

ISTEA Reauthorization and the National Transportation Policy*

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I. INTRODUCTION

A. ISTEА REAUTHORIZATION AND THE NATIONAL TRANSPORTATION POLICY

Near the end of a long and distinguished career of public service, shortly before his retirement from Congress, the Honorable Norman Y. Mineta, then Chairman of the Surface Transportation Subcommittee, at the 1995 Annual Dinner of the International Institute for Surface Transportation Policy Studies at San Jose State University said, "[T]he crucial question in transportation today is: What should government do? And what should it leave to others?" Mr. Mineta thus framed the paramount transportation policy issue facing us as we begin a new century. The answer we give to Mr. Mineta's "CRUCIAL QUESTION" will undoubtedly affect the course that the Nation pursues well into the future. Soon, reauthorization of the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. 102-240 (ISTEA), either by enactment of the Administration's bill, the National Economic Crossroads Transportation Efficiency Act of 1997 (NEXTEA) or one of the other proposals now before the Congress, will reveal how we embark upon the new century answering the Crucial Question. This paper will explore how the answer we give to the Crucial Question with ISTEА reauthorization legislation comports with the national transportation policy.

B. THE PAST AS PROLOGUE

Mr. Justice Holmes' conclusion toward the end of the last century in *The Common Law* that, "[T]he life of the law has not been logic; it has been experience," has new meaning in the field of transportation law and policy. What Mr. Justice Holmes called the "felt necessities of the time" may be seen in each generation's framing and answering of what they perceive to be the crucial questions of their time. Does Abraham Lincoln's analogy of "A House Divided" have renewed application today when we find ourselves half slave to publicly owned transportation and

half free enterprise? Will this generation's answer to the Crucial Question propel us toward the former or return us to the latter? Indeed finding ourselves at a "crossroads," will we opt for traditional capitalism, or something else?

C. THE NATIONAL TRANSPORTATION POLICY

It is said that physicists are searching for the Grand Unified Theory (GUT) to explain all the laws of the universe. I believe that we in transportation ought to be seeking the Grand Unified Transportation Theory (GUTT) to heal the artificial division that exists in American transportation policy today and to return us to our free enterprise roots. Saying that we have a National Transportation Policy (NTP) is like saying we have a Rule Against Hearsay. In Title 49 there are currently five transportation policies: Rail Transportation Policy, §10101; National Transportation Policy, §13101; Air Commerce and Safety Policy, §40101; National Mass Transportation Policy, §5301; and National Intermodal Transportation System Policy, §5501. Additionally, the U.S. Dept. of Transportation (USDOT) published its National Freight Transportation Policy in the *Federal Register* on Jan. 6, 1997.¹

D. HISTORY OF THE NATIONAL TRANSPORTATION POLICY

Professor Farris traced our NTP to the Treaty of Paris in 1763 and the passage of the Northwest Ordinance in 1787.² Free enterprise capitalism was the key to our transportation industry growth, with Adam Smith's "Invisible Hand" receiving occasional support from the taxpayers for turnpikes, canals and railroads. When the excesses of human nature grew unacceptable, during the age of the Robber Barons, regulation by government was the response of that generation to those "felt necessities of the time." Private ownership of industry, however, was retained, except for those natural monopolies like water, sewer and power. Uniquely, America rejected the notion that the government would own our transportation industries.³ Although the railroads were nationalized during

1. See 49 U.S.C. §§ 10101, 13101, 40101, 5301, 5501 (1994). The "findings and purposes" for promoting commercial space transportation read like policy-making. 49 U.S.C. §70101(a), (b) (1994).

2. Martin T. Farris, *National Transportation Policy: Fact or Fiction?*, in MODERN TRANSPORTATION: SELECTED READINGS 425 (Martin T. Farris & Paul T. McElhiney eds., 2d ed. 1973). [hereinafter FARRIS].

3. See, generally, HARVEY A. LEVINE, *National Transportation Policy: A Study of Studies* (1978) (chapters 1, 4, and 5 discuss in greater detail this policy); PHILIP D. LOCKLIN, *Economics of Transportation* (5th ed. 1960); DUDLEY F. PEGRUM, *Transportation Economics and Public Policy* (1963) (chapters 3, 16, and 20 highlight the United States and its attempts to regulate transportation policy); ROY J. SAMPSON & MARTIN T. FARRIS, *Domestic Transportation: Practice, Theory and Policy* (3d ed. 1975); GEORGE W. WILSON, *Economic Analysis of Intercity*

WWI, even one of our most gifted orators, William Jennings Bryan, could not convince the American people that the "Plumb Plan" of joint federal-state ownership was preferable to privatization.⁴ Despite its many faults, the American people chose capitalism rather than switching to statism or socialism. The Transportation Act of 1940 was the first express transportation policy by Congress. However, almost each session of Congress since has added to or altered transportation policy, yielding a result that one should expect when political decision-making seeks solutions attempting to please every transportation need of a diverse, growing population. Consequently, the NTP is taught to transportation students as "somewhat vague" and containing "numerous conflicting provisions."⁵ As Professors Coyle, Bardi and Novack conclude in their transportation textbook:

The federal government's policy toward transportation is a composite of these federal laws, rules, funding programs, and regulatory agencies; however, there is no unified federal transportation policy statement or goal that guides the federal government's actions.

In addition to the Congress and the president, there are more than 60 federal agencies and 30 congressional committees involved in setting transportation policy. There are two independent regulatory agencies that interpret transport law, establish operating rules, and set policy. Lastly, the Justice Department interprets statutes involving transportation and reconciles differences between the carriers and the public. Each of these groups has made decisions that have affected the development of transportation.⁶

Whether in war or peace, the NTP reflected rising concern with transportation problems in the United States and in other developed nations.⁷

E. EVOLVING TRANSPORTATION POLICY

Of the many commentators, Professor James C. Nelson has given us

Freight Transportation (1980); DONALD F. WOOD & JAMES C. JOHNSON, *Contemporary Transportation* (1980).

4. ROBERT W. CHERNY, *A Righteous Cause, The Life of William Jennings Bryan* 159 (1994).

5. JOHN J. COYLE, ET AL., *Transportation* 104, 108 (4th ed. 1994). [hereinafter COYLE].

6. *Id.* at 104.

7. DAVID BANISTER & PETER HALL, *Transport and Public Policy Planning* (1981); JOSEPH BERECHMAN, *Public Transit Economics and Deregulation Policy* (1993); K.J. BUTTON & D. GILLINGWATER, *Future Transport Policy* (1986); PAUL W. DEVORE, *Introduction to Transportation* (1983); PUBLIC POLICY AND TRANSIT SYSTEM MANAGEMENT, (George M. Guess, ed. 1990) [hereinafter GUESS]; DAVID W. JONES, JR., *URBAN TRANSIT POLICY: AN ECONOMIC AND POLITICAL HISTORY* (1985) [hereinafter JONES]; JOHN B. LANSING, *Transportation and Economic Policy* (1966); AURELIO MENENDEZ, *Estimating Capital and Operating Costs in Urban Transportation Planning* (1993); A.W.J. THOMPSON & L.C. HUNTER, *The Nationalized Transport Industries* (1973).

enlightening perspective on the NTP's evolution.⁸ Writing during the Kennedy administration, Professor Nelson said "recent studies of regulatory agencies and public policy in transportation attest eloquently to the continuing public interest in the long-standing issue of the appropriate role for government in the transportation sector of the economy."⁹ At that point in time he saw "little legislative action," but that was quickly changed as Congress tackled mass transit problems. However, Professor Nelson did raise the "Crucial Question" by saying, "The question of the proper role of the government in the allocation of traffic and resources in transport" was worthy of "a general review and evaluation." He saw two roles for government in transportation: promotion and regulation.

In the United States, government shares with private enterprise the risks and costs of providing transport in a mixed system of public and private enterprise. Governments generally participate by furnishing the basic ways (and some terminals) while private enterprise conducts carrier operations over public facilities. Mixed enterprise is characteristic of air, highway and water transport but not of pipeline and railway transport. As most countries operate railway under public enterprise, this country's mix of private and public enterprise is unique.

The Crucial Question presented itself time and again in the post-war era, and so many studies were made that studies of the studies appeared.¹⁰ Every aspect of transportation has been examined and re-examined. Reflecting its importance to the economy and society, commissions and committees have devoted forests of paper and vast resources to this endeavor. Regardless of the report or study, they all recognize the role of federal tax dollars on our transportation systems.¹¹

II. SUBSIDIES

A. TRANSPORTATION SUBSIDIES AND POLICY

Call it aid, grants, assistance, tax breaks, or subsidies, there is little difference from a policy perspective. However, since "subsidy" has be-

8. James C. Nelson, *Government's Role Toward Transportation*, TRANSPORTATION JOURNAL (1962) (reprinted in *Modern Transportation Selected Readings* 416-24 (Martin T. Farris & Paul T. McElhiney, eds., 2d ed. 1973)). [hereinafter NELSON].

9. *Id.*

10. HARVEY A. LEVINE, *National Transportation Policy: A Study of Studies* (1978). See LEVINE, *Chronology of Research Studies*, Ch.2. [hereinafter LEVINE].

11. GUESS, at 1-2. Professor Guess concludes that "federal aid remains the dominant force in shaping activities by state and local transit agencies" but "the incentives provided are often irrational from the perspectives of efficiency and effectiveness." *Id.* See also, JONES, *supra* note 7. Professor Jones concludes that federal subsidies have not stabilized the industry; it is necessary for changes in transit's basic way of doing business if mass transit is to play a significant role in the future of urban transportation. Transit subsidies are necessary and appropriate, however endlessly increasing is neither.

come a dirty word, we seldom see it used. Instead, "private-public partnership" has emerged as a popular phrase to use. How do transportation subsidies distort our transportation systems? First, however, can we agree on a definition of "subsidy"? It has been authoritatively said about subsidies:

One remarkable attribute of Government subsidies is the capacity of the very words themselves to conjure up marvelously diverse images in different minds. To most economists the subsidy is a useful fiscal instrument whose major purpose is to improve the private sector's allocation of resources among their alternative uses. To many laymen, on the other hand, subsidies are an elusive and worrisome phenomenon, frequently hidden from the general view and often suspected of being used more for private gain than for the public good. These widely divergent viewpoints appear to come mainly from differing perceptions of the efficiency with which private markets function. To the laissez-faire enthusiast there is little or no legitimate role for subsidies since, as he sees the world, free markets do the best job of organizing production to satisfy present and future consumer demands. Others, worried about the lack of strong competitive pressures for efficiency in concentrated markets and perceiving pervasive externalities, both beneficial and harmful, which are not taken into account by private business, actively support extensive Government intervention, through subsidies and other means, in the operation of private markets.¹²

And, another highly respected economist said in the same study:

Congress is not always adequately equipped to evaluate expenditure programs; the device of holding hearings is far from being a complete substitute for objective evaluation. *All too often hearings are dominated by the special interests who expect to benefit from them rather than by those who have to pay for them*; thus representatives of nonfarm sectors are rarely heard by the congressional committees on agriculture. . . . Another reason why special benefit programs need particular attention is the inertia in our political system, which tends to preserve such programs long after their initial justification (if indeed there was one) has disappeared. *These programs tend to create vested interests, whose anguished cries of ruin at the slightest suggestion of reform are usually loud enough to drown out the voice of reason*. Even if a program is widely conceded to be unsatisfactory, Congress is likely to let sleeping dogs lie by extending it unchanged rather than reforming it; the recent extension of the Sugar Act is one example. The laxity of our rules concerning political contributions may well aggravate the problem of inertia.¹³(emphasis added)

12. George F. Break, *Subsidies as an Instrument for Achieving Public Economy Goals*, THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS 1 (compiled by U.S. Congress Joint Economic Comm. 1972).

13. Hendrick S. Houthakker, *The Control of Special Benefit Programs*, THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS 8 (compiled by U.S. Congress Joint Economic Comm. 1972).

B. THE TAXPAYERS' IDEAL SUBSIDY

These definitions of "subsidy" are as sound today as they were when those economists testified to the Joint Economic Committee of the Congress. Inducing private sector behavior with transportation subsidies has long been a feature of American politics and government. For the individual a particular subsidy may be "good" or "bad," depending on whether he pays for it or receives it. But for the Nation, a particular subsidy may diminish an "inherent advantage" of one mode of transportation to the advantage of a competing mode. We need to ask: Who actually benefits from the subsidy? The Grandfather of all transportation subsidies may have been the land grants to the railroads. In this case it was we taxpayers who enjoyed the profits. Professor Nelson described the fiscal ramifications of the land grants and other subsidies to the railroads, in exchange for reduced freight rates (under former Section 22 of the Interstate Commerce Act) for government freight and military passengers. By June 30, 1943, the rail rate breaks for the taxpayers were estimated to be \$580 million, "a sum several times the value of the granted land at the time land grants were awarded and in excess of the sums derived by the railroads from the grants."¹⁴ Thus, this precedent-setting transportation subsidy proved that the taxpayers could actually profit from a Congressional deal to promote transportation, *viz.*, infrastructure improvements. In other words, with private sector profit motives allowed to control, the promoters and the taxpayers (investors) both made huge profits. Have we learned from our history? Did subsequent Congressmen make equally advantageous agreements for later generations of taxpayers?

C. SUBSIDIES DISTORT TRANSPORTATION INDUSTRY RESULT

Before the railroad land grant subsidies, canals had been constructed by state agencies and operated with tolls recovering capital and operating costs. But just as highway subsidies would later affect the railroads' profitability, since about 1880, by which time the railroads had largely superseded the canals, the federal and state governments have provided improved waterways entirely free of user charges except on the St. Lawrence Seaway. Like a house of cards, tinkering with one card inevitably affects the whole transportation structure.

Even earlier, private turnpikes provided main highways on a commercial basis; but, since 1850, highways have been provided by state and local governments with ever-increasing federal aid (since 1916) for construction of limited federal-aid systems and with user fee support in the modern period.¹⁵ Finally, the federal government early undertook to pro-

14. NELSON, *supra* note 8, at 423 n. 3.

15. Federal transportation outlays for all modes increased from \$23.961 billion in 1980 to

vide the civil airways and facilities, with the synergistic benefits accruing to the airlines. As Professor Nelson concluded, "Over the years, tremendous sums have been spent by government in making way and terminal facilities available for use by private carriers; in giving direct subsidies to certain classes of carriers; and in engaging in expensive scientific research, and development for national security, making as a by-product much valuable technology available to the air carriers without charge to them."¹⁶

The national purposes for giving financial assistance to transport development are important factors in this evaluation. Clearly, railroad grants had the unique national objective of stimulating initial settlement of undeveloped lands in the West by rapid development of a new transport technique, greatly reducing long-distance costs and increasing service speeds. Air transport aid sought improved postal communication, rapid introduction of a new technology, adequate equipment, aircraft manufacturing facilities and skilled personnel for national defense. Federal highway aid had improvement of rural postal services and stimulation of interstate commerce as its principal purposes; in addition, an underlying national defense interest has existed in a highly developed system of interstate highways adequate for the needs of commerce and the military.

State highway investment largely has been in response to the *way-service demands* of a rapidly multiplying ownership of motor vehicles. The principal objectives for inland waterway improvement, including the no-toll policy, have been to give landlocked areas lower freight rates and to furnish additional competition for the railroads. The overall historical record indicates that perhaps the strongest motive for federal transport subsidies has been to bring about, more rapidly than otherwise would occur, the economic and social benefits of improvements in transport service and of lowered transport costs *when entirely new transport technology became available*. This was true of federal aids for highway and air transport development. That motive also stimulated the land grants to railroads, but with the significant difference that a century ago far greater emphasis was necessarily placed on land settlement and resource development in pioneering areas. The introduction of modern air, highway and waterway transport came long after the railroads had already opened up most of the remote and under-developed regions of this country. The grant of subsidies to those modes was intended to exploit their technologies at a faster rate than market demand could accomplish so that the

\$39.064 billion in 1994, measured in current dollars. U.S.Dept. of Transport., *National Transportation Statistics 1997* at 98 (1996).

16. NELSON, *supra* note 8, at 418.

economy might earlier have the new types of services and competitive transport.¹⁷

Professor Nelson also concluded that as a broad generalization, the American system of mixed enterprise in transport has worked tolerably well. He said that it has produced a fully-developed, large-scale, multiservice and essentially competitive transport system that is the envy of most countries. Of course, when he wrote the United States was not the world's largest debtor nation! In general, he stated, the promotional policies accomplished their purposes and the government has made a truly important contribution to the American transport system. But as government promotion also has created excess facilities and inefficient transport, this by no means implies that the best and most efficient system has resulted. Nor does it mean that past policies necessarily should be continued indefinitely.¹⁸

But, looking objectively at the justification for continuing subsidies to domestic transport, it seems clear that most historical reasons for subsidies have disappeared long ago. There is, Nelson said, no present need for land grants to stimulate initial development of railways. Also, motor transport is now a mature and thriving industry, operating over highways with high-type surfaces throughout the land. Although expanding traffic and urban congestion obviously require highway expansion, plainly there is no longer any need for public subsidies to introduce the advantages of motor transport to the American economy! He believed that most needed highway development would come as rapidly as can be *economically justified* in response to *effective demand* on the basis of appropriate user fees and tolls. The quick additions of modern highways in congested areas by state-owned toll road authorities suggest that the required facilities would come sooner on a full commercial basis than under existing so-called free-road policies.

Air transport, he said, should no longer be regarded as an infant industry in need of developmental subsidies, except for non-economic subsidization of local and metropolitan airlines to give rural and urban communities more advantages of the air age. The rapid introduction of airline technology did not cease, nor even slacken, with cessation of air-mail subsidies to the trunk lines. He predicted that placing user fees on the civil airways over a period of time would not seriously impede beneficial innovations.

The traffic growth experienced by barge lines on well-located waterways suggests that free channel and lock services are no longer essential to intensive use of inland waterways. Since the traffic on marginal water-

17. *Id.*

18. *Id.*

ways does not rise to efficient levels without user fees, serious questions can be asked concerning the economic justification of continued investment in such waterways.¹⁹

Professor Nelson believed that the beneficial general results of this country's policy of stimulating economic development through encouraging adequate, efficient and competitive transport with subsidies have long ago been achieved. Today, he said, the problem of transport policy is radically different than during the 1830-1930 period. He also said, "Insufficient attention has been given to this fact in formulating transport policies in recent years."

The transport problem today, and in the foreseeable future, is to promote the right economic development of each of the five contending agencies, including coordinated services by two or more modes. The primary aim of policy can no longer be to foster initial economic development of the western regions, nor even to hasten the introduction of new transport industries by means of subsidies. This is not to say that transport modes now not visualized will never be invented. Rather, present-day policymakers face well-defined and critical questions growing out of the existing relations among carriers, the current promotional and regulatory policies, and the competitive structure of transport. Thus, it would seem wholly unreasonable to leave the question of what subsidies may be desirable for promoting rapid development of a new transport mode until someone invents it and operations appear to be practicable.²⁰

III. THE PAST GOVERNMENT ROLE: REGULATION

The remaining general problem of government relations to transport is how best to promote adequate and efficient transport by self-sustaining modes, all paying appropriately adjusted user fees or providing their own way.²¹ The concept of "self-sustaining modes" of transportation has, however, come to mean two completely different things, depending on whether the carrier is in the public or private sector. In the corporate form a carrier can seek out a variety of sources of income in the marketplace, whereas the public sector carrier lacks the freedom to engage in commercial activities. So, since farebox revenues are usually a small portion of total costs of operation (and a smaller portion of overall expenses), taxpayers subsidies are thought to be the only way to keep the operation moving. However, as recent calls for freight revenue for Amtrak reveal, if the public sector carriers were returned to the private sec-

19. *Id.*

20. *Id.* at 419.

21. *Id.* For an overall, in depth discussion of the implications of deregulation of the transportation industry, see, PAUL S. DEMPSEY, *The Social and Economic Consequences of Deregulation: The Transportation Industry in Transition* (1989).

tor, and enough other revenue attracted, e.g., freight revenues, then the need for taxpayers subsidies would diminish or cease altogether. It is when we answer the Crucial Question by saying that transportation must solve social problems (e.g., Welfare to Work; Spare the Air; Rebuilding America) that we justify continued taxpayer subsidies.²²

Professor Nelson asked: "How, then, can the role of government in transport be adjusted to serve a more economic purpose?" And he answered the Crucial Question in this way:

Is it assumed that government's role is ideal when it encourages provision of essential transport at the least total costs, including social costs. Over the long run, the role of government can become more economic only to the extent that promotional and regulatory policies are designed to be fully consistent with achieving maximum overall economy in transport and high standards of efficiency in each of the several modes. The national transport problem of today is not to stimulate an initial supply of efficient techniques of transport nor to encourage development of vast underdeveloped land resources, but rather it consists of facilitating the right economic development of each mode of transport, including the essential public way and terminal facilities. Consequently, in the promotional sphere government should not continue subsidy after its economically valid purposes have been accomplished. And so much of the nation's capital is involved in public transport investments that they should be limited by fully economic investment criteria and by universal user fees, properly adjusted to the conditions of utilization and to require all transport alternatives and resource costs involved to be considered in expanding public transport facilities.²³

After WWII a series of detailed government reports analyzed how we failed in practice to attain the goals of the NTP.²⁴ Professor Farris identified two types of NTP: "informal institutional policy" and "formal statutory policy."²⁵ In a detailed analysis which is equally valid today, he

22. According to a study by Professor Don H. Pickrell, Harvard University, and Transportation Systems Center, U.S. Department of Transportation, Cambridge, Mass., transit subsidies are rapidly increasing to cover growing transit systems' operating losses all across the Nation. Don H. Pickrell, *Rising Deficits and the Uses of Transit Subsidies in the United States*, JOURNAL OF TRANSPORT ECONOMICS AND POLICY 281, 281-98 (1985).

23. James C. Nelson, *Government's Role Toward Transportation*, TRANSPORTATION JOURNAL at 422.

24. The "Sawyer Report" of the U.S. Dept. of Commerce, ISSUES INVOLVED IN A UNIFIED AND COORDINATED FEDERAL PROGRAM FOR TRANSPORTATION (1949); the "Weeks Report" (sometimes called the Cabinet Committee Report), Presidential Advisory Committee on Transportation Policy and Organization, A REPORT TO THE PRESIDENT ON REVISION OF FEDERAL TRANSPORTATION POLICY (1955); the "Mueller Report," U.S. Dept. of Commerce, FEDERAL TRANSPORTATION POLICY AND PROGRAM (March 1960); the "Doyle Report," 87th Cong., NATIONAL TRANSPORTATION POLICY (prepared for the U.S. Senate Comm. on Interstate and Foreign Commerce, by the Special Study Group on Transportation Policies in the United States 1961).

25. FARRIS, at 425.

concluded that the NTP is incomplete and inconsistent and contains indefinable terms.²⁶ He concluded:

Undoubtedly the national transportation policy is a *fiction*. As stated in the declaration, it has many shortcomings. It is incomplete, inconsistent, and indefinable. From the point of view of containing generally acceptable ideas, the declaration of national transportation policy is a *fact*. It does contain acceptable goals and it does establish ideals to be sought. Although one may be critical of the goals and ideals, it is a fact that they are indeed present in the declaration. In a word, national transportation policy is both a fact *and* a fiction.²⁷

Written when the USDOT was new, Professor Farris accurately predicted that "the executive branch will assume a larger and more forceful role than in the past."²⁸ Since then, the Crucial Question has been answered time and again by increasing the federal government's role in transportation.²⁹ For example, the President's Executive Order No. 12893, Jan 26, 1994,³⁰ requires the agencies to "seek private sector participation in infrastructure investment and management," but reliance on taxes, rather than user fees, e.g., farebox revenues (the passengers' "co-pay" in current parlance) is the choice our elected representatives make as they promise to satisfy everyone's transportation needs. Meanwhile,

26. *Id.* at 427-31.

27. *Id.* at 432.

28. *Id.* at 425.

29. Federal preemption by Congressional action (e.g., Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705; Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1683; Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569; and the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803); and Supreme Court construction of the Commerce Clause, the Supremacy Clause, and the Tenth Amendment, have exploded the myth of "private-public partnerships" and "state-federal partnerships" in transportation today. 49 U.S.C. §§14501, 41713 (1994); *Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1995); *Kelley v. United States*, 69 F.3d 1503 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1566, 134 L.Ed.2d 665 (1996). See, generally, Robert E. McFarland, *Section 601 Redux*, 4 *The Transportation Lawyer* 23 (1995); *The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers*, 24 *TRANSPORTATION LAW JOURNAL* 155 (1997); *Federal Preemption of State Consumer Fraud Regulations: American Airlines, Inc. v. Wolens*, 115 *S.Ct.* 817 (1995), 18 *HARVARD JOURNAL OF LAW & PUBLIC POLICY* 903 (1996).

30. *Executive Order No. 12893*, Jan. 26, 1994, "Principles of Federal Infrastructure Investments," §2(c): Private Sector Participation. "Agencies shall seek private sector participation in infrastructure investment and management. Innovative public-private initiatives can bring about greater private sector participation in the ownership, financing, construction, and operation of the infrastructure programs referred to in section 1 of this order. Consistent with the public interest, agencies should work with State and local entities to minimize legal and regulatory barriers to private sector participation in the provision of infrastructure facilities and services." No definition of "public-private initiatives" is found, or how they may differ from "private-public partnerships."

these criticisms of the NTP remain accurate.³¹ There are so many exceptions made to the NTP by the demands of our political process that we honor it more in the breach than the observance.³² We give lip service to the goal, but reveal our selfish selves by our conduct. Our elected representatives summon us to attack the 'federal pot of funds.' Ironically, we demand unlimited transportation services at the same time that we demand that government balance its budget. How can we have both? Are we in effect a society "trapped in a preoccupation with the public rather than the private" in seeking transportation problem solutions?³³

IV. INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT

ISTEA "broke new ground" in how America's States and metropolitan regions approach transportation planning and investment decision-making, according to the USDOT.³⁴ According to President George Bush, it was a "jobs" bill, as he said at the ISTEA signing ceremony.³⁵ ISTEA's hallmarks may be found in its "Declaration of Policy," the very first paragraph of which states:

It is the policy of the United States Government to develop a National Intermodal Transportation System that is economically efficient, environmentally sound, provides the foundation for the Nation to compete in the global economy, and will move people and goods in an energy efficient manner.³⁶

As Professor Farris recognized, the internal inconsistency of the NTP of trying to be economically efficient while satisfying all of the transportation expectations of every person in the Nation continues to make impossible an acceptable answer to Mr. Mineta's Crucial Question. Advocates of competing modes and needs want the available funds spent on their "felt necessities" and not those of someone else. Transportation thus be-

31. George Eads, *Economists versus Regulators*, PERSPECTIVES ON FEDERAL TRANSPORTATION POLICY 101 (1975). Professor Eads' "conviction" is that "the market, though imperfect, works better than the sort of regulation society is likely to get, barring commissions composed of omnipotent, omniscient, benevolent dictators." *Id.* at 108. See also, Thomas A. Till, *National Transportation Policy: The Need for a Clear Concept*, PROCEEDINGS: FIFTEENTH ANNUAL MEETING TRANSPORTATION RESEARCH FORUM 18-22 (1974); Herman Mertins, Jr., NATIONAL TRANSPORTATION POLICY IN TRANSITION (1972).

32. DONALD L. BARLETT AND JAMES B. STEELE, AMERICA: WHAT WENT WRONG? 105 (1992).

33. ROBIN PAUL MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT (1991).

34. HOW TO KEEP AMERICA MOVING: ISTEA-TRANSPORTATION FOR THE 21ST CENTURY (Jan. 20, 1997) (U.S.D.O.T. Report on the U.S. Dept. of Transportation's Outreach on Reauthorization of the Intermodal Surface Transportation Efficiency Act).

35. TRAFFIC WORLD, Dec. 9, 1991 at 4.

36. 49 U.S.C. §5501(a) (1994).

comes a means to an end, e.g., urban redevelopment, air pollution mitigation, unemployment reduction, infrastructure improvement, etc. Transferring "social costs" to transportation systems to solve myriad social problems and achieve non-transport goals distorts the reality of transportation.³⁷ Taxpayers want to know what the government is doing taking over the responsibility for unprofitable transportation systems when a free enterprise solution exists in an equitable division of freight revenues between the various modes.³⁸

V. ISTEA, NEXTEA, BESTEA, HOTTEA, OR JIM JONES' KOOLAID

NEXTEA seeks to "continue the successful federal role in developing a national intermodal surface transportation system through programs that ensure the safe and efficient movement of people and goods, improve economic productivity, preserve the environment, and strengthen partnerships among all levels of the government and the private sector."³⁹ Of course, if by "success" you mean increasing tax burdens to finance nationalized industry, then NEXTEA could become a "successful" successor to ISTEA. The public debate on ISTEA reauthorization curiously omits mention of the Crucial Question. The "web of alliances and interests"⁴⁰ clash with the coalitions in what *Traffic World* describes as a "titanic struggle" over the federal pot 'o funds to be appropriated in the "mother of all transportation bills."⁴¹ Each coalition accuses the other of being "self-serving," while touting their own proposal as best for the public. However, all of them urge greater government subsidies, and therefore, higher tax burdens. Underlying this struggle lies the Crucial Question and the internal inconsistencies in the NTP. The "Divided House" of transportation policy continues to worsen as ever larger taxpayer subsidies (ISTEA-type "investments") are required to fund what would otherwise be bankrupt businesses. It seems as if an "Iron Curtain" has been erected by those advocates of taxpayer funded transportation, creating an artificial barrier between nationalized transporta-

37. PATRICK O'SULLIVAN, *TRANSPORT POLICY: GEOGRAPHIC, ECONOMIC AND PLANNING ASPECTS* 82-107 (1980). The author calls nationalization a form of "constitutional intervention" and a "widely anathematized fate worse than death for private enterprise." It has, however, often been seen as a solution "sought eagerly by owners anxious to convert the failing yield of an ailing enterprise into the secure return of government bonds offered in compensation for their ancient property." *Id.* at 108.

38. ROBERT HEILBRONER & LESTER THUROW, *Economics Explained* 114 (1994).

39. Hearing on Senate Bill 468, 105th Cong. 1 (1997). The full text is found on the Internet at [HTTP://FTP.LOC.GOV/PUB/THOMAS/C105/S468.RCS.TXT](http://ftp.loc.gov/pub/thomas/c105/s468.rcs.txt). A section-by-section analysis is also available. One coalition, the Surface Transportation Policy Project has written at Website at [HTTP://WWW.ISTEA.ORG](http://www.istea.org).

40. CONG. QUARTERLY, March 8, 1997, at 583.

41. TRAFFIC WORLD, March 24, 1997, at 6-7.

tion and free enterprise transportation. While a privatization revolution is occurring around the world, private sector transportation in the United States is being consumed by politically fueled notions of public ownership which history has shown are not sustainable over the long haul.⁴² Metropolitan Planning Organization (MPO) transportation planners say that they are prohibited from even considering private transportation options. Why argue the "Question of Money"⁴³ when we should be focusing on a sustainable NTP? How can we justify our NTP if we fail to debate Mr. Mineta's Crucial Question? Mr. Justice Douglas said, "there is no free speech in the full meaning of the term unless there is freedom to challenge the very postulates on which the existing regime rests."⁴⁴ Some say that we cannot question public ownership of transportation, and any mention of it is "off limits." Artificial barriers to truth, insulating the "untouchables" of their adherents, precludes our ability to attain our goals, warps the notion of the "public interest" to something short of it, deflects tax dollars for private gain, and traps us behind a politicized Iron Curtain and in a "House Divided" against ourselves. Mr. Justice Douglas reminds us of John Stuart Mill's famous logic:

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.⁴⁵

Our debate on ISTEA reauthorization, and the NTP, must first answer the Crucial Question because until we decide if we want the public sector or the private sector to handle our transportation needs we are going to suffer the ills of fundamentally inconsistent policy and conflicting goals, and all the adverse financial consequences which follow from them.⁴⁶ If we fail to have a sound foundation upon which to erect our transportation systems, why should our fate not be the same as that of the Soviet Union? A debate which does not address the primary issue, which skirts the Crucial Question, is not what we should expect in America.⁴⁷

42. JOHN D. DONAHUE, *The Privatization Decision: Public Ends, Private Means* (1989).

43. *TRAFFIC WORLD*, May 19, 1997, at 11.

44. WILLIAM O. DOUGLAS, *The Right of the People* 9 (1958).

45. *Id.* at 14.

46. *See, e.g., Suburban Trails, Inc. v. New Jersey Transit Corp.*, 620 F.Supp. 1383 (D.N.J. 1985); *see also, Westport Taxi Service, Inc. v. Adams*, 571 F.2d 697 (2d Cir. 1978), *cert. denied*, 439 U.S. 829 (1978) (cited by PAUL STEPHEN DEMPSEY AND WILLIAM E. THOMS, *LAW AND ECONOMIC REGULATION IN TRANSPORTATION* 322-27 (1986)).

47. DOUGLAS, at 9.

To those who say they refuse to discuss the Crucial Question, we should reply in President Jefferson's philosophy, stoutly maintained by generations of Americans over the years that "Truth is the proper and sufficient antagonist to error." On January 16, 1787, he wrote:

I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors; and even their errors will tend to keep them to the true principles of the institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.⁴⁸

We debate everything else in the NTP, e.g., how to raise the taxes, where the subsidies will go, what demonstration projects will each Congressman win for his district, but we won't touch Mr. Mineta's Crucial Question. NEXTEA proposes to encourage "private sector participation" in accomplishing ISTEA's goals.⁴⁹ While the world is experiencing a privatization revolution,⁵⁰ we torture ourselves about balancing the federal budget while we encumber ourselves with nationalized transportation.

VI. "ASK NOT WHAT YOU CAN DO FOR YOUR COUNTRY; WHAT CAN YOUR COUNTRY DO FOR YOU"

As a philosophy of government, ISTEA is diametrically opposite to that contained in President Kennedy's Inaugural Address, Jan. 20, 1961. Our democratic split personality, legislative hypocrisy, akin to subsidizing tobacco farmers while financing lung cancer research, appears to be a primary philosophy underlying ISTEA. We raise a double standard, saying as we deregulate transportation that only market conditions will set prices, while subsidies to public sector carriers continually increase. Each of the currently pending proposals include the unstated presumption that publicly-owned transportation industries are acceptable. These are (1) the

48. *Id.* at 11.

49. 49 U.S.C. §5303 (1994); *See*, Letter from Transportation Secretary Rodney Slater to Speaker of the House Newt Gingrich, March 12, 1997, (transmitting the Administration's bill to the Congress, found at the Internet site for NEXTEA at [HTTP://FTP.LOC.GOV/PUB/THOMAS/C105/S468.RCS.TXT.](http://ftp.loc.gov/pub/thomas/c105/s468.rcs.txt))

50. *See, generally*, JOSÉ A. GÓMEZ-IBÁÑEZ & JOHN R. MEYER, *Going Private: The International Experience with Transport Privatization* ch.2 (1993). [hereinafter GÓMEZ-IBÁÑEZ].

Administration's National Economic Crossroads Transportation Efficiency Act (NEXTEA), S.468, H.R.1268; (2) the Streamlined Transportation Efficiency Program for the 21st Century (STEP 21) by Sen. John W. Warner, R-Va., and Rep. Tom DeLay, R-Tex., S.335, H.R.674; (3) the Surface Transportation Authorization and Regulatory Streamlining Act (STARS 2000), by Sen. Max Baucus, D-Mont., S.532; and (4) the ISTEA Reauthorization Act, by Sen. John H. Chafee, R-R.I., S.586. According to the Federal Highway Administration estimates, the following sums are the average yearly federal subsidies that we will spend under these four proposals, compared with ISTEA⁵¹:

<u>ISTEA</u>	\$18,221,367,000
<u>NEXTEA</u>	\$20,063,973,000
<u>STEP 21</u>	\$25,516,563,000
<u>STARS 2000</u>	\$25,895,529,000
<u>S.586</u>	\$24,327,204,000

A late entry is BESTEA, the "Building Efficient. Surface Transportation and Equity Act," proposed by House Transportation Infrastructure Committee Chairman Bud Shuster (R-Pa.). Which provisions, if any, of these competing bills passes and then emerges unscathed from Conference Committee remains in doubt as this is written. The simultaneous outcry is that America must invest in its infrastructure and balance its budget. If we default to a nationalized industry platform, premised upon tax revenues to fund operations, how can we do both? If nationalized housing did not succeed, why should we expect nationalized transportation to be successful? There are, of course, many proper things that government should do for transportation.⁵² But, 'what should it leave to others'?

VII. RICKSHAWS, LUNAR ESCALATOR AND BULLET TRAINS

Recent history has shown that planning by Big Brother, with the adhesion of the federal government, and even with the support of a totalitarian dictatorship, is not sustainable over the long run. Only Adam Smith's "Invisible Hand" has emerged as the supreme, although imper-

51. CONG. QUARTERLY, 1067 (May 10, 1997).

52. GAO Report to Committees on Surface Transportation: *Research Funding, Federal Role, and Emerging Issues*, 105th Cong. 3 (1996). The GAO found that the USDOT provided \$2.9 billion for surface transportation research programs from fiscal 1992 through fiscal 1996, which was about 2% of the Department's total budget for surface transportation programs. About \$2.1 billion went to FHWA, which allocated nearly half of the funds for the Intelligent Transportation Systems program's projects. The GAO has also reported to Congress on the benefits of attracting investment funds from the private sector. GAO Report to State Infrastructure Banks: *A Mechanism to Expand Federal Transportation Financing* (1996).

fect, platform for successful social structure.⁵³ Transportation policy as a vehicle for accomplishing other social goals distorts transportation efficiency, yielding problems which the Invisible Hand would have avoided.⁵⁴ If transportation is used to achieve our Manifest Destiny, or to promote national security, then you will have trains through buffalo grazing lands and Defense Highways to move MX Missiles. Solving inner city decay, air pollution, unemployment, infrastructure entropy, poverty, discrimination, or tax iniquities are all admirable social goals, but adding the cost of doing so to passenger and freight fares distorts the truth about transportation. There is a difference between what we can do and what we ought to do. If we gave rickshaws to the unemployed we might get some people out of their cars and reduce the welfare rolls, but would that be acceptable in a democracy? If we ignored the cost and built a lunar escalator for sightseers and vacationers, we might please builders, engineers and the tourist industry but what offset would there be in terms of increased tax burdens on small business? If the rider's "co-pay" (farebox contribution) covers only 2% of the fully amortized cost of his trip on the Bullet Train, then 98% must be coming from the rest of us. The rider may think he has transportation freedom, but it is only at the price of enslaving his society.

VIII. POLITICAL MEANS TRANSPORTATION POLICY VERSUS MARKETPLACE

Professor Robin Paul Malloy has suggested a result of such policy. In defense of liberty, human dignity, and freedom, Professor Malloy has set forth a theory of law, economics, and the state which applies effectively to transportation as it does to urban development.⁵⁵ Focusing on social distortions in urban planning when citizens face wrestling with The 800 Pound Gorilla called City Hall, Professor Malloy shows us what can happen whenever public ownership prevails over private ownership of property.

Just as monopolies can be bad for consumers of gasoline or cameras, so too can they be bad for individuals when a coercive power is a person (a parent over a child for instance), a group (the mafia or a collusion of chemical companies), or the state itself. A capitalist system of private ownership is, therefore, an essential element of a free society, because it is the only context in which the necessary balance between public and private can be

53. GÓMEZ-IBÁÑEZ, at 281. The case studies "provide strong evidence of private sector cost reductions in labor-intensive services."

54. *Nationalizing of Railroads: A Mistake America Cannot Afford to Make*, TRAFFIC WORLD, March 31, 1975, at 71-72 (Part I) and June 30, 1975, at 72-74 (Part II).

55. ROBIN PAUL MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT 39 (1991).

maintained.⁵⁶

According to Professor Malloy, competing sources of power are essential for the preservation of an environment favorable to creativity, freedom, and spontaneous social order. He identifies marketplace competition as the essential element, and the adverse affects upon it made by public ownership.

When the product is government, competition means protecting the individual from the tyranny of the state while providing an institutional means, via government, for protecting the individual from private coercion. But as a competitive construct this model tells us something more. It says that there will be constant conflict between the competitive roles or boundaries of the private versus the public domain. Concepts such as public/private partnerships tend to break down and destroy these boundaries. The breakdown of such boundaries is detrimental because tension can produce positive externalities. As in the commercial marketplace, however, losing the will or means to compete can leave one increasingly at the mercy of other, more powerful players.⁵⁷

He concludes that in the Nation today we have witnessed a loss of both will and means in the private sector because our values have changed or are being changed as we look to political means and the "expansion of the state" to accomplish goals like urban development.⁵⁸ We are witnessing, he concludes, "the inevitable progression toward statism."⁵⁹

Without a commitment to a strong private sector as a counterbalance to the public sector, the power of the state is unlikely to be adequately restrained. Thus, the impersonal and spontaneous social order of the marketplace will give way to the pervasive intrusion of state planning and increasing reliance on the political rather than the economic means for the allocation of rights and resources in our society. Such a process of setting the political means over the economic means results in the elevation of personal status over impersonal market outcomes and leads to a new age of serfdom in which *individual* rights are subservient to the group, institutional, and organizational claims of the state.⁶⁰

IX. ISTEA GOALS VS. MARKETPLACE

Accepted learning for graduate business students holds that too much expenditure on nonwealth creating activities by government may lower the capacity of a nation to create wealth out of which the former

56. *Id.* at 32.

57. *Id.* at 34.

58. *Id.* at 35.

59. *Id.* at 35.

60. *Id.* at 37.

activities are financed.⁶¹ Thus, our push toward statism and nationalized transportation undermines our ISTEA goal of enabling the United States to “compete in the global economy.”⁶² So, if we opt for public sector solutions, i.e., nationalization, we fall into the trap of mortgaging our children’s future so that we can have “cheap” transportation now. What is likely to follow from such a policy? Professors Gómez-Ibáñez and Meyer have shown that in both developed and developing countries, a “fairly similar cycle of private and public involvement” was found to occur in stages identified as follows:

1. Entrepreneurial
2. Consolidation
3. Regulation of fares and franchises
4. Decline in profitability
5. Withdrawal of capital and services
6. Public takeover
7. Public subsidies
8. Declining efficiency
9. Dilemma of subsidy cuts, fare increases, and service cuts
10. Privatization

X. A HOUSE DIVIDED AGAINST ITSELF CANNOT STAND

The double standard we have accepted for transportation in the United States has created a “House Divided.” We tell the private sector that they must be deregulated; no more government “Nanny” to protect carriers. Let insolvency reap its grisly toll. Bankruptcy Court waits with open doors. *Laissez faire* and *caveat viator!* Concurrently, no subsidy is spared for the public sector carriers. Transportation “entitlements” mean that the taxpayers will give everyone a “free” ride (or nearly so). Can we exist with both? Massive numbers of bankruptcies are acceptable in the private sector, while the taxpayers offer passengers “free” transit, e.g., “Free Light Rail Shuttle.” Taxpayers as “investors” in transportation “industry” accept systems that are insolvent from conception. Have we defeated the Soviet Union only to adopt their mistakes?

XI. WHERE ARE WE HEADING?

Executive Order No. 12893 directs the agencies to carefully examine all of the factors that our infrastructure investments cause in the economy and society. Section 2(a)(5) states, “[a]nalyses should consider not only

61. DUNNING, *Multinational Enterprises and the Global Economy* (1993). (concluding that the globalization of business and its implications for fostering competitiveness between countries, may then force some societies to reappraise their priorities of resource allocation, particularly assessing wealth-creating and other activities). *Id.* at 529.

62. 49 U.S.C. §5501(a) (1994).

quantifiable measures of benefits and costs, but also qualitative measures reflecting values that are not readily quantified.”⁶³

Economists and planners urge decisions based upon concrete results of past operations, or sound predictions of future events based upon scientific analyses. Planned urban development has become the entrenched model form of government. But we need to ask what “values that are not readily quantified” by economists and planners are being ignored as we plunge ahead with statism and nationalization of transportation systems in the United States. We need to re-think our policies in terms of our capitalistic roots. A new unit of measurement designated as the equivalent of our heritage of freedom, which we may call the “Jefferson,” ought to be required of our infrastructure investment decision-makers under the President’s Executive Order. The significance of this precious “not readily quantified” value is seen in Abraham Lincoln’s tale of his first transportation enterprise. The institution of private property is the paramount characteristic of capitalism. This vital fact is the most crucial element of our successful economic philosophy, and has had immeasurable impact on our historical survival as a democracy. Lincoln certainly thought so.

For the rest of his life, Lincoln remembered the day he earned his first dollar. It opened up for him the possibilities of heading out on his own, not just to survive but to succeed.

“You never heard, did you, how I earned my first dollar? I was about eighteen years of age. I was contemplating my new flatboat, when two men came down to the shore in carriages with trunks. “Will you,” said one of them, “take us and our trunks out to the steamer?” I was very glad to have the chance of earning something. I supposed that each of them would give me two or three bits. I sculled them out to the steamboat.

Each of them took from his pocket a silver half-dollar, and threw it on the floor of my boat. I could scarcely believe my eyes as I picked up the money. You may think it was a very little thing, but it was a most important incident in my life. I could scarcely believe that I, a poor boy, had earned a dollar in less than a day—that by honest work I had earned a dollar. The world seemed wider and fairer before me. I was a more hopeful and confident being from that time.”⁶⁴

XII. CONCLUSION

How many “flatboatmen,” transportation “Horatio Algiers,” future free enterprise transportation leaders, and private sector transportation entrepreneurs among the living, and in future generations of Americans,

63. Exec. Order No. 12893 (Jan. 26, 1994),

64. PHILLIP B. KUNDHARDT, JR., ET AL., *Lincoln: An Illustrated Biography* 43 (1992). See HONORE MORROW, *Great Captain* 392-94 (1927).

will we deny ourselves by accepting statism and nationalization of our transportation industries? What value should we place upon each one of them? Yes, *difficult to quantify*, but can we afford to ignore it as we formulate our NTP? How would the President have answered Mr. Mineta's Crucial Question? The American people must insist that our government adhere to both the letter and to the spirit of the President's Executive Order in our NTP for the next century. Let's put the "Jefferson" into our cost-benefit analysis for infrastructure investments at all three levels of our government so that we may achieve the correct answer to the CRUCIAL QUESTION.