motor carri-

1008. *Antitrust Law*, *supra* note 852, at 515, 524.

1009. *State of the Airline*, *supra* note 420, at 151.

1010. *Id. See generally* Steven Morrison & Clifford Winston, The Economic Effects of Airline Deregulation (1986).

1011. 94 I.C.C. Ann. Rep. 99-100 (1980); 93 I.C.C. Ann. Rep. 102-03 (1979); 92 I.C.C. Ann. Rep. 94-95 (1978); 91 I.C.C. Ann. Rep. 101-02 (1977); 90 I.C.C. Ann. Rep. 113-14 (1976).

> The trucking industry is one of the most important components of the nation's economy. The House report on the Motor Carrier Act of 1980 furnishes an interesting description of the industry:
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> The industry as a whole generates about $108 billion in revenues annually, or about 75 percent of the revenues earned by all forms of transportation.
>
> . . . .
>
> The portion of the motor carrier industry subject to regulation by the Interstate Commerce Commission is composed of over 17,000 trucking firms that earned revenues in 1979 of about $41.2 billion. The regulated motor carriers handled about one billion tons of freight in intercity service in 1979 and logged over 21.5 billion intercity miles. Regulated carriers comprise less than 50 percent of the industry. Consequently, the larger part of the industry is not now regulated by the Federal Government.
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> In 1979, the commission-regulated truckers owned approximately 950,000 pieces of equipment composed of about 100,000 trucks, 260,000 tractor units and 590,000 trailers. The commission-regulated carriers directly employed about 825,000 full-time personnel and thousands of part-time employees. In 1979, these commission-regulated carriers consumed about 8 billion gallons of fuel, almost 3 billion gallons of gasoline in pickup and delivery operations, and 5 billion gallons of diesel fuel in intercity service.
>
> The regulated industry includes common carriers and contract carriers. These carriers are listed in three classes based upon revenues. The common carriers are subdivided into those who carry general freight, specialized goods, and household goods. In the common carrier category among all Class I and II motor carriers, the specialized carriers are greater in number than general freight carriers. They handle more tonnage than general freight and log approximately an equal number of miles. However, the general freight carriers earn two-thirds of industry revenue. The general freight carriers have two-thirds of the assets and equipment, and employ almost 80 percent of all personnel. They also earn 70 percent of the net income. These differences are understandable considering the different nature of the operating environments of these segments. The general freight segment is characterized by the transportation of small shipments in consolidated lots while the specialized carrier segment is characterized by point-to-point service in truckload lots.
>
> Contract carriers are the other significant segment of the regulated industry. A contract carrier operates in accordance with contracts signed by himself and the shippers he serves. These carriers enter into continuing contracts with individual shippers and dedi-

ers was initiated with the promulgation of the Motor Carrier Act of 1935.[1012] Among the purposes of this legislation were the prevention of destructive competition among motor carriers and the protection of mo-

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cate equipment or provide services designed to meet the specific needs of those shippers.

H. R. REP. 96-1069 (2d Sess. 1980), *reprinted in* 1980 U.S.C.C.A.N. 2283.

Several members of Congress have made statements highlighting the vital importance of the trucking industry. For example, Senator Howard Cannon declared, "There is virtually nothing worn, eaten, or used by the American public that has not at one time or another been transported in a truck. It is no exaggeration to say that the trucking industry is critical to the growth and prosperity of the Nation's economy." *Econ. Regulation of the Trucking Indus.: Hearings Before the Senate Comm. on Commerce, Sci. & Transp.*, 96th Cong. 1 (1979) (statement of Sen. Howard Cannon). Similarly, Senator Russell Long presented data describing the magnitude of the industry:

> In 1978, there were over 28 million vehicles registered as trucks in the United States. Of this number, over 1 million are engaged in for-hire operations and over 16,000 trucking companies are regulated by the Interstate Commerce Commission (ICC). The trucking industry serves over 60,000 communities in the United States, many of which rely on trucking as the sole mode of transportation for freight. In 1978, the trucking industry had revenues in excess of $35 billion and this figure represented over 50 percent of the total revenues from intercity freight carried by the various transport modes. There are over 9 million individuals engaged in the trucking industry accounting for over $100 billion in wages each year. The trucking industry is truly a multibillion-dollar business. Clearly, the trucking industry plays a major role in our economy and our society.

Id. at 3 (statement of Sen. Russell Long). And Senator Edward Kennedy, a major proponent of the deregulation of transportation, provided his own estimates of the industry's importance:

> Trucking is one of the largest businesses in this nation. Altogether, it generates more than $100 billion dollars in revenue annually. It is one of the backbones of our national transportation system, accounting for about 78 percent of the total revenues earned by all transportation modes.
>
> Interstate trucking is a $56 billion dollar a year industry. Approximately half of this amount is generated by the more than 14,000 carriers licensed by the Interstate Commerce Commission to haul regulated freight. The rest is earned by more than 100,000 trucking companies—many of' them owner/operators—who haul unregulated freight.

Id. at 9 (statement of Sen. Edward Kennedy).

In addition, the following information was provided in the Senate report on the Motor Carrier Act of 1980:

> In 1979, revenues of the regulated motor carriers amounted to an estimated $41.2 billion, or 55 percent of the total regulated intercity freight bill. There are 16,874 federally regulated motor carriers operating 840,000 pieces of equipment. In 1979, these carriers handled over 1 billion tons of freight. Industry mileage approaches 21 billion annually with ton-miles transported at 276 billion. General freight carriers alone handle about 1 million shipments each working day, and 95 percent are less-than-truckload . . . .
>
> There are more than 61,000 communities in the United States; and of these, nearly 40,000 or 65 percent, are completely dependent on motor carriers for their freight service.

SENATE COMM. ON COMMERCE, SCI. & TRANSP., REPORT ON THE MOTOR CARRIER REFORM ACT OF 1980, S. Rep. No. 641, at 85 (2d Sess. 1980).

1012. *Congressional Intent*, *supra* note 20, at 4-5. In 1935, the Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, was amended by the Act of Aug. 9, 1935, ch. 498, 49 Stat. 453. This amendment divided the Interstate Commerce Act into two parts. The original Act was designated "Part I." The Motor Carrier Act of 1935 was then added as "Part II." The Motor Carrier Act of 1980 amended the Interstate Commerce Act. *Id.* at 3 n.3.

tor and rail carriers from each other.[1013]

In the 1970s, retailer Sears, Roebuck & Co., led a public relations campaign against the onerous paperwork and costly burdens of regulation.[1014] Somehow, trucking became a focus of the regulatory reform campaign. The American Trucking Associations [ATA] was an ineffective opponent, having long lost the ability to command attention on Capitol Hill.[1015]

1013. THOMAS D. MORGAN, CASES AND MATERIALS ON ECONOMIC REGULATION OF BUSINESS 66-67 (1976). Another principal impetus for the promulgation of the Motor Carrier Act of 1935 was the decision of the United States Supreme Court in *Buck,* 267 U.S. at 315, which eliminated state regulation of transportation in interstate commerce. Prior to Buck, "some forty states prohibited motor common carriers of passengers from using their highways without a certificate obtained by a showing that the involved service is required by the present or future public convenience and necessity." Webb, *supra* note 488, at 92. This development paralleled the decision of the Supreme Court in *Wabash, St. Louis & Pacific Railway, Co. v. Illinois*, 118 U.S. 557 (1886), which prompted Congress to regulate rail carriers in 1887. *See* Harris, *supra* note 161, at 13-15. It is usually argued that monopolists should be regulated so as to prohibit accumulation of excess profits, and to increase production at a price lower and a quantity higher than that at which marginal costs equal marginal revenues (so as to approach a situation comparable to that of a competitive market) so that maximization of social benefits and minimization of waste can be achieved. The regulation of natural monopolists, such as those who provide service on certain rail lines for market dominant traffic, protects the public against attempts by those monopolists to maximize their profits through restriction of their production by requiring production at a level higher than they would otherwise provide and at a price lower than that which they would otherwise offer. Enlightened regulation also attempts to avoid waste and guarantee a fair rate of return. *Congressional Intent*, *supra* note 20, at 5 n.8.

Transportation is an example of an industry in which regulation has expanded at a compound rate. Regulation of rail carriers began in the late 19th Century. Regulation was expanded to embrace other modes of transportation by 1935, largely in order to ensure protection of regulated rail carriers and to maintain the delicate balance of modes competing for essentially the same traffic. The industry is an example of the tendency of regulation to proliferate. *Id.* Transportation is also an example of the initiation of regulation to prevent the deleterious effects of excessive competition. Thus, an additional reason for the promulgation of the Motor Carrier Act of 1935 was to protect existing motor carriers from the excesses of cutthroat competition which had caused numerous firms to drop out of the market during the economic turmoil of the Great Depression. The fear was expressed that without regulation, the economies of scale inherent in the industry would cause concentration, and inevitably, oligopolistic and monopolistic markets. *Id.*

1014. AIR COMMERCE, *supra* note 57, at 200. Specifically, the charge was led by Stan Sender of Sears Roebuck & Co. *Id.* at 200 n.79.

1015. *Id.* at 200. The regulatory environment for the motor carrier industry that preceded the 1980 Act was by no means devoid of competition. Indeed, more than 16,000 motor carriers held operating authority from the ICC. Marketplace imperatives of supply and demand largely influenced the establishment of rates, although government intervention existed to restrain carriers from exploiting monopoly or oligopoly market positions or to prohibit larger carriers from employing predatory pricing activities to drive their smaller competitors out of business. The market, therefore, provided the basis for the lion's share of the decisions regarding pricing and service, and the government participated only occasionally to protect those societal objectives that Congress stated to be within the public interest. *Institution Disintegration*, *supra* note 697, at 48.

After lengthy hearings,[1016] in 1980, Congress passed both the Motor Carrier Act[1017] and the Household Goods Transportation Act to liberalize entry and rates of trucking companies.[1018] Although not intended to create deregulation, the new legislation was so interpreted by a highly politicized and ideological Interstate Commerce Commission.[1019]

In some respects, the Motor Carrier Act of 1980 affirmed the quasi-judicial relaxation of regulatory standards begun three years before by the majority of recent presidential appointees to the ICC, the nation's oldest independent regulatory agency.[1020] This liberalization had already begun to swing the pendulum away from protectionism of established carriers from the deleterious effects of excessive competition (a philosophy which had prompted a previous Congress to promulgate the Motor Carrier Act of 1935, which first established ICC jurisdiction over the motor carrier industry) to an ideology that espoused enhanced competition and free market economics.[1021] In other respects, the legislation reflected a belief that Congress should specify the parameters within which the ICC exercised its discretion, and that the flexibility of the ICC to become excessively liberal in its regulatory approach should be constricted.[1022]

1016. *See* SENATE COMM. ON COMMERCE, SCI. & TRANSP., REPORT ON THE MOTOR CARRIER REFORM ACT OF 1980, S. Rep. No. 641, at 2 (2d Sess. 1980); *See also* H. R. REP. 96-1069 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283. The Introduction to the House report provides an insight into the effort Congress devoted to this investigation:

> The Motor Carrier Act of 1980 is the product of over 18 months of continuous study of one of the most complex issues ever undertaken by this Committee. In the last 1 1/2 years, 16 days of hearings were conducted, with 215 witnesses presenting the views of nearly every entity in our society touched by this industry. On two of those days, the committee's hearings were held in Chicago jointly with the Senate committee on commerce, science and transportation. In addition, thousands of letters from consumers— from beef processor to independent owner-operators— have been received and considered. Through this process, Congress has reaffirmed its role to control and set policy and guidelines for the conduct of interstate commerce.

H. R. REP. 96-1069 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283.

1017. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

1018. Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat 2011 (1980).

1019. SOCIAL & ECONOMIC CONSEQUENCES, *supra* note 6, at 22.

1020. *Congressional Intent*, *supra* note 20, at 3. The Interstate Commerce Act was promulgated in 1887. *Genesis and Evolution*, *supra* note 2, at 341.

1021. *Congressional Intent*, *supra* note 20, at 3.

1022. *See* SENATE COMM. ON COMMERCE, SCI. & TRANSP., REPORT ON THE MOTOR CARRIER REFORM ACT OF 1980, S. Rep. No. 641, at 2-3 (2d Sess. 1980). Dissatisfaction with the ICC's deregulatory initiatives was among the major factors motivating Congress to take into its own hands the reins of regulatory reform and to carve out specific areas for liberalization. The Constitution confers on Congress, not the ICC, the power to regulate interstate and foreign commerce. Congress originally created the ICC to effectuate its legislative will. In drafting the 1980 Act, Congress reasserted its constitutional primacy by delineating the parameters of regulatory reform as clearly as statutorily possible. Congress did not intend the Act to constitute only a liberalization of entry regulation. The Act's other principal purpose was to put a halt to the actions of an agency that had become obsessed with deregulation and had exceeded the statutory limitations on its discretion. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3(a), 94 Stat.

The 1980 Act represented the culmination of a process of legislative compromise.[1023] The Senate bill was a more deregulatory effort than its House counterpart.[1024] In the waning days of the 96th Congress and the last summer of the Carter Presidency, the White House recognized the strong possibility that Congress would adjourn without having passed any legislation at all. Hoping that Congress would approve the legislation before the presidential election, President Carter persuaded the Senate to capitulate to the more conservative House bill.[1025] The House bill became law without any changes.[1026] Thus, the revised House Report is the most authoritative source of legislative history of the 1980 Act.[1027] Desiring to end the ICC's monumental strides toward *de facto* deregulation, the motor carrier industry supported the 1980 Act as a compromise that would halt the erosion of economic regulation.[1028]

The Motor Carrier Act of 1980 was not written to authorize wholesale deregulation of the motor carrier industry.[1029] Nevertheless, political forces were at play to try to ensure that it would be interpreted as man-

793 (1982) (ICC should not attempt to go beyond powers vested in it by Interstate Commerce Act and other legislation enacted by Congress).

1023. *Institution Disintegration*, *supra* note 697, at 6 (citing Kretsinger, *The Motor Carrier Act of 1980: Report and Analysis,* 50 UMKC L. REV. 21, 21 (1981)). The 1980 Act represents a compromise between shippers, trucking firms, and labor, who favor the regulatory status quo, and consumer advocates, who desire complete deregulation. *Id.* "The media characterization of the Act as 'trucking deregulation' is actually a misnomer. More precisely, the Act should be termed 'trucking deregulation.'" *Id. See* Donald L. Flexner, *The Effects of Deregulation in the Motor Carrier Industry,* ANTITRUST BULL. 185 (1983) (noting that the Act reduced but did not eliminate regulation of trucking industry).

1024. *Compare* Pub. L. 96-296, S. 2245, 96th Cong. (1980) (stating motor carrier legislation will substantially streamline ICC administrative procedures), *with* H.R. 6418, 96th Cong. (1980) (stating goal of ICC is to serve public interest by increasing competition and reducing unnecessary federal regulation).

1025. *Cf.* H.R. Res. 714, REP. NO. 96-1101 96th Cong. (1980) (providing for elimination of Senate bill by incorporating identical provisions into House bill).

1026. *Institution Disintegration*, *supra* note 697, at 6. *Compare* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *with* H.R. 6418, 96th Cong., 2d Sess. (1980).

1027. *See* H.R. REP. 96-1069, 96th Cong. (1980).

1028. *See Econ. Regulation of the Trucking Indus.: Hearings on S. 2245 Before the Senate Comm. on Commerce, Science, & Transp.,* 96th Cong. 1856 (1980) (report of Darius Gaskins, Jr., Chairman, ICC).

1029. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, § 2, 94 Stat. 793, 793 (codified at §49 U.S.C. § 10101 (1982)) (discussing purpose of 1980 Act); H.R. REP. No. 1069, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S.C.C.A.N. 2283, 2285 (discussing provisions of Act intended to ease entry and certification requirements). *See, e.g.,* 49 U.S.C. § 10922(b)(6) (1982) (requiring ICC to streamline and simplify certification process); *id.* § 10922(i)(1)(B) (requiring ICC to implement procedures for expeditious processing of applications for removal of restrictions on operating authority); *Id.* § 10922(b)(l) (easing requirements for operating authority by modifying test for public convenience and necessity); *see also* Cent. Transp., Inc. v. United States, 694 F.2d 968, 974 (4th Cir. 1982) (legislative intent of 1980 Act is to mitigate excessive regulation and simplify certification); Gamble v. Interstate Commerce Comm'n, 636 F.2d 1101, 1103 (5th Cir. 1981) (goals of Act include simplifying certification process and reducing restrictions on operations).

dating comprehensive deregulation of the industry. At the time of the Senate vote on the conservative House bill, Sen. Robert Packwood (R-Ore.) had a fabricated dialogue between himself and Sen. Howard Cannon (D-Nev.) inserted into the Congressional Record that purported to interpret the essential provisions of the bill, section-by-section, as mandating comprehensive deregulation.[1030] No such dialogue ever occurred on the floor of the Senate, and its insertion, without an identifying "bullet" to reveal its subsequent insertion, was a strategic effort toward a desired political result that had not been legally obtained.[1031] The deregulation-minded ICC Commissioners appointed by President Carter—Darius Gaskins, Tad Trantum, and Marcus Alexis—were quick to seize upon the Packwood-Cannon colloquy as crucial legal history in interpreting the Motor Carrier Act of 1980.[1032]

B. The Disintegration of the ICC

America's first independent regulatory agency, the Interstate Commerce Commission, celebrated its centennial anniversary in 1987.[1033] Throughout much of its history, the ICC was regarded as among the most competent and highly respected governmental agencies.[1034] Presidents traditionally selected Commissioners for the ICC almost as carefully as they have chosen Justices of the United States Supreme Court, emphasizing their competence, integrity, and ability to apply the law with skill and reason.[1035]

As noted above, on the ICC's fiftieth anniversary, one contemporary commentator commended the agency for its vigorous and spirited administration of the law.[1036] The Commission also received high praise for its fidelity to congressional mandate and for its prudent, nonpartisan protec-

1030. Air Commerce, *supra* note 57, at 202.

1031. *Id.* Packwood was a deregulation ideologue, coached by former-ICC attorney and staffer Matthew Scocozza (who later became an Assistant DOT Secretary); Cannon was eager to distance himself from the Teamsters, who opposed deregulation, as the newspapers had revealed unsavory financial dealings between them. *Id.* at 202 n.92.

1032. *Congressional Intent*, *supra* note 20, at 25 n.98. Gaskins had been a lieutenant of Alfred Kahn at the Civil Aeronautics Board when it was deregulating the airline industry. Air Commerce, *supra* note 57, at 202-03 n.93.

1033. *Congressional Intent*, *supra* note 20, at 2 n.1. President Grover Cleveland established the Interstate Commerce Commission in 1887 when he signed into law the Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887).

1034. *Institution Disintegration*, *supra* note 697, at 1.

1035. *See* Aitchison, *supra* note 750, at 401 (concluding that ICC has promoted equal justice and improvement of general welfare); Oren Harris, *The Commissioners*, 31 Geo. Wash. L. Rev. 309, 309 (1962) (lauding excellent work of ICC commissioners over 75-year period).

1036. Aitchison, *supra* note 750,at 321.

tion of the public interest.[1037] Supreme Court Justice Felix Frankfurter heralded the seventy-fifth anniversary of the ICC in even more glowing terms. He lauded the ICC as an institution of unblemished character, with "a fastidious regard for responsibility, a complete divorcement between public and private interest, and all other concomitants of a true and worthy conception of public duty."[1038] But at the Centennial celebration of the ICC's existence, many were critical of the institution. Those favoring regulation were disappointed in the ICC's unwillingness to follow its statutory mandates.[1039] Those favoring deregulation felt that the ICC had not gone far enough.[1040]

Although Congress designated the ICC to be an eleven-member body,[1041] by the mid-1970's Presidents were appointing no more than seven members.[1042] The large size of the Commission traditionally had contributed to its conservatism; policy change within the Commission rarely had been radical. By appointing individuals dedicated to radical change and by keeping the Commission's membership small, however, the White House quickly and dynamically shifted the Commission's internal policy to one enthusiastically dedicated to deregulation.[1043]

Congress first empowered the President to designate which Commissioner shall serve as chairperson during the Nixon administration.[1044] This authority sharply increased Presidential influence over the Commission and its chief officer, and undermined the ICC's traditional autonomy from the executive branch as an arm of Congress.[1045]

1037. *See* Esch, *supra* note 751, at 464 (describing the ICC as a faithful creature of Congress responsible to no other entity).

1038. FRANKFURTER, *supra* note 752, at 236. Justice Frankfurter called the ICC "a laboratory demonstration of how economic problems may be worked out by trial and error," *id* at 244, and commended the agency for its success at remaining independent from external pressures. *Id.*

1039. AIR COMMERCE, *supra* note 57, at 203.

1040. *Id.*

1041. *Institution Disintegration*, *supra* note 697, at 3. Commissioners were appointed by the President with the advice and consent of the Senate. No more than six commissioners could be members of a single political party. *Id.* at 3 n.8.

1042. *Id.* at 3.

1043. *Id.*

1044. Reorg. Plan No.1 of 1969, 34 Fed. Reg. 15783, 83 Stat. 859 (1969).

1045. *Institution Disintegration*, *supra* note 697, at 3. Congress can delegate the power to regulate commerce in a manner that enhances or diminishes presidential influence. There are at least four models for such delegation: delegation directly to the president, *see* Field v. Clark, 143 U.S. 649, 690-93 (1892); delegation to an executive branch agency, *see* United States v. Grimaud, 220 U.S. 506, 521 (1911); delegation to an independent regulatory commission subject to presidential review, *see* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 9-15 (1984); and delegation to an independent regulatory commission without presidential review, *see id.* By choosing the latter approach in creating the ICC, Congress intended to minimize presidential influence over the agency. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 624-25 (1935) (Congress' purpose in creating regulatory agencies independent of executive authority was to free agencies to exercise their judgment without hindrance); *see also* Freedman, *supra* note 874, at 1060-61 (insulation of

Alleging political patronage in the appointment process, some observers criticized the quality of presidential appointments to the ICC.[1046] By the late 1970s and early 1980s, there was a deliberate attempt by the executive branch to give this quasi-judicial agency a philosophical mission by means of the appointment process.[1047] President Carter filled vacant seats on the Commission with individuals fervently dedicated to deregulation.[1048] Although the Ford appointees[1049] had moved moderately in the direction of liberalized entry and ratemaking, their deregulatory efforts pale in comparison to the vigorous efforts of the Carter economists.[1050] Despite campaign promises to appoint only qualified and experienced individuals to the regulatory agencies, President Reagan continued this trend with the appointment of his own deregulation ideologues.[1051]

By the late 1970's, the ICC had moved resolutely toward deregulation. By 1979 the ICC was granting ninety-eight percent of the applications filed for motor carrier operating authority.[1052] The Commission supplemented its efforts to open the floodgates of entry and to deregulate ratemaking with numerous liberal decisions and rulemakings.[1053]

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administrative agencies from executive branch ensures integrity of administrative process); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House,* 80 COLUM. L. REV. 943, 963 (1980) (Congress has power to restrain executive control over agency policymaking). *But see* Lloyd N. Cutter & David R. Johnson, *Regulation and the Political Process,* 84 YALE L J. 1395, 1410-11 (1975) (noting redeeming reasons to justify presidential intervention in regulatory process); Verkuil, at 956-57 (arguing that presidential power to control, coordinate, and guide policymaking is means of holding agencies accountable).

1046. *See* FELLMETH, *supra* note 876, at 1 (political connections and political party are two important qualifications for Commissioner); *see also Study of Fed. Regulation, Pursuant to S. Res. 71, Senate Comm. On Gov't Operations*, 95th Cong. xxxi (1977) (neither White House nor Senate has demonstrated sustained commitment to high quality regulatory appointments).

1047. *Institution Disintegration*, *supra* note 697, at 3-4.

1048. *Id.* One prominent Washington, D.C. attorney observed that the Commission became highly politicized during the Carter Administration. *See Lawyer Blames Political Ideologues for Commission's Regulatory Failures,* TRAFFIC WORLD, May 24, 1982, at 34.

1049. *Institution Disintegration*, *supra* note 697, at 4. President Carter appointed Chairman Darius Gaskins, Jr., and Commissioners Marcus Alexis and Tad Trantum, who are affectionately referred to by many as the "Three Marketeers." *Id.* at 4 n.14.

1050. *Id.* at 4.

1051. *Id.* President Reagan appointed deregulation zealots Frederic N. Andre, Malcolm M.B. Sterrett, and Heather J. Gradison to the ICC. *See 'Newcomers' Now Dominant as ICC Members,* TRAFFIC WORLD, Jan. 10, 1983, at 17.

1052. *See* James W. Freeman & Robert W. Gerson, *Motor Carrier Operating Rights Proceedings-How Do I Lose Thee?,* 11 TRANSP. L.J. 13, 15 n.3 (1979) (providing statistics of percentage of applications for operating authority that ICC approved from 1975 until 1979); *see also Congressional Intent*, *supra* note 20, at 17 (discussing liberal regulatory policies of ICC during late 1970's).

1053. *See, e.g.,* Arrow Transp. Co. of Del. Extension-Boise, Idaho, 131 M.C.C. 941 (1980) (increasing burden of party opposing grant of new entry to show that such entry would have deleterious effect on opposing party's overall operations); Change of Policy Consideration of Rates in Operating Rights Application Proceedings, 359 I.C.C. 613, *17-*18 (1979) (easing ICC

As dissatisfaction with the size and breadth of the government grew in the mid-1970's, the trend toward deregulation developed. The Proposition 13 tax revolt and the country's disillusionment with the Great Society experiment reflected the sentiment that government generally had become inefficient, costly, and ineffective.[1054] The populace generally perceived regulation as an unnecessary intrusion that wrapped small businessmen in red tape and marched them through a confusing bureaucratic labyrinth.[1055] It was this public sentiment that encouraged several consecutive presidents to favor transportation deregulation. Presidents Carter and Reagan accomplished comprehensive deregulation even in the absence of statutory authority.[1056] Reagan was fond of saying, "If it moves, tax it. If it keeps moving, regulate it. If it stops moving, subsidize it."[1057] White House influence in the ICC, as reflected in ICC endorsement of presidential policy, reached its highest level in the agency's history.[1058]

The Commission lost the autonomy that traditionally shielded its decision making from the political winds that blow down Pennsylvania Avenue.[1059] The White House became the dominant political force influencing ICC policy.[1060] With the Commission dominated by the deregulatory policy of the executive branch and with Congress split on the wisdom of deregulation, the remaining check on aberrant ICC action was

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policy by suggesting acceptance of applications that promised lower rates to shippers); *see also Congressional Intent, supra* note 20, at 14-21 (discussing ICC's deregulatory decisions); Freeman & Gerson, *supra* note 1052, at 63-64 (questioning whether ICC's relaxed standards are better, cheaper, or more efficient than previous standards).

1054. *Institution Disintegration*, *supra* note 697, at 49.

1055. *Erosion of the Regulatory Process*, *supra* note 11, at 318-20. (discussing the rationale underlying deregulation); *Rise and Fall*, *supra* note 543, at 114-18 (1979) (discussing public dissatisfaction with regulation of airline industry). The economic benefits resulting from motor carrier regulation included freedom from destructive competition and predatory pricing, and the assured access of small and remote shippers and communities to motor carrier services.

1056. *Institution Disintegration*, *supra* note 697, at 49.

1057. The Ronald Reagan Information Page, *at* http://www.presidentreagan.info/speeches/quotes.-cfm.

1058. *See* RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES IN A NUTSHELL 343-344, (4th ed. 1999) (arguing that catalyst for transportation deregulation has originated in the executive, and not the legislative, branch).

1059. *Institution Disintegration*, *supra* note 697, at 49.

1060. *See* Verkuil, *supra* note 1045, at 944-47 (discussing Carter administration's confrontations with agency policymakers). Dean Verkuil has noted that "[h]ighly charged White House intervention poses a danger of frustrating the will of Congress as expressed in legislation establishing an agency and defining its mission." *Id.* at 949-50. *See also* Don Byrne, *ICC Chairman Taylor Again Displays Depth of Rift Between Commissioners,* TRAFFIC WORLD, Apr. 16, 1984, at 47 (questioning whether the ICC no longer heeds Congressional mandate but follows executive policy). No ICC Chairman could retain independence when his designation as Chairman was at the whim of the President.

the judiciary.[1061] Litigants frequently and successfully used the judicial forum to challenge the Commission's actions.[1062] Many federal courts of appeals concluded that the ICC's actions in the area of motor carrier deregulation inconsistent with its statutory obligations.[1063] One court recognized that the Commission's actions were *de facto* deregulation despite the absence of statutory authority.[1064] Noting the ICC's tendency to ignore the burden of proof by resolving doubts in favor of an applicant for common carrier status, the United States Court of Appeals for the Sixth Circuit announced its suspicion that the ICC was disregarding congressional intent by making decisions solely for the purpose of increasing competition.[1065]

The ICC in the late 1970's was abdicating its responsibility to engage in meaningful rate and entry regulation.[1066] Reviewing the Commission's actions, courts found the ICC's decisions to be without an apparent legal or factual basis.[1067] They found it necessary to remind the ICC that Congress' decision to enter into comprehensive regulation contravenes the ICC's apparent belief that national policy unqualifiedly favors competition.[1068]

The rhetoric of deregulation had not, however, caught up with the law. Though pro-deregulation Commissioners urged pricing deregulation, the statute required that all rates be included in tariffs filed with the ICC, and that carriers could not lawfully deviate from their filed rates.[1069] The result was that motor carriers were wildly discounting their rates, not filing the discounts with the ICC, and dropping into bankruptcy.[1070] Trust-

1061. *See Congressional Intent, supra* note 20, at 55 (discussing judiciary's role in overseeing ICC).

1062. *Id.* at 49.

1063. *Id.* at 49-50.

1064. Argo-Collier Truck Lines v. United States, 611 F.2d 149, 155 (6th Cir. 1979).

1065. *Id.* (ICC's conclusions are not supported by substantial evidence or legislative intent).

1066. *See* Paul Stephen Dempsey, The *Experience of Deregulation: Erosion of the Common Carrier System,* 13 TRANSP. L. INST. 121, 149 (1980) [hereinafter *Erosion of the Common Carrier System*].

1067. *See, e.g.,* CADC 79-14 Campbell Sixty-Six Express, Inc. v. Interstate Commerce Comm'n, 603 F.2d 1012, 1014 (D.C. Cir. 1979) (remanding decision to ICC because of lack of rational connection between findings and decision); Pitre Bros. Transfer, Inc. v. United States, 580 F.2d 140, 143-44 (5th Cir. 1978) (remanded because of ICC's failure to address petitioner's arguments); Humboldt Express, Inc. v. Interstate Commerce Comm'n, 567 F.2d 1134, 1137 (D.C. Cir. 1977) (remanding decision to ICC after finding no information in administrative record that indicated basis of decision to transfer operating authority from one carrier to another).

1068. *See* Trans-Am. Van Serv. Inc. v. United States, 421 F. Supp. 308, 323 (N.D. Tex. 1976) (congressional mandate that ICC must determine those cases in which grant of operating authority will serve public convenience and necessity) (citing FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953)).

1069. *See* DEMPSEY & THOMS, *supra* note 22, at 168-69.

1070. AIR COMMERCE, *supra* note 57, at 158.

ees in bankruptcy began to file to recapture the difference between the amount charged and billed, and the amount specified in the ICC-filed tariff, under the "Filed Rate Doctrine."[1071] Billions of dollars were sought from shippers.[1072] Congressional dissatisfaction with the anomaly of *de facto* deregulation and *de jure* regulation was a catalyst for eliminating the tariff-filing requirement in 1994, and sunsetting the Interstate Commerce Commission in 1995.[1073] From its ashes was born the Surface Transportation Board—essentially a small railroad regulatory agency, as had been the original ICC.[1074]

C. Trucking Deregulation

With the appointment of deregulation advocates to head the ICC, it administratively accomplished *de facto* deregulation, despite the *de jure* prohibition in the Motor Carrier Act of 1980.[1075] The emasculated ICC lost the support of the industry, and the Trucking Industry Regulatory Reform Act of 1994 removed most of the remaining barriers to entry in the trucking industry (except regulation of safety and insurance) and eliminated the requirement of tariff filing.[1076]

With strong lobbying by United Parcel Service, Kentucky's largest employer, and without Committee hearing or vote, Sen. Wendell Ford (D-Ky.) added a rider to the Federal Aviation Administration Authorization Act of 1994 preempting State regulation of intrastate motor carriers.[1077] The American Trucking Associations [ATA] did not effectively oppose the legislation.[1078] At this moment in history, the ATA was headed by Tom Donohue, who had previously, and would subsequently, hold senior positions in the U.S. Chamber of Commerce, which supported trucking deregulation.[1079] The Teamsters were in disarray, having just ousted their principal lobbyist, and having lost the ability to ban Mexican truckers under the North American Free Trade Agreement [NAFTA].[1080] President Clinton was unwilling to veto the FAA reauthorization act, given that it included so many pork construction projects, important to selected Congressmen and their constituents.[1081]

1071. *Id.*
1072. *Id.*
1073. *Id.*
1074. *Id.*
1075. *Id.* at 207-08.
1076. *Id.* at 208.
1077. *Id.* (citing Daniel W. Baker, TLA Annual Report and Summary of Motor Carrier Regulation of the Respective States (1998)).
1078. *Id.*
1079. *Id.*
1080. *Id.*
1081. *Id.*

Under the terms of the North American Free Trade Agreement, which became effective in January 1994, most restrictions against Mexican carriers operating in the United States were to have been phased out in the 1990s.[1082] Foreign ownership restrictions were also to be lifted under NAFTA.[1083]

The provisions allowing Canadian carriers, vehicles, and drivers were dutifully implemented by the United States.[1084] Canada has a truck inspection program similar to that of the U.S.[1085] But on December 17, 1995, only one day before the U.S.-Mexican border was scheduled to open, President Bill Clinton issued a safety proclamation for unilaterally closing the border to Mexican trucks beyond the commercial zones, thereby failing to implement NAFTA.[1086] The Mexican government responded by placing a similar restriction on U.S. vehicles.[1087]

President Clinton's suspension of implementation of NAFTA led the Mexican government to file a formal complaint in 1998 requesting arbitration under the treaty's dispute resolution provisions.[1088] The Mexicans

1082. Alexandra Walker, *No Easy Solutions to Mexican Truck Safety Issues*, STATES NEWS SERVICE (Feb. 22, 2001). Under NAFTA, beginning December 18, 1995, Mexican trucking companies were to have been allowed to obtain licenses to perform cross-border operations into the four U.S. border states (i.e., California, Arizona, New Mexico and Texas), and U.S. carriers were to have been allowed entry into the six northern border states of Mexico. As of January 1, 2000, NAFTA provides cross-border access for Mexican carriers, in foreign commerce only, throughout the United States, and for U.S. carriers throughout Mexico. A similar phased-in schedule will eventually allow full access by Mexican passenger carriers to the U.S. market. Robert Collier, *Long-Distance Haulers Are Headed Into U.S. Once Bush Opens Borders*, S. F. CHRON., Mar. 4, 2001, at A1.

1083. Paul Stephen Dempsey, *Free Trade But Not Free Transport? The Mexican Stand-Off*, 30 DEN. J. INT' L L. & POL'Y 91, 93 (2001) [hereinafter *Free Trade*] (citing *NAFTA Will Be Slow to Change the Rules for Transportation Operations and Ownership*, Info. Access Co., Jan. 1994, at 26). Under it, on December 18, 1995, Mexican investors were to be permitted to invest in 100% of a Mexican carrier providing international service, while U.S. investors were allowed to invest up to 49% in U.S. carriers. On January 1, 2001, the percentage increased to 51%; complete ownership is to be permitted in 2004. *Id.*

1084. Don Stewart, *Mexico's Truckers Detoured by Legal, Safety Barriers*, TULSA WORLD (Mar. 4, 2001).

1085. *Id.*

1086. *NAFTA Panel Decision Creates Uproar,* LOGISTICS MGMT. (Mar. 1, 2001), at 19.

1087. Collier, *supra* note 1082, at A1. Ostensibly, President Clinton's moratorium was based on safety considerations. He insisted that Mexican trucks would not be allowed beyond the commercial zone until the U.S. was satisfied with Mexican carrier compliance with U.S. safety laws. *Id.* But some contend that President Clinton's moratorium was imposed under pressure from the 1.4 million-member International Brotherhood of Teamsters and the insurance industry. Mexican drivers earn only about a third of the salary of U.S. drivers, and typically drive their vehicles up to 20 hours per day. As a consequence, many anticipate that after NAFTA is fully implemented, most of the two nations' trade will be driven by Mexican drivers. *Id.*

1088. Collier, *supra* note 1082. (referring to North American Free Trade Agreement, P.L. 103-192, art. 2008,107 Stat. 2057 (1993).

alleged protectionism.[1089] The U.S. counterclaimed, accusing Mexico of improper retaliation by sealing off its borders to U.S. carriers.[1090] The process was to take six years to run its course.[1091] While the arbitration panel was being formed, Congress passed the Motor Carrier Safety Improvement Act of 1999, which created the Federal Motor Carrier Safety Administration within DOT and increased the penalties for Mexican carriers operating outside the commercial zones.[1092]

On February 6, 2001, the five-member arbitration panel unanimously concluded that the U.S. decision to block Mexican trucks from entering the United States violated the NAFTA agreement, as was its refusal to allow Mexican companies to invest in U.S. international cargo companies.[1093] It gave the United States thirty days to conclude a plan identifying a timetable and action steps the U.S. must take or face possible sanctions.[1094] If negotiations to implement NAFTA are unsuccessful, Mexico has the right to levy compensatory duties equal to the economic damage it incurred as a result of a closed border since 1995, which some estimate to be around $200 billion.[1095]

D. Bus Deregulation

In the United States, the rate wars, bankruptcies, a deteriorating margin of safety, and consumer exploitation coalesced in the mid-1930s to prompt federal regulation of the bus industry.[1096] In promulgating the Motor Carrier Act of 1935, Congress added trucking and bus companies to the jurisdiction of the Interstate Commerce Commission.[1097] Destructive competition abated, and for the half-century that followed, bus service was ubiquitously available throughout the nation at a price, which was "just and reasonable."[1098] Service was safe and dependable to large

1089. *Id.*

1090. *Free Trade*, *supra* note 1083, at 94 (citing Debra Rose, *U.S.-Mexican Trucking: Standoff at the Border Continues,* Borderlines, June 2000, at 15).

1091. Collier, *supra* note 1082.

1092. *See* William Buxton, *Read: This Act Could Change Your Business,* Transp. & Distribution, Mar. 1, 2000, at 11. Under it, foreign domiciled carriers must carry a copy of their registration, and if a vehicle operates beyond the scope of their registration, it may be placed out-of-service; the carrier is liable for a civil penalty and, depending on whether the violation is intentional, may be suspended from operating anywhere in the United States for a period of time. *See* Lisa H. Harrington, *Trucking Wins A Big One,* Transp. & Distrib., Jan. 1, 2000, at 69.

1093. Walker, *supra* note 1082.

1094. *Id.*

1095. *Free Trade*, *supra* note 1083, at 94-95. (citing Daniel McCosh, *DOT, Mexico Talk Trucks*, J. of Comm. (Mar. 22, 2001)).

1096. *Interstate Trucking*, *supra* note 498, at 187.

1097. Pub. L. No. 74-255, 49 Stat. 543 (1935). *See Hearings on S. 1629 and S. 1635 Before the Senate Comm. on Interstate Commerce*, 74th Cong. 78 (1935).

1098. *Interstate Trucking*, *supra* note 498, at 187.

and small communities throughout the nation.[1099]

As in telephone regulation, there was some measure of "cross subsidization" performed under the regulatory umbrella of the ICC (in interstate transport) and the State Public Utility Commissions [PUCs] (in intrastate transport), with more lucrative, denser traffic lanes paying a premium above marginal costs to subsidize rural and small community service.[1100] With the disintegration of the passenger railroad system (only partially replaced by Amtrak), buses became the only public means of transport to or from tens of thousands of communities across the nation.[1101]

With the *laissez faire* crusade sweeping railroads (with promulgation of the 4-R Act of 1976 and the Staggers Rail Act of 1980), airlines (with the enactment of the Air Cargo Deregulation Act of 1977 and the Airline Deregulation Act of 1978), and trucking (following the Motor Carrier Act of 1980), the buses were deregulated as well.[1102]

The Bus Regulatory Reform Act of 1982 [BRRA] significantly liberalized entry, exit and pricing of the U.S. bus industry, and largely preempted the states.[1103] The BRRA liberalized entry by removing the requirement that applicants prove "public convenience and necessity," leaving them with the obligation to establish only that they are "fit, willing, and able" to provide the proposed operations.[1104] A protestant must then prove that issuance of the authority sought will not be in the public interest.[1105] Abandonments became easier too.[1106] Moreover, industry-proposed intrastate abandonments and price increases denied by the state PUCs could now be appealed to the Interstate Commerce Commission, where they were almost always reversed.[1107]

In the first year under the BRRA, the bus industry announced termination or reductions of service at 2,154 communities.[1108] By late 1986, 4,514 communities had lost bus service, while only 896 had gained it.[1109]

1099. *Id.*
1100. *Id.*
1101. AIR COMMERCE, *supra* note 57, at 210.
1102. *Id.*
1103. *Interstate Trucking*, *supra* note 498, at 230 n.170 (citing 49 U.S.C § 10922).
1104. *Id.*
1105. *Id.* (citing H. REP. NO. 97-334, 97th Cong. at 29 (1981)).
1106. *Id.*
1107. *Id.*
1108. *Id.* The ICC estimated that 1,045 communities that lost service in the first year of deregulation had no alternative intercity transportation. *Id.* (citing U.S. DEP' T OF AGRICULTURE, RECONNECTING RURAL AMERICA REPORT ON RURAL INTERCITY PASSENGER TRANSPORTATION 20 (1989) [hereinafter RECONNECTING RURAL AMERICA])).
1109. The big losers were small communities—3,432 of the small towns that lost service had a population of 10,000 or less. *Interstate* Trucking, *supra* note 498, at 230 n.170 (citing a letter from ICC Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 1986)). Nonmetropolitan

The U.S. intercity bus network constricted significantly under deregulation.[1110] Peaking at 27.7 intercity passenger miles traveled in 1979, it fell steadily each year thereafter to twenty-three billion passenger miles in

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and rural populations have a higher percentage of children and elderly who need access to public intercity transport than do urban areas. *Id.* (citing RECONNECTING RURAL AMERICA, *supra* note 1108, at 8). During 1977, 30% of all intercity bus passenger miles were traveled by individuals living in rural areas, compared to trains (20%) and airlines (15%); families earning less than $10,000 a year accounted for 45% of intercity bus passenger miles, compared to trains (25%), automobiles (18%), and airlines (15%); people under the age of 18 or over the age of 64 accounted for half of intercity bus passengers, compared to automobiles (33%), railroads (25%), and airlines (17%). A 1988 survey by Greyhound Lines Inc. revealed that 44.8% of its passengers were from families which earned less than $15,000 a year. ROBERT K. NATHAN ASSOC., FEDERAL SUBSIDIES FOR PASSENGER TRANSPORTATION, 1960-1988: WINNERS, LOSERS, AND IMPLICATIONS FOR THE FUTURE 17-20 (1989). The U.S. Department of Agriculture summarized the impact of deregulation upon small towns and rural communities:

> Many rural residents no longer have intercity public transportation available to them. It is no longer possible "to get from here to there." The combined effect of rail, air, and bus deregulation has simply removed many rural areas from the intercity transportation network. In those small communities where some form of intercity transportation is still available, the cost of travel has risen, sometimes dramatically. . . .
>
> The net result for many rural residents is increased isolation from society at large, as linking with other communities becomes more and more difficult. An alternative for some elderly people is to move away from their homes in rural areas to an urban area—where they no longer have the support of their local community network and where they may require the support of human services agencies to remain independent. [T]here may be an incremental addition to a larger trend toward increased isolation and rising costs for rural communities. As costs rise, businesses close, thereby reducing the number of services available locally. And as the number of services decline, residents are forced to travel farther to access medical care, shopping, employment opportunities, and social and recreational outlets. As people travel to meet basic needs, the cycle of decline is reinforced as individuals combine their trips to the larger community to include the doctor, the shopping center, and the theater—and bypass the local business as an additional, unnecessary stop. Eventually, population declines as access to basic services becomes too difficult or too costly for rural residents to sustain.

Interstate Trucking, *supra* note 498, at 230 n.170 (citing RECONNECTING RURAL AMERICA, at 26-27). *See generally The Dark Side of Deregulation*, *supra* note 9.

1110. *Interstate Trucking*, *supra* note 498, at 230 n.170. Prior to its deregulation, industry officials predicted that deregulation would result in drastic service reductions to small communities. Harry Lesko, President of Greyhound of Arizona, said that "Eighty-nine percent of our routes are subsidized by the bread-and-butter primary routes. . . [I]f we are to keep our lines running and the scheduled miles operating on the primary routes to satisfy the high-density population factors, the rural areas are going to have to suffer because they' re straining the main line system." *Id.* (citing *Intercity Bus Service in Small Communities: Senate Comm. on Commerce, Sci. & Transp.*, 95th Cong. 17 (1978)). Similarly Charles Webb, President of the National Association of Motor Bus Owners, insisted that

> [t]he one conclusive argument against removal of controls on entry by motor carriers of passengers stems from their obligation to provide service to thousands of small cities and towns and to vast rural areas without profit or at a loss, and from the fact that it would be unconscionable either to permit new entrants to skim the cream of the traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation."

Webb, *supra* note 488, at 105. Moreover, the loss of bus service meant the loss of the most fuel efficient and least polluting mode of transport. In 1985, the various modes consumed the following amounts of fuel per passenger mile:

1987.[1111]

Despite the freedom to raise prices and leave unprofitable markets created by deregulation, the bus industry suffered unprecedented losses under deregulation.[1112] Part of this was due to "cream skimming" by new entrants that focused their operations on the denser, higher revenue traffic lanes.[1113] Excessive capacity in dense markets deprived carriers of the revenue needed to cross-subsidize weaker markets.[1114] Another part still was prompted by the impact of the airline rate wars of the early 1980s, after promulgation of the Airline Deregulation Act of 1978.[1115] Supersaver airfares were luring passengers away from the bus stations and into airports.[1116]

Between 1981 and 1986, Greyhound in the United States exper-

FUEL CONSUMPTION BY MODE

Mode	*BTUs per passenger mile*
Buses	1,323
Trains	2,800
Automobiles	4,040
Commercial Aviation	4,376
General Aviation	11,339

NATHAN, *supra* note 1109, at 20.

1111. NATHAN, *supra* note 1109, at app. B, table B-1.

1112. *Id.* at app. C, table C.

1113. *Interstate Trucking*, *supra* note 498, at 224 n.140.

1114. *Id.*

1115. *Id.*

1116. *Id.* Even charter and tour deregulation had a deleterious effect upon carrier profitability. Jeremy Kahn painted the following portrait of the empirical results of deregulation:

> [W]ith the exception of a handful of intercity carriers engaged in regular route transportation (be it true intercity transportation or even long distance commuter service within major metropolitan areas), charter and tour revenues provide a significant—if not the most significant—proportion of most carrier revenues. Deregulation of charter and tour operations on the federal level (and, generally on the state level to varying degrees) has resulted in overcapacity, leading to severe price competition, resulting in a diminution of overall carrier profits. This, coupled with ever increasing costs of operation, including the staggering cost of the newest intercity motorcoaches, increased cost of labor, including benefits, and other operating costs, including fuel and taxes, has resulted in mere economic survival being a major issue for many smaller charter and tour carriers within the industry.
>
> Regardless of the number of efficient management programs which are instituted, regardless of the modernization of maintenance facilities and customer service facilities, and regardless of computerization of record keeping and billing, many carriers are faced with a close-to-being-unbearable squeeze on their profits.
>
> . . . .
>
> Many carriers are today operating aging fleets of equipment, with models costing the then significant amount of $155,000 now replaceable only with comparable models which cost twice as much.
>
> In many instances, only new entrants, highly leveraged, and barely able to make lease payments on these expensive coaches, enter the charter market and provide fierce price competition, anxious only in the short run to meet their leasing obligations, thereby further exasperating this problem.

Jeremy Kahn, *Stopping By the Bus Terminal on a Dark and Stormy Night: The U.S. Bus Industry Seven Years After Deregulation*, 18 TRANSP. L.J. 269-70 (1990).

ienced severe losses.[1117] In 1986, Greyhound of Arizona sold its domestic operations to an investment group led by Fred Curry, a former officer, for $350 million.[1118] The following year, Greyhound acquired its rival Trailways, for $80 million, and the U.S. bus duopoly became a monopoly.[1119] Recognizing the Trailways was on its deathbed, the U.S. Department of Justice acquiesced and withheld antitrust opposition under the "failing company" doctrine.[1120] By the mid-1980s, that single firm accounted for more than 85% of the operating revenues of the ten largest carriers.[1121]

Alfred Kahn, the principal proponent of transportation deregulation, acknowledged that bus deregulation was a threat to small communities, whose lifeline is the intercity operator; therefore, had he been at the helm of government, he likely would not have deregulated the bus industry.[1122]

XXIII. Deregulation of Ocean Carriers

Steamship conferences first arose in the late 19th Century as vessel owners began to recognize that a purely competitive environment tended toward destructive competition.[1123] "Conferences" are agreements between ocean common carriers for the purpose of agreeing on rates and other competitive practices, sometimes including sailing times and pooled earnings.[1124] In the Shipping Act of 1916, Congress sought both to grant intercarrier agreements antitrust immunity, but regulate them to moderate anticompetitive abuses.[1125]

The Shipping Act of 1984 was the first significant statutory change in the regime of ocean shipping regulation since the Shipping Act of 1916. The 1984 Act reaffirmed the antitrust immunity shield created by the 1916 Shipping Act, which enabled carriers to collectively set prices within

1117. *Interstate Trucking*, *supra* note 498, at 224 n.140 (citing Greyhound Corp., 1982 Annual Report 2 (1982); Greyhound Corp., 1986 Annual Report 1 (1986)). *See Greyhound Put on S&P's Watch List*, Wall St. J., Jan. 24, 1983, at 32.

1118. Fredrick Rose, *Greyhound to Sell U.S. Bus Operations for $350 Million to Group of Investors*, Wall St. J., Dec. 24, 1986, at 3. *See* Laurie McGinley & Andy Pasztor, *Greyhound Gets Clearance to Run Trailways for Now*, Wall St. J., July 3, 1987, at 3; *Greyhound Lines to Take Control of Trailways Assets*, Wall St. J., July 14, 1987, at 16.

1119. Laurie McGinley & Andy Pasztor, *Greyhound Gets Clearance to Run Trailways for Now*, Wall St. J., July 3, 1987, at 3; *Greyhound Lines to Take Control of Trailways Assets*, Wall St. J., July 14, 1987, at 16.

1120. *Interstate Trucking*, *supra* note 498, at 224 n.140.

1121. Kahn, *supra* note 1117, at 268.

1122. *Interstate Trucking*, *supra* note 498, at 224 n.140. (citing testimony of Alfred Kahn Before the California Public Utilities Commission on Cross Examination by Paul Stephen Dempsey 6247-48 (Jan. 31, 1989)).

1123. Pansius, *supra* note 356, at 337.

1124. *Id.*

1125. Dempsey & Thoms, *supra* note 22, at 32-33.

the conference system,[1126] and to publish conference tariffs containing those rates.[1127] Conference members were given the right of independent action, whereby they could offer a rate other than the collective rate offered by the conference.[1128] Shippers were given the right to negotiate contracts with an ocean carrier or group of carriers (conference).[1129] Such "service contracts"[1130] were required to be filed with the Federal Maritime Commission [FMC], and their essential provisions were published.[1131] But under the 1984 Act, the conferences were given the authority to control their members' use of service contracts and could prohibit their members' entering into such contracts.[1132]

The Ocean Shipping Reform Act of 1998[1133] changed these rules in two basic areas: (1) tariff filing and enforcement; and (2) confidential contracts. The 1998 Act no longer required the filing of tariffs with the FMC.[1134] Carriers must instead publish and make these tariffs available to their customers and other shippers electronically.[1135] Carriers may take independent action on five days notice (compared with the previous ten day period), while rate increases or new tariffs require thirty days advance notice.[1136] Time volume rates are permitted.[1137]

Conference agreements are restricted under the 1998 Act. They may neither prohibit a member carrier from negotiating a service contract with (a) shipper(s), require a member carrier to disclose a negotiation of a service contract or the terms and conditions thereof, nor otherwise restrict the rights of a member carrier to negotiate or enter into service contracts.[1138] In essence, these provisions ensure freedom of contract be-

1126. 46 U.S.C. § 1703(a)(1) (1984).

1127. *Id.* § 1707(a)(1).

1128. *Id.* § 1704(b)(8).

1129. *Id.* § 1703(a)(7).

1130. *Id.* § 1702(19).

1131. *Id.* § 1707(c).

1132. *Id.* § 1703(a)(7). William McCurdy, Jr., *Maritime Issues for the Year 2000 and Beyond: Contracting in the New Global Market*, 32 TRANSP. L. INST. (1999).

1133. 46 U.S.C. § 1701 (1999).

1134. *Id.* § 1707(a)(1).

1135. *Id.*

1136. *Id.* §§ 1704(b)(8) & 1707(d).

1137. *Id.* § 1707(b). The 1998 Act also amended the definition of a "service contract" to provide that it must be a separate written document; the writing requirement is not satisfied by bill of lading or a receipt. The contract may involve one or more shippers and one or more carriers or a conference of carriers, whereby the shipper or shippers commit to tender a certain volume of or portion of its cargo or freight revenue over a specified period of time, and the carrier or carriers commit to a specified rate or rate schedule and service level (e.g., assured space, transit time, port rotation, or similar service feature). The contract may also specify penalties for nonperformance. Thus, service contracts focus on rates and levels of service. The shippers need not form a shipper's association to negotiate a service contract *Id.* § 1702(19).

1138. *Id.* § 1704(c).

tween shippers and shippers associations in confidence a service contract with the carrier(s) of its choice.

The 1998 Act also repealed the provisions of earlier legislation that required a carrier to offer the same or equivalent service contracts to a similarly situated shipper.[1139] But both parties must ensure that their actions do not unjustly discriminate against ports or non-vessel operating common carriers [NVOCCs].[1140]

XXIV. Economic Trends Under Deregulation

The first two decades of deregulation were the darkest financial period of the airline, bus and trucking industries. They produced an unprecedented failure rate.[1141] More than 150 airlines went bankrupt.[1142] More than 1,000 motor carriers ceased operations every year beginning in 1983.[1143] More than half the general freight trucking companies disappeared.[1144]

Concentration became an epidemic in all modes of transport.[1145] The eight largest airlines, which in 1978 accounted for 81% of the domestic passenger market, dominated 94% by 1989.[1146] The seven largest railroads, which in 1979 accounted for 65% of revenue ton miles, had swollen to 89% by 1987.[1147] The eight largest motor carriers, which in 1978 accounted for 20% of that industry, had grown to 37% by 1987.[1148] And the bus duopoly became a monopoly with the merger of Greyhound and Trailways.[1149]

Mergers also proliferated in the airline and railroad industries. United Airlines acquired many of the international routes of Pan American World Airways, which was liquidated.[1150] American Airlines acquired Air Cal, Reno, and TWA as well as many of the international routes of Eastern Airlines, which was liquidated.[1151] Delta Air Lines acquired Western Airlines. Northwest Airlines acquired Republic Airlines,

1139. *Id.* § 1707(c).

1140. *Id.* § 1709(c).

1141. *See* Paul Stephen Dempsey, *Running on Empty: Trucking Deregulation and Economic Theory*, 43 Admin. L. Rev. 253, 254 (1991) [hereinafter *Running on Empty*].

1142. *Market Failure*, *supra* note 468, at 31.

1143. *Running on Empty*, *supra* note 1141, at 272.

1144. *Id.* at 273.

1145. *Id.*

1146. *Interstate Trucking*, *supra* note 498, at 223.

1147. *Id.*

1148. *Id.*

1149. *Id.*

1150. *See* Paul Stephen Dempsey, *Airlines in Turbulence: Strategies for Survival*, 23 Transp. L.J. 15, 39 [hereinafter *Airlines in Turbulence*].

1151. Air Commerce, *supra* note 57, at 216. TWA had earlier acquired Ozark Airlines. *Id.*

itself the product of the merger of North Central, Republic, and Hughes Airwest.[1152] Continental was the product of the merger of Continental, Texas International, New York Air, People Express, and Frontier Airlines, as well as several regional carriers.[1153] USAirways (formerly Allegheny Airlines) acquired Piedmont and PSA.[1154] Southwest Airlines acquired Muse and Morris Air.[1155]

Not only were national concentration levels at unprecedented levels, regionally, carriers had established hub-and-spoke systems, in which airlines maintained market power.[1156] Nearly all hubs were virtual monopolies, with megacarriers dominating more than 60% of gates, flights, and passengers.[1157] The General Accounting Office found that rates were 27% higher in monopoly hubs than in nonhubs.[1158] Pricing reflected the level of competition in any market, rather than marginal costs.[1159] The domination by giant airlines of hubs, landing and takeoff slots, computer reservations systems, frequent flyer programs made it exceedingly difficult for new entrants to challenge the established megacarriers.[1160]

Much of deregulation had been premised on assumptions that there were not significant economies of scale or scope in transportation (except, perhaps, in the railroad industry), and that should incumbents raise prices to supracompetitive levels, new entrants would be attracted like sharks to the smell of blood.[1161] In theory, actual or potential entry would curtail the extraction of monopoly profits and discipline the market.[1162] This was the theory of contestable markets, which provided the intellectual foundation for deregulation.[1163] But during the 1990s, new entrants accounted for less than 5% of the national market.[1164] With megacarrier domination of hub airport infrastructure, computer reservations systems, code-sharing regional airlines, and frequent flying programs, the prospectus for new entry appeared dim.[1165]

For railroads, mergers had also proliferated under a complaisant Interstate Commerce Commission, and its successor agency, the Surface

1152. *See Airlines in Turbulence, supra* note 1150, at 41.
1153. *Id.*
1154. AIR COMMERCE, *supra* note 57, at 216.
1155. *See Airlines in Turbulence, supra* note 1150, at 44 n.105.
1156. AIR COMMERCE, *supra* note 57, at 216-17.
1157. *Id.* at 217.
1158. *Id.*
1159. *Id.*
1160. *Id.*
1161. AIR COMMERCE, *supra* note 57, at 217.
1162. *Id.*
1163. *Id.*
1164. *Id.*
1165. AIR COMMERCE, *supra* note 57, at 217.

Transportation Board.[1166] Intense public criticism of the ICC's abdication of its antitrust responsibilities prevailed to force the Commission to disapprove the merger of the Santa Fe and Southern Pacific in 1986 and upon Congress to disapprove the sale of Conrail to the Norfolk Southern that same year.[1167] But by the dawn of the 21st Century, four major railroads dominated the nation—the Union Pacific, the BNSF, the Norfolk Southern, and CSX.[1168]

Perhaps the most consistent theme expressed by deregulation's proponents was that deregulation has caused a significant decline in fares.[1169] For example, Steven Morrison and Clifford Winston of the Brookings Institution maintained that price savings resulted in consumer savings amounting to some $6 billion a year.[1170] About $4 billion of that was attributed to business traveler time-savings because of more frequencies.[1171]

This has been a matter of some controversy. Some maintain that the hub-and-spoke phenomenon has caused the air transport system to become decidedly slower because both of circuitous routings, congestion, and delays at hub airports necessitated by passenger transfers.[1172] Moreover, much of the pro-deregulation literature fails to mention the pre-deregulation trend of declining fares which preceded 1978.[1173] In fact, except for a period of sharp fare declines from 1976 to 1979, fuel and inflation adjusted fares fell at a 30% faster rate in the decade preceding deregulation than in the decade subsequent to it.[1174]

The literature shows a decline in the rate of airline productivity growth after 1978.[1175] Deregulation critics point out that the pre-deregulation trend of flying increasing numbers of passengers nonstop in wide-bodied aircraft (Boeing 747s, McDonnell-Douglas DC-10s, and Lockheed L-1011s) was aborted with the development of hubs-and-spokes, which require smaller planes with higher seat mile costs.[1176] Hubbing also burns more fuel and consumes more labor and time.[1177]

Whatever the truth on whether deregulation has benefited consum-

1166. *Id.*
1167. *Id.*
1168. *Id.*
1169. AIR COMMERCE, *supra* note 57, at 217.
1170. *Id.*
1171. *Id.*
1172. *Id.* at 218.
1173. PAUL STEPHEN DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 28 (1990).
1174. *Id.* at 29-30. *See* Melvin A. Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179, 220 (1988).
1175. *Id.* at 217-18.
1176. *State of the Airline*, *supra* note 420, at 152.
1177. *Id.*

ers, its impact on the industry itself was profound. By 1992, the airline industry had suffered more than 150 bankruptcies and 50 mergers, and had lost all the profit it had made since the Wright Brothers flight at Kitty Hawk, plus $1.5 billion more.[1178] Alfred Kahn admitted, "There is no denying that the profit record of the industry since 1978 has been dismal, that deregulation bears substantial responsibility, and that the proponents of deregulation did not anticipate such financial distress—either so intense or so long-continued."[1179]

1178. *Id.* at 131. Competition oversight and financial stabilization was performed during the Air Mail contract period, and during the period of economic regulation (1938-1978). Economic growth and technological developments, coupled with benign governmental oversight, kept the industry profitable, and importantly, lowered consumer prices significantly until the recession of 1969-71. Potential economic collapse caused by excessive capacity, recession, and a sharp spike in fuel prices triggered by the Yom Kippur War and the Arab Oil Embargo was avoided in that period by the application of regulatory tools—a route moratorium, capacity limitation agreements, pass through of fuel in the rates, and route swapping. All that was viewed as anticompetitive and anti-consumer, and the industry was deregulated in 1978, the year in which it achieved record profitability. It was not to last long. During the 1981-83 recession, the industry lost $1.4 billion, and one major airline was liquidated. AIR COMMERCE, *supra* note 57, at 218.

The laissez-faire period which followed led to a roller coaster of industry consolidations in the 1980s, creating modest profitability for a short. Then recession, the Gulf War, and a spike in fuel caused economic collapse from 1990-94, during which the industry lost $13 billion. The President and Congress responded by creating the Baliles Commission, most of whose members had little enthusiasm for any governmental remedy beyond such indirect subsidies as releasing crude from the Strategic Petroleum Reserve and rolling back taxes. Direct subsidies were provided to one Minneapolis-based airline. Five major carriers collapsed into bankruptcy; two were liquidated. *Id.* 218-19.

With a growing economy in the later 90s, prosperity reappeared. But we are again back to financial collapse of a magnitude we have never seen before (losses of nearly $13 billion last year alone, absent the federal bail-out, and probably around $6-8 billion this year). This time, the government responded with socialism again—having the taxpayers bail out an industry which appears to have the characteristics of destructive competition whenever the economy softens. The U.S. government has not only become the financial fuel injector, but the financial lender insurer and insurer of last resort, holding a growing portfolio of airline stocks. *Id.*

Who would have imagined that a concept such as deregulation—designed to inject free market capitalism into an industry whose pricing and entry had been regulated for 40 years—would instead produce socialism. Regulation is not the antithesis of competition; socialism is.

1179. Alfred E. Kahn, *Airline Deregulation—A Mixed Bag, But A Clear Success Nevertheless*, 16 TRANSP. L.J. 229, 248 (1988) [citations omitted] [hereinafter *Deregulation, A Mixed Bag*]. Alfred Kahn did not promise that deregulation would produce a world of perfect competition. But his assumptions about economies of scale, barriers to entry and contestability reveal how well versed he was in the theory, and how it drove the economics and politics of deregulation.

Before Congress in 1977, he testified, "the assumption that you are going to get really intense, severe, cut throat competition just seems to be unrealistic when you are talking about a relatively small number of carriers who meet one another in one market after another." Kahn said, "I just do not see any reason to believe that an industry which is potentially rapidly growing, for which there is an ever-growing market, cannot prosper and attract capital." *Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works & Transp.*, 95th Cong. 178-79 (1978).

Speaking before the New York Security Analysts in 1978, he discounted, "The most general fear about [airline deregulation] is that when the CAB withdraws its protective hand from the

After deregulation, national and regional concentration reached unprecedented levels. One source described five major issues of concern of airline deregulation:

- The competitiveness of the industry (its effects on the fares and level of service provided to consumers today and the prospects of reduced competition from further industry concentration),
- The long-term financial stability of the industry,
- Possible discrimination against consumers of different types or in different parts of the country,
- The safety provided to the public by airlines and the FAA, and
- The ability of the federal government to respond to airport and airway capacity constraints.[1180]

Because performance of the industry under deregulation deviated significantly from the economic model of near perfect competition predicted, some of deregulation's early proponents reevaluated their hypotheses. Michael Levine, among the most staunch early proponents of deregulation, and whose early literature on the subject found no economies of scale of significance in commercial aviation,[1181] subsequently developed a theoretical justification for and found the existence of

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doorknob, the door will open to destructive competition - to wasteful entry and cut-throat pricing - that will depress profits, render the industry unable to raise capital, and so cause a deterioration in the service it provides - on the whole, it must be admitted good service." That was before deregulation. *State of the Airline*, *supra* note 420, at 149 (quoting Alfred E. Kahn, Talk to the New York Society of Security Analysts (Feb. 2, 1978)).

A decade after deregulation, Kahn confessed, "There is no denying that the profit record since 1978 has been dismal, that deregulation bears substantial responsibility, and that the proponents of deregulation did not anticipate such financial distress—either so intense or so long-continued." That was said before the $13 billion losses of airline industry losses of 1990-94, or the $21 billion of losses in 2001-02. *Deregulation, A Mixed Bag*, at 248.

Also in 1988, Kahn put out the second edition of his regulatory economics textbook, wherein he wrote, "The major prerequisites [of destructive competition] are fixed or sunk costs that bulk large as a percentage of total cost; and long-sustained and recurrent periods of excess capacity. These two circumstances describe a condition in which marginal costs may for long periods of time be far below average total costs. If in these circumstances the structure of the industry is unconcentrated—that is, its sellers are too small in relation to the total size of the market to perceive and to act on the basis of their joint interest in avoiding competition that drives price down to marginal cost—the possibility arises that the industry as a whole, or at least the majority of its firms, may find themselves operating at a loss for extended periods of time." ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, II-173 (2d ed. 1988).

A few years later, when Kahn was asked whether he anticipated that deregulation would lead to such unsatisfactory financial results, he said, "No, I talked about the possibility that there might be really destructive competition, but I tended to dismiss it. And that certainly has been one of the unpleasant surprises of deregulation." Kahn said, "We thought an airplane was nothing more than marginal costs with wings." *Airlines in Turbulence*, *supra* note 1150, at 87.

1180. WINDS OF CHANGE, *supra* note 428, at 43.

1181. *See* Note, *Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416, 1439 (1965).

substantial economies of scale and scope in the industry.[1182]

The early economics literature also emphasized the potential contestability of airline markets. Subsequent evaluation of commercial aviation finds little evidence of contestability.[1183] As Charles Rule, Assistant Attorney General for Antitrust observed, "[M]ost airline markets do not appear to be contestable, if they ever were. . . . [D]ifficulties of entry, particularly on city-pairs involving hub cities, mean that hit-and-run entry is a theory that does not comport with current reality."[1184]

XXV. Summary and Conclusions

The transportation industry has undergone a rather remarkable metamorphosis—from horses and wagons, to steamships, to railroads, to trucks and automobiles, to aircraft—a transformation that is far from over. The evolution of technology, of America's economy, and indeed, of economic theory and political ideology have all contributed to the relationship between government and this important infrastructure industry, one which today accounts for approximately 16% of the gross national product.[1185]

Few industries play as broad or vital a role in the U.S. economy as transportation. Throughout the nation's history, a network of roads, canals, railroads, and airways has spurred growth by making possible the movement of goods from one market to another.[1186] Transportation has historically been identified as an industry that is "affected with a public interest."[1187] Indeed, the common carrier obligation—the principle (derived from common law) that common carriage is open to all, upon reasonable request, on fair and nondiscriminatory terms—has been imposed upon transportation companies since the Middle Ages. Accordingly, federal regulatory oversight of the surface transportation industry has long been considered necessary and justified to protect the public's interest in having adequate transportation available on reasonable terms.

Federal, state, and local governments in the United States have a

1182. *See* Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. REG. 393, 492-494 (1987).

1183. *See* Elizabeth E. Bailey & Jeffrey R. Williams, *Sources of Economic Rent in the Deregulated Airline Industry*, 31 J. L. & ECON. 173, 199 (1988); Levine, *supra* note 1182, at 405-08. WINDS OF CHANGE, *supra* note 428, at 25.

1184. *State of the Airline*, *supra* note 420, at 153 (citing Charles Rule, *Antitrust and Airline Mergers: A New Era* 15, 18 (speech before the Int'l Aviation Club, Washington, D.C., Mar. 7, 1989)).

1185. THE ENO TRANSP. FOUNDATION, TRANSPORTATION IN AMERICA, 38-42 (12th ed. 1994).

1186. By the mid-1990s, outlays for transportation-related goods and services in the U.S. amounted to more than $1.025 trillion annually (16% of gross national product), of which nearly $300 billion was attributable to the for-hire freight and passenger sectors. *Id.*

1187. *Munn*, 94 U.S. at 130.

long history of building, financing, subsidizing, and promoting transportation. The land grants and government subsidies helped build the railroads; the nationalization of rail passenger service helped restore the health of the freight railroads. Government carries the mail. It builds the roads, highways, transit lines, airports, and seaports. It does all this because it understands the profound positive social and economic externalities transportation potentially offers. Whenever possible, the provision of transportation services in the United States has been left to private firms (a/k/a common carriers). When it has not been economically feasible, such as with airports, air traffic control and the airways, the government has assumed responsibility—state and local governments through ownership and operation of airports, and the federal government through capital funding support for airports and operation of the air traffic control system.

Federal regulation of the transportation sector of the United States' economy has served various purposes: to remedy market deficiencies (such as lack of effective competition, or to remedy destructive competition), to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the States. These purposes and the manner in which regulation has been implemented to achieve them affect not only the performance of the companies and industries in this sector, but also the ability of the United States to lead the global economy.

In 1887, Congress passed the Interstate Commerce Act to protect the shipping public from the monopoly power of the rail industry, and created the Interstate Commerce Commission to carry out that regulatory charge.[1188] In 1935, the Commission's regulatory authority was extended to include the nascent interstate trucking and bus operations.[1189] Other sectors of surface transportation—pipelines, domestic water carriers, and freight forwarders—were subjected to economic regulation in 1910, 1940, and 1942, respectively.[1190] Airlines were regulated in the same fashion beginning in 1938.[1191] Federal economic regulation of transportation developed into a comprehensive web of governmental oversight of entry and exit, rates, consolidations, and service quality. Regulation reached its high water mark in the 1950s and 1960s.

In the late 1970s and early 1980s, Congress began to pare and refine federal transportation regulation to reflect contemporary industry conditions and evolving ideological attitudes. The result was to reduce significantly the federal presence in the interstate transportation industry.

1188. *See Genesis & Evolution*, *supra* note 2, at 336.
1189. *See id.* at 344.
1190. *See id.* at 343 n.51.
1191. *Id.*

Legislative regulatory reform began in the railroad industry with the 3-R Act of 1973 and 4-R Act of 1974, followed a few years later by the Staggers Rail Act of 1980. Airlines followed, with the Air Cargo Deregulation Act of 1977, the Airline Deregulation Act of 1978, and the Civil Aeronautics Board Sunset Act of 1984, which terminated the Civil Aeronautics Board, and transferred its remaining responsibilities to the U.S. Department of Transportation.[1192] The Motor Carrier Act of 1980 and

1192. The five-year period from 1976 to 1981 will be remembered as perhaps the most active in the almost 100-year history of governmental regulation of transportation. During the decades surrounding 1900, the federal focus was limited to railroads and ocean carriers. Indeed, concern with rail transportation prompted the creation of the nation's first independent regulatory agency, the Interstate Commerce Commission. During the 1930's, federal concern again focused on the problems confronting transportation, leading Congress to regulate several new modes of transport: motor, bus, inland water, and air carriers, as well as freight forwarders and brokers. But beginning in the mid-1970s, national concern over the economic health of railroads led Congress to promulgate successive pieces of legislation designed to stimulate the rail industry and avoid future problems of the type experienced by Conrail, the Rock Island, and the Milwaukee Road. Thus, the 4R Act of 1976 and the Staggers Rail Act of 1980 attempted to free the rail industry from excessive governmental intervention, making it possible for the industry to enjoy the economic opportunities available in the marketplace. Congress also freed rail carriers from the obligation of providing passenger service by creating the federally subsidized Amtrak. AIR COMMERCE, *supra* note 57, at 223.

Similarly, the regulatory scheme established by the Civil Aeronautics Board led Congress to deregulate air transportation under the Air Cargo Deregulation Act of 1977 and the Airline Deregulation Act of 1978. The motor carrier industry also came under legislative and regulatory scrutiny that culminated in the passage of the Motor Carrier Act of 1980, the Household Goods Transportation Act of 1980, and the Bus Regulatory Reform Act of 1982. *Id.*

Few industries have undergone such a comprehensive reevaluation by Congress in such a short period of time as has transportation. This reevaluation represents a concern that government can become archaic in its ways and fail to keep pace with a modern, rapidly growing, industrialized society. Occasionally, it is desirable for Congress to pull out the old statutes and dust them off, to examine the "dinosaur" agencies and revamp them as necessary and to modernize the regulatory structure and improve its organization and procedures in order to ensure that the public interest is best served. It is clearly in the public interest for Congress to maintain a close working relationship with the agencies under its control. *Id.*

The Seventh Circuit summarized the vitality of legislative activity in the transportation area when it observed:

> "Deregulation" is the current "buzzword" with respect to all forms of transportation. Beginning under the Jimmy Carter administration with the Airline Deregulation Act of October 24,1978, 92 Stat. 1705, 49 U.S.C. s 1301 et seq. whose title describes it as an Act "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services," the increased reliance on what President Ronald Reagan has called "the magic of the market place" was extended to motor carriers by the Act of July 1,1980, 94 Stat. 793, 49 U.S.C. s 10101, and to railroads by the Act of October 14,1980, 94 Stat. 1895, 49 U.S.C. s 10101 (known from the name of its House sponsor, as the "Staggers Rail Act of 1980"). Likewise, one day later, the Household Goods Transportation Act of October 15, 1980, 94 Stat. 2011, 49 U.S.C. s 10101 note, . . . was enacted.
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> Historians might philosophize that excessive reliance upon market forces may prove shortsighted and resurrect some of the ancient evils which led to the enactment in 1887 of the Interstate Commerce Act in the first place. Was it not the uninhibited operation of marketplace forces which enabled John D. Rockefeller's Standard Oil Company to

the Household Goods Act of 1980 significantly reduced federal economic regulation of trucking operations.[1193] Congress addressed and reshaped regulation of the intercity bus industry in the Bus Regulatory Reform Act of 1982.[1194] The Surface Freight Forwarder Deregulation Act of 1986 deregulated freight forwarders, other than those handling household goods.[1195] The Negotiated Rates Act of 1993 addressed problems arising out of filed rate regulatory requirements in the trucking industry.[1196] The Trucking Industry Regulatory Reform Act of 1994 further reduced federal regulation of the trucking industry.[1197] The ICC Termination Act of 1995 sunset the Interstate Commerce Commission, deregulated and amended certain functions, and transferred jurisdiction over rail, motor, bus, broker, freight forwarder and pipeline services to the newly created Surface Transportation Board [STB] and the DOT.[1198] And a rider to an FAA appropriations act preempted the States from continuing intrastate regulation of motor carriers.

At this writing, railroads have consolidated into four major lines; the bus industry has one large survivor; and several hundred airlines and trucking companies have gone bankrupt.

In the 19th Century, market failure gave birth to transport regulation. The public interest in transportation was deemed paramount. Nearly a century after economic regulation was born, an expanding, even inflationary economy, coupled with a perceived failure of the regulatory mechanism, gave birth to deregulation. Undoubtedly, the pendulum of American public policy will swing again. Like transportation itself, public policy in this vital infrastructure industry is in perpetual movement.

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obtain from railroads a rebate, not only upon its own traffic, but also upon that of its competitors?

N. Am. Van Lines, Inc. v. Interstate Commerce Comm'n, 666 F.2d 1087, 1089 (7th Cir. 1981).

1193. AIR COMMERCE, *supra* note 57, at 223-24.

1194. *Id.* at 224.

1195. *Intermodal Transportation*, *supra* note 780, at 388.

1196. *Id.*

1197. *Id.* at 388-89.

1198. *Id.* at 389. The STB is a three-member independent panel within the U.S. Department of Transportation. The MCIA is a part of the DOT's Federal Highway Administration. Jurisdiction over railroads and pipelines is now vested in the STB. Jurisdiction over motor carriers, water carriers, brokers and freight forwarders is now vested in the Office of the Secretary of Transportation. *Id.*