Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*

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I. INTRODUCTION

Deregulation, that powerful legal, economic, and political movement of the last decade, is beginning to reveal its profound impact upon the industries it has grasped. During the late 1970s and early 1980s, it embraced a multitude of diverse industries, including airlines, railroads, bus companies, telecommunications, broadcasting, banking, cable television, oil and gas, pipelines and motor carriers. Stripped bare of government bureaucrats and layers of red tape, firms in these industries were cast into the stormy seas of the free market, to sink or swim on their own.

Not unlike other deregulated industries, the decade of deregulation has been one in which the motor carrier industry has been plagued by severe economic problems. Indeed, perhaps the most onerous economic impacts of deregulation have been suffered by savings and loan institutions and motor carriers. Deregulation of the thrifts has made the headlines because the taxpayer has been saddled with more than $300 billion in federal insurance liability. But the trucking story has been left untold. Trucking only makes the local news when a semi turns over on the interstate and flattens a few automobiles. But make no mistake about it, the economic carnage in both industries has been relentless.

The level of bankruptcies and rate of concentration among motor carriers has been unprecedented in American business history. The public served by the trucking industry is paying highly discriminatory prices for service. Motorists are endangered by an unacceptable deterioration in the level of safety. As we shall see, these deleterious results of deregulation in the 1980s and 1990s parallel those which preceded economic reg-

ulation of motor carriers in the 1930s, and of the railroads in the 1880s.[1]

Rate wars, bankruptcies, a deteriorating margin of safety, and consumer exploitation coalesced in the 1930s to prompt federal regulation of the motor carrier industry. In promulgating the Motor Carrier Act of 1935, Congress added trucking and bus companies to the jurisdiction of the Interstate Commerce Commission (ICC).[2] Destructive competition abated, and during the half century which followed, motor carrier service was ubiquitously available throughout the nation at a price which was "just and reasonable." Service was safe and dependable to large and small communities throughout the nation. 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.

Nearly a half century later, the fire kindled in a movement which found economic regulation wasteful and hateful, and deregulation was advanced as the means to achieving a more efficient and productive economy. The free market economists who promoted deregulation assumed that the motor carrier industry had relatively insignificant economic barriers to entry and economies of scale, that destructive competition was unlikely, and that deregulation would likely produce an atomistic market, with a large number of buyers and sellers in nearly textbook levels of healthy competition.[3] Their efforts persuaded Presidents Carter and Reagan to appoint individuals strongly wedded to the ideology of *laissez faire* to the ICC, who began *de facto* deregulation of trucking in the late-1970s.[4] Congress followed suit by promulgating the Motor Carrier Act of 1980, a modest bill aimed at regulatory reform, but which has been inter-

1. Congress deregulated motor carriers with the promulgation of the Motor Carrier Act of 1980. But *de facto* deregulation preceded *de jure* deregulation in the United States by about two years, tracing its origins to decisions of the U.S. Interstate Commerce Commission in 1977 and 1978. *De facto* deregulation of the motor carrier industry began with the liberalized approach of the Interstate Commerce Commission in 1977 and 1978, when the ICC began issuing operating authority more broadly defined, from a commodity and territorial perspective, than ever before. The nation's economic recession did not begin until 1979 and ended in about 1983, yet every leading economic indicator shows that the industry has progressively suffered virtually every year since 1977, both before and after the recession of the 1980s. *See* P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 40 (1989) [hereinafter P. DEMPSEY].

2. Pub. L. No. 74-255, 49 Stat. 543 (1935). *See Hearings on S. 1629, S. 1632 and S. 1635 Before the Senate Comm. on Interstate Commerce*, 74th Cong., Ist Sess. 78 (1935).

3. For a more recent expression of the same views, *see* D. OWEN, DEREGULATION IN THE TRUCKING INDUSTRY (1988).

4. *See* Dempsey, *The Interstate Commerce Commission—Disintegration of An American Legal Institution*, 34 AM. U.L. REV. 1 (1984).

preted as if it mandated comprehensive deregulation.[5] These policies have crippled the industry. After a decade of empirical evidence, we see that the assumptions of the free market economists were erroneous, and hence, the predictions upon which they rested were, simply, wrong.

Their folly affects not only the motor carrier industry, which is perhaps the most important mode of for-hire transportation, but the entire nation. The movement of goods over the highways accounts for more revenue than all the other modes of transportation (i.e., air, rail, water, and pipeline) *combined*.[6] Nearly everything we Americans consume — our clothes, our food, our furniture, our appliances — was at some point moved by truck. Moreover, transportation as a whole accounts for nearly eighteen percent of the U.S. gross national product.[7] Hence, governmental policy here, good or bad, has profound implications.

In the first part of this article, we will review the principal theoretical underpinnings of deregulation. In the second, we examine the results of deregulation upon this important industry and the public it serves. Finally, we shall explore the theory of economic regulation, and advance a policy justification for a more responsible governmental approach to this important industry.

II. THE THEORY AND POLITICS OF DEREGULATION

The generation of Americans which lived through the Great Depression and World War II perceived government to be an essential companion — a friend who could achieve greater social good for society. 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*. They turned to government to find a solution. It was during this era that many of the independent regulatory agencies were born. Most were modeled after the first of these, the Interstate Commerce Commission, created in 1887 to reign in the monopoly railroads.

But the generation of Americans who lived through the 1960s and 1970s became cynical, perceiving government to be a malignant sore. Those on the left abhorred Watergate and the war in Vietnam. Those on the right opposed the Great Society and high taxes. Both converged on a path that viewed government with some hostility.

During the 1970s and early 1980s, deregulation became a bipartisan

5. *See* Dempsey, *Congressional Intent and Agency Discretion— Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI. KENT L. REV. 1 (1981).

6. *See* R. SAMPSON, M. FARRIS & D. SHROCK, DOMESTIC TRANSPORTATION 12 (6th ed. 1990).

7. *Gridlock*!, TIME, Oct. 5, 1988, at 14A.

movement, one which swept America profoundly and provided a new order of radically less government intervention in the market. Presidents Carter and Reagan led the crusade for significant deregulation of major industries — broadcasting, banking, telecommunications, oil and gas, airlines, railroads, and bus and trucking companies. That was coupled with deregulation in such less industry specific areas as antitrust, the environment, safety and health.[8]

The politicians saw it as a rallying point against inflation and high taxes, attacking "big government," "red tape" and "federal bureaucrats." Deregulation and the free market became as American as motherhood, apple pie and Chevrolet.

Free market economists, who had for years attacked the phenomenon of economic regulation, provided the intellectual justification. They insisted that government distorted the competitive equilibrium, created a misallocation of resources, was "in bed with" or "captured by" the industries it regulated, caused these industries to be inefficient and charge consumers excessive prices, and that the direct and indirect costs of regulation were exorbitant.[9] Thus, society would be better off if we amputated the dead hand of regulation and replaced it with Adam Smith's invisible hand, for we would then enjoy marginal cost pricing and near-perfect competition in a healthy competitive environment. The discipline of economics had not embraced an ideology with such religious passion since the Bolshevik Revolution.

In promoting motor carrier deregulation, most free market economists made wildly optimistic predictions about what deregulation would bring. Typically, they insisted that prices would fall, productivity would improve, and concentration would decline. The economists believed that there were few economies of scale in the trucking industry, and few significant barriers to entry other than the regulatory requirement that carriers secure certificates of public convenience and necessity. Moreover, we were assured that with the removal of licensing requirements, new entrants would spring up to rival established carriers, and that such new entry or the threat thereof would discipline the market in a way that would ensure that consumers would be protected. This was the essence of "contestability theory."

Alfred Kahn is perhaps more responsible for transportation deregulation than any other single individual.[10] While a number of scholars have

8. P. DEMPSEY, *supra* note 1.

9. *See* 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, 26-29 (1989).

10. It was he, as Jimmy Carter's Chairman of the Civil Aeronautics Board, who forcefully lobbied in support of the Airline Deregulation Act of 1978, which, after a transition period, abol-

pointed out the existence of economies of scale in trucking,[11] in urging deregulation, Kahn alleged that "there is very clear evidence that the relatively high concentration (in the motor carrier industry). . . is, itself, a consequence of regulation. . . ."[12] Kahn insisted that concentration levels were not the product of economies of scale,[13] and that there were few economic barriers to entry.[14] He also believed that the ". . . immediate and constant presence of potential competitors . . ." would discipline the market and protect consumers ". . . against excessively high prices or poor service."[15] Kahn also declared, "I believe genuinely that (under de-

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ished airline entry and price regulation, and terminated the Civil Aeronautics Board. It was Kahn, as Jimmy Carter's Chairman of the Council on Wage and Price Stability (more popularly referred to as the nation's Inflation Czar) who lobbied strongly on behalf of trucking deregulation, ultimately leading to promulgation of the Motor Carrier Act of 1980. As Kahn said, "In my last years in the White House as adviser to President Carter on inflation, my staff and I devoted a large share of our energies to regulatory reform generally, and, most prominently and in particular, to the passage of the Motor Carrier Act of 1980." *Trucking Deregulation: Is It Happening? Hearing Before the Joint Economic Comm.*, 97th Cong., 1st Sess. 3 (1981).

11. *See* Koeneker, *Optimal Scale and the Size Distribution of American Trucking Firms*, 11 J. TRANSP. ECON. & POL'Y 54 (1977); Ladenson & Stoja, *Returns to Scale in the U.S. Trucking Industry*, 40 S. ECON. J. 390 (1974); Lawrence, *Economies of Scale in the General Freight Motor Common Carrier Industry: Additional Evidence*, 17 TRANSP. RES. F. 168 (1976); Rakowski, *Cost Differences According to Firm Size in U.S. Trucking*, TRANSP. J., Winter 1978, at 63.

12. *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations: Hearings Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 96th Cong., 1st Sess. 416 (1979).

13. First of all, Senator Kennedy's own data, setting side by side a large number of comparable markets, strongly suggest that there is a wide range in the number of carriers than any given market will support, and that a principle determinant of how many there actually are is not the presence, or absence of economies of scale but the ICC's regulatory policy. The ICC undeniably restricts entry; one can hardly conclude in these circumstances that the dominance of some markets by a relatively small number of firms is the result of anything but those artificial restrictions themselves.

Id. at 394.

14. In 1977, in testimony before the Senate Judiciary Committee, Kahn insisted that the economic barriers to entry and economies of scale were relatively insignificant:

> If trucking is not potentially an effectively competitive industry, then I do not know any industry in the country that is. I do not know of any industry that more nearly meets the prerequisites of effectively functioning unregulated competition.
>
> The capital requirements for entry are small. The ease of exit is very great. In other words, there is no reason why anybody need stay for years and years in a depressed market. What other industry do you have in which your capital equipment can itself get up on wheels and move? The economies of scale are so limited that I do not know anybody who believes that the most efficient performance of that market requires that you have one firm or only a couple of firms.

Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 95th Cong., Ist Sess. 231 (1977).

15. [T]he very mobility of trucks makes this an industry in which entry would, if the government would get out of the way, be very easy; existing companies among the thousands that ply their trade in the United States, could easily move into one another's markets. This immediate and constant presence of potential competitors on the outside of individual geographic markets is the best possible protection consumers need against excessively high prices or poor service.

regulation) we will have a more prosperous industry, both rail industry and trucking industry."[16]

Thus, Kahn insisted that it was the ICC's entry policies, not economies of scale, that were responsible for the "relatively high" concentration levels of 1979, that exploitation by a concentrated industry would be exacerbated by potential competition, and that deregulation would make motor carriage more prosperous. Because Kahn's basic assumptions about the industry were specious, his predictions were significantly off the mark.

Since 1980, the ICC has issued nearly 12,000 forty eight-state irregular route general commodities certificates of public convenience and necessity.[17] Nonetheless, not a single new firm has successfully entered the national less-than-truckload [LTL] industry (Leaseway did briefly, but retreated). As noted above, all the transport modes are more concentrated under deregulation than they were under regulation. It is clear that, despite the assurances by the free market economists to the contrary, there are significant economies of scale and economic barriers to entry which restrict entry.

Alfred Kahn has since conceded that the less-than-truckload (LTL) industry is not atomistic in nature, that there are economies of scale in the business, and that successful entry into the national LTL industry has not occurred.[18] Specifically, he now admits, "there *do seem to be economies of scale in the LTL business*—in the carriage of LTL shipments to central collection points, assembling them in truckloads, and carrying them to disassembly points for transmission to their ultimate destination."[19] Since ICC licensing is *de facto* deregulated in trucking, only the existence of large capital requirements and economies of scale can explain the fact that not a single new entrant has emerged in the LTL industry since deregulation.

Why has deregulation failed to achieve much of what it has promised? Deregulation failed because it was a theory based on false assumptions. In theory, regulation distorted efficiency. The transportation

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Id.

He continued:

> The best protection that the public has against being exploited by a concentrated industry is availability of free entry, and trucking is an industry above any other industry in which entry could be relatively free, and even if it is only potential, it will keep the firms in the industry honest.

Id. at 416-17.

16. *Id.* at 421.

17. TRAFFIC WORLD, Dec. 5, 1988, at Supp. E.

18. *Before the Calif. Pub. Util. Comm'n* 8 (Oct. 27, 1988) (Prepared Testimony of Alfred E. Kahn on Behalf of Calif. Coalition for Trucking Deregulation) [hereinafter Kahn Calif. Testimony].

19. *Id.* [emphasis supplied].

industry was thought to be naturally competitive. It was perceived to have no economies of scale or scope of consequence. It was believed that there were no barriers to entry of significance except those of certificates of public convenience and necessity issued by regulatory authorities. It was thought that, if incumbent firms enjoyed market power and raised prices to supra-competitive levels, new entrants would emerge to restore the competitive equilibrium. It was also predicted that destructive competition would not occur.

But industry experts disagreed, insisting that, "Faced with excess capacity, carriers will use the increased pricing freedom to drop rates to variable costs in order to attract freight from competitors. The end result will be widespread price wars, bankruptcies, and chaotic conditions in the industry."[20] To this, deregulation proponent John Snow replied, "Any tendency toward unsettled price conditions could be expected to be brief and mild."[21] But as we shall see below, what we have experienced under deregulation is unprecedented losses, a high number of bankruptcies, a shakeout of many small producers, an industry which is highly concentrated, and one in which there has not been significant new entry. And none of this has been either brief or mild.

The theory of contestable markets has not been sustained by the empirical evidence. Leaseway was the only major carrier to enter the less-than-truckload sector of the industry, and it exited after several years of significant losses.[22] There do appear to be significant economies of scale, scope, and density, and economic barriers to entry in the trucking industry. The LTL sector requires a significant multi-million-dollar investment in a network of terminals, a large number of employees, and skilled management.[23]

Deregulation's proponents also did not foresee the monopsony power of large shippers and the high level of discrimination it creates. This overwhelming strength of large carriers and large shippers has distorted the market for the sale of transportation services in a way that is antithetical to notions to achieving allocative efficiency.

III. THE TRUCKING INDUSTRY TODAY—THE EMPIRICAL RESULTS OF DEREGULATION

Deregulation has produced results wildly divergent from those ob-

20. *Quoted in* Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector,* TRANSP. J., Spring 1988, at 11-12.

21. MCAVOY & SNOW, REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION (1977), *quoted in* Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J., Spring 1988, at 11-12.

22. *Truckers in Trouble*, INSIGHT, Nov. 3, 1986, at.

23. *Is Deregulation Working*? BUS. WEEK, Dec. 22, 1986, at 53.

served by deregulation theorists staring into their crystal balls. Unlimited entry and rate deregulation has created excessive capacity, declining productivity, destructive competition, discriminatory pricing, inadequate returns on investment, a deterioration in safety, a decline in wages, an erosion in labor-management relations, an enhanced number of bankruptcies, mergers, and acquisitions, and, in the long term, unprecedented concentration. The U.S. motor carrier industry is becoming dominated by a very small number of extremely large firms.[24] In the long-term, deregulation appears to have created an oligopoly of megacarriers providing highly discriminatory pricing, as smaller firms fall into the social Darwinist abyss of bankruptcy. In the interim, the smaller firms endanger safety of those with whom they share the highways.

A. THE TRUCKLOAD, LTL DISTINCTION

We begin by noting one important distinction in the motor carrier industry. The motor carrier industry can be divided into two broad sectors — truckload and less-than-truckload. The economic characteristics of these sectors are significantly different. Typically, a truckload carrier picks up a large volume shipment filling an entire trailer and carriers it directly to destination without reloading.

In contrast, an LTL carrier must have a more sophisticated distribution system of a multitude of trucks stopping at numerous consignors, taking on small shipments, then aggregating them at a central terminal facility, consolidating them into larger shipments for long-distance transport to a remote terminal facilities, where they are disassembled and put on smaller trucks to be distributed to their individual consignees. As we shall see, the terminal facilities and regional distribution systems of LTL transportation require significant capital investments.

B. EXCESSIVE CAPACITY AND DECLINING PRODUCTIVITY

In his book, *Economic Principles of Transportation*, published in 1935, economist W. T. Jackman summarized the problem posed by the ease of entry into trucking by unsophisticated entrepreneurs which preceded the original Motor Carrier Act, promulgated that same year:

> 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 favorable. But the mortality in the motor truck field is very heavy . . . .
>
> The shipper wants a small shipment taken . . . and the motor carrier

24. P. DEMPSEY, *supra* note 1, at 129-69. Today, much of North America is dominated by its four largest trucking companies (*i.e.*, United Parcel Service, Yellow, Consolidated Freightways, and Roadway), or its single bus company (*i.e.*, Greyhound).

> 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 reasonable 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. While 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 . . . .
>
> [P]robably 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.[25]

Precisely these consequences of destructive competition which preceded regulation in the 1930s emerged under deregulation in the 1980s. Indeed, 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. Destructive competition produced economic anemia which encouraged consolidations and monopolization.[26] Federal economic regulation was able to protect the public against widespread pricing and service discrimination, and alleviate the dire financial straits in which the railroads found themselves.

The empirical evidence of motor carrier deregulation in the United States reveals that a large number of new carriers entered the truckload sector of the industry during the initial years of deregulation.[27] Excessive

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25. W. JACKMAN, ECONOMIC PRINCIPLES OF TRANSPORTATION 842-43 (1935) [footnotes omitted] [hereinafter W. JACKMAN].

26. *See generally* P. DEMPSEY, *supra* note 1, at 6-10.

27. According to one source, between 1980 and 1982, 11,000 new firms entered the industry. Richards, *Independent Truckers Who Hailed Deregulation Reconsider as a Rate War Races and Taxes Rise*, WALL ST. J., Mar. 31, 1983, at 56. According to another source, between 1980 and 1983, 49,726 new certificates for motor carrier operating authority had been granted by the ICC; this included certification of 13,806 new carriers. Rosenak, Address before the Motor Car-

capacity caused the proportion of empty trailers and the number of empty miles to increase and load factors to fall.[28] The immediate response to declining rates was one of great public applause. This appeared to be a development of great benefit for shippers.[29]

However, in the longer run, there are some distressing trends. Among them is declining productivity[30] — because more entry creates more capacity without stimulating additional freight, and that simply leaves trucks emptier over more miles. In the short run, wealth is transferred first from investors, and then from labor, to shippers, particularly large shippers. Productivity of interstate motor carriers has declined since federal deregulation began — this despite the introduction of larger and more efficient equipment.[31] Tremendous overcapacity stimulated both by unlimited entry and the ruthless struggle for market share has decreased average load factors for general freight motor carriers. The average load for this segment of the industry fell from 13.5 tons in 1978 to 12.8 tons in 1987.[32]

Total intercity tonnage increased eleven percent, from 2.26 billion tons in 1980 to 2.5 billion tons in 1989. But during the same period, the number of carriers issued certificates of public convenience and necessity by the ICC more than doubled, from 17,000 in 1979 to 45,000 in 1990.[33]

De facto federal deregulation of the motor carrier industry began

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rier Lawyers Ass'n. (Washington, D.C., Jan. 8, 1983); *ICC Chairman Tells Senate Panel He Favors Early Sunset of Agency*, TRAFFIC WORLD, Dec. 20, 1982, at 27. The ICC has also largely expanded the ability of private carriers to engage in common carriage. *See e.g.*, Leasing Rules Modifications, 132 M.C.C. 927 (1982); Lease of Equipment and Drivers to private Carriers, 132 M.C.C. 956 (1982). *See Farris & Southern, Federal Regulatory Policy Affecting Private Carrier Trucking*, 49 ICC PRAC. J. 503 (1982); Borghesani, *Motor Carrier Regulatory Reform and Its Impact on Private Carriers*, 10 TRANSP. L.J. 398 (1978). As of June 1, 1983, the ICC had certificated 25,342 carriers. This represents a 43% increase in the number of carriers holding operating authority since promulgation of the Motor Carrier Act of 1980. The Commission gave some 870 carriers nationwide authority, effectively deregulating them from an entry standpoint until the end of time. *See Before the U.S. Senate Surface Transp. Subcomm. of the Comm. on Commerce, Science and Transp.*, 98th Cong. 1st Sess. (Sept. 21, 1983) (statement of George Ziglich).

28. P. DEMPSEY, *supra* note 1, at 79.

29. *Id.* at 100.

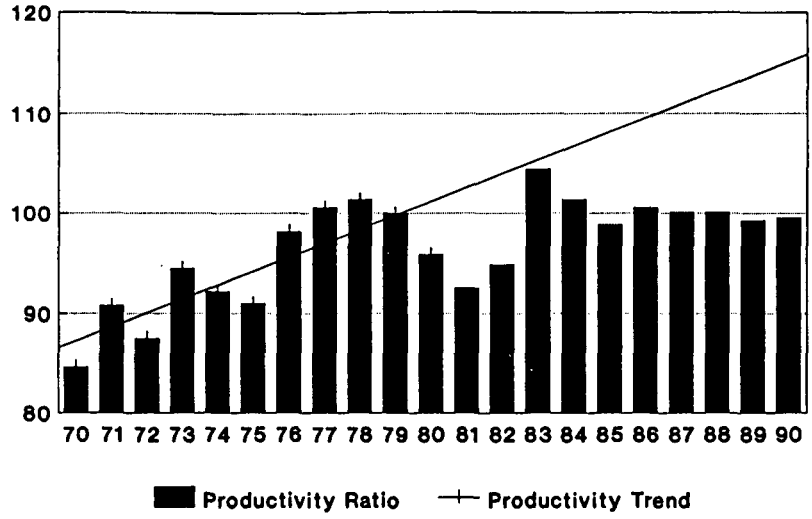
30. Productivity for general freight carriers grew by an average of 1.29% annually after 1969, it declined by 0.21% per year between 1978 and 1986. In contrast, productivity levels of all manufacturers increased an average of 2.4% per year after 1975. *Panelists Deplore Truck Regulation, Rate Discrimination at NARUC Confab*, TRAFFIC WORLD, Dec. 1, 1986, at 68-69 [hereinafter *Rate Discrimination*].

31. *Version of the Motor Carrier Act of 1980, Hearings Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science and Transp.*, 99th Cong., 1st Sess. 96 (1985) (statement of Dean Stanley J. Hille).

32. TRAFFIC WORLD, Dec. 5, 1985, at Supp. J.

33. D. BARTLETT & J. STEELE, AMERICA: WHAT WENT WRONG 115 (1992).

Chart I--Productivity in Trucking



Productivity, Trucking = (1)/(2) Indexed to 1979 = 100

under ICC Chairman A. Daniel O'Neal nearly three years prior to the promulgation of the Motor Carrier Act of 1980. Although productivity for general freight carriers grew by an average of 0.29% annually after 1969, it declined by 0.21% per year between 1978 and 1986. In contrast, productivity levels of all manufacturers increased an average of 2.4 % per year between 1975 and 1986.[34]

Economist Dabney Waring, Jr., compared productivity levels of the trucking and railroad industries between 1970 and 1990. Chart I reveals his findings.[35] By comparing the number of ton miles to employment, he reached the following conclusions:

> Trucking productivity was increasing at an annual 1.9% rate from 1970

34. *Rate Discrimination*, *supra* note 30. Professor Nelson's study revealed that productivity grew from 1968 to 1978, but fell from 1978 to 1984. Nelson, Verified Statement in ICC Docket M 30408, General Increase M.W.M.F.B., Oct. 19, 1987, Appendix G. The entry of large less-than-truckload [LTL] carriers into territories previously served efficiently by regional carriers has caused per unit costs to increase as average load factors have declined. As a consequence, thousands of motor carriers have gone bankrupt or ceased operations in the post-deregulation era. Many more would likely join the ranks of the "belly up" were it not for the unfunded pension liability imposed by the Employer Retirement Security Act [ERISA]. Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329, 346-49 (1984) and N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 18-19 (1986) [hereinafter cited as N. GLASKOWSKY].

35. *Before the Colo. Pub. Util. Comm'n* (statements of Dabney T. Waring, Jr.) 13 (1991) [hereinafter Waring Colo. Testimony].

> to 1979 while railroads were improving at a 3.6% annual rate. In 1980 trucking productivity dipped 4.1% and has stagnated since. Meanwhile, railroad productivity has accelerated to an 8.4% annual rate of increase. To what extent deregulation is responsible for the railroad fortunes is uncertain, but certainly federal deregulation has not been healthy for trucking.[36]

Similarly, Professors Ozment, Cunningham and Davis examined five measures of fuel efficiency and equipment utilization and found that "it cannot be concluded that energy efficiency and equipment utilization have improved since deregulation. In fact it appears that just the opposite has occurred. . . . [T]he net effect of deregulation on fuel efficiency and equipment utilization appears to be negative."[37] Professor Robert Gordon found that while productivity for railroads increased under deregulation, long term productivity improvements disappeared following deregulation in both the airline and motor carrier industries.[38]

Since transportation is an industry particularly susceptible to overcapacity, unconstrained entry must necessarily lead to distress sale pricing in those markets where competition is excessive, at least until waves of bankruptcies wipe out the smaller and weaker rivals.[39] Since deregulation began, motor carrier profits, as measured by return on equity, have consistently fallen below the rate of all manufacturers, and declining productivity must bear at least part of the blame. Excessive capacity and lost productivity have eroded the profitability of carriers, creating an unprecedented wave of bankruptcies.[40]

Professor Martin Farris prophetically predicted that deregulation would cause a decline in efficiency and productivity prior to the promulgation of the federal Motor Carrier Act of 1980:

> The concern over efficiency in the regulated sector is a real paradox. Critics of [economic regulation allege that it produces inefficiencies which are exemplified by] . . . low load factors in air transportation, empty backhauls in trucking, energy waste, excess capacity, and idle capital all around. To the critics it is obvious that these "wastes of regulation" could be avoided if regulation were abolished and the natural forces of supply and demand were allowed a free hand. The paradox arises in that the solution to these "inefficiencies caused by regulation" is more excess capacity, more duplica-

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36. *Testimony Before the Mich. House Transp. Comm.* (statement of D. Waring, Jr.) 15 (Aug. 28, 1989) [hereinafter Waring Mich. Testimony].

37. R. Gordon, Productivity in the Transportation Sector (unpublished monograph 1991).

38. Ozment, Cunningham & Davis, *Motor Carrier Fuel Efficiency and Equipment Utilization: Effects of Deregulation*, 30 J. TRANSP. RESEARCH FORUM 431, 440 (1990).

39. Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329, 346-49 (1984).

40. "Despite continued economic growth . . . bankruptcy remains one of the major financial problems of the decade. While many segments of the economy have been hard hit, nowhere is the problem more severe than in the transportation sector." Chow & Gritta, *Estimating Bankruptcy Risks Facing Class I and II Motor Carriers: An Industry-Specific Approach* 55 TRANSP. PRAC. J. 352 (1988).

tion, more wasted energy, more idle capital, more empty back-hauls, and low load factors caused by allowing more competition in entry and price. As more firms entered these markets and competed on a price basis, excess capacity and waste would increase, not decrease.[41]

C. *MONOPSONY/OLIGOPSONY AND DISCRIMINATORY PRICING*

Under deregulation, the trucking industry experienced a phenomenon that was largely unanticipated — monopsony power of large shippers which can mandate highly discriminatory pricing.[42] Very large shippers enjoy monopsony power because of their enormous volume of freight, which enables them unilaterally to dictate rates.

For example, between 1983 and 1988, the Interstate Commerce Commission approved ten general rate increases, totaling 51.3%.[43] Discounts off the published rates are running up to seventy percent for the largest shippers, like J.C. Penny and Johnson & Johnson[44] (and average between thirty five and thirty seven percent).[45] But the steep discounts are enjoyed exclusively by large-volume shippers.[46] Smaller shippers either pay the full rate or enjoy rather more modest discounts of, say, five to fifteen percent.[47] In fact, many unsophisticated consignees pay the full undiscounted rate plus an additional five to ten percent surcharge.[48] While most shippers perceive that they are getting a bargain, in fact, smaller shippers are paying significantly more for transportation today than they did prior to deregulation.[49]

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41. Farris, *The Case Against Deregulation In Transportation Power and Communications*, 46 ICC PRAC. J. 306, 329 (1978) [emphasis in the original].

42. Professor Grant Davis has observed that the nation's largest shippers exert monopsony of the economic leverage they wield by conferring or withholding their vast volumes of freight. The Fortune 500 can unilaterally dictate rates at (and for cash-starved carriers, below) the marginal costs of trucking companies. *Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. of Surface Transp. of the Senate Comm. on Commerce: Science and Transp.*, 99th Cong., Ist Sess. 234 (statement of Prof. Grant M. Davis).

43. Dolan, *Benefits of Economic Regulation*, 17 TRANSP. L.J. 235, 255 (1989) [hereinafter Dolan].

44. Schulz, *Rate-Cutting Competition Darken Profit Picture for LTL*, TRAFFIC WORLD, June 4, 1990, at 15-16.

45. Similarly, full airline fares have increased 156% since 1978, twice the growth rate of the Consumer Price Index. Ott, *Industry Officials Praise Deregulation But Cite Flaws,* AV. WEEK & SPACETECH Oct. 31, 1988, at 88.

46. *Testimony Before the Mich. House Transp. Comm.* (statement of M. Foley) (July 24, 1989) [hereinafter M. Foley Mich. Testimony]; Waring Mich. Testimony, *supra* note 36, at 16.

47. P. DEMPSEY, *supra* note 1, at 97-100.

48. Schulz, *Collect Shipment Surcharges Latest Surprise to Small Shippers*, TRAFFIC WORLD, Sept. 11, 1989, at 27.

49. A small shipper recently summarized the impact of transportation deregulation upon smaller enterprises in testimony before the U.S. House of Representatives: "the benefits promised by the Motor Carrier Act of 1980 have not reached the medium and small shipper. Small shippers are receiving discounts substantially below what the large shippers enjoy. Our markets

Moreover, this distortion in transport pricing distorts the broader market for the sale of commodities.[50] If a large shipper can get his goods to market at a lower price than a smaller shipper, then the large shipper will, by definition, have a significant advantage in and access to the market for the sale of his commodities, one which might enable him to dominate that market.

The U.S. Supreme Court in its seminal decision of *Munn v. Illinois* recognized that transportation firms are the gatekeepers of the larger market for the sale of commodities; hence, it is imperative that their price and service offerings be nondiscriminatory.[51] If the market for transportation services is distorted, the market for the sale of commodities will be distorted as well.[52] A significant advantage that Fortune 500 companies enjoy under deregulation *vis à vis* their smaller rivals is of particular concern, unless one concludes that domination by huge corporations is not an undesirable phenomenon.

Two other developments which are products of the monopsony (or oligopsony) power of large shippers have manifested themselves in the United States. One is the ability of large shippers with market power unilaterally to dictate excessively low rates insufficient to allow trucking companies to cover their full costs of operation. This has a fatal economic impact on unsophisticated carriers with an inadequate understanding of costs and without the ability to counterbalance the monopsony power of large shippers.[53] This causes carriers to underprice their services, which gives them insufficient resources to maintain a high level of safety. By underpricing their services, they also drag down efficient firms with them into the Darwinist grave of bankruptcy.

Wisconsin deregulated intrastate trucking in 1982. Since then, many carriers have spiraled downward in bankruptcy. As one Wisconsin carrier noted:

> The large shippers are demanding transportation rates that are below carriers' costs. Large multi-page invitations to bid are distributed by shippers that spell out conditions under which to bid. Many carriers are so desperate for the business that they are bidding each other to death just to generate additional revenues. Many of these bids are far below the operat-

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are shrinking." COALITION FOR SOUND GENERAL FREIGHT TRUCKING, THE RATIONALE FOR TRUCKING REGULATION: EXPOSING THE MYTHS OF DEREGULATION 9 (1986).

50. Pricing discrimination may cause serious injury to those enterprises or geographic regions disfavored by the pricing scheme. The U.S. Supreme Court has observed that "discriminatory rates . . . may affect the prosperity and welfare of a State . . . They may stifle, impede, or cripple old industries and prevent the establishment of new ones." Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945).

51. 94 U.S. 113 (1876).

52. P. DEMPSEY, *supra* note 1.

53. Dempsey, *Punishing Smallness*, CLEVELAND PLAIN DEALER, Dec. 12, 1987, at 15A.

> ing costs of carriers successful in securing the business; consequently these carriers have no choice but to make up the difference on small shippers. Cash flow pricing results in carriers operating in a weak financial condition. The weaker the carrier financially, the more important it may become just to generate revenue to meet payroll and debt. These companies fall as easy prey for shippers to place heavy pricing demands upon them. Demands are also being placed on carriers for discriminating and deceptive rate discounting, rebating to parties not responsible for payment of rate charges.[54]

Note the striking similarity between these observations of the deregulated trucking industry today with those of economist W.T. Jackman, above, who observed the same conditions in the trucking industry more than half a century earlier, before economic regulation.[55]

A second phenomenon which appears to be growing more widespread is the practice by large shippers of sending commodities "freight collect," whereby the consignee pays the full, published rate for transportation. The large shipper then forces the carrier to rebate to the consignor the difference between the full, published rate and the significant discount of up to seventy percent off the published rate.[56] This is nothing less than deliberate fraud being practiced on unwary consignees. Jackman noted that the practice of "secret and discriminatory rates and the prevalence of rebates" was widespread in the 1930s, before regulation.[57]

In sum, deregulation brought shippers an immediate fall in transport prices, followed by a longer-term increase in discrimination between large *vis à vis* small shippers, so that larger corporations today enjoy a significant advantage over their smaller competitors. This distorts the broader market for the sale of commodities, giving larger firms a decided advantage, and causes many motor carrier failures.

Nonetheless, some deregulation proponents have made extraordinary claims as to the consumer benefits produced by deregulation. For example, a Cato Institute study authored by Robert Delaney claimed that trucking deregulation had (a) produced efficiency savings to the tune of $26 billion annually, (b) was largely responsible for the extended period of national recovery in the 1980s, and (c) had caused U.S producers and distributors to save between $56 billion to $90 billion annually in reduced inventories and improved efficiency.[58] The many flaws in the study have

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54. *The Changing World of Deregulation: The Good—The Bad—The Ugly; Testimony Before the Mich. House Transp. Comm.*, (statement of D. Sisel) (July 6, 1989).

55. *See infra* text accompanying note 25.

56. Dolan, *Benefits of Economic Regulation* , 17 TRANSP. L.J. 235, 255 (1989).

57. W. JACKMAN, *supra* note 25, at 847.

58. R. DELANEY, THE DISUNITED STATES: A COUNTRY IN SEARCH OF AN EFFICIENT TRANSPORTATION POLICY 1, 2, 9, 12 (1989). These findings were embraced in a study prepared by an analyst at the Federal Trade Commission in a review of the literature, where the author alleged that "the total benefits of trucking deregulation. . . [is] between $39 and $63 billion per year, or

been well documented in separate studies by economist Dr. Irwin Silberman and Professor Jerold Muskin.[59]

Dr. Silberman has assessed Mr. Delaney's assertion that the United States enjoys a savings of between $60 billion and $80 billion annually as a result of just-in-time inventory, presumably a product of deregulation. Silberman notes that Delaney failed to adjust his data for inflation, and included services and government expenditures in his calculations of the Gross National Product. But more devastating to Mr. Delaney's assertions was Dr. Silberman's observation that Delaney had wholly failed to recognize the long-term secular relationship between the inventory/sales ratio and the business cycle. For all but one of the years between 1971 and 1987, constriction or expansion in the national economy correlates to the rise and fall in the inventory/sales ratio. As one would expect, as the economy expands, retailers and wholesalers cannot maintain their inventory levels, and inventories drop. As the economy slides into recession, inventories grow. The national economy enjoyed sustained expansion from 1983-87, and inventories fell. To attribute this fall to motor carrier deregulation is to ignore the long-term correlation between inventory levels and the business cycle. It is voodoo economics.

D. Destructive Competition: Inadequate Returns on Investment

The guru of transportation deregulation, Alfred Kahn, summarized the phenomenon of "destructive competition" which was the catalyst for promulgation of the Motor Carrier Act of 1935: "competition was intense, profits and wages depressed, and the safety and reliability of the services provided by the industry, and especially by many of the new entrants, left much to be desired . . . ."[60] Like many contemporary free market economists, he insists that it was the Great Depression that caused these economic problems, not any unique economic circumstances surrounding the transportation industry.

Yet each of the conditions he describes — the intense competition, depressed wages and profits, and deterioration of safety and reliability of service — which existed before regulation, have re-emerged under deregulation, even in the absence of a Depression. The U.S. Office of Technology Assessment (OTA) notes:

> Profit margins have fallen even for the most successful carriers, a product of intense price competition caused partly by changes in manufacturing

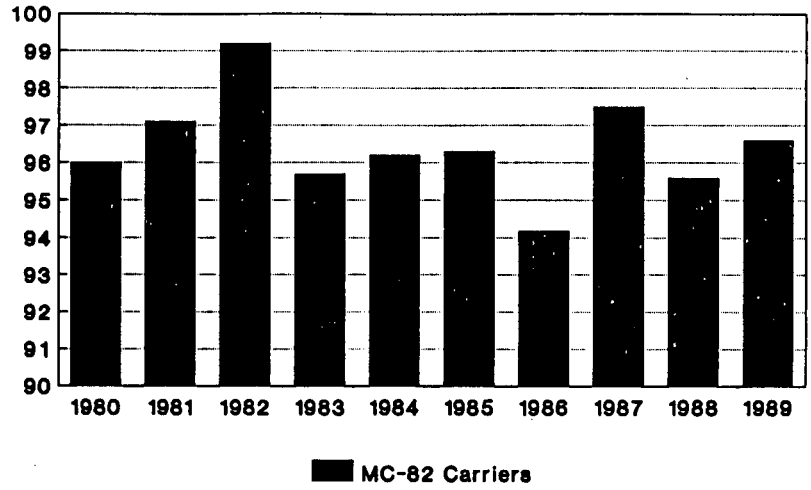
between $160 and $260 for every American." *See* D. Owen, Deregulation In the Trucking Industry (1988).

59. *See e.g.*, Muskin, *Solving the Trade Balance Problem: The "Stuff" of Public Policy in Transportation,* 43 Transp. Q. 373 (1989); *Testimony Before the Mich. House of Rep. on House Bill 4735*, (statement of I. Silberman) 21-22 (Oct. 11, 1989).

60. *Calif. Pub. Util. Comm'n* (statement of Alfred E. Kahn) 13 (Oct. 27, 1988).

and partly by continuing overcapacity. Carriers' expenses per ton-mile are up 75 percent since 1978, while revenues have increased only 54 percent. General freight revenues . . . have not matched price increases in the general economy, particularly for large shippers and those in highly competitive city-pair traffic lanes. Carriers that serve small shippers and those in less competitive markets have fared better.[61]

Chart II--Operating Ratios (1980-89)



Average 96.4

61. OFFICE OF TECHNOLOGY ASSESSMENT, GEARING UP FOR SAFETY: MOTOR CARRIER SAFETY IN A COMPETITIVE ENVIRONMENT 26 (1988) [hereinafter OTA SAFETY STUDY].

Chart III--General Freight Carriers
Return on Equity

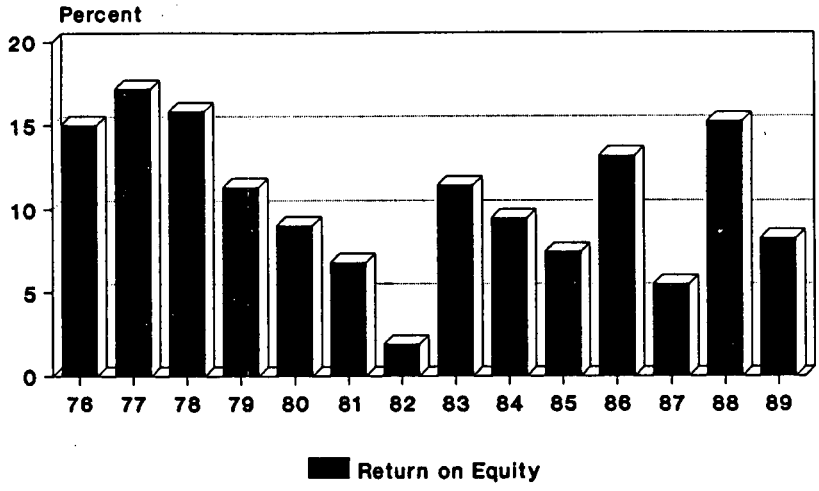
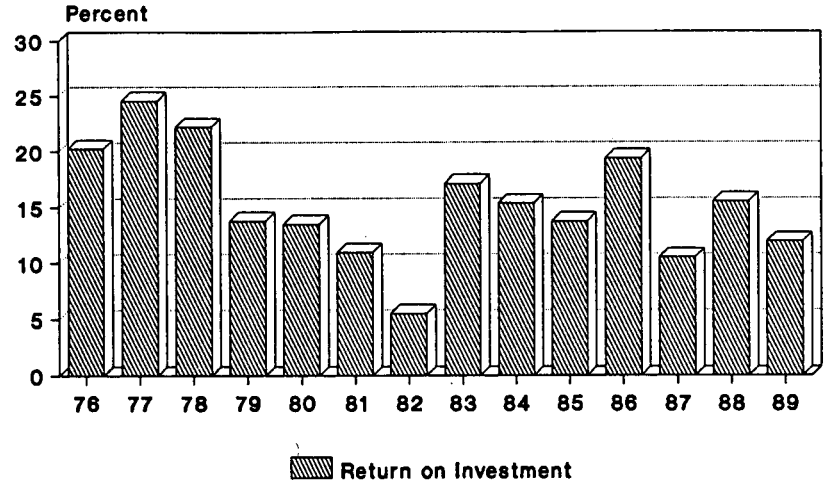


Chart IV--General Freight Carriers
Return on Investment



In order to provide an accurate picture of the anemic nature of the motor carrier industry under deregulation, several different pictures are offered in the preceding three charts, and all are grim. One measure of industry profitability is operating ratios — non-interest and non-tax operating expenses as a percentage of operating revenues. As Chart II reveals, operating ratios for the MC-82 carriers (those required to file financial data with rate bureaus subject to the ICC's order in Ex Parte MC-82) have been abysmal under deregulation, fluctuating between 94.2 (1986) and 99.2 (1982), and averaging only 96.4 since deregulation.[62]

Thus, the margin for interest, taxes and profit over the decade was a miserable 3.6%. In only a single year, 1986, did the industry achieve an operating ratio below ninety five. Dr. Irwin Silberman points out that this is all the more remarkable in light of the fact that the above data reflect operating ratios for the *survivors*, for a large number of MC-82 firms have disappeared, and their freight has been distributed among the remaining carriers.

Charts III and IV reveal the industry's performance in terms of return on equity [ROE] and return on investment [ROI], respectively.[63] From 1976-79, ROE averaged 14.85; thereafter it fell to an average of 8.82. In contrast, average ROE for All Manufacturers (the target for the motor carrier industry embraced by the ICC) was 14.89 during the 1976-70 periods, or virtually identical to the motor carrier sector, and 12.21 from 1980 to 1989. Stated differently, the ROE average dropped forty one percent trucking after 1980, while dropping only eighteen percent for all

62. I. SILBERMAN, GRAPHS FOR FOURTH QUARTER OF 1989 4 (1990). These data are compiled from the national database of MC-82 carriers, the largest in the industry.

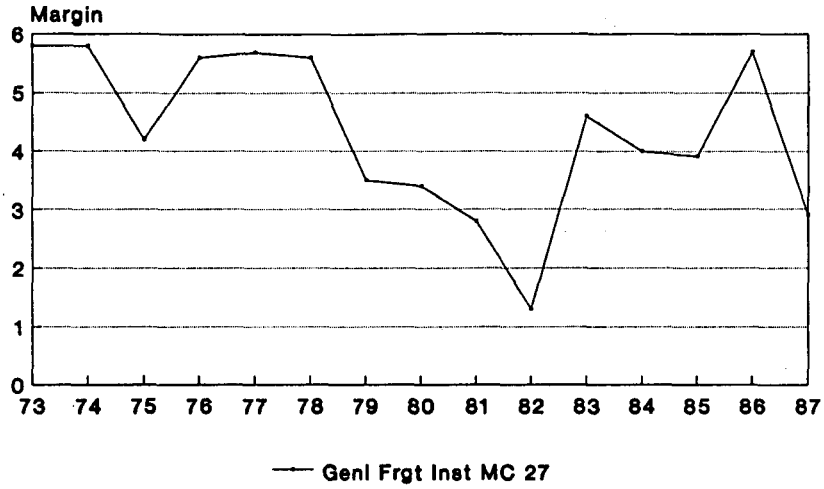
OPERATING RATIOS

Year	Operating Ratio
1976	95.14
1977	94.45
1978	94.52
1979	96.52
1980	96.63
1981	97.31
1982	98.54
1983	95.67
1984	96.09
1985	96.35
1986	94.63
1987	97.04
1988	95.51
1989	95.51

Before the Colo. Pub. Util. Comm'n (statement of Dabney T. Waring, Jr.) 7 (Aug. 1, 1991). *See also Testimony Before the Mich. House Transp. Comm.* (statement of I. Silberman) 14 (Oct. 11, 1989).

63. These data are taken from D. Waring, *Statement Before the Colo. Pub. Util. Comm'n* 7 (Aug. 1, 1991).

Chart V--Operating Margins 1973-87



Avg. 1973-79--5.17; Avg. 1980-87--3.58

manufacturers.[64]

The ICC has concluded that a reasonable ROI for the motor carrier industry would be twenty one. As Chart III reveals, motor carriers averaged close to that, with 20.18, ROI from 1976-79. But from 1980-89, the average ROI dropped to 13.33.[65]

In 1980, there were 239 MC-82 general freight carriers in the United States. By 1987, only 125 such carriers remained, and fifty of those had operating ratios in excess of 100.[66] Appendix A is a list of the 100 largest motor carriers in 1980; Appendix B is the same list in 1990, deleting carriers which had ceased operations, principally as a result of bankruptcy, merger or shutdown.

Lest one conclude that motor carriers have always been so anemic, Chart V compares carrier operating margins[67] of the seven years preceding enactment of the Motor Carrier Act of 1980 with the eight years follow-

64. *Id.* at 8.

65. *Id.*

66. *Testimony Before the Calif. Pub. Util. Comm'n* 1.08046, (statement of I. Silberman) at 2, 5 (Oct. 27, 1988).

67. Operating margin is defined as the difference between operating revenue and operating expense (excluding interest and profit) divided by operating revenue.

ing it.[68] Thus, the average operating margin preceding promulgation of the Motor Carrier Act of 1980 was 5.17, but fell after 1980 to 3.58 — a deterioration of thirty percent. In contrast, the ICC has traditionally deemed a "reasonable" margin to be seven percent, and the United Parcel Service (UPS) companies earn about nine percent.[69] Return on equity also fell significantly after deregulation.[70] With profitability so poor, it is no wonder that bankruptcies have soared under deregulation, as is revealed by Chart VI.[71]

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68. OPERATING MARGINS
OF THE GENERAL FREIGHT INSTRUCTION 27 CARRIERS

Year	Margin	Year	Margin
1973	5.8	1980	3.4
1974	5.8	1981	2.8
1975	4.2	1982	1.3
1976	5.6	1983	4.6
1977	5.7	1984	4.0
1978	5.6	1985	3.9
1979	3.5	1986	5.7
		1987	2.9
Average	5.17	Average	3.58

ATA Financial and Operating Statistics, Summary Table III. Data for 1973-75 are from quarterly reports. Data prior to 1973 are not available. *Reprinted in Testimony Before the Mich. House Transp. Comm.* (statement of D. Waring, Jr.) 5 (Aug. 28, 1989).

69. *Id.*

70. Morash & Enis, *Investor Perceptions of the Impact of Deregulation on Motor Carrier Earnings*, 19 LOGISTICS & TRANS. REV. 309, 310 (1983).

71. BANKRUPTCIES AND PROFIT MARGINS
FOR INTERSTATE MOTOR CARRIERS
VIS-A-VIS PROFIT MARGINS FOR ALL MANUFACTURERS SINCE 1978

	Motor Carrier	Profit Margins*	
Year	Bankruptcies	Motor Carriers	All Manufacturers
1978	162	2.92%	5.4%
1979	186	1.97	5.7
1980	382	1.73	4.8
1981	610	1.58	4.7
1982	960	0.77	3.5
1983	1,228	2.37	4.1
1984	1,416	2.24	4.6
1985	1,543	1.74	3.9
1986	1,564	2.64	3.8
1987	1,351	1.57	4.9

* profits are measured as after-tax earnings as a percentage of gross revenues.

These statistics were compiled by Ron Roth, Director of Statistical Analysis of the American Trucking Association (Jan. 1988). Profit margins are measured in terms of after tax earnings as a percentage of gross revenues. *See also*, R. ROTH, TRUCKING: AN OVERVIEW AND FOCUS ON PRESENT TIMES: THE MOTOR CARRIER INDUSTRY IN TRANSITION, IMPACTS AND IMPLICATIONS—A GRAPHIC PRESENTATION OF 1978-1986 (Sept. 1987), and DUN & BRADSTREET, FAILURE DATA (1987).

Chart VI--Motor Carrier Bankruptcies 1978-1990

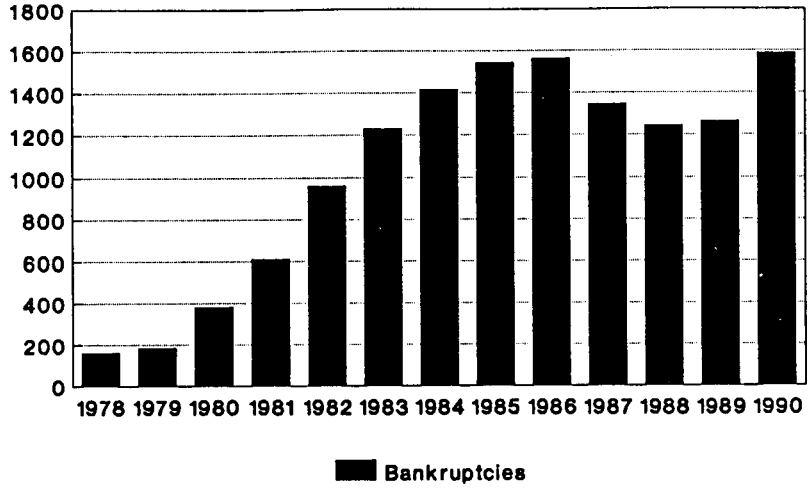
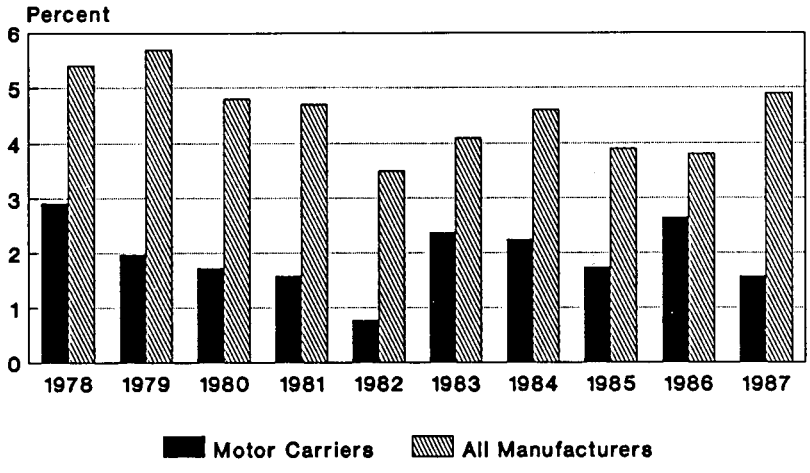
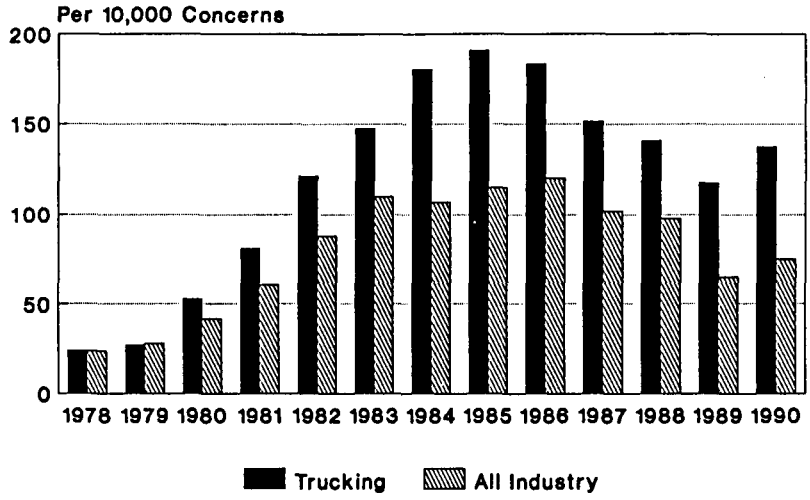


Chart VII--Profit Margins Motor Carriers/All Manufacturers



Profits are measured as after-tax earnings as a percentage of gross revenues

Chart VIII--Failure Rate/10,000 Concerns Trucking v. All Industry



The period of deregulation is the era of the lowest returns in the trucking industry's history. As Chart VII reveals, profit margins have been highly unsatisfactory.[72] Bankruptcies have exceeded 1,000 a year each year since 1983, continuing long after the recession of the early 1980s abated, and fuel prices fell.[73] In the less-than-truckload sector of the industry, more than half of the firms which existed before deregulation failed.[74] Of the fifty largest trucking companies in 1965, only seven remained by 1992.[75] In fact, more motor carriers failed in the decade of the

72. *Id.* Although productivity for general freight carriers grew by an average of 0.29% annually after 1969, it has declined by 0.21% per year since 1978. In contrast, productivity levels for all manufacturers have increased an average of 2.4% per year since 1975. *Rate Discrimination*, *supra* note 30. Michael Evans found that productivity in the motor carrier industry fell from an average annual 1.5% increase between 1960-1981 to 1.7% between 1980-1985. M. EVANS, THE ECONOMIC EFFECT OF TRUCKING REGULATION 3 (1987).

73. P. DEMPSEY, *supra* note 1, at 80. In 1978, the rate of bankruptcies among trucking companies was 20 failures per 10,000 companies, about the same as all businesses. In 1987, trucking suffered 150 failures per 10,000 companies, compared to 120 failures per 10,000 companies for all businesses. R. SAMPSON, M. FARRIS & D.SHROCK, DOMESTIC TRANSPORTATION 322-23 (6th ed. 1990).

74. Between 1978 (the year that *de facto* deregulation of interstate trucking began) and 1986, more than 54% of the LTL trucking companies went out of business, costing 120,000 employees their jobs. *Comments Before the Calif. Pub. Util. Comm'n En Banc Hearing on Regulation of the State's For-Hire Trucking Industry* (statement of Martin E. Foley) 34 (Feb. 12, 1988) [hereinafter M. Foley Calif. comments].

75. Dempsey, *Running on Empty: Trucking Deregulation and Economic Theory*, 43 ADMIN. L. REV. 253, 315 (1991).

1980s (11,496) than in the combined forty five years in which the ICC regulated the industry.[76]

Indeed, these data are conservative. Between 1980 and 1989, the ICC revoked 18,557 common and contract motor carrier operating certificates and permits for failure to maintain adequate insurance.[77] This suggests that the failure rate may be much higher than that reported by Dun & Bradstreet, reflected above in Chart VIII.

The Reagan Administration's Interstate Commerce Commission provided the following justification for abdicating its statutory responsibility to regulate entry in motor carriage:

> Confronting the protestant with more vigorous competition—indeed, even competition which forces an existing carrier out of business—does not automatically cause harm to any aspect of the public interest. Congress, after all, requires us to foster efficiency in motor carrier transportation and there may be situations in which, considering the transportation industry as a whole, it is preferable to replace an inefficient operator with a more efficient one and promote the introduction of innovative services or prices.[78]

There is absolutely no evidence to sustain the hypothesis that all these several thousand bankrupt carriers were inefficient. Unlimited entry has caused excessive capacity which in turn has led to lower productivity, which has caused unprofitability, and widespread bankruptcies, shutdowns and mergers. Even efficient carriers, pricing at marginal costs, find it impossible to stay in business if they do not eventually recover fixed costs. And those with shallower pockets have a more difficult time in a market as filled with economic turmoil as trucking has been under deregulation. As Chart VIII reveals, the failure rate of trucking firms under deregulation has significantly exceeded that of other American industries even though they all suffered the effects of the recession of the early

76. D. BARTLETT & J. STEELE, *supra* note 33, at 112.

77. M. Foley Mich. Testimony, *supra* note 46, at 23.

78. La Bar's, Inc., Extension—Mountaintop Insulation, 132 M.C.C. 263, 272 (1980); discussed in P. DEMPSEY & W. THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 96-99 (1986).

1980s.[79] Transportation economist Dabney Waring, Jr., has observed, "[P]rior to deregulation, the failure rates in the trucking industry were almost identical to the average for all-industry. In 1980, however, trucking failures began to rise much faster than all-industry, reaching a peak margin of more than sixty nine above the all-industry rate in 1984. It has since eased somewhat to a current level forty four percent above the all-industry rate, probably due to the expanding economy and the early destruction of the least healthy carriers."[80]

In the deregulated environment, we often see the phenomenon of pricing at or below short-term marginal costs. In part, this is inspired by the instantly perishable nature of the service being sold and the monopsony power of large shippers.[81]

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79. Failure RATE PER 10,000 CONCERNS

Year	Trucking	All Industry	Ratio Trucking to All Ind.
1978	24.2	24	1.01
1979	27.2	28	.97
1980	52.9	42	1.26
1981	81.2	61	1.33
1982	121.3	88	1.38
1983	147.5	110	1.34
1984	180.7	107	1.69
1985	191.1	115	1.66
1986	183.6	120	1.53
1987	151.5	102	1.49
1988	141.0	98	1.45
1989	117.6	65	1.81
1990	137.6	75	1.83

Waring Michigan Testimony, *supra* note 36, at 12, *updated* by Waring Colorado Testimony, *supra* note 35, at 9. The failure rate per 10,000 firms was reported by Dun & Bradstreet.

80. *Id. See also Rebuttal Testimony Before the Calif. Pub. Util. Comm'n in the Matter of General Freight Transp. by Truck* (statement of D. Waring, Jr.) 12 (Feb. 2, 1989).

81. P. DEMPSEY, *supra* note 1, at 84-85. Some free market economists insist that predatory pricing in the LTL industry is improbable, for it is unlikely that a carrier could recoup its losses once a competitor is driven from the market. Some suggest that the antitrust laws are a satisfactory means of dealing with the problem, and then goes on to cite several unsuccessful antitrust complaints. The evidentiary, legal and economic hurdles for successful civil prosecution of predatory behavior under Section 2 of the Sherman Act are formidable. Proving the existence of a conspiracy between competitors or other behavior designed to establish a monopoly is difficult, to say the least. And the reality is, the Justice Department has shown little enthusiasm in recent years for pursuing allegations of predatory behavior. And even if successful, antitrust remedies often only award monetary damages to the victor (and/or in a criminal action, imprisonment). They do not necessarily restore a lost competitor to the market. For example, a generous out-of-court settlement did not restore Sir Freddie Laker to the transatlantic passenger industry after his rivals drove him out of business with their predatory practices. Hence, while aggrieved firms may sometimes be vindicated, the consumers' interest in a healthy competitive environment is often left unprotected.

Alfred Kahn has expressed concern about predation in the airline industry. Said he, in a recent interview in *Antitrust*, "the airline industry clearly demonstrates the dangers of permitting unrestricted responses by incumbents to counter competitive entry, particularly with selective, pinpointed, or targeted price reductions." *Interview With Alfred E. Kahn*, 3 ANTITRUST 7 (1988).

Unlimited entry and rate deregulation have, as noted above, created excessive capacity, declining productivity, and therefore destructive competition which, in turn, has created inadequate returns on investment. This economic anemia has had other adverse consequences in addition to the high failure rate among trucking firms. It has had an adverse impact on labor-management relations and wages.

E. The Impact of Deregulation Upon Labor

Because of the competitive pressures unleashed by deregulation, overall industry financial performance has declined to the point of inadequacy, despite the fact that the recession of the early 1980s has abated and fuel prices have fallen. Because so many motor carriers have terminated operations since 1980, more than 115,000 union members have lost their jobs.[82]For the carriers that have survived, these competitive pressures have forced management to engage in hard negotiations to reduce labor costs and tighten work rules.

As a result of the severe rate competition engendered by excessive capacity, carriers cut costs wherever they can.[83] The alternative, as noted above, is bankruptcy. For that reason, they have reduced wages

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Kahn continued, "The nature of entry is not independent of the policies of the incumbents. . . . If you know that if you enter a market you will immediately be met on the nose or even under the nose, that will affect your willingness to enter." *Id.* In testimony delivered in 1978 before the U.S. Senate Commerce Committee, in response to a question involving the tendency of airlines to purchase landing slots to gain control of an airport, Kahn said:

> Well, what you are describing, Congressman, is the possibility that the airlines, the big ones, may engage in some sort of predatory tactics, and that is a kind of predatory tactic. . .
>
> I happen to be one of the few economists in the country who still believes there is such a thing, that it is really a danger.

Safety and Re-Regulation of the Airline Industry: Hearings Before the Senate Comm. on Commerce Science and Technology, 100th Cong., 1st Sess. 162 (1987). In his article, "Deregulatory Schizophrenia," Kahn expounded upon the problem of allowing a competitor to be driven from the market via predatory means:

> As for the increasingly respectable view among economists that predation is nothing to worry about—why incur the, cost of driving a rival from the market when you re unlikely to be able to sustain monopoly profits because rivals can always reenter? My answer then was and still is: Does anybody really think that new price competitors will come to the consumer's rescue as promptly as their defunct predecessors? As I once heard Irwin Stelzer observe, a hiker might not pay much attention to a "no trespassing" sign standing alone, but if he sees the field behind it, littered with bodies of previous trespassers, it's reasonable to suppose he will respect it.

Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059, 1067 (1987). Economic regulation can obviate the likelihood of predation by requiring cost-based and nondiscriminatory pricing.

82. TRAFFIC WORLD, Dec. 5, 1988, at Supp. I. Another source states that between 1978 to 1986, more than 54% of general freight carriers went out of business, costing 120,274 employees their jobs. J. HARKINS, *State of the LTL Trucking Industry* (Dec. 1987). *See also*, C. PERRY, DEREGULATION AND THE DECLINE OF THE UNIONIZED TRUCKING INDUSTRY (1986).

83. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*, in N.W. U. CONF. PROCEEDINGS, TRANSP. DEREGULATION AND SAFETY 629, 663 (1987).

for drivers and mechanics.[84] Between 1979 and 1985, trucking wages fell thirty percent in California, at a time when factory wages increased more than fifteen percent. By reducing pay, the job becomes less attractive, causing the industry to hire unskilled and untrained drivers. Chart IX reveals relative wage levels during the deregulation period.[85]

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84. An AAA study concludes that because there are few other areas in which to cut costs, motor carriers whose profit margins are squeezed have little alternative but to "run older equipment, pay less in wages, work drivers longer, and/or skip on maintenance." F. BAKER, SAFETY IMPLICATIONS OF STRUCTURAL CHANGES OCCURRING IN THE MOTOR CARRIER INDUSTRY 15 (1985) [hereinafter AAA SAFETY STUDY].

85. REAL AVERAGE WAGES FOR MILEAGE BASED DRIVERS
(Class I carriers of general freight)

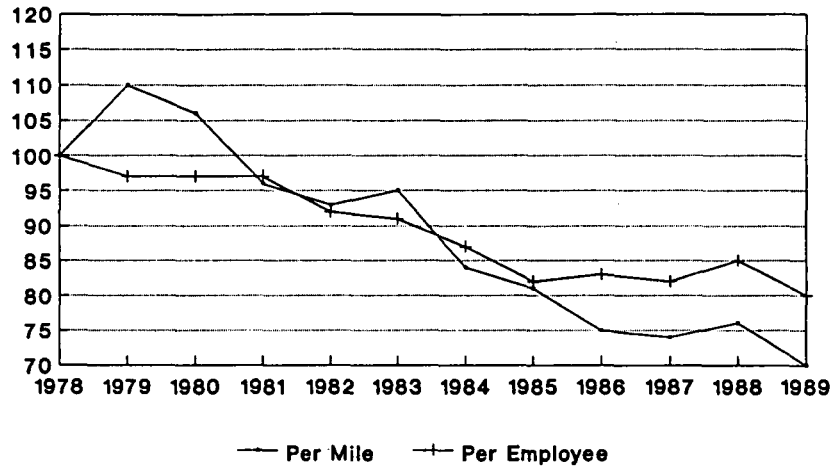
Year	Index of Average Wages Per Mile	Index of Average Wages Per Employee
1978	100	100
1979	110	97
1980	106	97
1981	96	97
1982	93	92
1983	95	91
1984	84	87
1985	81	82
1986	75	83
1987	74	82
1988	76	85
1989	70	80

Waring Mich. Testimony, *supra* note 36, at 10, *updated* by Waring Colo. Testimony, *supra* note 35, at 11. Mr. Waring developed these indices from data published by the Interstate Commerce Commission in TRANSPORT STATISTICS OF THE UNITED STATES for drivers paid on a mileage basis (line-haul drivers). The dollar amounts were deflated using the CPI-U. 1978 = 100. *Id.* at 9. The specific data for Class I Carriers of general freight, unadjusted for inflation, is as follows:

Year	Avg. Wage per mile ($)	Avg. Wage per employee ($)
1978	0.27	24,508
1979	0.33	26,455
1980	0.35	30,027
1981	0.36	33,349
1982	0.37	33,365
1983	0.39	34,244
1984	0.36	34,005
1985	0.36	33,194
1986	0.34	34,236
1987	0.35	35,235
1988	0.37	38,101
1989	0.36	37,336

Rebuttal Testimony Before the Calif. Pub Util. Comm. in the Matter of General Freight Transp. by Truck (D. Waring, Jr.) 12 (Feb. 2, 1989), *updated* by Waring Colo. Testimony, *supra* note 35.

Chart IX--Average Wages for Mileage Based Drivers



Class I Carriers of General Freight
1978=100

One source estimates that unionized motor carrier employees wages have been reduced between $1 billion and $1.7 billion annually.[86] Dabney Waring, Jr., observed, "Clearly linehaul drivers are finding their work significantly less remunerative: twenty six percent less remunerative per mile than in 1978, thirty percent less remunerative than in 1980. Further, their annual income has declined eighteen since 1978. But since this decline is less than the decline in wages per mile, they are driving more miles for less total income. This is not the sort of trend that will foster improved highway safety."[87]

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86. Since 1983, with the continuing erosion of carrier profits the average driver's wage per mile has been declining. In 1986, at $0.34 per mile, that figure was lower than any year since 1980 when the average was $0.36 per mile. During that same period, however, the average annual driver wage increased from $30,072 to $34,286. Therefore, drivers are driving more miles, but are doing so at less wage per mile. It is far from speculative to state that the increase in speed-related accidents is caused, in part, by the drivers' need to cover more miles in less time in order to meet their income requirements.

M. Foley Mich. Testimony, *supra* note 46, at 21. Another source states that while wages in all industries rose 150% since 1979, all truck drivers' wages rose only 130% and truckload drivers', wages rose only 110%. Schulz, *Smaller Profits, Higher Costs Cause Truckers to Increase Rates*, TRAFFIC WORLD, Jan. 1, 1990, at 18.

87. *Id.* at 10.

Professor Grant Davis noted that "the impact on human capital as a result of the deregulation movement raises numerous public policy questions and may well result in costly industrial relation conflicts in the near future."[88] Not only does a deterioration in labor-management relations create unnecessary enmity between groups that need to work together, it also may jeopardize the public's safety. Cost cutting may well have a deleterious impact on the margin of safety. While working longer for less pay theoretically increases efficiency, it can induce fatigue, which has a negative impact upon safety.[89] As a study published by the American Automobile Association noted:

> [S]tructural changes resulting from deregulation of the industry have produced a combination of rapidly aging equipment operated by underpaid and overworked drivers, many of whom are not intellectually or emotionally qualified for what they are doing, and these changes are threatening the safe operation of motor carrier equipment on the highways and endangering the lives of motorists and truckers alike. . . . By paying a driver less per mile, costs can . . be reduced. However, it is axiomatic that a driver will run the miles necessary to meet the income needs of himself or his family. Excess driving hours threaten safety.[90]

F. The Impact of Deregulation Upon Safety

Under deregulation, motor carriage is an anemic industry with a high turnover rate among firms running aging and poorly maintained equipment and employing overworked and underpaid drivers.[91] As wages are reduced by financially strapped carriers, drivers have a strong economic incentive to stay on the highway beyond the maximum hour limitations established by the federal government.[92]

The average driver believes that about one in four of his fellow drivers regularly operate their vehicles on the highway under the influence of illegal drugs.[93] A recent National Transportation Board Study found that one-third of drivers killed in accidents had been drinking or using drugs.[94] Drivers take amphetamines in order to fight the fatigue of staying behind the wheel excessive hours. Tight schedules and the pressure to make a living cause many drivers to speed.[95] One driver wrote an published by

88. Davis, *Regulatory Program of the United States Government: The Role for Economic Regulation?*, 53 TRANSP. PRAC. J. 251, 258 (1986).

89. *See* R. BEILOCK, MOTOR CARRIER SAFETY STUDY 16 (1989).

90. AAA SAFETY STUDY, *supra* note 84.

91. P. DEMPSEY, *supra* note 1, at 120-125.

92. AAA SAFETY STUDY, *supra* note 84.

93. R. BEILOCK, MOTOR CARRIER SAFETY STUDY 7 (1989).

94. The study covered an eight state area over a period of one year. Rosenfeld, *Fatigue, Alcohol and Drugs Identified As Prime Causes of Fatal Truck Accidents.* TRAFFIC WORLD, Feb. 12, 1990, at 13.

95. *See* Beilock, *Are Truckers Forced to Seed?*, 21 LOGISTICS & TRANSP. REV. 277 (1985).

the *Wall Street Journal*. He put it this way:

> In 10 years of driving I have had no employer who expected less than twice the legally allotted number of hours. Many drivers, probably the majority, find themselves in similar binds. They must constantly break the law to keep their jobs. The resulting fatigue is the truck driver's real enemy and the true killer on the highway. . . .
>
> About 4,500 people died last year in traffic accidents involving trucks. If the same official zeal were focused on shippers and employers who demand outlawry from drivers, the first step will have been taken toward reducing that number. Until then, shippers will expect 68-hour trips from California to Boston, and profit will be made because drivers disregarded the law. More important, public safety will continue to be jeopardized.[96]

Under federal regulations, log books are supposed to show eight hours rest after ten hours work;[97] in the trucking industry, log books are referred to as "comic books."[98] Drivers often exceed those limits. As one source noted, "There is far too much pressure on owner-operators and trucking companies to work their drivers seventy-eighty-ninety hours a week just to compete or keep their jobs."[99] The result has been increased numbers of trucking accidents and related deaths and injuries. Fatigue has been cited by the National Transportation Safety Board as the largest single factor in causing fatal accidents.[100]

Many scholars have examined the relationship between trucking deregulation and the deterioration in safety. Daust and Cobb found a "relationship between federal economic deregulation and the substantial rise in safety related incidence. . . [as well as a] cause-and-effect relationship of driver fatigue and unqualified drivers on traffic crash occurrences."[101] Carriers earning inadequate profits have cut training and forced drivers to work longer hours. Inexperienced drivers are three times more likely to

96. Barton, *A Trucker's Road to Safety and Sanity*, Wall St. J., Dec. 22, 1987, at 20.

97. Specifically, truck drivers may drive no more than 10 hours within a 15-hour period following eight consecutive hours off duty. In sleeper operations, the eight hours off duty can be divided into two periods. Drivers cannot drive more than 60 hours in a seven day week. Schulz, *Truckers, Hours of Service Rules to Receive Comprehensive Study*, TRAFFIC WORLD, Dec. 4, 1989, at 20.

98. Kalette, *Truck Deaths: 41,500 a Year, 50+ Last Week*, USA Today, Mar. 23, 1987, at 1, 2.

99. Schulz, *Truckers, Hours of Service Rules to Receive Comprehensive Study*, TRAFFIC WORLD, Dec. 4, 1989, at 20.

100. Rosenfeld, *Fatigue Alcohol and Drugs Identified As Prime Causes of Fatal Truck Accidents*, TRAFFIC WORLD, Feb. 12, 1990, at 13. An American Automobile Association [AAA] study reveals that driver fatigue is the probable or primary cause of 41% of heavy truck accidents. AAA FOUNDATION FOR THE TRAFFIC SAFETY, A REPORT ON THE DETERMINATION AND EVALUATION OF THE ROLE OF FATIGUE IN HEAVY TRUCK ACCIDENTS (1985). For purposes of this study, fatigue was defined as more than 15 consecutive hours of on-duty or defined activity time. *Id.* at 2.

101. Daust & Cobb, *The Relationship Between Economic Deregulation of the Motor Carrier Industry and Its Effects On Safety*, N.W. U. CONF. PROCEEDINGS, TRANSP. DEREGULATION AND SAFETY 785 (1987).

have accidents than are experienced drivers.[102] Under the National Accident Sampling System, the three largest causes of accidents were (1) speeding, (2) the level of training, and (3) the age of the vehicle.[103] All of these factors seem to have grown worse under deregulation.

The industry also appears to be deferring new vehicle purchases.[104] Because carrier profits have been so severely squeezed, the average age of equipment on the highway has increased dramatically since deregulation.[105] The average age of trucks on the highway rose from 6.9 years in 1978 (when *de facto* deregulation began) to eight years in 1987.[106] According to Professor Evans, the number of trucks twelve years or older on the highway has more than doubled under deregulation.[107] Charts X, XI and XII reveal these distressing trends.[108]

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102. R. BEILOCK, MOTOR CARRIER SAFETY STUDY 10 (1989). "Using a threshold of five years driving experience to separate the two categories of drivers, almost one inexperienced driver in four has had an accident per year." *Id.* at 11-11.

103. AAA SAFETY STUDY, *supra* note 84, at 5.

104. AAA SAFETY STUDY, *supra* note 84, at 17. N. GLASKOWSKY, *supra* note 34, at 32.

105. AAA SAFETY STUDY, *supra* note 84, at 17. N. GLASKOWSKY, *supra* note 34, at 32.

106. Dolan, *supra* note 43, at 274. *See* M. Foley Calif. comments, *supra* note 74, at 25.

107. Dolan, *supra* note 43, at 273-274.

108. AGE OF TRUCKS, 1978-1988

Year	(1)	(2)	(3)	(4)
1970	7.3	3.9	17.7	100
1971	7.3	4.0	18.3	99
1972	7.2	4.0	19.7	92
1973	7.0	4.0	21.3	85
1974	7.0	4.1	23.3	81
1975	6.9	4.4	24.8	80
1976	7.0	4.8	26.5	82
1977	6.9	5.2	28.2	82
1978	6.9	5.5	30.5	82
1979	6.9	5.9	32.6	82
1980	7.1	6.5	35.2	84
1981	7.5	7.2	36.1	90
1982	7.8	7.9	37.0	97
1983	8.1	8.5	38.1	101
1984	8.2	9.6	40.1	109
1985	8.1	10.7	42.4	115
1986	8.0	11.5	44.8	117
1987	8.0	11.8	47.3	113
1988	7.9	12.6	50.2	114
1989	7.9	14.0	53.2	119
1990	8.0	15.5	56.0	120

(1) Average age, all trucks.
(2) Number of trucks (millions), 12 years or older.
(3) Number of trucks in use (millions).
(4) Ratio of number of trucks 12 years and older to total trucks in use, indexed at 1970 = 100.
Waring Mich. Testimony, *supra* note 36, at 6; *updated* by Waring Colo. Testimony, *supra* note 35, at 10.

Chart X--All Trucks
Average Age (1970-90)

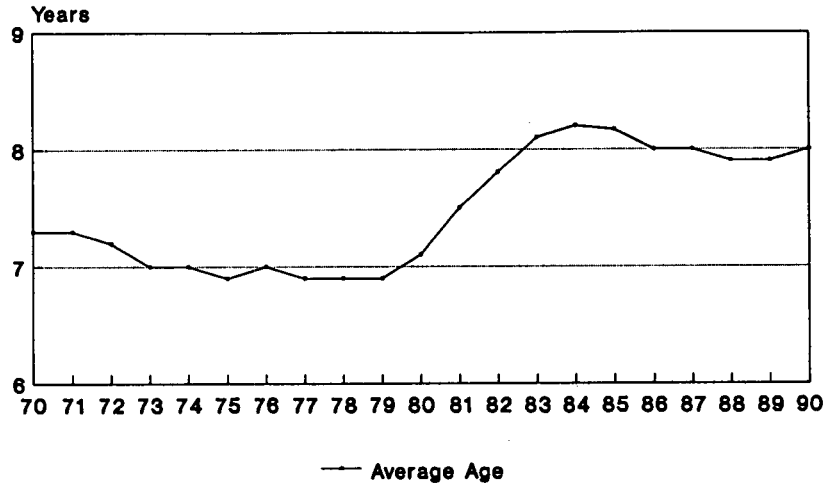


Chart XI--No. of Trucks
12 Years & Older (1970-90)

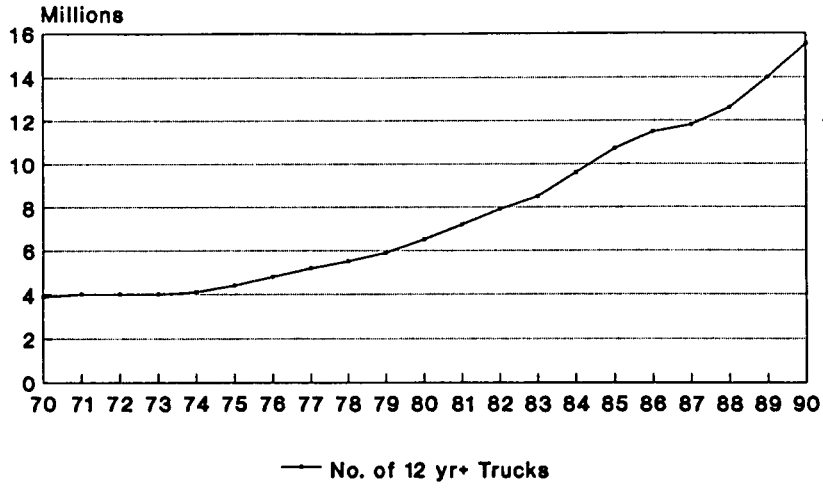
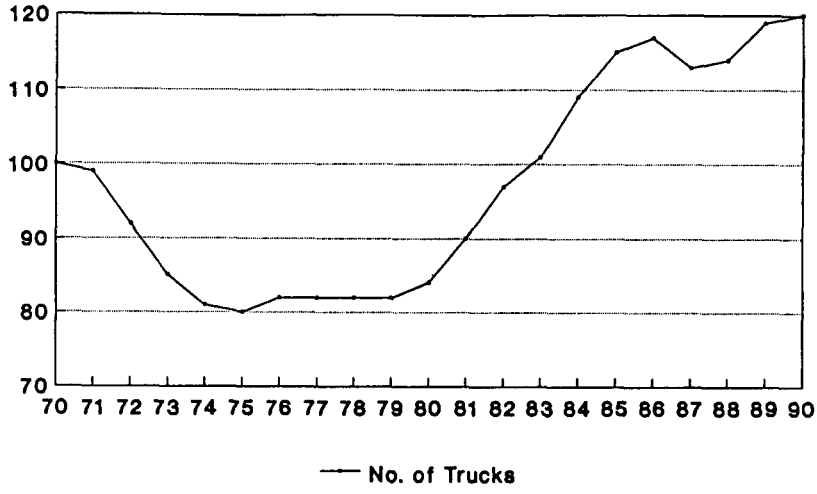
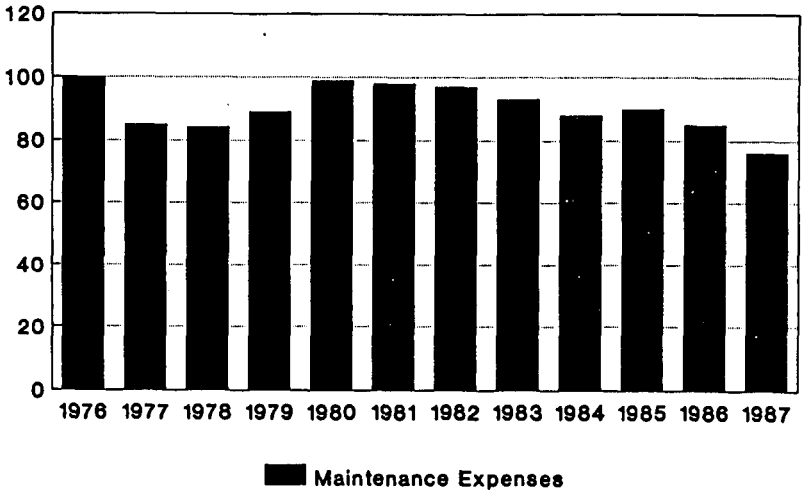


Chart XII--Ratio of No. of Trucks 12 Yrs. and Older/Total Trucks In Use



1970 • 100

Chart XIII--Maintenance Expenses/Mile 1976-1987



1976 • 100

Economically anemic carriers simply do not have the resources to invest in replacing (and in some instances, repairing) aged equipment. Older vehicles require greater maintenance, yet unfortunately, they are getting *less*. Carriers have cut maintenance expenditures up to 3.6% annually. This means that carriers are not buying spare parts when they need them and are not taking vehicles off the highway when they ought to be. Chart XIII sustains this dismal conclusion.[109]Professor Bruning concluded as follows:

> [A]ccident rates are significantly related to the nature of the equipment employed over the road. The rate of defective equipment and the age of the vehicles are instrumental in accounting for accident rates of small and medium specialized carriers but not for general freight carriers. The results may be related to financial performance as well as to the level of safety enforcement by the regulatory authorities.[110]

In 1985, checks of vehicles on the highway under the Federal Motor Carrier Safety Assistance program revealed that twenty nine percent of large trucks were insufficiently safe to be on the highway. In some states, the figures have been even higher.[111] In 1986, studies in New York and Connecticut revealed that sixty percent of trucks were insufficiently safe to be on the highway.[112] In 1988, the U.S. Department of Transportation rated 14,769 motor carriers as having unsatisfactory or conditional safety.[113] In 1989, 31,522 driver/vehicle inspections were conducted at about 160 locations in forty seven states and Canada. More than 70,000 driver or vehicle violations were discovered; out of service orders were

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109. INDEX OF MAINTENANCE EXPENSES PER MILE

Year	Index
1976	100
1977	85
1978	84
1979	89
1980	99
1981	98
1982	97
1983	93
1984	88
1985	90
1986	85
1987	76

Waring Mich. Testimony, *supra* note 36, at 7. These data were based on the General Freight Instruction 27 Carriers, and are derived from ATA Financial and Operating Statistics, Summary Table III. Mr. Waring deflated maintenance expenses to constant dollars using the GNP deflator and then dividing by vehicle miles traveled. 1976 = 100.

110. Bruning, *The Relationship Between Profitability and Safety Performance in Trucking Firms*, TRANSP. J., Spring 1989, at 40, 47.

111. P. DEMPSEY, *supra* note 1, at 122.

112. Hanley, *60% of Trucks Fail New York Area Inspections*, N.Y. Times, Oct. 8, 1986, at B1.

113. M. Foley Calif. comments, *supra* note 74, at 23.

issued against 10,134 trucks (32.1%) and 1,908 drivers (6.1%).[114]

An American Automobile Association [AAA] study found that because there are few other areas in which to cut costs, motor carriers whose profit margins are squeezed have little alternative but to "run older equipment, pay less in wages, work drivers longer, and/or skip on maintenance."[115] Similarly, Professors Corsi, Fanara, Jr. and Jarrell concluded:

> [I]n the competitive post [deregulation] environment there is a significant relationship between poorer operating performance and a higher accident rate. Despite claims to the contrary that deregulation and safety concerns are unlinked, it is clear that some firms operating in the new competitive environment in a precarious financial situation have significantly higher accident rates than do those not in financial distress.[116]

Professor Garland Chow found that the carrier which eventually goes bankrupt spends less on maintenance and new equipment; he runs older equipment and uses more owner-operators.[117] Professor Corsi found a correlation between owner-operator use and a higher accident rate.[118]

It is not only the carrier exiting the unregulated market which poses a serious safety hazard on the highway. The new, undercapitalized, shoe string operator is also a threat. Professors Corsi and Fanara, Jr., examined the impact of the Motor Carrier Act of 1980 upon safety and concluded that new entrants have accident rates between twenty seven percent and thirty three percent higher than established carriers.[119] The Motor Carrier Act of 1980 exacerbated this problem by increasing the number of new entrants. Even Alfred Kahn admits, the safety record "is markedly worse for the most recent entrants."[120]

Professor Grant Davis observed that "There may well be a strong

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114. U.S. Federal Highway Administration, 1 Transp. Safety Reports No. 8 (July 3, 1989).

115. AAA SAFETY STUDY, *supra* note 84.

116. Corsi, Fanara, Jr. & Jarrell, *Safety Performance of Pre-MCA Motor Carriers. 1977 Versus 1984,* TRANSP. J., 1988, at 30, 36. *See also*, Corsi Fanara, Jr. & Roberts, *Linkages Between Motor Carrier Accidents and Safety Regulation*, 20 LOGISTICS & TRANSP. REV. J. 149 (1984).

117. G. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*, N.W. U. CONF. PROCEEDINGS, TRANSP. DEREGULATION & SAFETY, at 629 (1987).

118. Corsi & Fanara, Jr., *Effects of New Entrants on Motor Carrier Safety*, N.W. U. CONF. PROCEEDINGS, TRANSP. DEREGULATION & SAFETY, 561 (1987); *See also* Labich, *The Scandal of Killer Trucks*, FORTUNE, Mar. 30, 1987, at 85.

119. Corsi & Fanara, Jr., *Effects of New Entrants On Motor Carrier Safety*, N.W. U. CONF. PROCEEDINGS, TRANSP. DEREGULATION & SAFETY, 561 (1987). *See also*, Corsi, Fanara, Jr. & Jarrell, *Safety Performance of Pre-MCI Motor Carriers, 1977 Versus 1984*, TRANSP. J., Spring 1988, at 30.

120. *Testimony Before the Calif. Pub. Util. Comm'n on Cross Examination by Paul Stephen Dempsey* (testimony of Alfred Kahn) 6337, 6247-48, 6283 (Jan. 31, 1989) [hereinafter Kahn Oral Testimony].

relationship between earnings, capacity and safety."[121] Professor Nicholas Glaskowsky reached similar conclusions, noting that "After five years of deregulation three trends are fairly clear: (1) the equipment fleet of the motor carrier industry is aging, (2) a lot of maintenance (expense) is being deferred, and (3) the motor carrier accident rate is increasing."[122] A recent study of the U.S. Office of Technology Assessment echoed these findings:

> Overcapacity leads to price discounting and shrunken profit margins, creating difficult economic trade-offs for decisions about investment in safety-related equipment and safety-conscious hiring and scheduling practices. Competition, increased operating, costs, and low, erratic profit margins create a need to control costs that can lead to shortchanging safety-related driver training, truck maintenance, and equipment improvements. . . . Costs and safety trade-offs are particularly problematic for owner-operators and small carriers, who have to generate revenue regularly to stay in business and may have no regular operations base or maintenance facility.[123]

Some sources allege that the number of truck-related accidents and fatalities have decreased, on a per-mile basis, since promulgation of the Motor Carrier Act of 1980.[124] But this allegation has not gone unchallenged. The U.S. Office of Technology Assessment [OTA] concluded that the number of accidents between 1981 and 1986 (which is, as we shall see, the last year for which accurate data are available) increased fifteen percent, more than the increase in truck-miles traveled during that period.[125] Further, OTA found that the by 1990, the total cost of highway accidents reached $65 billion annually, far out-pacing any purported transportation pricing savings.[126]

OTA's findings with respect to fatality levels are also sustained by the American Insurance Association, which reported that the accident rate for interstate motor carriers increased from 2.65 per million miles in 1983, to 3.06 in 1984, to 3.39 for the first half of 1985.[127] Professor Darwin Daicoff studied the data and concluded that, "deregulation has been associated with a deterioration in the rate of improvement of motor carrier safety whether expressed in motor carrier fatalities, injuries, or accidents

121. Davis, *Regulatory Program of the United States Government: The Role for Economic Regulation?*, 53 TRANSP. PRAC. J. 251, 254 (1986).

122. N. GLASKOWSKY, *supra* note 34, at 32.

123. OTA SAFETY STUDY, *supra* note 61, at 27.

124. *Trucking Safety Deregulation Unrelated*, TRAFFIC WORLD, Apr. 16, 1990, at 28.

125. OTA SAFETY STUDY, *supra* note 61. *See also* N. GLASKOWSKY, *supra* note 34, at 32.

126. OFFICE OF TECHNOLOGY ASSESSMENT, GEARING UP FOR SAFETY, SUMMARY REPORT 6 (1988).

127. N. GLASKOWSKY, *supra* note 34, at 32. A more recent decline in fatalities (if there has been one) despite the increase in the number of accidents may be attributed to mandatory 55 mph speed limits and mandatory state seat belt laws enacted during this period.

per truck mile."[128]

Professor Glaskowsky points out that deregulation has produced aging equipment, deferred maintenance, and an increasing accident rate.[129] Professor Daryl Wyckoff found a positive correlation between motor carrier regulation and safety; regulated carriers displayed a superior safety and compliance record *vis-à-vis* unregulated motor carriers.[130] Another source concluded, "Deregulation compounded the problems by creating economic circumstances that made trucking far more dangerous."[131]

Recently, the U.S. General Accounting Office attempted to assess whether certain economic factors could be used as predictors of accidents in the motor carrier industry. It concluded:

> [T]hree measures of profitability — return on equity, operating ratio, and net profit margin — were associated with subsequent safety problems as measured by accident rates. The data agreed with GAO's model for five of seven financial ratios: Firms in the weakest financial position had the highest subsequent accident rates. GAO also used a number of other factors to predict safety outcomes, including the following. First, the smallest carriers, as a group, had an accident rate that exceeded the total group's rate by 20% Second, firms operating closer to a broker model — that is, those that rely on leased equipment and/or drivers to move freight — had a group accident rate 15 to 21% above the total group's rate.
>
> With regard to two of the submodels (driver quality and compliance), driver's age, years of experience, and compensation were all good predictors of safety problems. GAO's evidence is generally consistent with the model's hypothesis since younger, less experienced drivers and lower paid company drivers posed greater-than-average accident risks.[132]

But does this overwhelming body of evidence conclusively prove, as the deregulators insist we must, that deregulation has caused a deterioration in safety? Probably not. Neither has the U.S. Surgeon General, with all the resources at his disposal, satisfied that burden in proving that cigarette smoking causes cancer. In both instances, the burden or disproving a link ought to be placed upon those who, common sense tells us, are jeopardizing public safety.

For its part, the Department of Transportation [DOT] has obfuscated the impact of deregulation upon motor carrier safety. One of the most significant problems of measuring safety is the integrity of the federal data base maintained by the DOT's Federal Highway Administration. On Janu-

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128. Daicoff, *Deregulation and Motor Carrier Safety*, 24 LOGISTICS & TRANSP. REV. J. 175, 182 (1988).

129. N. GLASKOWSKY, *supra* note 34.

130. MOTOR CARRIER ACT OF 1980: REPORT OF THE SENATE COMM. COMMERCE, SCIENCE, AND TRANSP., S. REP. NO. 641, 96th Cong., 2d Sess. 85, 100 (1980).

131. Labich, *The Scandal of Killer Trucks*, FORTUNE, Mar. 30, 1987, at 85.

132. U.S. GENERAL ACCOUNTING OFFIXCE, FREIGHT TRUCKING: PROMISING APPROACH FOR PREDICTING CARRIERS' SAFETY RISKS 2-3 (1991).

ary 1, 1986, it more than doubled the reporting threshold for property damage accidents, from $2,000 per accident, to $4,200 per accident, and has raised it since.[133] The definition of "bodily injury" was also made more rigorous.[134] Thus, while the raw numbers suggests a significant reduction in the number of commercial motor vehicle accidents after 1985, the truth is that the two sets of data (pre-1986 and post-1986) are apples and oranges. Neither do the data account for the changes in the number of miles driven or the number of motor carriers.[135] As the Congressional Research Service of the Library of Congress concluded, "Year to year comparisons of accident rate data . . . are subject to serious question because of differences, in sampling techniques, differences in the type of carrier sampled, and validity of the data collected."[136]

G. *Unprecedented Concentration*

As a consequence of the ruthlessly competitive environment unleashed by deregulation, the U.S. transportation industry has become more highly concentrated than it has ever been.[137] This high level of concentration has manifested itself not only among motor carriers, but also among airlines, railroads, and bus companies.[138] The eight largest U.S. airlines accounted for eighty one percent of revenue passenger miles in 1978, and ninety two percent in 1990;[139] the seven largest railroads accounted for sixty five percent of revenue ton miles in 1979, and eighty nine percent in 1987; the eight largest motor carriers accounted for twenty percent of industry revenue in 1978, and thirty seven percent in 1987; and the bus duopoly of Greyhound and Trailways which preceded deregulation became an effective national monopoly with their merger after deregulation.[140] Because of the scale and network economies inher-

133. *Motor Carrier Safety, Hearings Before the Subcomm. on Surface Transp. of the Sen. Comm. on Commerce, Science and Transp.*, 101st Cong., 1st Sess. 37 (1989) (statement of the Congressional Research Service).

134. *Id.*

135. *Id.*

136. *Id.*

137. U.S. GEN. ACCT OFF., TRUCKING REG. 11, 14 (1987).

138. P. DEMPSEY, *supra* note 1, at 91-92. Even Alfred Kahn admits as much. *See* Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. REG. 325 (1990).

139. *Safety and Re-Regulation Hearings Before the Senate Commerce Comm.*, 100th Cong., Ist Sess. 158 (1987); P. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION (1990).

140. P. DEMPSEY, *supra* note 1, at 83-93, 129-93. Despite the freedom to raise prices and leave unprofitable markets created by deregulation, the bus industry suffered unprecedented losses under deregulation. Industry operating ratios exceeded 96.9 every year between 1982 and 1986. R. NATHAN, FEDERAL SUBSIDIES FOR PASSENGER TRANSPORTATION, 1960-1988: WINNERS, LOSERS, AND IMPLICATIONS FOR THE FUTURE, at Appendix C, Table C (1989). Part of this was due to "cream skimming" by new entrants which focused their operations on the denser, higher revenue traffic lanes. Excessive capacity in dense markets deprived carriers of the revenue needed to cross-subsidize weaker markets. Another part still was prompted by the impact

ent in all modes of transportation, the long-term product of deregulation appears to be oligopoly of megacarriers.

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of the airline rate wars of the early 1980s, created by the destructive competition unleashed by the Airline Deregulation Act of 1978. Super saver air fares were luring passengers away from the bus stations and into airports. 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's 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 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.

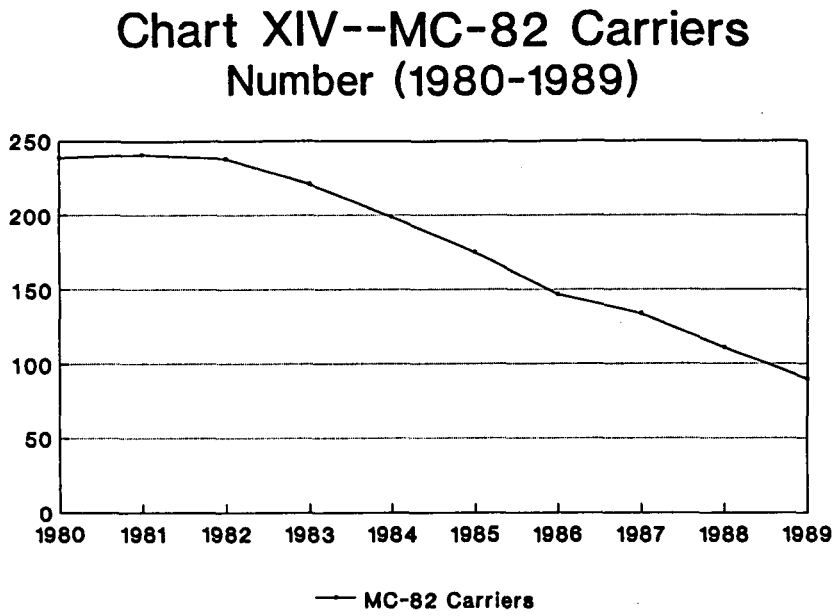
J. Kahn, The U.S. Bus Industry Seven Years After Deregulation 16-17 (address before the Canadian Transport Lawyers Assn., Nov. 18, 1989) [hereinafter J. Kahn]. *See also* Kahn, *Standing By the Bus Terminal on a Dark and Stormy Night: The U.S. Bus Industry Seven Years After Deregulation*. 18 TRANSP. L.J. 255 (1990). Between 1981 and 1986, Greyhound in the United States experienced severe losses. GREYHOUND CORP., ANNUAL REPORT 2 (1982); Greyhound Corp., ANNUAL REPORT 1 (1986). Because of its anemic performance and labor difficulties, it was placed on Standard & Poor's "watch list" in 1983. *Greyhound Put on S & P's Watch List*, WALL ST. J., Jan. 24, 1983, at 32, col. 2. In 1986, Greyhound of Arizona sold its domestic operations to an investment group led by Fred Curry, a former officer, for $350 million. *Greyhound to Sell U.S. Bus Operations for $350 Million to Group of Investors*, WALL ST. J., Dec. 24, 1986, at 3, col. 2.

The following year, Greyhound acquired its rival Trailways, for $80 million, and the U.S. bus duopoly became a monopoly. *Greyhound Gets Clearance to Run Trailways for Now*, WALL ST. J., July 3, 1987, at 3, col. 5.; *Greyhound Lines to Take Control of Trailways Assets*, WALL ST. J., July 14, 1987, at 16, col. 2. Recognizing the Trailways was on its death bed, the U.S. Department of Justice acquiesced and withheld antitrust opposition under the "failing company" doctrine. *See* Dempsey, *Antitrust Law and Police in Transportation: Monopoly I$ the Name of the Game*, 21 GA. L. REV. 505 (1987). That single firm today accounts for more than 85% of the operating revenues of the ten largest carriers. J. Kahn, *supra* note 140, at 14.

While deregulation initially increased price competition by flooding the market with excess capacity, it caused the industry's profit margin to plummet, a large number of carriers to fail, and mergers to lead to unprecedented levels of concentration. All the while small and rural communities lost bus service or faced extreme price discrimination. Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier Obligation*, 13 TRANSP. L. INST. 121, 172-75 (1981).

Thus, deregulation of the U.S. intercity bus industry has created an anemic monopoly pro-

Despite the predictions of the free market economists that deregulation would reduce industry concentration, there are far fewer LTL competitors now than before deregulation. As noted above, while the less-than-truckload sector of the motor carrier industry has experienced a shakeout of more than half of the firms which previously existed, there have been no new, major LTL entrants since deregulation began.[141] Although there were nearly 500 LTL firms in 1973, fewer than 150 existed in 1986.[142] Between 1978 (the year that *de facto* deregulation of interstate trucking began) and 1986, more than fifty four percent of the LTL trucking companies went out of business.[143]



viding poorer service than before deregulation. Even Alfred Kahn, the guru of deregulation, has 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 probably would not have deregulated the bus industry. *See* Kahn Oral Testimony, *supra* note 120, at 6247-48.

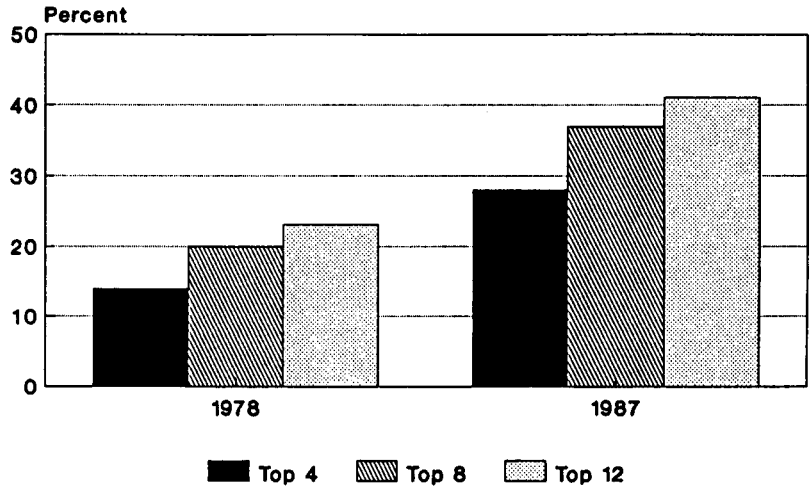
The public has suffered unduly in the United States as free market economists played havoc with national transportation policy. *Laissez faire* has made impossible the achievement of the broader social and equity objectives of ubiquitous intercity passenger transportation linking all to the infrastructure, even those living in remote communities, for it has obliterated the delicate balance of cross-subsidies which only responsibly administered economic regulation can provide.

141. N. GLASKOWSKY, *supra* note 34, at 25; U.S. GEN. ACCT. OFF., TRUCKING REG. 11, 14 (1987).

142. Silberman & Hill, *State of the LTL Industry*, TRANSP. EXEC. UPDATE, Mar./Apr. 1988, at 6.

143. M. Foley Calif. comments, *supra* note 74, at 34.

Chart XV--Market Share of Top 12 Carriers As % of All ICC Carriers



The MC-82 carriers are the largest in the industry, required by the ICC to be reflected in rate filings by the independent rate bureaus. Chart XIV reveals the declining number of LTL carriers of size.[144] Thus, sixty two percent of the largest general freight carriers have disappeared. A 1987 study of the General Accounting Office found that all geographic regions in the nation have experienced increased motor carrier concentration since deregulation began.[145] The industry has also never been

144. NUMBER OF MC-82 CARRIERS 1980-1989

Year	Number of Carriers
1980	239
1981	241
1982	238
1983	221
1984	199
1985	175
1986	147
1987	134
1988	111
1989	90

Irwin Silberman, Graphs for Fourth Quarter of 1989 (1990).

145. U.S. GEN. ACCT. OFF., TRUCKING REG. 11, 14 (1987).

MARKET SHARE OF TOP 12 CARRIERS AS PERCENTAGES OF ALL ICC CARRIERS (by Revenue)

	1978	1987
Top 4	14%	28%
Top 8	20%	37%
Top 12	23%	41%

more highly concentrated on the national level. Relative market shares pre- and post-deregulation are set forth in Chart XV.[146]

Stripped of entry regulation, the industry has become more highly concentrated that at any time in its history. The fact that not a single new LTL carrier of consequence has successfully emerged strongly suggests the existence of economies of scale.[147] Note also that the growth in the rate of trucking concentration has outstripped even that of airlines, which have been longer and, with federal preemption, more comprehensively deregulated.[148] Moreover, while no new major entrant has successfully emerged in LTL trucking, several new airlines have been launched.

The largest motor carriers are also the most profitable. *Business Week* reported that in 1986, the ten largest LTL carriers accounted for sixty percent of LTL shipments, and ninety percent of its profits.[149] In 1968, the four largest motor carriers accounted for 19.5% of the top 100 revenue, and thirty one percent of the profits of the 100 largest carriers. In 1987, the four largest enjoyed forty percent of the top 100 revenue, and forty eight percent of the top 100 profit.[150] The three largest LTL motor carriers (Roadway, Yellow and Consolidated Freightways) grew from twenty percent of the operating revenue and forty one percent of the operating income of the 100 largest carriers in 1979, to thirty one percent of the operating revenue and sixty one percent of the operating income in

146. TRAFFIC WORLD, Dec. 5, 1988, at Supp. J.

147. Even Alfred Kahn now admits that LTL trucking has exhibited". . . a trend toward increasing concentration at the national level." Kahn Oral Testimony, *supra* note 120, at 6246. A Standard & Poor's survey of the trucking industry indicates that all the major LTL motor carriers now operate in all 48 states. Kahn Oral Testimony, *supra* note 120, at 6167. True, nearly every carrier which has applied for it has received 48-State interstate general commodities motor carrier operating authority from an unusually liberal Interstate Commerce Commission, so they can surely hold themselves out as serving all 48 States. But the certificated authority and the real ability to serve all 48 states are often two entirely different things. It is unclear whether the Standard & Poor's reference refers to operating authority, interline ability, or actual operations.

148. The 10 most profitable carriers in 1984 accounted for over 80% of all general freight carrier's profits. Between 1979 and 1983, the 75 largest general freight carriers increased their share of Class I less-than-truckload revenues from 79.2% to 88.2%. During this same period, the four largest carriers increased their market share from 26.4% to 30.6%, with the largest carrier increasing its share from 9.1% to 10.1%. D. SWEENEY, C. MCCARTY, S. KALISH & J. CULER, JR., TRANSPORTATION DEREGULATION: WHAT'S REGULATED AND WHAT ISN'T? 172 (1986).

149. *Is Deregulation Working?*, BUS. WK., Dec. 22, 1986, at 50, 52.

150. Desmond, *20 Year Analysis of the Top 100,*. COMMERCIAL CARRIER J., July 1988, at 122. The General Accounting Office found that the national share of the of the four largest LTL firms increased from 25% in 1980 to 36% in 1984, and as much as 50% in some regions of the country. U.S GEN. ACCT. OFF., TRUCKING REG. 11, 14 (1987). By 1989, the four largest carriers enjoyed 40% of the industry's gross revenues, and 44% of its profits. *Testimony Before the Mich. House Transp. Comm.* (J. Conn) 4 (July 1989). Another source says the four largest trucking companies account for nearly half the revenue of the top 100 carriers, up from a third in 1980. McRoberts, *Fewer and Fewer Operators Can Keep on Trucking*, CHI. TRIB., SEPT. 3, 1989, AT 7-1, 7-4.

1985.[151] The big three increased their relative market share by approximately forty five percent in just six years.[152] These three megacarriers, accounting for one-third of the operating revenue of the top twenty five companies before deregulation, by 1991 accounted for nearly half.[153]

Professor James Rakowski notes, "The concentration of revenue and, even more so, of profit is shown to have increased significantly in recent years while a large percentage of firms are shown to be losing money or, at best remaining barely profitable."[154] Indeed, smaller carriers are being eclipsed by their larger competitors. Between 1980 and 1987, the market share of the all but the ten largest MC-82 carriers declined, whether measured in LTL revenue, tonnage, or shipment counts.[155] These firms lost fifty five percent of their truckload tonnage and thirty percent of their LTL tonnage under deregulation.[156] If these trends continue, smaller companies will play only a minor competitive role in general freight transportation.[157] One source predicts that the next recession will result in a massive shakeout, ultimately leaving only about six carriers dominating the national network.[158] Another anticipates that three or four megacarriers will dominate the industry, "forcing higher rates and fewer service options on shippers . . . ."[159]

Professor Glaskowsky has disputed the essential assumptions upon which deregulation was predicated, saying:

> The LTL for-hire carrier segment of the industry is *not* atomistic in any sense of the word. A small and still shrinking group of increasingly large firms dominates this traffic nationally. LTL operations *do* have significant economies of scale. The established large national LTL carriers are the beneficiaries of an almost insurmountable financial barrier to entry: their large and widespread terminal networks. . . .[160]

A modern LTL operation of significant size involves an extensive net-

151. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J., Spring 1988, at 11, 13. Another source states that these three trucking companies "raised their market share from 21.7% of LTL revenue in 1979 to 36.5% in 1988." Schulz, *Rate-Cutting: Competition Darken Profit Picture for LTL*, TRAFFIC WORLD, June 4, 1990, at 15, 17.

152. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J., Spring 1988, at 11, 13-14.

153. D. BARTLETT & J. STEELE, *supra* note 33, at 112.

154. *Id.*

155. *Testimony Before the Mich. Transp. Comm.* (statement of I. Silberman) 16-17 (Oct. 11, 1989).

156. *Id.* at 19.

157. *Id.* at 18.

158. McRoberts, *Fewer and Fewer Operators Can Keep on Trucking*, CHI. TRIB., Sept. 3 1989, at 7-1, 7-4.

159. Shulz, *Rate-Cutting, Competition Darken Profit Picture for LTL*, TRAFFIC WORLD, June 4, 1990, at 15, 16.

160. N. GLASKOWSKY, *supra* note 34, at 9.

> work of terminals, a computerized management information system, a large number of employees, has a need for a highly skilled management, and must be able to cope with the fact that most of its costs are fixed in the short run and at least semi-fixed in the longer run. For these reasons, the barriers to entry in the LTL sector of the motor carrier industry are high.[161]
>
> On the basis of the indisputable hard evidence, it is clear that one of the most significant results of deregulation of the motor carrier industry is that *large scale interstate motor carriage has become a closed club with a dwindling number of members*. . . .
>
> The rate of growth of interstate LTL traffic concentration since deregulation is without parallel in American business history. It is unquestionably a direct result of motor carrier deregulation, and the increasing concentration of LTL traffic in the hands of a shrinking number of carriers is continuing.[162]

Professor Rakowski also points out that not only do economies of size and scope create advantages for larger trucking firms,[163] marketing economies, or the ability of larger carriers to serve a broader geographic area ubiquitously, "exist in the LTL business which give the larger carriers an edge in securing traffic in the new deregulated environment."[164]

H. The Impact of Deregulation on Small Communities

Another adverse effect of deregulation is its impact upon small community service and pricing.[165] In motor carriage, we have not yet seen the full impact of deregulation because there has been no federal preemption of intrastate trucking. Therefore, the deleterious consequences have been somewhat blunted. The overwhelming majority of states continue to regulate motor carrier entry and pricing.[166]

However, in those transport sectors where the federal government has preempted the states, the adverse impact upon small community service has been quite profound.[167] For example, after enactment of the Staggers Rail Act of 1980, more than 1,200 small communities lost all of

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161. *Id.* at 25.

162. *Id.* at 26 (emphasis in original).

163. Rakowski, *The Market Failure in LTL Trucking: What Hath Deregulation Brought*, 56 TRANSP. PRAC. J. 33, 36 (1988).

> [I]t is evident there are definite economies of size or scope, even if the economy of scale issue is still unsettled. What this means in the marketplace is that, other things being equal, larger firms offering a superior service with more terminals and more points served have a greater probability of getting the freight.

Id.

164. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J., Spring 1988, at 11.

165. P. DEMPSEY, *supra* note 1, at 195-216; Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN L. REV. 445 (1987).

166. Since the Motor Carrier Act of 1980, only six states have deregulated their motor carrier industries. P. DEMPSEY, *supra* note 1, at 217.

167. Under the provision of the Airline Deregulation Act, state jurisdiction over intrastate air service is totally preempted, and the Bus Regulatory Reform Act of 1982 gave the Interstate

their rail service.[168] Since promulgation of the Airline Deregulation Act of 1978, more than 130 communities have lost all air service.[169] And four years after promulgation of the Bus Regulatory Reform Act of 1982, more than 4,500 communities had lost service, while fewer than 900 had gained it.[170] Even Alfred Kahn saw a need for economic regulation to

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Commerce Commission jurisdiction to reverse Public Utility Commission denials at bus discontinuances and rate increases. P. DEMPSEY, *supra* note 1, at 199.

168. P. DEMPSEY, *supra* note 1, at 210.

169. Havens & Hemsfeld, *Small Community Air Service under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641, 673 (1981). Goetz & Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 947 (1989). More than 150 now receive air service under section 419 of the Federal Aviation Act, which provides essential air services to eligible points. GEN. ACCT. OFF., DEREGULATION 31-32 (1988). Should the federal subsidies for such service dry up, a significant number of them—perhaps most—would lose all air transport service. That is of significant concern when one realizes that eighty percent of the Fortune 500 executive officers revealed that they would not locate a facility in a community which did not have reasonably adequate air service. *The Economic Impact of Fed. Airline Transp. Policies on East Tenn.: Hearings Before the Senate Comm. on the Budget*, 99th Cong., 1st Sees. 12-13 (testimony of Eugene Joyce) (1985).

170. Letter from ICC Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 1986). 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. 49 U.S.C. § 10922 *et seq*. Paradoxically, while the BRRA was premised on the notion that deregulation would enhance competition, the result has been a higher level of concentration than has ever existed in the industry, poorer returns than have ever been realized, and a large and growing number of small community abandonments.

The BRRA liberalized entry by removing the requirement that applicants prove "public convenience and necessity," leaving them with the obligation to establish on that they are "fit, willing and able" to provide the proposed operations. A protestant must then prove that issuance of the authority sought will not be in the public interest. H. REP. NO. 97-334, 97th Cong., 1st sess. 29 (1981). Abandonments become easier too. Moreover, industry proposed intrastate abandonments and price increases denied by the State PUC could now be appealed to the ICC, where they were almost always reversed. In the first year under the BRRA, the bus industry announced termination or reductions of service at 2,154 communities. U.S. DEPT. OF AGRICULTURE, RECONNECTING RURAL AMERICA 20 (1989) [hereinafter RECONNECTING RURAL AMERICA]. The ICC estimated that 1,045 communities that lost service in the first year of deregulation had no alternative intercity transportation. *Id.* By late 1986, 4,514 communities had lost bus service, while only 896 gained it. The big losers were small communities — 10,000 or less. Letter from ICC Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 1986). This loss of service falls particularly hard on non-metropolitan and rural populations, which have a higher percentage of children and elderly who need access to public intercity transport, than do urban areas. *See* RECONNECTING RURAL AMERICA, *supra*, at 8.

Who suffers when bus service deteriorates or becomes more expensive? Individuals in the lowest income groups, people living in rural areas, and the young and elderly rely disproportionately upon buses than any other mode of transportation. During 1977, the last year the U.S. Department of Commerce performed a travel survey, 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%). The trend continues. 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. R. NATHAN, FEDERAL SUBSIDIES FOR PASSENGER TRANSPORTA-

protect service to small communities, saying "I'm not sure I would ever have deregulated the buses because the bus is a lifeline of many small communities for people just to get to the doctor or to the Social Security

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TION, 1960-1988): WINNERS, LOSERS, AND IMPLICATIONS FOR THE FUTURE 17 (1989) [hereinafter R. Nathan]. 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%). *Id.* at 17-20.

The Isolation of Rural America has had a pernicious social and economic impact. *See* Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of this Endangered Species*, 32 AM. U. L. REV. 335, 343-344 (1983). The U.S. Department of Agriculture recently 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 or rail, air, and bus deregulation has simply removed many rural areas from the intercity transforation 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 liking 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—bypass the local business as an additional, unnecessary stop. Eventually population declines as access to basic services becomes to difficult or too costly for rural residents to sustain.

RECONNECTING RURAL AMERICA, *supra*, at 26-27. The U.S. intercity bus network is shrinking under deregulation. Peaking at 27.7% intercity passenger miles traveled in 1979, it has fallen steadily each year since to 23 billion passenger miles in 1987. R. Nathan, *supra,* at Appendix B, Table B-1.

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 are straining the main line system." INTERCITY BUS SERVICE IN SMALL COMMUNITIES: SENATE COMM. ON COMMERCE, SCIENCE AND TRANSP., 95th Cong., 2d Sess. 17, (1978). Similarly Charles Webb, President of NAMBO insisted that:

> The 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 traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation."

Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 105 (1976). *See* P. DEMPSEY, *supra* note 1, at 205.

Moreover, the loss of bus service means the loss of the most fuel efficient and least pollutive mode of transport. R. Nathan, *supra*, at 20-24. In 1985, the various modes consumed the following amounts of fuel per passenger mile:

office."[171]

The national air system, the national rail system and the national bus system have all suffered a loss in the number of communities served under deregulation.[172] Paradoxically, the U.S. transportation system is shrinking despite the fact that the nation's population is increasing. The loss of transport services creates an out-migration of investment, jobs and population to crowded urban areas, a social consequence which may not be desirable.

Studies performed by DOT during the first five years of deregulation suggested that LTL service had increased for small communities. However, a more recent study of small community service finds the trend to be just the opposite. Comparing service between 1976 and 1988 at 4,326 points in thirteen western states, Folger Athearn, Jr., found that sixty six percent lost all their LTL service. He concludes:

> This study, conducted more that three years after the last of the DOT studies, indicates that short-term gains have been replaced by long-term losses in LTL service due to numerous motor carrier bankruptcies and/or the abandonment of their common carrier obligations by financially distressed truckers. These results confirm the predictions of those who were opposed to trucking deregulation."[173]

Prices also appear to have increased significantly for small towns which still receive service.[174] As we shall see below, many communities are served solely by United Parcel Service. UPS sets a price somewhat lower than the United States Postal Service for small parcels, but enjoys profit margins well above those of other industries, suggesting a pricing structure reflecting their monopoly position in the market.

Moreover, many large carriers are refusing to provide discounts on interline movements.[175] Hence, local regional carriers are unable to pro-

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Fuel Consumption by Mode

Mode	Bus per passenger mile
Buses	1,323
Trains	2,800
Automobiles	4,040
Commercial Aviation	4,376
General Aviation	11,339

R. Nathan, *supra*, at 20.

171. Kahn Oral Testimony, *supra* note 120, at 6337, 6247-48.

172. Kahn Oral Testimony, *supra* note 120, at 6300-6301.

173. Athearn, Jr., *LTL Service In the West: Long-Term Losses Replace Short-Term Gains*, TRANSP. RESEARCH FORUM 98 (1989).

174. Thomas Gale Moore, a nationally recognized proponent of deregulation admits that 40% of small communities have suffered a los of air service since deregulation began, while ticket prices have increased disproportionatly for them. Moore, *U.S. Airline Deregulation: Its Effects on Passenger, Capital, and Labor*, 24 J.L. & ECON. 1, 15, 18, 28 (1986).

175. Dolan, *Benefits of Economic Regulation of Oregon Intrastate Motor Carriers*, 16 TRANSP. L.J. 235, 262 (1989).

vide the small communities they serve with the discounts enjoyed in the national pricing structure. This means that pricing to and from small communities is higher, on average, than competitive rates in larger markets.

Some deregulation proponents contend that, prior to deregulation, the ICC took no action to ensure that regulated carriers provide service to small communities. In fact, the administrative scheme of licensing entry encouraged a continuation of service to small communities. Since new certificates would be granted where an applicant could establish that "existing service was inadequate", under regulation incumbents had an incentive to provide adequate service to all points in their certificated territories, so as to maintain the economies of density they enjoyed.[176] Satisfaction of the common carrier obligation was mandated by the informal activities of the pre-deregulation ICC Bureau of Enforcement in response to service complaints.

Moreover, the overwhelming majority of states, both before and after federal deregulation, regulate intrastate motor carriage. In some states, rate averaging insures cross-subsidization for small community service. Hence, intrastate regulation assures that many small communities continue to receive adequate motor carrier service.

Prior to deregulation, small shippers enjoyed statutory protection against pricing and service discrimination.[177] After deregulation, interstate pricing discrimination is pervasive. As noted above, large shippers with monopsony power unilaterally dictate significant discounts below the full published rates, which are climbing to make up for the erosion of carrier productivity.

Many deregulation proponents point to studies financed by the U.S. Department of Transportation [DOT] on intrastate deregulation in Florida and Arizona in 1982 and 1984 to support the hypothesis that rates have declined.[178] Of course, that period of economic recession was the worst since the Great Depression, so one would expect transportation prices to fall as manufacturing declined. These studies were based on questionnaires, or attitudinal-perception data, rather than on "hard" data. Professor Chow notes that significant disparities can result in research prepared

176. *See* P. DEMPSEY, LAW & ECONOMIC REGULATION IN TRANSPORTATION, 90-95 (1985); Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729 (1977); Dempsey, *Congressional Intent and Agency Discretion— Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHICAGO KENT L. REV. 1 (1982).

177. Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This Endangered Species*, 32 AM. U. L. REV. 335 (1983).

178. Virtually every study prepared or financed by the United States Department of Transportation during the last decade has concluded that transportation deregulation is a success.

under these alternative methodologies.[179] For example, asking a small shipper who receives a five percent discount off the published rate whether he feels that rates are reasonable might elicit a different response if he was informed that the large shipper across the street enjoys a seventy percent discount for equivalent shipments.

The DOT studies also concluded that while "common carrier service [in small communities] is perceived to be of low quality accompanied, sometimes by high rates", service was considered to be adequate because of the existence of private carriage and United Parcel Service.[180] That is, indeed, an interesting observation, for UPS has a virtual monopoly on small package shipments. UPS dominates about eighty percent of the small parcel market nationally, while the United States Postal Service carriers most of the rest (RPS is a distant third). UPS participates in proceedings of the U.S. Postal Rates Commission arguing for higher and higher U.S. Postal Service rates for small packages. The result is that UPS is able to capture the lion's share of the small parcel market simply by under-pricing the U.S. Postal Service. As Chart XVI reveals, UPS's market power has enabled it to earn supracompetitive profits, far higher than the rest of the motor carrier industry and, indeed, higher than the average for all American industry.[181]

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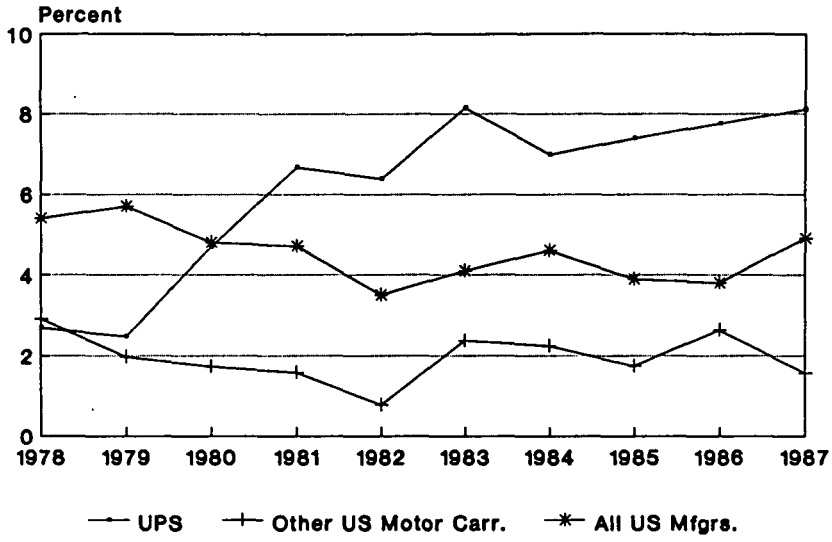
179. Chow, *An Evaluation of Less-then-Truckload Transport in Small Rural Communities of Western Canada*, 19 LOGISTICS & TRANSP. REV. 225 (1983).

180. Beilock & Freeman, *Deregulated Motor Carrier Service to Small Communities*, TRANSP. J. 71, 74 (Summer 1984).

181.

		RELATIVE PROFIT MARGINS	
		OTHER US MOTOR CARRIERS	ALL US MANUFACTURERS
YEAR	UPS		
1978	2.70%	2.92%	5.4%
1979	2.48	1.97	5.7
1980	4.69	1.73	4.8
1981	6.67	1.58	4.7
1982	6.37	.77	3.5
1983	8.14	2.37	4.1
1984	6.97	2.24	4.6
1985	7.38	1.74	3.9
1986	7.76	2.64	3.8
1987	8.10	1.57	4.9

Chart XVI--Relative Profit Margins



Hence, during the 1980s, UPS has out-performed not only the ailing motor carrier industry, but the average of all manufacturing industries in the United States, even during the recession and the period of high fuel prices which dominated the early portion of this decade. This could not have occurred unless UPS has market power to set its prices above competitive levels. Market power is the ability of a firm to maximize profits by maintaining prices above or restricting output below the competitive level for a significant period of time.[182] That results in the transfer of wealth from consumers to producers, and is therefore regressive in character.

In fact, UPS has grown to be the dominant transportation company of all modes, with gross revenues of $12.4 billion in 1989, and profits of nearly $700 million — the largest of any transportation firm in the nation.[183] But if UPS is earning supracompetitive profits, why have new entrants not been attracted to its markets like sharks to the smell of blood? Under the theory of contestability (upon which deregulation was largely premised), new entry, or the threat thereof, should hold profit margins down to competitive levels. But entry into the less-than-truckload industry has proven difficult because of the high costs incurred in developing terminal operations geared to the movement of small shipments. As noted above, major LTL trucking companies utilize a network

182. *See* Dempsey, *Antitrust Law & Policy in Transportation: Monopoly I$ the Name of the Game*, 21 GA. L. REV. 505 (1987).

183. *The Service 500*, FORTUNE, June 4, 1990, at 164.

of hub-and-spoke systems which include hundreds of satellite terminals and dozens of large consolidation centers.[184] Such factors have coalesced effectively to prohibit a single major LTL carrier from emerging since *de facto* deregulation of U.S trucking began in 1978.[185] In fact, not only has a new competitor not emerged, poor levels of productivity, excessive capacity, numerous bankruptcies, significant economies of scale and scope, and economic barriers to entry have caused the number of major LTL carriers to dwindle significantly since deregulation.

Under deregulation, pricing discrimination has become pervasive. This distortion in transportation pricing distorts the broader market for the sale of goods in a perverse way — a way in which larger producers are favored, and smaller and rural producers are disfavored.

IV. Toward a New Theory of Economic Regulation

A nation's government is inextricably intertwined with its economy. Neither trade nor, indeed, civilization can proceed without government. In modern western nations, government guarantees property rights, provides standards of fair trade, a forum for peaceful dispute resolution, and currency as a medium of exchange. These things are essential if commerce is to flow freely. Prospects for economic growth are dim in a state of chaos and anarchy. Order and predictability are required — sheriffs and marshalls are necessary to enforce legal rights and responsibilities. Even private consensual ordering via contract and property transactions requires government and its laws as a means of dispute resolution. Thus, government's participation in the economy is inevitable.

In modern nations, the fundamental question is not whether government will participate, but to what extent it shall participate. Hence, governmental participation is a matter of degree. How shall a nation allocate decisional responsibility between private entrepreneurs and government over such matters as the price, quantity, and quality of goods produced, and the relationship between producers, on the one hand, and consumers, employees and the general public, on the other?

In socialist economies, the government itself owns the means of production and allocates resources by dictating the level of production, which goods shall be produced, and at what price. This is an extremely difficult task, and several European communist nations appear to be abandoning it as costly, inefficient and wasteful. In capitalist nations, most of these decisions are made by private entrepreneurs, driven by a profit motive to invest their own capital into privately owned and operated enterprises.

184. *Is Deregulation Working*?, Bus. Wk. (Dec. 22, 1986), at 59, 53.
185. *Id.* at 53.

Profit is a two-edged sword. On the one hand, it serves as an effective stimulant for efficiency, productivity, and responsiveness to consumers, who cast votes of approval in the form of currency in favor of those entrepreneurs who best satiate their desires. The lure of profit encourages producers to trim costs and satisfy consumer tastes and preferences. In a fully competitive environment, consumers receive the goods and services they want at the lowest cost to society for their production — something economists describe as "allocative efficiency."

But profit also inspires greed, producing the classic Scrooge, the miser, who will do anything to maximize his personal wealth — give workers slave wages and dangerous working conditions, pollute the air and the water with carcinogens, ruthlessly subvert competitors and competition, satiate the public's hedonistic desire for sex and drugs, take candy from a baby's mouth, or turn Bedford Falls into Pottersville, for example — all for the lust of wealth.

Many of these results are deemed undesirable by modern societies. So in capitalist nations, government is employed in a somewhat schizophrenic capacity — as a means of facilitating the attributes of freedom in a market, while circumscribing those noxious results of too free a market. Government intrudes both to facilitate the production of the cornucopia of goods and services private ownership can bring, and to protect the public against harm.

Again, line drawing becomes a problem. Which things ought to be encouraged in a market, and which discouraged? In democratic nations, these decisions are left to elected representatives, who essentially draw lines, generally reflecting the will of the people, in laws which define the metes and bounds of acceptable behavior.

Free market economists argue that the lines should be drawn in a way which attempts to create perfect competition, which will achieve "allocative efficiency." While perfect competition exists in economic models, it rarely exists in the real world.[186] Even in economics textbooks, it requires some rather strict assumptions — for example, that preexisting or resulting distributions of wealth are irrelevant, that consumers have perfect information, that they and producers behave rationally, and that no single producer has "market power" (the ability to increase profits by

186. According to theory, the market is self-correcting — demand adjusting the amount of supply to produce equilibrium. This, however, is a theory which can be demonstrated only in the laboratory. If there is any impurity in the real arena, the formulae break down. Unfortunately, impurities are not merely a possibility, they are a certainty. The free market extremists fail to perceive the noneconomic forces which abound: political forces, social forces, as well as the impossibility of manifesting an industry with the requisite characteristics of perfect competition.

Waring, *Motor Carrier Regulation—BY State or By Market?* 51 ICC PRAC. J. 240, 240-41 (1984).

unilaterally constricting production or raising price).[187] Since these things often do not exist outside economics textbooks, government becomes involved to correct for "market failure," trying to encourage fair competition. Antitrust laws are an example of governmental intervention designed to punish efforts to diminish competition.

But even if perfect competition could be achieved, economic goals are not the only goals of a nation. A nation is a political body, and sometimes it chooses to achieve social goals which may even diminish efficiency in the distribution of its resources. For example, it may decide to transfer wealth to the elderly or the poor, even though they are unproductive.

The choice among economic and social goals is a difficult one, and is further complicated by the wide variety of means available to achieve such goals once identified. Government can attempt to (1) completely ban the enterprise (illicit drugs and prostitution, for example); (2) own and operate the industry (public education and the postal system, for example); (3) regulate levels of pricing and service (electricity and telephones, for example); (4) regulate industry standards and qualifications (the legal and medical professions, or cigarette advertising, for example); (5) sanction undesirable behavior through the judiciary (antitrust and punitive damages for products liability, for example); (6) tax and spend (high taxes on alcohol, and subsidies for low-income housing, for example).

What is this thing, regulation, which had become such a monster that its eradication was pursued with such triumphant zeal? Regulation involves government oversight. In effect, and in a general sense, the government looks over the shoulder of the private entrepreneur and says to him:

> You have an obligation to serve the public interest. You shall neither exploit nor harm your consumers, your workers, or others. You are entitled to make a fair profit, and no more. But you must also serve the public interest.

And what is the public interest? It is the interest of all who are affected by the industry — consumers, shippers, consignees, stockholders, highway motorists, managers and employers, large and small, urban and rural — to enjoy safe, adequate and dependable service at a reasonable price . . . to be treated fairly. It is also the national interest in such things as ubiquitous service and national defense.

Regulation is as old as the republic. Early on, the nation imposed tariffs upon foreign imports and set standards of weights and measurement. The modern age of regulation is commonly thought to have begun

187. *See Market Failure and Regulatory Failure as Catalysts for Political Change, supra* note 9.

in 1887 with the creation of the Interstate Commerce Commission — the nation's first independent regulatory agency — to regulate the most important infrastructure industry of the era, the railroads. Antitrust law (in effect, a regulatory enterprise employing different means) followed shortly thereafter, with the promulgation of the Sherman Act of 1890 and the Clayton Act of 1914.

A major growth of regulation occurred during the 1930s, in response to the economic collapse created by what then was perceived to be too free a market. During the New Deal, a number of additional regulatory agencies were created to regulate industries and enterprises important to the nation's economy — including the Federal Communications Commission, the Securities and Exchange Commission, the Federal Power Commission, the National Labor Relations Board, and the Civil Aeronautics Board. The U.S. Supreme Court expressed the tenor of the times:

> [There] has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon with the good of all depends.[188]

The next major wave of regulation occurred during the 1960s, and it took a different form, focusing on problems of market failure in the environment, safety, health and consumer protection.

These instances of growing government reflect an evolution in the national psychology in which communitarian values came to supplant a traditional individualistic or more libertarian ideology. As noted above, it came to be recognized that in a crowded, interrelated society, the actions of individuals affect us all. It was the public interest that regulation was created to satisfy.

Government as a participant in economic decision making has come in for a rhetorical ravaging during the past decade, in a political movement which saw most restraints on economic freedom as a nuisance at best, and wasteful and unnecessary at worst. The political creed of "deregulation" became the ideological centerpiece of an economic policy which had *laissez faire* as its foundation.

188. Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 442 (1934) (Johnson, J., concurring).

In the 1970s, inflation drove many to complain about the aggregate drag on the economy provided by comprehensive governmental oversight. American business objected to the Kafkaesque metamorphosis of government into a grotesque creature it did not understand. Presidents Ford, Carter, Reagan, and Bush pursued an aggressive policy to eradicate regulation. In one instance, Congress abolished a regulatory agency (the Civil Aeronautics Board), and sowed the ground with salt.

In part, the new wave of individualism is a response to regulatory failure — the perceived inefficiency and waste engendered by an unresponsive and lethargic government bureaucracy. But it also reflects a more deep seated ideological notion of individual freedom, a notion which is at the root of the American experiment in liberty.

The trouble is, we cannot do without government. Someone must pave the roads, deliver the mail, and protect the borders. And collectively, we can do things we cannot do individually — like maintain parks in cities, and educate all our children. So again, it is not a question of whether we will have a government, but one of how much government we shall have, and what it shall do.

In a homogeneous society, such as many of the nations of Europe, communitarian values find less resistance. Collectively, there is a public consciousness and responsibility in these nations by those who have, to assist those who do not, for they are alike in race, religion and culture. But in a heterogeneous society, such as the United States, those in need are not like those who are not; hence, there is perhaps more resistance to communitarian values here than abroad.

But the pendulum on things political, legal and economic tends to swing as popular opinion evolves. Just as regulatory failure brought cries for deregulation, market failure will inevitably bring demands for reregulation.[189] The excesses of one generation become the catalysts for reform of the next.

Indeed, that trend already appears to be emerging. Fresh with indigestion with a myriad of problems, Congress has recently considered bills proposing reregulation of various aspects of the cable television, railroad, airline, telephone, savings and loan, and broadcasting industries. Many politicians have expunged "deregulation" from their campaign speeches as the dreaded "D" word.

Thus, among the most important issues facing our government is what shall be the proper relationship between government and our economy, and how can government achieve desirable social and economic goals most efficiently and at least cost. How can we tailor the govern-

189. *See Market Failure and Regulatory Failure as Catalysts for Political Change*, *supra* note 9.

mental solution to our economic and social problems without making things, on balance, worse than they were before government intervened? It is the position of the author that neither extreme of rigid governmental supervision nor *laissez faire* is realistic or responsible. With that as a starting point, let us examine the origins of economic regulation of the motor carrier industry.

Problems of destructive competition in the motor carrier industry, seemingly endless bankruptcies, and the deterioration of wages, working conditions and safety they create gave birth to economic regulation in the 1930s. As this author has noted elsewhere:

> During the Great Depression, the motor carrier industry was plagued with an oversupply of transportation facilities. Intensive competition among truckers suppressed freight rates excessively and caused hundreds of bankruptcies. Entry into the industry was easy. The ranks of the unemployed provided an endless pool of drivers; with a drivers license and a used truck they could haul goods for hire. Not knowing what their costs were, or victimized by shippers with greater market power, they frequently took traffic at below-cost rates. They drove for gas money, or to cover their monthly payments on the truck, and kept rolling until needed repairs brought the trucks to a halt. Soon they were bankrupt, while their truck was patched up and sold to yet another entrant and the cycle repeated itself. All the while, efficient and productive trucking companies and railroads were also hemorrhaging dollars.[190]

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 overexpansion.[191] Beginning that year, Congress in each session considered bills for economic regulation of the motor carrier industry.

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"; Henry R. Trumbower argued that rail and motor carriage "should be regarded as a regulated monopoly."[192]

Other economists agreed. Shan Szto condemned excessive competition as of "no benefit to anyone," making the industry "unattractive to reasonable business people."[193] Harold G. Moulton and his Brookings Institution associates criticized the waste and instability created by exces-

190. P. DEMPSEY, *supra* note 1, at 16-17 [footnotes omitted].

191. W. JACKMAN, *supra* note 25, at 847.

192. *Quoted in* D. ANDERSON & R. FELTON, REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY 7 (1989).

193. *Id.*

sive competition and urged comprehensive coordination of transportation.[194] D. Philip Lockin summarized the inherent characteristics which warranted economic regulation: "The 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."[195] Professor Paul Kauper noted that "The present demoralization of interstate motor transportation, due to unsound competitive practices, and the menace of much unrestrained competition to the detriment of the integrity of the national transportation system as a whole, creates problems that call imperatively for federal legislation."[196]

The Great Depression exacerbated the problems which 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."[197] 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."[198] Two years later, the federal coordinator of transportation, Joseph B. Eastman, expressed even greater concern over the economic chaos plaguing the industry caused by unlimited entry and exacerbated by the Great Depression.[199] Note the striking similarity between these economic conditions which preceded deregulation with the empirical results of deregulation, summarized above.

In promulgating the Motor Carrier Act of 1935, which gave the Interstate Commerce Commission entry and rate regulatory jurisdiction over trucking and bus companies, the 74th Congress concluded:

> Motor carriers . . . are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to 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

194. *Id.* at 8. Sadly, Brookings today is a bastion of *laissez faire* ideologues who attack economic regulation at every opportunity and who insist that deregulation has produced billions of dollars in consumer savings.

195. *Id.*

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

197. *Quoted in* D. ANDERSON & R. FELTON, REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY (1989), at 5.

198. *Id.*

199. *Id.*

> present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves. . . .
>
> The ultimate objective of [the Motor Carrier Act of 1935] is a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art. All parts of such a system of transportation should be in the hands of reliable and responsible operators whose charges for service will be known, dependable, and reasonable and free from unjust discrimination.[200]

In the eyes of the early advocates of regulation, transportation was particularly prone to alternative periods of destructive competition and monopoly or oligopoly. Because of the tremendous economies of scale along many different dimensions exhibited by much of the transport sector, the out-of-pocket or marginal cost of providing service tends to lie far below its full or average cost. Moreover, transportation firms sell what is, in essence, in the nature of an instantly perishable commodity. Once the truck leaves its terminal, any unused space is lost forever. It cannot be warehoused and sold another day as could, say canned beans.

Alfred Kahn once remarked that he could see no difference between transportation firms and grocery stores. Imagine a grocer who was selling commodities which had the spoilage properties of open jars of unrefrigerated mayonnaise. He would be forced to have a "fire sale" every afternoon in order to rid himself of unsold inventory, for it could not be warehoused and sold another day.

So it is with transportation capacity. Unlimited entry creates excessive capacity which, in turn, creates conditions conducive to destructive competition and economic anemia. Hence, unconstrained competition in these circumstances tends to drive the price down towards marginal cost, causing profits to disappear. Bankruptcies and mergers ensue as excess capacity is weeded out, and a profitable monopoly or oligopoly eventually emerges. The restoration of market power may well be accomplished by a blatantly discriminatory rate structure with price differences between markets reflecting not relative costs, but the differing degree of competition.

In the view of the early advocates of regulation these two phenomena — destructive competition and powerful monopolies — were simply two sides of the same coin. The purpose of regulation, under these circumstances, was to eliminate this Hobson's choice for consumers: preventing the potential threats to safety, service and investment posed by destruc-

200. *Report of the Comm. on Interstate Commerce, Motor Carrier Act*, 1935, 74th Cong., Ist Sess. 2-3 (1935).

tive competition on the one hand, and the price-gouging and price discrimination associated with market power in a consolidated industry, on the other.[201] A healthy competitive environment was envisioned, with government providing a leveling influence on the market and protecting the public interest by establishing the perimeters of lawful behavior.

In addition to the discriminatory pricing that deregulation has unleashed, declining productivity engendered by excessive capacity appears also to have caused destructive competition between the motor carriers themselves.[202] And it is worse for motor carriers than it is for the other modes of transport.

Railroads and airlines have significant advantages that motor carriers do not. True, all sell an instantly perishable product, and the short term marginal costs of production are nil (adding an extra passenger to a scheduled flight costs the airline only a few additional drops of fuel and another cardboard meal). Yet (like telephone, electric and gas distribution companies) railroads and airlines can control a bottleneck — monopoly rail lines or airport infrastructure, respectively — and therefore exert market power to raise prices or reduce service levels to maximize profit. Thus, air fares for passengers who begin or end their trips at a concentrated hub airport are twenty one percent more expensive than for passengers who do not. Electric utilities claim their rail rates for coal from monopoly railroads are exorbitant.

In contrast, while a motor carrier can build a terminal facility which it operates exclusively, a competitor can build its terminal facility across the street. Thus, until the trucking industry becomes very highly concentrated, there will be relatively less opportunity to enjoy market power *vis-à-vis* the other modes, for truckers control no equivalent bottleneck.

Second, airlines can, by lowering prices, tap the elasticities of demand to stimulate new business. Lower prices can lure the discretionary traveler to fill a seat which might otherwise go empty. A ninety nine dollar fare will fill planes with throngs of passengers off to Disneyland (or, for that matter, Wally World), who might not otherwise make the trip. In contrast, trucking companies cannot, by lowering prices, appreciably increase the volume of freight shipped, for transportation rates are too small a percentage of the total cost of most products to stimulate additional demand. Certainly, trucking companies can steal freight away from competing motor carriers, or from railroads, by lowering prices. But the aggregate volume of freight shipped will not grow appreciably.

Third, motor carriers are subservient to the whims of large shippers who, by threatening to withhold their vast volumes of freight, can unilater-

201. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 4 (1990).
202. *See* Murray, *Turmoil in Trucking*, DUNS'S BUS. REV. (May 1982).

ally dictate rates far below the carriers' average costs. In order to survive, the carrier must cover its fixed costs by charging discriminatory prices — significantly higher rates charged to smaller and rural shippers.

Motor carriers have only a couple of shields from the ravages of destructive competition. First, an overwhelming number of states have rejected the federal experiment in motor carrier deregulation, and continue to regulate intrastate trucking. Second, the antitrust immunity accorded rate bureaus allows some rationality in the rate structure. But incredibly, the U.S. Department of Transportation would like to do away with both.

Surely, other industries sell services which are in the nature of instantly perishable commodities, which have *de minimis* short term marginal costs — hotels, movie theaters, bowling alleys, to name a few. Most can avoid destructive competition by making up fixed costs on auxiliary products and services. For example, concessions of popcorn and soft drinks are the real profit centers for the oligopoly theaters (they lose money or break even on admissions), and these are monopoly concessions for moviegoers in the theater. Hotels earn significant income from restaurants, room service, and leased space for shops in the lobby, and can differentiate their products based on location and class of service. Transportation firms have only two major variables with which to differentiate their product — speed and price — and have no auxiliary monopoly opportunities with which to make up fixed costs.

Moreover, transportation is even more prone to instant perishability than are hotel rooms or bowling alleys. Empty hotel rooms and unused bowling alleys can be sold ten minutes or several hours later. In contrast, once the truck leaves its terminal, the aircraft pulls away from its gate, or the train pulls its cars away from its siding, any empty space is lost forever.

Moreover, and more importantly, we do not care whether movie theaters become an oligopoly charging exorbitant or highly discriminatory prices, for we can stay home and watch television, or rent a movie for our VCR, or read a good book, or do a thousand different things with our leisure time. The numerous alternatives of leisure keep pricing in check.

But transportation is a *necessity*. It is the circulatory system of the nation — the veins and arteries through which commerce flows — and an important facilitator of communications. We *must* get our goods to market, and too often, we *must* travel to business meetings (teleconferencing has made only a small dent in this market). While discretionary airline travel is sometimes attractively priced (reflecting the varied alternatives to vacation time, including driving the station wagon to Lake Wobegon with the kids) business travel is not, and both are often restricted in onerous ways. If these markets are distorted by highly imperfect competition, we suffer distortions in other markets which depend upon them. Other busi-

nesses are adversely affected, and the ripple effect of distortion is pernicious.

Various sectors of the economy and various regions of the nation can be adversely affected by the aggregate impact of pricing and service discrimination. We depend upon the transportation network to allow us to exchange goods between all regions; this advances several economic and social goals, like promoting a geographic dispersal of population, avoiding the ills of overcrowding, allowing economic and social diversity and pluralism, expanding the production and consumption market, as well as promoting a geographic distribution of wealth.

Like telephone services, gas and electricity, access to the transportation infrastructure is a necessity for the public, and hence, in the nature of a public utility. None of the transportation firms individually are public utilities, but the national transportation *system* is at least a quasi-public utility. The system is the fabric that binds the nation together, and regulation is the glue that holds the system together. Prudently administered economic regulation assures that the national transportation system does not disintegrate into its antagonistic parts, and that individual firms cooperate to provide service which, from the perspective of the individual user, works effortlessly. Conversely, deregulation has deleterious systemic effects in creating a regime of transportation firms competing to the death rather than cooperating to ensure that operations flow smoothly.

Service must be ubiquitously available at an adequate level and a fair price or the public will suffer. The process of production is not complete until goods are in the hands of consumers. Just as a clogged artery can halt the flow of blood and seriously damage a body organ, a constipated transportation (or energy or communications) system will cause industrial organization to collapse. The infrastructure industries affect consumers and the economy in a way that bowling alleys do not.

While economists insist that only natural monopolies should be regulated, they ignore the necessity feature of the infrastructure industries. Moreover, all the infrastructure industries, including transportation firms, do tend toward concentration in reaction to destructive competition.

And further, we can regulate transportation firms with a clear conscience because they consume a public resource. Airports and airways and highways belong to the public. Our tax dollars built them, paved them and maintain them. Even the early railroads were given public land on which to build, and even those that were not, have used the government power of eminent domain to obtain their rights of way. Our taxes built the public infrastructure, and therefore, we have a right to exact a *quid pro quo* from the private firms which use them — that these public resources be used in the *public* interest. If we had laid the wood for bowling alleys, perhaps we could justify their regulation (although again, we

need not — they are not a necessity, other sectors of the economy do not depend upon them, and alternatives keep pricing in check).

We can legitimately insist that transportation firms satisfy the public need for ubiquitous service at a fair price, that the service not endanger public safety (we have a right not to be killed by the trucks with which we share the highways), and that they will serve the needs of national defense.

Prudently administered economic regulation can accomplish both economic and social goals deemed to be in the highest public interest. Among the economic goals are the prevention of distortions created by imperfect competition. Regulation can avoid the regressive wealth transfers created by market power, including the monopsony power of large shippers unilaterally to dictate rates which are noncompensatory. Additionally, regulation can ameliorate the market power of large carriers, preventing them from charging excessively high rates to small shippers and undercutting their competing carriers.

Regulation can also avoid the problem of externalities, which manifests itself in the impact of inadequate profits upon highway safety, and the discriminatory pricing and service provided to small communities. Shippers have a strong incentive to keep their private fleets of trucks repaired and driven by well trained drivers, for the tort system will hold them accountable for any innocent third parties injured or killed because of their negligence. In contrast, shippers can use unsafe common carriers with virtual impunity. They therefore have an economic incentive to shave the common carriers' profit margin to the bone, for their is no piercing of the corporate veil to hold shippers accountable for their ruthless greed, so to speak. Because the common carrier or its insurer pays for injury to the innocent automobile drivers, the shipper can externalize the cost of unsafe transportation.

Of course, some injured parties find the carrier in bankruptcy, or without insurance, and are never compensated. And however well money can ease pain, it often fails to restore health, and almost never restores life. Thus, exerting monopsony power to shave the common carrier's rate below compensatory levels can be economically rational for the shipper, while causing an undesirable externalized costs on society in terms of deteriorating safety, and loss of human life.

Regulation can not only ameliorate the problem of externalities, it can also accomplish a number of important social goals. It can engender a regime of cross-subsidization providing for equality of access to all shippers and to all communities, large and small. Regulation can create a geographic distribution of opportunity for economic growth spread over a larger and more diverse group of participants, thereby enhancing pluralism. It can ensure that small and remote users enjoy the same access to

the broader market for the sale of goods as do large firms, thereby enhancing competition in that broader market for the sale of goods.[203]

Dabney Waring, Jr., eloquently summarized the appropriate role of government in the market with respect to motor carrier transportation:

> Government has responsibilities, principal among which is maintaining the infrastructure of essential services necessary for the commerce and amenities of a civilized nation. Certainly the government would be a poor manager of the motor carrier industry or of any business. But is not management of the motor carriers which is at issue. It is the metes and bounds, parameters, if you will, of performance. It is requiring that carriers fulfill their common carrier obligation; of seeing that service is not abandoned when there is not a viable alternative; of monitoring service offerings to see that capacity is not so far in excess of demand that gross waste results; of opening entry selectively to assure adequate numbers of carriers; of preventing any semblance of predatory pricing; of forbidding exploitation of market dominance situations be they in the area of geography, commodity, size of a shipment, or whatever. Such regulation, however, should leave a significant latitude for managerial discretion in pricing, service options, and operational decisions.[204]

V. CONCLUSION

Let us summarize what deregulation has produced in transportation:

- Not only has public sector disinvestment produced a level of deteriorating bridges and potholes on the highways that would embarrass a third world country, deregulation has caused a disinvestment in the private components of the infrastructure as well. Inadequate profits have denied the industry the economic resources to invest in newer and more productive equipment. Our geriatric trucks, busses and aircraft are now among the oldest in the developed world.
- Productivity in this essential infrastructure industry has declined.
- Bankruptcies have reached unprecedented levels.
- Pricing discrimination is widespread, and skewed against those producers (small businesses) which have traditionally created ninety percent of the nation's jobs.
- Wages and working conditions for employees in the transportation sector have deteriorated.
- The public's safety has been jeopardized.

If Congress had known that these would be the consequences of the Motor Carrier Act of 1980, would it have promulgated the legislation? The implicit thesis of the theology of *laissez faire* is that unconstrained human

203. P. DEMPSEY, *supra* note 1.

204. Waring, *Motor Carrier Regulation—By State Or By Market*, 51 ICC PRAC. J. 240, 242 (1984).

greed will produce a better society. The public is beginning to understand that deregulation is not all the free market ideologues promised it would be.

Recently, the Consumer Federation of America issued a report revealing consumer perceptions of the impact of deregulation. It found: (a) a plurality, perhaps a majority of people, support enhanced regulation; (b) with respect to neither transportation nor communications does a majority believe that deregulation has been in the best interest of individuals or the nation; and (c) a plurality believes that deregulation has hurt consumers.[205] According to the study, support for transportation and telecommunications regulation reached a low point in the early 1980s, but has since climbed back to the higher levels of the 1970s.[206] Support for economic regulation has followed the reverse trend. In a *Business Week* poll conducted in 1987, forty nine percent of respondents said "no" when asked whether the results of deregulation of airlines, trucking and telecommunications has been positive, while forty six percent said "yes." It is clear that as Americans become better acquainted with deregulation, they become less enamored with it.

But not the U.S. Department of Transportation. Despite growing evidence of widespread failure, DOT continues tenaciously to insist that "moves to deregulation were almost universally needed and well-founded."[207] Incredibly, DOT believes that even more deregulation would be better. This is the same DOT that issued a long-awaited National Transportation Policy which argued the states should pay for the deteriorating infrastructure of highways, but that they should be preempted from regulated intrastate motor carriage, thereby forcing them to follow the course of deregulation.

Transportation is a part of the broader infrastructure which is the foundation for economic growth. In most nations, that infrastructure (communications, energy, and transportation) is owned, subsidized, or regulated by government. Only in North America have we entered the Brave New World of deregulation and the imperfect economic environment that it creates. Most nations view the infrastructure as an essential foundation for economic growth, and therefore, distortions in it cannot be tolerated. It is for that reason that these industries are treated differently from other sectors of the economy. There is also a strong public interest

205. CONSUMER FEDERATION OF AMERICA, PUBLIC OPINION ABOUT REGULATION AND DEREGULATION IN THE TRANSPORTATION AND COMMUNICATIONS INDUSTRIES (May 1988).

206. *See* Dempsey, *Adam Smith Assaults Ma Bell With His Invisible Hands: Divestiture, Deregulation and the Need for a New Telecommunications Policy*, 11 HASTINGS COMM. & ENT. L.J. 527 (1989).

207. U.S. DEPT. OF TRANSPORTATION, MOVING AMERICA: NEW DIRECTIONS, NEW OPPORTUNITIES 69 (1990).

in motor carriage because these firms are users of a public resource — highways — which are shared by nearly all citizens. If carriers are to use this scarce public resource, they have traditionally been required to do so in a way that achieves broader social goals.

The net impact of deregulation is that the social objectives for which regulation has traditionally been a catalyst have been abandoned. We have left the industry and the public it serves to a highly imperfect market which has created gross distortions between large and small firms. The net effect of deregulation is that the larger users of the system (the large shippers) in the short run, and the larger providers of the service (the large carriers) in the longer run, are its principal beneficiaries. Small shippers, small communities, and small transportation firms are clearly disadvantaged in an unregulated environment. Professor Rakowski succinctly summarized the results of motor carrier deregulation:

> The results of deregulation in the LTL sector have been the opposite of what was predicted by the deregulators. Instead of more competition, . . . [we have] increased concentration of both revenues and profits. Instead of more competitors, there are fewer firms in this segment of the industry now than prior to deregulation and open entry. Bankruptcies and voluntary departures (often because of impending doom) have thinned the ranks of competitors and there has been essentially no new entry.[208]

Throughout history, chaos in the rate structure has persuaded government to provide oversight and maintain stability. In the 1870s, widespread rate discrimination by railroads stimulated by excessive competition in competitive markets and inadequate competition in monopoly markets led to a public outcry. In rural areas served by a single railroad, farmers were enraged to see their crops moved at a higher rate to market than crops coming along the same line from a farther distance. But in Chicago, served by several highly competitive railroads, the price of shipping cattle to New York fell to a dollar a car. Jim Fisk, an owner of the Erie Railroad, responded by buying all the cattle he could find and shipping them aboard his competitor, the New York Central.[209]

These pricing anomalies caused two sets of problems — for the industry, profits were inadequate; for the shipping public, discriminatory prices had a deleterious externality. Disfavored regions or shippers found themselves significantly disadvantaged in the broader market for the sale of goods. The remedy was creation of the Interstate Commerce Commission in 1887, the nation's first independent regulatory agency.

Revisionist historians have insisted that the natural monopoly characteristics of railroading at the time necessitated government regulation.

208. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J., Spring 1988, at 11, 21.

209. P. DEMPSEY, *supra* note 1, at 8.

But they had some trouble explaining the expansion of regulation to other transport modes in the 1930s, when certainly, the motor carriers had no such monopoly.

When the Great Depression broke, Congress was confronted with a national economic disaster, one which had hit the infrastructure industries particularly hard. As has been explained above, the economic condition of the trucking industry in the 1930s was intolerable. It was characterized (as it is today) by highly discriminatory pricing, inadequate profits, an astronomical number of bankruptcies, and legitimate concerns over highway safety. Congress imposed regulatory controls with the promulgation of the Motor Carrier Act of 1935, making the rate structure more rational. For nearly half a century, the industry grew, became more productive, and prospered, and upon its shoulders, the nation grew.

In the late 1930s, Congress also examined 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. 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.[210] Carriers were spiraling downward into a sea of red ink. Without governmental protection, bankruptcies proliferated. Colonel Edgar S. Gorrell, president of the Air Transport Association, observed:

> 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 fifty 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 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.[211]

Not only had private entrepreneurs invested considerable capital in the airline industry, but the federal and local governments had as well. That

210. Dempsey, *The Rise and Fall of the Civil Aeronautics Board — Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 97 (1979).

211. *Quoted in id.*, n.14.

investment needed protection.[212] In order to avoid the deleterious impact of excessive and destructive competition and to avoid the economic "chaos" which 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.[213]

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.[214] ICC Chairman Joseph Eastman noted, "important 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."[215]

The same problems which exist today in a deregulated transportation environment are those which existed in the 1930s prior to motor carrier and airline regulation (or in the 1880s, prior to rail regulation) and differ only in magnitude.[216] A nation that does not learn from its history is doomed to repeat it. The United States has an extremely short memory, and is prone to reliving its past. The time has come to roll back deregulation.

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212. *Id.* at 102.

213. *Id.* at 95-97.

214. *Id.* at 96, n.11.

215. *Id.* at 100.

216. In the 1930s, the world was ravaged by the worst economic depression of this century; during the early 1980s, the economy was struggling. After the recession, the economy has much improved. Yet, the same parallels exist between destructive competition in the 1930s preceding regulation and the destructive competition in the 1980s following deregulation. *See, e.g.*, Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 TRANSP. L.J. 9 (1991); P. DEMPSEY & A. GOETZ, AIRLINE DEREGULATION & LAISSEZ FAIRE MYTHOLOGY (1992).

APPENDIX A

The Top 100 Carriers in 1980

1.	United Parcel Service	51.	Midwest Energy Freight System
2.	Roadway Express	52.	Pacific Trucking Co.
3.	Consolidated Freightways Corp.	53.	Gordons Transports
4.	Yellow Freight Services	54.	Watkins Motor Lines
5.	McLean Trucking Co.	55.	Merchants Fast Motor Lines
6.	Ryder Truck Lines	56.	Central Transport
7.	North American Van Lines	57.	CW Transport
8.	Spector Red Ball	58.	System 99
9.	Pacific Intermountain Express	59.	Thurston Motor Lines
10.	Allied Van Lines	60.	Maislin Transport
11.	Smith's Transfer Corp.	61.	Commercial Carriers
12.	Arkansas-Best Freight System	62.	Schwerman Trucking Co.
13.	Overnite Transportation System	63.	Commercial Lovelace Motor Freight
14.	United Van Lines	64.	Coastal Tank Lines
15.	Carolina Freight Carriers	65.	Murphy Motor Freight Lines
16.	Transcon Lines	66.	Red Star Express Lines
17.	Interstate Motor Freight System	67.	Campbell 66 Express
18.	American Freight System	68.	Jones Truck Lines
19.	East Texas Motor Freight Lines	69.	Riss International Corp.
20.	Lee Way Motor Freight	70.	Ligon Specialized Haulers
21.	Hall's Motor Transit Co.	71.	Global Van Lines
22.	Mattack Inc.	72.	Motor Freight Express
23.	Anchor Motor Freight	73.	Georgia Highway Express
24.	Signal Delivery Service	74.	National Freight
25.	Aero Mayflower Transit Co.	75.	Santa Fe Transportation Co.
26.	Mason & Dixon Lines	76.	Graves Truck Line
27.	Chemical Leaman Tank Lines	77.	United Transports
28.	Preston Trucking Co.	78.	Frozen Food Express
29.	Central Freight Lines	79.	Nu-Car Carriers
30.	IML Freight	80.	Old Dominion Freight Line
31.	Schneider National Van Carriers	81.	Milne Truck Lines
32.	TIME-DC Inc.	82.	Midwest Coast Transport
33.	Associated Truck Lines	83.	Hemingway Transport
34.	Bowman Transportation	84.	A-P-A Transport Corp.
35.	Garrett Freight Lines	85.	Dohm Transfer Co.
36.	C & H Transportation Co.	86.	BN Transport
37.	Jones Motor Co.	87.	Briggs Transportation Co.
38.	Gateway Transportation Co.	88.	Midwestern Distribution
39.	Delta Lines	89.	Groendyke Transport
40.	Pilot Freight Carriers	90.	Easzor Express
41.	Branch Motor Express Co.	91.	Willis Shaw Frozen Express
42.	Bekins Van Lines	92.	Cooper Jarrett Inc.
43.	Brown Transport Corp.	93.	Chemical Express Carriers
44.	Atlas Van Lines	94.	Refiners Transport & Terminal Corp.
45.	International Transport	95.	Ruan Transport Corp.
46.	Tri-State Motor Transit Co.	96.	Interstate Contract Carrier Corp.
47.	Refrigerated Transport Co.	97.	Holmes Transportation
48.	St. Johnsbury Trucking Co.	98.	Ace Doran Hauling & Rigging
49.	Illinois-California Express	99.	CRST Inc.
50.	Complete Auto Transit	100.	Duff Truck Line

Source: Transport Topics (Aug. 5, 1991), at 28.

APPENDIX B

The Top Carriers of 1980 and 1991

1.	United Parcel Service	51.	
2.	Roadway Express	52.	
3.	Consolidated Freightways Co.	53.	
4.	Yellow Freight System	54.	Watkins Motor Lines
5.		55.	Merchants Fast Motor Lines
6.		56.	Central Transport
7.	North American Van Lines	57.	
8.		58.	
9.		59.	
10.	Allied Van Lines	60.	
11.		61.	Commercial Carriers
12.	Arkansas-Best Freight System	62.	Schwerman Trucking Co.
13.	Overnite Transportation Co.	63.	
14.	United Van Lines	64.	
15.	Carolina Freight Carriers	65.	
16.		66.	Red Star Express Lines
17.		67.	
18.		68.	
19.		69.	
20.		70.	
21.		71.	Global Van Lines
22.	Matlack Inc.	72.	
23.	Anchor Motor Freight	73.	Georgia Highway Express
24.	Signal Delivery System	74.	National Freight
25.	Aero Mayflower Transit Co.	75.	
26.		76.	
27.	Chemical Leaman Tank Lines	77.	
28.	Preston Trucking Co.	78.	Frozen Food Express
29.	Central Freight Lines	79.	Nu-Car Carriers
30.		80.	Old Dominion Freight Line
31.	Schneider National Van Carriers	81.	
32.		82.	Midwest Coast Transport
33.		83.	
34.		84.	A-P-A Transport Corp.
35.		85.	
36.		86.	
37.	Jones Motor Co.	87.	
38.		88.	
39.		89.	Groendyke Transport
40.		90.	
41.		91.	Willis Shaw Frozen Express
42.	Bekins Van Lines Co.	92.	
43.		93.	Chemical Express Carriers
44.	Atlas Van Lines	94.	Refiners Transport & Terminal Corp.
45.		95.	Ruan Transport Corp.
46.	Tri-State Motor Transit Co.	96.	
47.		97.	
48.	St. Johnsbury Trucking Co.	98.	Ace Doran Hauling & Rigging
49.		99.	CRST Inc.
50.	Complete Auto Transit	100.	

Source: Transport Topics (Aug. 5, 1991), at 28.