The Empirical Results of Deregulation: A Decade Later, and The Band Played On*

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I. INTRODUCTION

For the past decade, America has basked in the sunshine of deregulation—deregulation of telecommunications, broadcasting, banking, oil and gas, and transportation. Transportation was the nation's first industry to be regulated by government, and a century later, the first to enjoy significant deregulation. We have now had a decade to evaluate the social and economic impacts of that experiment. This article assesses that experience.

Market failure gave birth to economic regulation. In the late 19th Century, pricing discrimination and destructive competition in the transportation industry prompted Congress to establish our nation's first independent regulatory agency, the Interstate Commerce Commission, in 1887.[1]

Beginning in the late 1970s, regulatory failure became the catalyst for deregulation. Various forms of *de jure* and *de facto* interstate deregulation resulted both from legislation passed by Congress in the mid-1970s and early-1980s, and from the appointment by Presidents Carter and Reagan of individuals to the federal regulatory commissions fervently

1. P. DEMPSEY & W. THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 7-17 (1986) [hereinafter P. DEMPSEY].

dedicated to deregulation. The federal statutes partially deregulating various aspects of the transportation industry include the following:

The Railroad Revitalization and Regulatory Reform Act of 1976
The Air Cargo Act of 1977
The Airline Deregulation Act of 1978
The International Air Transportation Competition Act of 1979
The Motor Carrier Act of 1980
The Staggers Rail Act of 1980
The Household Goods Transportation Act of 1980
The Bus Regulatory Reform Act of 1982
The Shipping Act of 1984
The Civil Aeronautics Board Sunset Act of 1984
The Freight Forwarder Deregulation Act of 1986

The high water mark of deregulation as a blossoming political movement seems to be behind us, having peaked late in the Carter and early in the Reagan Administrations. As the American people have had more experience with the grand experiment in deregulation, they have become less enamored with it. Congress has not passed a major deregulation bill in recent years, and is now considering various reregulation proposals for those modes which have experienced the most comprehensive deregulation—airlines and railroads. And while a few states jumped on the bandwagon and adopted intrastate trucking deregulation in the early 1980s, that momentum seems to have died too, for no state has opted for intrastate deregulation since 1984. Today, the overwhelming majority of states continue to regulate intrastate motor carriage.

This article will examine the experience of interstate transportation deregulation,[2] and the likely impact that additional deregulation would have. It will focus on several of the areas in which there has been a significant adverse impact: (1) economic efficiency; (2) pricing; (3) service; and (4) safety. In addition, the question of federal preemption of intrastate transportation, and the experience of intrastate deregulation in the few states which have followed the federal lead will be briefly explored. The article will also examine the question of whether more deregulation is in the public interest, and if economic regulation is to be retained, what form it should take. It will conclude with an analysis of the public interest in transportation—the policy objectives essential to accomplish social and economic goals beyond allocative efficiency.

2. Portions of this article are based on the author's prior literature in this field, including Dempsey, *The Deregulation of Intrastate Transportation*, 39 BAYLOR L. REV. 1 (1987); Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987) [hereinafter *Dark Side of Deregulation*]; Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329 (1984) [hereinafter *Transportation Deregulation*]; Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 TRANSP. L. INST. 121 (1980); and Dempsey, *Erosion of the Regulatory Process In Transportation—The Winds of Change*, 47 ICC PRAC. J. 303 (1980).

We will examine the empirical evidence surrounding deregulation of all the major domestic transport modes—airlines, railroads, and bus and trucking companies. While these industries have somewhat different economic characteristics, they are strikingly similar as well, and in many markets compete for the same traffic. They all involve the movement of something or other from here to there. Moreover, their experience is particularly interesting in that airlines, railroads, and bus companies have undergone far more comprehensive deregulation at both the interstate and (by virtue of federal preemption) intrastate levels than have motor carriers.[3] Hence, they provide something of a barometer as to what the public can expect from additional motor carrier deregulation.

Today, transportation is among the nation's most important industries. In 1987, the total cost of moving the nation's goods and people totaled $792 billion, or 17.6% of the gross national product.[4] Hence, the role government plays has profound economic and social consequences.

Federal deregulation has had nearly a decade to prove its superiority to the system it replaced. The time has come to evaluate the empirical evidence and determine whether to follow the lead of the federal government toward comprehensive deregulation, or to chart a more prudent course.

II. THE EMPIRICAL RESULTS OF INTERSTATE TRANSPORTATION DEREGULATION

A. Economic Efficiency

1. Allocative Efficiency and Perfect Competition

In a purely competitive market in which no single producer has market power, consumers purchase goods and services closely approximat-

3. A decade ago, America deregulated its airline industry. With the promulgation of the Airline Deregulation Act of 1978, Congress fully deregulated entry and pricing, preempted the states, and (effective December 31, 1984) abolished the Civil Aeronautics Board. For ten years, airlines have been subjected to a more intensive and comprehensive scheme of deregulation, and over a longer period, than any other formerly regulated industry.

Alfred Kahn, the Godfather of this revolution in American public policy, assured us that deregulation would result in more competition (not less), better service (not worse), a healthier airline industry (not one chronically ill), and that neither safety nor service to small communities would suffer. A decade later, we see how wrong he was:

- The industry has become a national oligopoly and, in many markets, a monopoly;
- The industry has suffered the worst economic losses in its history;
- Pricing is highly discriminatory;
- Small communities pay more for poorer service;
- Labor relations have deteriorated;
- Airline service has gone to hell; and
- The margin of safety has narrowed.

4. *Gridlock!*, TIME (Sept. 12, 1988) at 52, 55 [hereinafter *Gridlock!*].

ing their marginal costs of production. In an ideal competitive marketplace, there is no input waste, excess capacity, or "monopoly" profits. In theory, the most efficient producers provide the commodity or service, and the public enjoys an efficient allocation of resources.

Prior to deregulation, the consensus among many economists was that removal of governmental barriers to entry and pricing, particularly for airlines and motor carriers, would result in a healthy competitive environment, one perhaps approaching that of perfect competition. Destructive competition, whose purported existence gave birth to regulation of these two industries in the 1930s, was deemed unlikely to occur. A 1978 Senate Committee report on federal regulation provided a fairly typical summary of those attributes of destructive competition deemed not likely to occur in a deregulated air and motor carrier industry:

> A . . . justification sometimes offered for regulation is that in the absence of regulation competition would be "destructive." In other words, without regulation, an industry might operate at a loss for long periods. . . . When there is excess capacity in a competitive industry . . . prices can fall far below average cost. This is because individual producers minimize their losses by continuing to produce so long as their variable (avoidable) costs are covered, since they would incur their fixed (overhead) costs whether they produced or not. . . . Similarly, if resources are mobile [as they are in the trucking and airline industries] depressed conditions in an industry or a region would result in the shift of resources to other employments. . . .
>
> What is "destructive" about large and long-lasting losses? Some economists have suggested that they would result in long periods of inadequate investment and slow technical progress which in turn might lead to poor service and periodic shortages. . . .
>
> Another scenario that has sometimes been suggested is that periods of large losses will result in wholesale bankruptcies and the shakeout of many small producers with the result that the industry in question becomes highly concentrated in a few large firms. . . .
>
> A third and related notion is the possibility that powerful firms might engage in predation. . . . "Destructive competition" seems . . . unlikely in the cases of airlines and trucks.[5]

The trouble is, transportation is simply not the ideal model of perfect competition that many proponents of deregulation insisted it was. There appear to be significant economies of scale and scope, and economic barriers to entry in the railroad, airline, and less-than-truckload [LTL] motor carrier industries. Widespread bankruptcies and mergers have reduced the number of competitors in each mode to the point that major oligopolies now exist. The theory of contestable markets, which posits that if a monopolist or oligopolist begins to earn supracompetitive profits, new competitive entry, or the threat thereof, will restore pricing competi-

5. *Study on Federal Regulation, Report of the Sen. Comm. on Government Affairs*, 96th Cong., 1st Sess. 13-15 (1978).

tion, appears not to be sustained by the empirical evidence. Hence, many carriers are now able to exert market power. In a situation where market power exists, prices rise and/or the level of service deteriorates, excessive wealth is transferred from consumers to producers, and society's resources are misallocated, as consumers purchase alternative products or services that cost society more to produce. In the long run, the pricing competition enjoyed by many users of the transportation network may be lost as a handful of giants come to dominate the industry. These consequences will be addressed more fully below.

2. *Public Policy*

But first, a word about policy objectives beyond allocative efficiency is in order. Regulation has traditionally been employed to facilitate a number of public policy objectives which might not find a high priority in the free market, or are necessary to avoid the problems surrounding the existence of imperfect competition. As was said by Vermont Royster, editor emeritus of the *Wall Street Journal*:

> [R]egulation to protect consumers is almost as old as civilization itself. Tourists to the ruins of Pompeii see an early version of the bureau of weights and measures, a place where the townsfolk could go to be sure they weren't cheated by the local tradesmen. Unfortunately a little larceny is too common in the human species.
>
> So regulation in some form or other is one of the prices we pay for our complex civilization. And the more complicated society becomes, the more need for some watching over its many parts. We shouldn't forget that a great deal of regulation we encounter today in business or in our personal lives arose from a recognized need in the past.[6]

Indeed, it was the rate abuses of the monopoly railroads that gave birth to the Granger movement of the 19th Century, and in 1887, inspired the creation of the nation's first independent federal regulatory agency—the Interstate Commerce Commission (ICC). The ICC was vested with jurisdiction to prohibit discrimination in rail rates, and to require carriers to offer rates which were just and reasonable. The economic problems of destructive competition during the Great Depression led to the expansion of the jurisdiction of the ICC in 1935 to embrace motor carriage,[7] and the creation of the Civil Aeronautics Board in 1938 to regulate the airlines.[8] Historical experience with market imperfection was the catalyst for economic regulation at both the federal and state levels.

In the United States, private ownership of the means of production has been deemed to provide the optimum incentives for efficiency in our

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6. Royster, *"Regulation" Isn't a Dirty Word*, Wall St. J., Sept. 9, 1987, at 36.

7. P. Dempsey, *supra* note 1, at 7-21.

8. Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening the Floodgates of Entry*, 11 Transp. L.J. 91 (1979) [hereinafter *The Rise and Fall*].

economy. Nonetheless, the need for government to facilitate the market's ability to accomplish desirable social and economic objectives has long been recognized:

> America's economic system is based on the belief that a competitive, free enterprise system is the best means of achieving national economic goals. Among these goals are minimum unemployment, a low rate of inflation, adequate supplies of goods and services, and an increasing standard of living.
>
> In some industries, the operation of the competitive, free enterprise system does not result in attaining these economic goals. This is because these goals sometimes conflict with the principal goal of private business, which is to maximize profits. For example, it may be more profitable for businesses to limit the supply of a product, thereby raising its price, than to produce a large enough supply to satisfy demand for the product. Limiting supply, however, may reduce the number of jobs in the industry, cause inflation, and negatively impact the standard of living. . . . [T]o prevent this from occurring, government regulation may be used as a means of altering the existing market (i.e. economic environment) to achieve economic goals.
>
> Government regulation is also used to achieve political and social goals when the economic system is unable to achieve these goals. These include such goals as national defense, regional development, and social equity. Like economic goals, political and social goals sometimes cannot be achieved through the economic system because they conflict with businesses' goal to maximize profits.[9]

To achieve societal ends other than those resulting from man's pursuit of wealth, the regulatory mechanism provides broad parameters for production and pricing of privately owned firms. Regulation provides an equitable balance of public interest objectives with market imperatives.

For example, regulatory prohibitions against rate discrimination are essential to rectify the problems of imperfect competition. By requiring carriers to charge both small and large shippers the same rate for equivalent shipments, economic regulation prohibits large shippers from using their monopsony power to exact a lower rate, which would give them superior access to the market for the sale of their products. Regulation thereby reduces the economic advantages attributable to size which a large shipper would otherwise enjoy over its smaller rivals. Both small and large shippers thereby enjoy nondiscriminatory access to the transportation infrastructure, and an equal opportunity to get their goods to market and to compete fairly in that market for the sale of their goods. Hence, the distortions of imperfect competition are mollified by a requirement that there be no rate or service discrimination.

But even if perfect competition existed in transportation (and it does not), society frequently views the achievement of objectives other than

9. COLORADO STATE AUDITOR, PERFORMANCE AUDIT OF THE PUBLIC UTILITIES COMMISSION 14-15 (1988) [hereinafter PUC PERFORMANCE AUDIT].

allocative efficiency as more important than fidelity to the ideology of *laissez faire*. For example, one public policy objective that may be enhanced by economic regulation is wealth distribution, or stated differently, a spreading of the opportunity to participate in economic growth to a more diverse group of participants. For example, prohibitions against rate discrimination require carriers to price their services to small communities at or just below marginal cost, facilitating economic growth in all geographic regions. Small towns and rural communities are served by fewer competitors than urban centers, and in the absence of regulation are more prone to the extraction of higher, non-competitive rates by monopoly or oligopoly carriers flexing their muscles of market power.

The transportation infrastructure is the foundation upon which the rest of commerce is built. Without adequate and reasonably priced transportation services, small towns and rural communities cannot sustain economic growth. The social and economic costs to a town or rural community of poor or highly priced service can also be devastating. They can impede growth, and thereby cause an outmigration of employment opportunities and population.

An additional public policy objective encouraged by economic regulation is the forced internalization of the costs of personal injury and property damage caused by poor levels of safety attributable to overworked, exhausted labor and deteriorated equipment. Regulation is superior to judicially-ordained tort damage awards for injuries, in that however well money can ease the pain of injury, economic compensation for injury frequently cannot restore health, and can never restore life. In contrast, regulation attempts to prevent injuries *before* they occur, thereby protecting the innocent from harm. Safety, too, will be discussed in greater detail below.

In an analogous sense, regulation protects smaller competitors from the predatory practices of larger rivals trying to drive them out of business. Judicial antitrust remedies ordinarily only award economic compensation to those injured by such anticompetitive conduct, and do not restore the lost competitor to the market. Thus, regulation can keep the market flush with small and medium size competitors engaged in a healthy competitive battle, providing consumers with a high level of service, and just and reasonable rates.

But before focusing on these policy objectives, let us examine the empirical evidence of industry concentration occurring since deregulation, which reveals that perfect competition does not exist in the unregulated marketplace.

3. *Carrier Productivity Under Deregulation*

Although deregulation proponents confidently predicted substantial

improvements in carrier productivity from deregulation, their predictions do not appear to have been realized. In fact, productivity of interstate motor carriers has actually declined since federal deregulation began—this despite the introduction of larger and more efficient equipment.[10] Tremendous overcapacity stimulated both by unlimited entry and the predatory struggle for market share has decreased average load factors for general freight motor carriers.[11]

De facto federal deregulation of the motor carrier industry began under ICC Chairman A. Daniel O'Neal nearly three years prior to 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 has declined by 0.21% per year since 1978. In contrast, productivity levels of all manufacturers have increased an average of 2.4 percent per year since 1975.[12] As a consequence, thousands of motor carriers have gone bankrupt or ceased operations in the post-deregulation era.[13]

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.[14] Since deregulation began, motor carrier profits, as measured by return on equity, have consistently fallen below the rate of all manufacturers.

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10. *Oversight of the Motor Carrier Act of 1980, Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 1st Sess.* 96 (statement of Dean Stanley J. Hille) [hereinafter *1985 Senate Hearings on MCA*].

11. Professor Martin Farris prophetically predicted that this would be the result of deregulation 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 back-hauls 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* duplication, *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.

Farris, *The Case Against Deregulation In Transportation, Power, and Communications*, 45 ICC PRAC. J. 306, 329 (1978) [emphasis in the original].

12. *Panelists Deplore Truck Deregulation, Rate Discrimination at NARUC Confab*, TRAFFIC WORLD (Dec. 1, 1986), at 68, 69 [hereinafter cited as *Rate Discrimination*].

13. Many more would likely join the ranks of the "belly up" were it not for the unfunded pension liability imposed by the Employer Retirement Income Security Act [ERISA]. *Transportation Deregulation, supra* note 2, at 346-49; and N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 18-19 (1986) [hereinafter cited as N. GLASKOWSKY].

14. *Transportation Deregulation, supra* note 2, at 351.

4. BANKRUPTCIES

Dean Stanley Hille has observed that "over-capacity [in the motor carrier industry] coupled with large discounts to powerful shippers have driven down the profitability of carriers to a point where rates of return in the industry are inadequate to attract new capital, and carrier bankruptcies are at the highest level in history."[15]

One source indicates that between 1979 and the first half of 1986, more than 10,000 motor carriers went out of business.[16] Another states that the number of LTL firms dropped from nearly 500 in 1973, to fewer than 150 in 1986.[17] 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.[18] The trend of motor carrier bankruptcies and profit margins since deregulation began is noted in Chart I.

CHART I — BANKRUPTCIES AND PROFIT MARGINS FOR INTERSTATE MOTOR CARRIERS VIS-A-VIS PROFIT MARGINS FOR ALL MANUFACTURERS SINCE 1978[19]

Year	Motor Carrier Bankruptcies	Motor Carrier Profit Margins	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

15. *1985 Senate Hearings on MCA, supra* note 10, at 100.

16. *Rate Discrimination, supra* note 12, at 69.

17. Silberman & Hill, *State of the LTL Industry*, TRANSPORTATION EXECUTIVE UPDATE (Mar./Apr. 1988), at 6.

18. Comments of Martin E. Foley, *California PUC En Banc Hearing on Regulation of the State's For-Hire Trucking Industry*, at 34 (Feb. 12, 1988) [hereinafter M. FOLEY].

19. These statistics were compiled by Ron Roth, Director of Statistical Analysis of the American Trucking Associations (Jan. 1988). Profit margins are measured in terms of after tax earnings as a percentage of gross revenues.

Note that carrier failures have exceeded 1,000 each year since 1983.[20] This is all the more remarkable in light of the fact that by 1984, the national economic recession had abated, and in 1986, fuel prices had declined significantly. As we shall see below, these waves of carrier bankruptcies have created service and pricing instability, and a deteriorating margin of safety.

Note also that the profit margins of all manufacturers have been consistently superior to those of interstate motor carriers since deregulation began. Although profit margins for all manufacturers fell during the recession of the early 1980s, the drop was not nearly as drastic as that experienced by the deregulated motor carriers. Today, the profit margin of interstate motor carriers is among the lowest of all American industries.[21]

While manufacturers seem to have rebounded from the depths of the recession of the early 1980s, profit margins in the motor carrier industry began to plummet beforehand, and continued steadfastly after it. Further, despite the record number of bankruptcies which have absorbed some of the excess carrier capacity, the above chart reveals that the gap between motor carrier profits and those of all manufacturers grew sharply wider in 1987.

Airlines have also suffered severe losses since deregulation. Deregulation was largely premised on the theory of contestable markets—the notion that there are no significant economies of scale or barriers to entry in the airline industry. New competitors, it was argued, would spring up to challenge the entrenched incumbents, and the industry would become hotly competitive. In the long run, we see how wrong these predictions were.

In the Darwinian scramble for survival and market share unleashed by deregulation, hundreds of carriers have gone "belly up" in bankruptcy, including such darlings of deregulation as Air Florida and Freddie Laker's Skytrain. Like Sir Freddie Laker, Donald Burr's smiling face stared out from the cover of TIME, an expression of the overwhelming success of airline deregulation that the media initially perceived. But not long thereafter, his airline, People Express, like so many others, was standing on the precipice of bankruptcy and swallowed by one of the giant megacarriers. Alfred Kahn once pointed to these new upstart airlines as evidence that deregulation was a brilliant success. But they have all since dropped from the skies into the social Darwinist grave of bankruptcy. A rash of mergers and bankruptcies has turned the industry into a national oligopoly, and in many markets, a monopoly.[22]

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20. *Truckers in Trouble*, INSIGHT (Nov. 3, 1986), at 45.

21. *See* R. Roth, Economic and Financial Conditions of the Regulated Motor Carrier Industry 4 (1983) (unpublished monograph).

22. As one careful observer of the airline industry, Melvin Brenner, noted:

Ten years after he implemented airline deregulation as President Carter's Chairman of the Civil Aeronautics Board, Alfred Kahn admitted, "There is no denying that the profit record of the industry since 1978 has been dismal, that deregulation bears substantial responsibility, and that the proponents of deregulation did not anticipate such financial distress—either so intense or so long-continued."[23]

In one important sense, the economic characteristics of transportation differ from those of most other sectors of the economy, and make it inherently vulnerable to overcapacity. If a manufacturer or retailer suffers a period of slack demand, it can usually store unsold goods and sell them another day, when demand improves. In contrast, transportation firms sell what is, in essence, an instantly perishable commodity. Once the truck leaves its loading dock, once the trail pulls its boxcars down the track, and once an aircraft taxis down the runway, any unused capacity is lost forever. This inevitably leads to distress sale pricing during weak demand periods, or when excess capacity created by unlimited entry abounds. Hence, the vicissitudes of the market cycle are particularly brutal for transportation. It is as if a grocer was faced with spoilage of all its canned goods on a daily basis—as if they had the properties of open jars of unrefrigerated mayonnaise. He would be forced to have a fire sale every afternoon.

In trucking, things are worse still, for many small, unsophisticated companies know not what their marginal costs are. Their naivete, or the monopsony bullying tactics of large shippers, can result in underpricing of their services, and eventual bankruptcy. In the interim, shippers enjoy a windfall at the expense of motor carrier labor and investors, while trucking productivity and profitability decline. For while the small unsophisticated trucking companies are hemorrhaging dollars, they are taking traffic away from efficient firms, causing them to bleed as well.

The established, efficient firms respond to such overcapacity by pricing at marginal costs (or sometimes, it has been alleged, by engaging in predatory practices if they can afford it, to hasten the demise of the new

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> The eight years of deregulation comprise the worst financial period in airline history. The cumulative industry operations in those eight years generated a loss of over $7 billion, when interest payments are included with operating expenses. . . . The deregulation era is the first time that the industry as a whole has recorded a cumulative loss over an eight-year period. . . .
>
> The principal cause of the poor financial results has been the tendency of airlines to engage in *destructive* competition in the absence of regulation—a tendency evident particularly in excess capacity and fare wars. . . . By failing to cover fixed costs, marginal cost reliance jeopardizes the industry's long term viability.

Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179, 200-01 (1988) [emphasis in original] [hereinafter Brenner].

23. Kahn, *Airline Deregulation—A Mixed Bag, But a Clear Success Nevertheless*, 16 TRANSP. L.J. 229, 248 (1988) [citation omitted] [hereinafter Kahn].

entrant).[24] But a company can price at the margin for only so long. It must eventually recover its fixed costs, or it too is doomed. Thus, under deregulation, many small, unsophisticated entrepreneurs have dragged a number of established, efficient trucking companies with them into the Darwinian grave of bankruptcy.

5. *Subhaulers Under Deregulation*

Independent owner-operators are also taking an economic beating under deregulation, as the profit margins of the carriers with which they contract are squeezed. These are the small entrepreneurs, the rugged individualists, who own their own tractors and lease their services to common carriers. Of the 300,000 in existence in 1980, the *Wall Street Journal* has estimated that fewer than 100,000 are still on the highway.[25]

Their competitive presence once offered some promise for the notion of new competitive entry and contestability. But the disastrous results of excessive competition have absorbed much of this industry. As we shall see below, the struggle to survive on the brink of bankruptcy creates a momentum all its own of deferred maintenance and aged equipment, which in turn jeopardizes the safety of those with whom they share the highways.

Subhaulers, comprised mostly of owner-operators, serve as an important supplement to the common carrier system. They give the system needed flexibility and additional capacity, which is particularly valuable during periods of peak demand.

As the prime carriers have been driven against the wall by the overcapacity generated by unlimited entry, and by shippers with monopsony power, rates have been sent tumbling. The squeeze on prime carriers has, quite naturally, squeezed every aspect of their costs, including maintenance, vehicular replacement, labor, and subhaulers. Hence, the tragedy of subhaulers is merely one aspect of a broader picture in which deregulation assaults prime carriers, and the inevitable consequence is that every enterprise affiliated with prime haulers suffers too.

6. *Industry Concentration*

During the past decade, several major American industries have been subjected to federal deregulation. These include telecommunications, airlines, railroads, bus companies, and motor carriers. The overriding and unmistakable trend that cuts across each of these industries has

24. Allegations of predatory behavior have been raised by many carriers. *See e.g.*, Marnell v. United Parcel Service, 260 F. Supp. 391 (N.D. Cal. 1966), and Broadway Delivery Service v. United Parcel Service, 651 F.2d 122 (2d Cir. 1981), *cert. den.* 454 U.S. 968 (1981).

25. Richards, *Independent Truckers Who Hailed Deregulation Reconsider As a Rate War Rages and Taxes Rise*, Wall St. J., Mar. 31, 1983, at 50.

been an unambiguous movement toward hefty concentration in a remarkably short period of time. Indeed, the economic pressures placed upon carriers by the intensive competition unleashed by deregulation has reduced the number of major competitors through waves of bankruptcies and mergers to the point that several of these industries have become oligopolies.

By the end of 1986, AT&T retained an 82% share of the long-distance telecommunications market, and a near monopoly in the toll-free, big business, and international markets.[26] The six largest airlines increased their passenger share from 73% in 1973, to 84% in 1986.[27] The 13 largest freight railroads which competed in 1978 had merged into seven by 1986.[28] The bus duopoly had evolved into a national monopoly, with the merger of Greyhound and Trailways. And the top 10 less-than-truckload [LTL] motor carriers accounted for almost 60% of shipments, and 90% of industry profits.[29] Let us look more closely at each transport mode.

A. *Motor Carriers*

In 1978, the largest four LTL motor carriers enjoyed 20% of the industry's shipments; the top ten accounted for 39%; and the top 20 for 43%. By early 1985, the top four had 35% (a 75% increase); the top ten had 60% (a 70% increase); and the top 20 enjoyed 67% of the market (a 56% increase since 1978).[30] By 1988, the four largest LTL carriers enjoyed 40% of the industry's gross revenue, and 48% of its profits. All geographic regions in the nation have experienced increased concentration in the trucking industry since deregulation.[31]

Entry into the LTL industry has proven difficult because of the high costs incurred in developing terminal operations geared to the movement of small shipments. Major LTL trucking companies utilize a network of hub-and-spoke systems which include hundreds of satellite terminals and dozens of large consolidation centers.[32] There appear to be considera-

26. *Is Deregulation Working?*, Bus. Wk. (Dec. 22, 1986), at 50, 52 [hereinafter cited as *Is Deregulation Working?*].

27. *Id.* In the short term, competition unleashed by deregulation reduced the dominance by the largest airlines. Thus, in January, 1986, the five largest airlines accounted for 54.3% of the domestic passenger market. But by July of 1987, after a series of unprecedented mergers, their share had soared to 72.2%. Dempsey, *Antitrust Law and Policy in Transportation: Monopoly I$ the Name of the Game*, 21 Ga. L. Rev. 505, 543 (1987) [hereinafter cited as *Monopoly I$ the Name of the Game*].

28. *Is Deregulation Working?, supra* note 26, at 52. *See Transportation Deregulation, supra* note 2, at 367-68.

29. *Is Deregulation Working?, supra* note 26, at 52.

30. N. Glaskowsky, *supra* note 13, at 25.

31. U.S. General Accounting Office, Trucking Regulation 11, 14 (1987).

32. *Is Deregulation Working?, supra* note 26, at 53.

ble economies of scale in the LTL industry.[33] High barriers to entry have effectively prohibited a single major LTL carrier from emerging since 1978.[34]

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 since deregulation. As Professor Glaskowsky has observed, concentration flourishes:

> 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 operating 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. . . .[35]
>
> On the basis of 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 LTL 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.[36]

At the other end of the spectrum, smaller interstate trucking companies complain that the large LTL carriers are expanding into regional markets by engaging in predatory pricing; large carriers, it is alleged, use the profits they earn on less competitive long-haul routes to sustain the deep (and sometimes below-cost) discounts offered in short-haul markets. As a consequence, there has been a high failure rate among small and medium size motor carriers.[37]

The insurance crisis is also contributing to the overwhelming number

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33. A modern LTL operation of significant size involves an extensive network of terminals, a computerized management information system, a large number of employees, has a need for 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. Accordingly, it is in this sector of the motor carrier industry that there is considerable potential for economic concentration. That potential has been realized dramatically since the industry was deregulated . . . .

N. GLASKOWSKY, *supra* note 13, at 25.

34. *Is Deregulation Working?, supra* note 26, at 53. The only major new entrant into the nationwide less-than-truckload industry since promulgation of the federal Motor Carrier Act of 1980 was Leaseway, which has since abandoned the costly effort. *Id.* at 16. It is somewhat ironic that Leaseway, a vigorous advocate of the philosophy of deregulation, proved incapable of sustaining its presence once freed to compete. The same could be said of Sir Freddie Laker in the airline industry.

35. N. GLASKOWSKY, *supra* note 13, at 9 [emphasis in original].

36. *Id.* at 26 [emphasis in original].

37. *Id.*

of bankruptcies in this industry. Small entrepreneurs are encountering significant economic barriers to entry in the high cost (and, in some instances, unavailability) of insurance. Insurance rates appear to be skyrocketing, not only because of the national insurance crisis, but also because, in an era of intensive competition in which profits are inadequate, maintenance has been deferred, the margin of safety has deteriorated, and accident rates have increased.

Moreover, with the high failure rate, the capital markets for new trucking ventures are drying up. Hence, the industry may ultimately become even more concentrated and less competitive than it is now, as deregulation takes its toll on the small trucking competitors unable to survive the Darwinian economic process.[38]

B. RAILROADS

The trend toward concentration cuts across all of the deregulated industries. Since 1980, when Congress passed the Staggers Rail Act, we have witnessed tremendously large railroad mergers. East of the Mississippi there are today but three major railroads: in 1980, the Chessie and Family Lines System merged to become CSX; in 1981, the Norfolk & Western and Southern merged to become the Norfolk/Southern; and during the 1970s, eight railroads in the northeastern United States merged to form Conrail.[39]

West of the Mississippi, only four major railroads exist: in 1980, the Burlington Northern merged with the Frisco; in 1982, the Union Pacific, Missouri Pacific and Western Pacific merged; only the proposed Santa Fe/Southern Pacific merger was disapproved by the Interstate Commerce Commission.[40] Chart II reveals the major mergers of the past three decades.

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38. Professor Grant Davis put it this way:

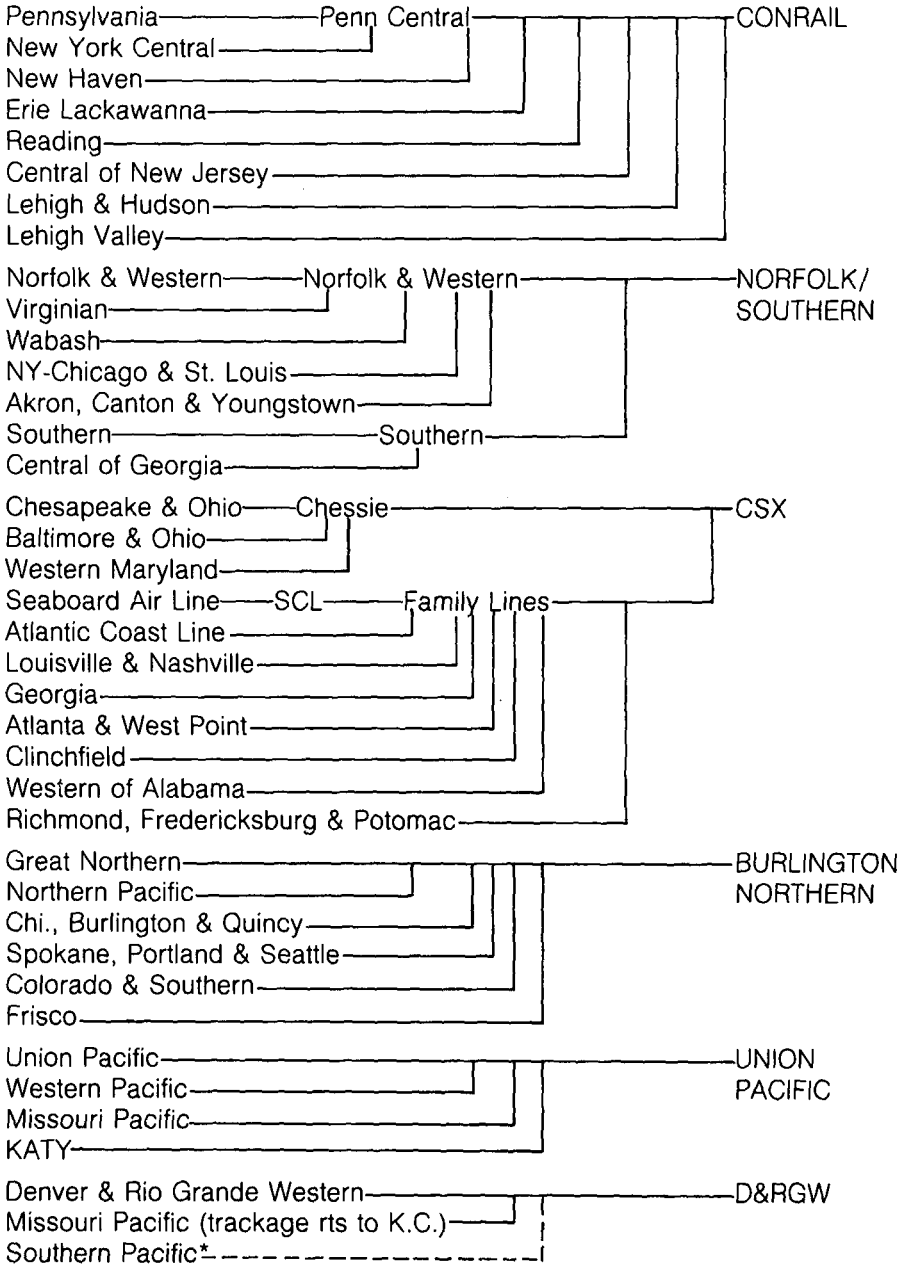
> Unlimited competition in trucking was envisioned to result in small units employing highly mobile capital. The growing concentration trend, the financial environment and carrier market strategy indicate that capital is not mobile, and a finite market is in the process of being dominated by a limited number of carriers. Small shippers dependent upon this segment of the industry for service are virtually "captive," and rates will continue to increase in certain segments of this market.

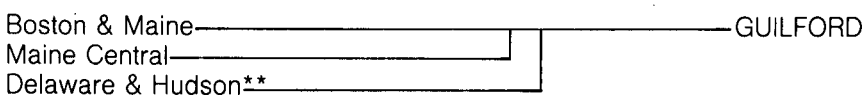
Davis, *Unresolved Issues In U.S. Trucking Regulatory Modernization Debate*, 54 TRANSP. PRAC. J. 163, 171 (1987).

39. *Monopoly I$ the Name of the Game, supra* note 27, at 547-48.

40. *Id.* at 548-49.

CHART II — MAJOR RAILROAD MERGERS, ACQUISITIONS & CONSOLIDATIONS SINCE 1960





* Originally merged into the Santa Fe, but ICC disapproved the merger and ordered divestiture; merger into D&RGW pending ICC approval.
** In bankruptcy; operated under service order by the New York, Susquehanna & Western.

The rail industry is today an oligopoly. Seven firms are responsible for 85% of the nation's revenue ton miles.[41] Moreover, major members of the industry are beginning to purchase their competitors. They are thereby becoming origin-to-destination intermodal megacarriers. For example, the Burlington Northern Railroad is acquiring a half dozen motor carriers.[42] The Norfolk/Southern purchased the nation's largest household goods carrier, North American Van Lines.[43] The Union Pacific purchased the nation's fifth largest motor carrier, Overnite Transportation.[44]

Railroads are also purchasing major pipelines, ocean shipping, and inland water companies. For example, in 1984 CSX Corporation, the nation's second largest railroad, purchased American Commercial Lines, the parent of the nation's largest barge company. CSX acquired Sea-Land Corporation, the nation's largest U.S. flag ocean carrier. It also bought Texas Gas, which has significant pipeline interests. Burlington Northern also has gone into the pipeline business, purchasing El Paso Natural Gas. And Norfolk/Southern also announced its intention to go into the barge business.[45] For the movement of large, bulk commodities, there are few competitive alternatives. And the railroads seem to be buying up most of them.

C. AIRLINES

During the Reagan Administration, the U.S. Department of Transportation regularly reported misleading data about the impact of deregulation. For example, in testimony submitted to a Senate subcommittee, DOT Assistant Secretary Matthew Scocozza observed, "As you know, aviation operations were deregulated in 1978 and the changes brought by this policy shape today's market. The results? Nine years ago approximately 39 commercial carriers were operating. A recent count esti-

41. *Transportation Deregulation, supra* note 2, at 367.
42. ICC STAFF REPORT NO. 10, at 15 (1986). TRAFFIC WORLD (Aug. 4, 1986), at 36.
43. D. SWEENEY, C. MCCARTHY, S. KALISH & J. CUTLER, JR., TRANSPORTATION DEREGULATION: WHAT'S DEREGULATED AND WHAT ISN'T 25-26 (1986).
44. *Union Pacific to Buy Overnite for $1.2 Billion*, Wall St. J., Sept. 19, 1986, at 3.
45. *Monopoly I$ the Name of the Game, supra* note 27, at 551-52.

mates that 131 are now in service."[46]

The numbers may be right, but the impression is grossly misleading. Since promulgation of the Airline Deregulation Act of 1978, the airline industry has also become an oligopoly, and in many major markets, a monopoly. While some small air carriers have entered, more than 150 airlines have fallen from the skies into bankruptcy.

In January 1986, the five largest airlines accounted for 54% of the domestic passenger market; by 1987, the figure had grown to 72%. Fifteen independent airlines operating at the beginning of 1986 had been merged into six megacarriers by the end of 1987.[47] The structural changes have been both comprehensive, and hastily implemented.[48]

Never before has the United States experienced the level of concentration in aviation that we have now. In several cities, a single airline enjoys virtual monopoly domination of landings, takeoffs, gates and passengers. These include the hubs of Charlotte, Detroit, Houston, Memphis, Minneapolis/St. Paul, Newark, Pittsburgh, Salt Lake City, and St. Louis.

Since deregulation, all major airlines have created hub-and-spoke systems, funnelling their arrivals and departures into and out of hub airports where they dominate the arrivals, departures, and infrastructure. Deregulation has freed them to leave competitive and smaller markets, and consolidate their strength into regional, hub and market monopolies and oligopolies. Today, only four airports in the nation are hub duopolies—Chicago, Atlanta, Dallas/Ft. Worth, and Denver.[49] The remaining hubs are virtual monopolies. The bottom line is, as the dust settles, we see a horizon devoid of meaningful competition.

Much criticism has been levied at the Department of Transportation

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46. *The Effect of Airline Deregulation on the Rural Economy, Hearings Before the Subcomm. on Rural Economy and Family Farming of the Senate Comm. on Small Business*, 100th Cong., 1st Sess. 145 (1987) (statement of Matthew V. Scocozza) [hereinafter *1987 Senate Hearings on Deregulation*].

47. Brenner, *supra* note 22, at 180.

48. One commentator summarized the structural changes in the industry which have occurred since promulgation of the Airline Deregulation Act of 1978:

> The 11 major airlines have shrunk to eight; the eight former local service carriers are now two and they are trying to merge; the eight original low-cost charter airlines have been reduced to one, through bankruptcy and abandonment; 14 former regional airlines have shrunk to only four; over 100 new upstart airlines were certificated by the CAB and about 32 got off the ground and most of those crashed, leaving only a handful still operating; of the 50 top commuters in existence in 1978, 29 have disappeared . . . .
>
> Today, the top 50 commuter carriers who constitute 90 percent of that industry are captives of the major carriers, in part or in total owned, controlled, and financed by the giant airlines and relegated to serving the big airlines at their hubs.

1987 Senate Hearings on Deregulation, supra note 46, at 61-62 (1987) (testimony of Morten S. Beyer).

49. *Monopoly I$ the Name of the Game, supra* note 27, at 592-93.

for approving every merger submitted to it since it assumed the Civil Aeronautics Board's jurisdiction over mergers, acquisitions and consolidations (under section 408 of the Federal Aviation Act) upon the CAB's demise on December 31, 1984. The Airline Deregulation Act of 1978 insisted that the agency guard against "unfair, deceptive, predatory, or anticompetitive practices" and avoid "unreasonable industry concentration, excessive market domination" and similar occurrences which might enable "carriers unreasonably to increase prices, reduce services, or exclude competition. . . ."[50] But these admonitions fell on deaf ears at DOT, which never met a merger it didn't like.

DOT approved them all. It approved Texas Air's (i.e., Continental and New York Air) acquisition of both People Express (which included Frontier) and Eastern Airlines (which included Braniff's Latin American routes);[51] United's acquisition of Pan Am's transpacific routes; American's acquisition of Air Cal; Delta's acquisition of Western; Northwest's acquisition of Republic; TWA's acquisition of Ozark; and USAir's acquisition of PSA and Piedmont, to mention only a few. As is revealed by Chart III, this has sharply increased national levels of concentration.[52]Concentration levels are even more pronounced when one recognizes that before deregulation, we had a healthy charter industry, that had significant market share. Under deregulation, it has virtually vanished.[53]

The father of airline deregulation, Alfred Kahn, appeared dismayed by what he characterizes as an "uncomfortably tight oligopoly." He has been particularly critical of the Department of Transportation's permissive approach to airline mergers. Said he, "They have been *permitted* by a totally, and in my view indefensibly, complaisant Department of Transportation. It is absurd to blame deregulation for this abysmal dereliction."[54] Certainly, DOT deserves some severe criticism for its abdication of antitrust responsibility to protect the public from excessive concentration.[55]

Clearly, the merger of Northwest and Republic resulted in sharply increased levels of concentration at Minneapolis/St. Paul and Detroit; and equally clearly, the same happened at St. Louis when DOT approved the merger of TWA with Ozark Airlines. But as Chart IV reveals, massive hub concentration has occurred at a large number of cities where no merger had a significant impact.

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50. 49 U.S.C. § 1302(a)(7) (1983). *See The Rise and Fall, supra* note 8, at 135.

51. DOT did require that some shuttle routes be sold off in the northeastern corridor, but otherwise the Eastern acquisition by Texas Air passed through unmolested. *See Monopoly I$ the Name of the Game, supra* note 27, at 538.

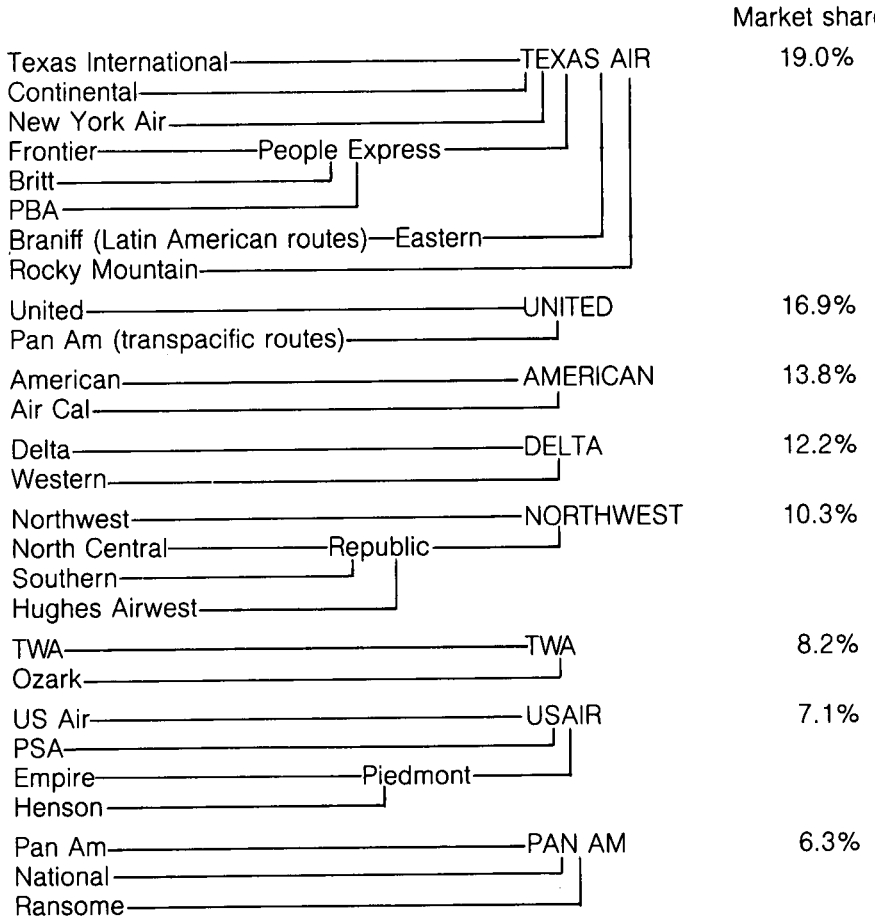
52. *Id.*

53. *See* Brenner, *supra* note 22, at 184.

54. Kahn, *Airline Deregulation—A Mixed Bag, But a Clear Success Nevertheless*, 16 TRANSP. L.J. 229, 234 (1988).

55. *Monopoly I$ the Name of the Game, supra* note 27.

CHART III — MAJOR AIR CARRIER MERGERS, ACQUISITIONS, PURCHASES AND CONSOLIDATIONS SINCE PROMULGATION OF THE AIRLINE DEREGULATION ACT OF 1978



* Market share as measured by revenue passenger miles as of July, 1987.
Source: Business Week, Oct. 5, 1987, at 40.

Indeed, the explanation for concentration at all but Detroit, Minneapolis/St. Paul and St. Louis is not DOT's generous approval of airline mergers, but simply the entry and exit opportunities unleashed by deregulation. Carriers adopting particular cities as hubs have increased frequencies and leased more gates, while incumbent airlines have quietly exited in favor of market dominance opportunities of their own in other hub airports. Kahn is therefore wrong. Freedom to enter and exit markets is the heart of deregulation, and it is responsible for concentration at more hub airports than is the DOT's "abysmal dereliction," abysmal though it

CHART IV — SINGLE CARRIER CONCENTRATION AT MAJOR AIRPORTS PRE AND POST DEREGULATION

Airport	1977	1987
Baltimore/Washington	24.5% US Air	60.0% USAir*
Cincinnati	35.0% Delta	67.6% Delta
Detroit Metropolitan	21.2% Delta	64.9% Northwest
Houston Intercontinental	20.4% Continental	71.5% Continental
Memphis	40.2% Delta	86.7% Northwest
Minneapolis/St. Paul	45.9% Northwest	81.6% Northwest
Nashville Metropolitan	28.2% American	60.2% American
Pittsburgh	43.7% US Air	82.8% USAir
St. Louis-Lambert	39.1% TWA	82.3% TWA
Salt Lake City	39.6% Western	74.5% Delta
AVERAGE	33.8%	73.2%

* includes Piedmont
Source: Consumer Reports (June 1988), at 362-67.

clearly is. Nonetheless, the DOT's antitrust delinquency is responsible for national concentration levels which are unacceptable, and which dampen competition by reducing the number of competitors in particular city pairs.

One additional observation about concentration levels pre and post deregulation is appropriate. Before deregulation, even a high level of concentration could be tolerated because fare levels were regulated. Even a monopolist could not reap monopoly profits from a market because the CAB regulated rates, ensuring that they were "just and reasonable." But in a post deregulation environment, these high levels of concentration are a matter of serious concern, for the regulatory mechanism which formerly shielded consumers from price gouging has been eradicated by deregulation, and the theory of contestable markets seems not to be sustained by the empirical evidence of deregulation.[56] Today, there appear to be significant economies of scale and scope in the airline industry.

For several reasons, it is unlikely that a new entrant will emerge to rival the megacarriers. First, the infrastructure of gates, terminal facilities, and at America's four busiest airports (i.e., Chicago O'Hare, Washington National, and New York's LaGuardia and Kennedy) landing slots have

56. *See* Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179 (1988). Even deregulation's most adamant proponents are now beginning to admit this. *See* Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. REG. 393 (1987); Moore, *U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor*, 29 J. L. & ECON. 1 (1986).

been consumed. Sixty-eight percent of our airports have no gates to lease to a new entrant. Even if an incumbent would be willing to lease a gate to an upstart airline (and at an incumbent's hub, few are so willing), the incumbent could nevertheless exact monopoly rents. The decision of the DOT to allow carriers to buy and sell landing slots means that the deeper-pocket carriers can purchase market share, and thereby enjoy the market power to reap oligopoly profits.[57]

Second, the largest airlines today own the largest computer reservations systems, from which most tickets are sold. Many critics have argued that not only does such vertical integration offer the incumbents the potential to enjoy various forms of system bias (including screen bias, connecting point bias, and database bias),[58] but that it gives the incumbents superior access to market information, with which they can adjust the number of seats for which discounts are offered on an hourly basis depending on passenger demand for seats.[59] Moreover, the advantages of being listed in the computer as an "on line" connection with one of the major airlines has led 48 of the 50 small air carriers to affiliate themselves with the megacarriers, renaming their companies (to, for example, United Express, Continental Express, American Eagle) and repainting their aircraft in megacarrier colors. Ninety percent of the 31.7 million passengers who flew abroad regional airlines in 1987 were carried aboard code-sharing airlines.[60] The small carriers have become, in effect, franchisees of the behemoths of the industry, and are therefore an unlikely source from which new competition will spring. They are also declining in number. The regional airlines, peaking at 246 in 1981, dwindled to 168 in 1987.[61]

Third, large airlines have more attractive frequent flyer programs, which serve as a lure to business travelers, the most lucrative segment of the market. Brand loyalty makes it difficult for a new rival to find a niche, particularly when its frequent flyer program offers free travel to decidedly less exotic destinations.

Fourth, although new entrants enjoyed significantly lower labor costs in the inaugural years of deregulation, the squeeze on carrier profits unleashed by deregulation has forced management to exact serious concessions in terms of labor wages and work rules. Some, like Continental and TWA, have effectively crushed their unions. Thus, the margin of labor

57. *See* Hardaway, *The FAA "Buy-Sell" Slot Rule: Airline Deregulation at the Crossroads*, 52 J. AIR L. & COM. 1 (1986).

58. *See* Saunders, *The Antitrust Implications of Computer Reservations Systems*, 51 J. AIR L. & COM. 157 (1985).

59. GENERAL ACCOUNTING OFFICE, AIRLINE COMPETITION: IMPACT OF COMPUTERIZED RESERVATIONS SYSTEMS (1986).

60. *Dereg's Falling Stars*, OAG FREQUENT FLYER (Aug. 1988), at 28.

61. *Id.*

cost and productivity between a new entrant and an established airline has been significantly narrowed.

Finally, with 150 airlines having gone bankrupt since 1978, investor confidence in new airline ventures has evaporated. Hence, significant new entry is highly unlikely in the deregulated airline industry.[62]

The dominance by incumbent carriers of gates, terminal space, landing and takeoff slots, computer reservations systems, and the most attractive frequent flyer programs makes it unlikely that new entrants will emerge to challenge the megacarriers. Barriers to entry and economies of scale do exist in the airline industry; the theory of contestable markets, which supplied the intellectual justification for deregulation, has been refuted by an overwhelming body of empirical evidence. After a decade of deregulation, one thing is clear—the oligopoly that resulted from deregulation is here to stay.

That of course, means that the price discounts that many consumers have enjoyed in recent years will likely evaporate. Low fares have stimulated new traffic in the past decade, mostly for vacation travelers flying between large cities served by more than a single carrier. But business travelers and others unwilling to sleep in strange cities on Saturday nights, individuals flying to small towns, or people who, at the last minute, have to fly home for funerals or other emergencies, are ineligible for these discounts. So deregulation's benefits have been unevenly distributed. Pricing discrimination is pervasive.

Kahn once argued that deregulation would bring about cost-based pricing. After a decade of deregulation, pricing seems to reflect the level of competition in any market, not costs. There seems to be a positive correlation between more competition and lower prices, and between fewer competitors and higher prices. With the industry becoming more highly concentrated, prices are ascending.

But even if new entry is unlikely, why should we be concerned with the high level of concentration which has emerged in the airline industry under deregulation? After all, even though Coke and Pepsi dominate the soft drink industry, don't we still have pricing competition between them? Although other American industries are dominated by huge firms, transportation is different in the way it impacts the economy. Melvin Brenner said it best:

> Other industries, even when comprised of only a few large firms, do not usually end up with a one-supplier monopoly in specific local markets. But this can happen in air transportation.
>
> Moreover, because of the nature of transportation, a local monopoly can do greater harm to a community than could a local monopoly in some other industry. This is because transportation is a basic part of the eco-

62. *See Monopoly I$ the Name of the Game, supra* note 27.

nomic/social/cultural infrastructure, which affects the efficiency of all other business activities in a community and the quality of life of its residents. The ability of a city to retain existing industries, and attract new ones, is uniquely dependent upon the adequacy, convenience, and reasonable pricing of its airline service.[63]

4. *Emerging Oligopolies*

All deregulated industries—airlines, bus companies, motor carriers, and railroads—are marching to the drum of increased concentration. Each is becoming a monopoly or oligopoly.

Traditionally healthy carriers have been bankrupted, or substantially driven out of the transportation industry, by the selective rate cutting by major competitors which now dominate the market nationally. Increased concentration created by bankruptcies of small and medium size competitors increases the probability that the firms remaining will be in a position, unilaterally or collectively, to exercise market power.

As noted above, market power is the ability of one or more firms to maximize profits by maintaining prices above or restricting output below the competitive level for a significant period of time. That results in the transfer of wealth from consumers to producers, and is therefore regressive in character. A transportation industry with market power will mean that even the price wars that the nation's largest shippers (and passengers flying between major markets) have enjoyed since deregulation began may be a short-term phenomenon.

Deregulation wasn't supposed to turn out this way. It was supposed to ensure that consumers enjoyed more competition, not less. Its proponents assured us that if an incumbent were to raise its prices in a monopoly or oligopoly market, and thereby enjoy supracompetitive profits, new competitors would be attracted like sharks to the smell of blood, and would reestablish the competitive equilibrium. This was the theory of contestable markets, which was premised upon the false assumption that transportation was inherently competitive, and that the only barriers to entry were governmental requirements that carriers obtain certificates of public convenience and necessity before being allowed to compete.

The foundation upon which the theory rested has been shattered by an overwhelming body of empirical evidence that proves that economic barriers to entry, significant advantages in terms of traffic density, and economies of scale and scope *do* exist in the airline, railroad, bus and LTL trucking industries.[64] The concentration which has inevitably emerged is a natural consequence of the dynamics of deregulation.

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63. Brenner, *supra* note 22, at 189.

64. *See supra*, text accompanying notes 27-63.

B. Effects of Deregulation on Pricing

Competition has enabled some users (particularly large shippers and discretionary passengers in major airline markets) to enjoy lower prices. But these benefits have been unevenly distributed, for small businesses, small towns, and rural communities pay relatively higher prices for poorer service. Moreover, as noted above, the unprecedented concentration emerging in all transport modes threatens to make the low prices enjoyed in large, competitive markets a short term phenomenon.

Deregulation inevitably eradicates some of the important benefits derived from the traditional scheme of economic regulation, including the prohibition against pricing discrimination. As Professors Wagner and Dean have noted, "regulation may better provide for rate equity for various shipper groups among commodities and between geographical regions. It can reduce discrimination."[65] Thus, it is no surprise that deregulation became a catalyst for pricing and service discrimination.

1. Cross Subsidization

Prior to deregulation, there was some amount of cross-subsidization within the transportation industry. While carriers were allowed to serve specified lucrative routes, they were also required to serve less lucrative markets in the geographic territory designated by their operating certificates. Carriers were expected to cross-subsidize losses or meager profits earned from serving small communities with healthier revenues earned from dense, lucrative markets, thereby providing just and reasonable rates to both. Deregulation was designed to end this internal cross-subsidization on grounds that such wealth redistribution created allocative inefficiency.

Actually, cross-subsidization appears merely to have been reversed in direction, rather than eliminated. Today, carriers can extract higher rates from their monopoly and oligopoly markets (typically small and rural communities) to cross-subsidize the losses they are incurring as a result of the intensive competitive battles being waged for market share in dense traffic lanes. The carriers which are ultimately victorious in those price wars stand to reap significant economic rewards once the dust has settled and the competition has been eliminated. Such are the spoils of economic battle.

With the floodgates of deregulation thrown open to new entrants, and the advent of unconstrained pricing, carriers have been able to charge predatory rates in competitive markets, and cross-subsidize such losses

65. Wagner & Dean, *A Prospective View Toward Deregulation of Motor Common Carrier Entry*, 48 ICC Prac. J. 406, 413 (1981). *See also*, Wagner, *Exit of Entry Controls for Motor Common Carriers; Rationale Reassessment*, 50 ICC Prac. J. 163, 172-73 (1983).

with higher, discriminatory rates in oligopoly and monopoly markets. As we have seen, significant barriers to entry and economies of scale exist in the railroad, airline, and less-than-truckload motor carrier industries, making it possible for survivors to exert market power once competition has fallen by the wayside.

2. *Monopoly*

The impact of market power is already visible in the rail industry, which is the most heavily concentrated of transport modes, the one with the largest fixed costs and the one with the most significant economies of scale and barriers to entry. Many shippers of bulk commodities, typically grain and coal, have no realistic alternative to monopoly railroads to get their product to market. There is often no parallel railroad or barge line, and no economically feasible trucking operation. As a consequence, the railroads are free to charge whatever the market will bear. These inflated rates are passed on to consumers in the form of higher electric bills by their coal-fired utilities. The Consumer Federation of America estimates that these excessive charges are costing consumers $1.3 billion a year.[66]

As we saw above, most of the transport modes are becoming oligopolies; most have not yet acquired the dominant position for many commodities that the railroads have attained. For example, in trucking, many carriers find themselves dwarfed by the economic power of America's largest shippers.

3. *Monopsony*

Professor Grant Davis has observed that the nation's largest shippers exert monopsony power over trucking companies. By virtue 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.[67] Professor James Rakowski agrees:

> [A]bout 90 percent of the firms in the LTL general freight industry, including some of the largest firms, are having severe financial difficulty. Firms on the brink of bankruptcy cannot worry about long range planning and marketing studies. Carriers up against the wall need cash for tomorrow (actually the bills are probably long past due), not next week. They must price accordingly to get the traffic, regardless of their costs. . .[68]
>
> In essence, the problem is one of greatly unequal market power between shippers and truck companies. The technical term for a situation like this is "monopsony". It is in very simplistic terms, something like a buyer side

66. *$1.3 Billion in Rail Overcharges*, CURE NEWSLETTER (June 1985), at 1.

67. *See 1985 Senate Hearings on MCA, supra* note 10, at 234 (statement of Prof. Grant M. Davis).

68. *Id.* at 247 (statement of Prof. James P. Rakowski).

> analogy to monopoly. In other words, the buyer rather than the seller has the power to set the price for the product. In the present situation, the large shippers and not the carriers themselves are effectively dictating the level of truck rates in many instances.
>
> With enormous amounts of traffic available, these large shippers simply play one carrier off against another until unrealistically low (and unprofitable) rates are offered in order to get the traffic. Conversely, a shipper could simply name a price and, in plain English, tell the carriers to take it or leave it if they do not file a rate at that level.[69]

The secret negotiation of special and discriminatory rate discounts between motor carriers and large volume shippers has become widespread in deregulated interstate markets.[70] While large volume shippers often exact substantial discounts from rail and motor carriers for the movement of freight, smaller businesses lack the monopsony power to decree a price lower than the published rate. Further, the published rate is climbing, to make up for the substantial discounts demanded by large shippers. Smaller shippers are forced to pay a disproportionate portion of carrier fixed costs, while large shippers enjoy generous discounts.[71] Hence, America's deregulated industries are robbing Peter to pay Paul.

Here, too, concentration exacerbates the problem of discriminatory pricing. The deregulated transportation industries are becoming oligopolies as the larger carriers consolidate their operations, and as smaller carriers collapse into bankruptcy. With fewer competitive alternatives to get their goods to market, smaller shippers today pay more for poorer service.[72]

4. *Discrimination*

Deregulation has created an environment in which widespread discrimination by airlines and motor carriers favors urban markets and large volume shippers, while penalizing smaller shippers and rural communities. One ICC study in California found that shippers in small towns were paying up to 40% more for motor carrier service than shippers in larger communities.[73]

In a sense, the big become bigger, and the small become smaller. It is no wonder, then, that America's largest companies clamor for still more deregulation, for it is they that are the principal beneficiaries of pricing and service discrimination. In earlier periods of American political history,

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69. *Id.* at 249.

70. *See* Betz, *Taking the Crooked Route*, DISTRIBUTION (Apr. 1986), at 69.

71. *See 1985 Senate Hearings on MCA, supra* note 10, at 241 (statement of Prof. Grant M. Davis).

72. Dempsey, *Small Towns Are Withering*, Denver Post, Jan. 2, 1988.

73. Butler, *ICC and DOT Charged With Duplicity for Allegedly "Burying" Rate Study*, TRAFFIC WORLD (June 13, 1983), at 21.

such concentrations of wealth and power would have mandated governmental intervention, not regulatory regression.

Professor Donald Harper has noted that the ability of small shippers to compete against larger rivals is hindered by relatively higher freight rates.[74] Hence, discriminatory transportation costs contribute to the economies of scale that larger entrepreneurs enjoy throughout the American economy.[75] The higher cost of access to the stream of commerce endured by small shippers places them at a competitive disadvantage vis-a-vis their larger rivals. Assuming all other factors are equal, the large manufacturer with relatively (and in many cases, significantly) lower transportation costs will be able to market his product at a lower price than his smaller counterpart. Deregulation facilitates this discrimination. These deleterious economic consequences have a broader social impact, for small businesses create most of America's jobs.

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 are shrinking."[76]

Interstate deregulation of motor carriers has been described as a "disaster" by many small shippers.[77] Professor Harper notes that "[t]he chief victim of [deregulation] is the small shipper who has little bargaining power with carriers, whose traffic is not as 'desirable' to the carriers as that of larger shippers, and who cannot practically enter into private carriage for financial or other reasons."[78]

In Professor David Huff's study comparing interstate and intrastate freight rates in Texas,[79] it was demonstrated that published intrastate rates for shipments of 20,000 pounds were significantly lower than corresponding interstate rates for the same commodity classifications, weights and distances.[80] Looking beyond the published rates, Dr. Huff examined the interstate and intrastate rates actually charged Texas shippers in

74. *1985 Senate Hearings on MCA, supra* note 10, at 278 (statement of Prof. Donald V. Harper).

75. COALITION FOR SOUND GENERAL FREIGHT TRUCKING, THE RATIONALE FOR TRUCKING REGULATION: EXPOSING THE MYTHS OF DEREGULATION 6 (1986).

76. *Id.* at 9. Dean Hille's survey of small Missouri shippers appears to confirm these conclusions. *1985 Senate Hearings on MCA, supra* note 10, at 94 (statement of Dean Stanley Hille).

77. *Panelists Deplore Truck Deregulation, Rate Discrimination at NARUC Confab*, TRAFFIC WORLD (Dec. 1, 1986), at 68.

78. *1985 Senate Hearings on MCA, supra* note 10, at 283 (statement of Prof. Donald V. Harper).

79. D. HUFF, PERSPECTIVES ON THE REGULATION OF TRUCKING IN TEXAS (1987) [hereinafter cited as D. HUFF].

80. *Id.* at 53.

1985, and found that the intrastate rates averaged 4.4 cents per pound, while corresponding interstate rates averaged 7.1 cents per pound.[81] Thus, regulated intrastate rates were 59.5% lower than deregulated interstate rates.[82]

The difference is even more pronounced when truckload rates are computed separately. For shipments of less than 500 pounds, Dr. Huff found that interstate rates were 186% higher than intrastate rates.[83] Based on such findings, he concluded, "An important expectation among those advocating the deregulation of the trucking industry is that rates will decline. The specific facts in Texas as well as historical developments in deregulated markets such as in interstate commerce and in California indicate that such an expectation is erroneous except for the small minority of shippers interested in large truckload shipments."[84]

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."[85] Dabney Waring, a nationally recognized transportation economist, has echoed these sentiments: "Discrimination, preference or prejudice, favoring one region, one industry, one person (or one type of region, industry, or person) can have an extremely disruptive effect on the dispersion of population and industry."[86]

Today, most states prohibit motor carrier discrimination in rates, charges and classifications between shippers. Such provisions are fundamental if small shippers and small communities are not to suffer relatively higher rates than their larger counterparts.

The one area in which the average consumer has had direct experience with deregulation is airline transportation. Here, widespread discrimination is practiced against business and other non-discretionary travelers and in favor of vacation travelers, and against small towns and in favor of large, competitive markets.

For example, the airline rate from Dubuque to Chicago is $1 per seat mile, while the fare from New York to Los Angeles is 3.3 cents per seat mile.[87] A round trip coach ticket between International Falls, MN, and

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81. *Id.* at 59.
82. *Id.* at 60.
83. *Id.*
84. *Id.* at 51.
85. Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945).
86. Waring, *Motor Carrier Regulation—By State Or By Market?*, 51 ICC PRAC. J. 240, 241 (1984) [hereinafter cited as Waring].
87. *1987 Senate Hearings on Deregulation, supra* note 46, at 81 (testimony of John J. Nance).

Minneapolis/St. Paul is 86 cents a seat mile; between Washington, D.C., and Minneapolis/St. Paul, the fare is 27 cents a seat mile.[88] The trip from Madison, WI, to St. Louis costs $225 one way, while a ticket from New York to Los Angeles via St. Louis is only $199.[89] Hence, rather than reflecting marginal costs, air fares are instead reflecting the level of competition in a given market. These fares take from the poor who fly between small towns and give to the urban rich, in competitive battles waged for domination of the larger, more lucrative markets. Moreover, unprecedented concentration in this industry is sharply reducing the number of markets in which effective competition exists.

Growing consumer irritation with the deregulated airline industry is reflected in public opinion polls. In 1984, when consumers were asked, "Should airlines be allowed to raise or lower their fares on their own, or should they be required to get government permission?", only 35% believed that they should be required to get the government's permission. However, as consumers became more acquainted with deregulation, they became less enamored with it. In 1987, when asked the same question, almost half were willing to opt for more government rate regulation.[90] Alfred Kahn now admits that the time has come to consider price ceilings in markets dominated by a single carrier. How quickly a dose of reality chills blind faith in *laissez faire* ideology.

C. ADEQUATE SERVICE TO THE PUBLIC

Nearly a decade has elapsed since the federal government launched its grand experiment in transportation deregulation. The outlines of a consistent trend are becoming visible in all deregulated industries—airlines, railroads, and trucking, bus, and telephone companies. While deregulation has created a class of beneficiaries, small businesses, and consumers in small towns and rural communities are not among them. Today, they pay higher prices for poorer service.

Transportation deregulation has meant isolation for many of America's rural communities. With the *de facto* elimination of the common carrier obligation (which traditionally insisted that carriers provide service to all points described in their operating certificates), interstate carriers have been free to reduce their level of service to less lucrative communities, and focus their energies and equipment on more profitable market opportunities. The Performance Audit of the Colorado Public Utilities Commission reached these conclusions:

> One clear pattern emerges from the studies on the impacts of deregulation in different public utility industries: small communities and rural areas

88. *Id.* at 41 (statement of Robert W. Anderson).
89. Dempsey, *Fear Of Flying Frequently*, NEWSWEEK (Oct. 5, 1987), at 12.
90. McGinley, *Bad Air Service Prompts Call for Changes*, Wall St. J., Nov. 9, 1987, at 28.

> have often paid a heavy price. Many small communities and rural areas have lost all of their passenger transportation services; many others have had their services reduced significantly. In addition, the costs of both passenger transportation and telephone services have increased, often substantially, in these areas.
>
> The implications of the loss of services and increases in costs to small communities are significant. Many of these communities are trying to attract new businesses and keep existing businesses and residents from moving away.[91]

Attracting new investment becomes increasingly difficult for these communities when transportation services are poor and prices are high. This section examines the impact of deregulation of each of the major transport modes upon small towns and rural communities.

1. *Bus Companies*

Since promulgation of the Bus Regulatory Reform Act of 1982, 4,514 communities have lost bus service, while only 896 have gained it. The big losers have been small communities. Indeed, 3,432 of the towns which have lost service have a population of 10,000 or less.[92] When Greyhound began its inaugural rounds of service cessation and reduction in 1982, 90% of the towns affected had fewer than 10,000 residents.[93]

The *New York Times* reports that "[t]he trend toward cuts in service is continuing at a rapid pace, with dozens of communities throughout the Middle West facing possible loss of their last means of public transportation."[94] Senator Larry Pressler (R-S.D.) notes that "[b]us deregulation has had a devastating impact on rural America. . . . Low-income families and the elderly are disproportionately affected because it is they who most heavily rely on the service."[95] With the Greyhound-Trailways merger, the bus duopoly became a monopoly. Can higher prices be far down the road?

2. *Railroads*

Railroads have also taken advantage of the abundant opportunities provided by deregulation to abandon small towns. Railroads took advantage of exit opportunities in the Transportation Act of 1958 to shed themselves of most of the nation's passenger trains.[96] Since enactment of the

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91. PUC Performance Audit, *supra* note 9, at 39.
92. Letter from ICC Chairman Heather J. Gradison to Senator Larry Pressler (Sept. 8, 1986).
93. Charlier, *Small-Town America Battles a Deep Gloom As Its Economy Sinks*, Wall St. J., Aug. 4, 1988, at 1, 6.
94. Robbins, *Dependent on Buses, Midwestern Towns Fight Cuts in Service*, New York Times, Oct. 14, 1986, at A14.
95. *Id.*
96. *The Dark Side of Deregulation*, *supra* note 2, at 450-53.

Staggers Rail Act of 1980, the focus has been on freight discontinuances; more than 1,200 communities have lost rail service.[97] The tragedy is that the loss is usually permanent—once the rails are ripped off their ties, they are almost never replaced.

3. *AIRLINES*

The airline industry provides yet another example of the impact on small community service resulting from deregulation. The result of airline deregulation "is that many small communities have experienced a drastic reduction or deterioration in air service."[98]

Congress deregulated the industry with the promulgation of the Airline Deregulation Act of 1978. In the first year of deregulation, 260 cities suffered a deterioration in air service, a disproportionate number of them being small towns.[99] Seventy of the communities which were receiving some service lost all of it.[100] In the first two years of deregulation, more than 100 communities lost all scheduled service.[101]

Professors Stephenson and Beier note that "deregulation has accelerated the withdrawal from smaller communities and . . . there has been a concomitant reduction in the frequency of direct flights in those markets."[102] This is indeed a surprising consequence of deregulation, since section 419 of the Airline Deregulation Act of 1978 provided for a 10-year program of federal subsidies to attempt to preserve essential air service to small communities. Since deregulation began, approximately 140 small towns have lost all air service. In 190 more, the larger airlines have disappeared, to be replaced by smaller commuter carriers, offering inferior levels of comfort, convenience, and safety.[103]

Clearly, there has been a qualitative deterioration of service for small communities.[104] With the use of smaller aircraft, several communities enjoy more frequent departures, but suffer a decrease in the number of

97. Dempsey, *Punishing Smallness*, Cleveland Plain Dealer, Dec. 12, 1987, at 15-A.

98. Note, *Airline Deregulation and Service To Small Communities*, 57 N. DAK. L. REV. 607, 608 (1981).

99. *See* CIVIL AERONAUTICS BOARD, REPORT ON AIRLINE SERVICE 43-50 (1979).

100. Meyer, *Section 419 of the Airline Deregulation Act: What Has Been the Effect On Air Service To Small Communities?*, 47 J. AIR L. & COM. 151, 181 (1981) [hereinafter cited as Meyer].

101. Havens & Heymsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641, 673 (1981).

102. Stephenson & Beier, *The Effects of Airline Deregulation on Air Service to Small Communities*, 20 TRANSP. J. 54, 57 (1981) [hereinafter cited as Stephenson & Beier].

103. Dempsey, *With Deregulation, Big Get Bigger*, Philadelphia Inquirer, Dec. 19, 1987, at 9-A.

104. *See* GENERAL ACCOUNTING OFFICE, DEREGULATION 73 (1985) [hereinafter cited as GAO REPORT].

seats.[105]

Many passengers complain that the smaller unpressurized aircraft used by the commuter airlines are less comfortable.[106] They are certainly less safe. Depending upon how it is measured, commuter airlines have a safety record of between 3 and 30 times worse than established jet airlines.[107] Passengers also appear to be less satisfied with the service schedules and flight delays of commuter airlines.[108]

Small towns lie remotely scattered under the dark and cloudy skies of deregulation, where not enough sunlight falls to give passengers a glimpse of the supersaver discounts prevalent in major markets.[109] With the airline industry becoming an oligopoly (the top 5 carriers dominate 72% of the domestic passenger market), passengers in small towns find their service reduced to a single airline, providing circuitous connections out of a major hub and charging whatever the market will bear.[110]

Even deregulation proponent Thomas Gale Moore admits that 40% of small communities have suffered both a loss of air service and a disproportionate increase in ticket prices since deregulation began.[111] Similarly, Professor Addus observes that "[a]s a result of airline deregulation . . . fares for traveling between small points have increased rapidly; and commuter air carrier fares are reported to be particularly high in most cases."[112] Assessing the quantitative and qualitative impacts, it has been noted that "smaller communities are receiving markedly worse air service

105. *Id.* at 73; Meyer, *supra* note 100, at 181.

106. Oster, Jr. & Zorn, *Deregulation and Commuter Airline Safety*, 49 J. AIR L. & COM. 315, 316 (1984).

107. *See* Oster, Jr. & Zorn, *Airline Deregulation, Commuter Safety, and Regional Air Transportation*, 14 GROWTH AND CHANGE 3, 7 (1983). Author John Nance summarized the reasons for the deterioration of safety resulting from the substitution of inferior commuter carrier service for scheduled airlines:

> The aircraft [commuter airlines] fly are usually less sophisticated, largely unpressurized, and much smaller than mainstream jetliners. Many are devoid of not only restrooms, they are also devoid of radar, devoid of decent cockpit communications, devoid of sophisticated flight instruments, devoid of those elements that are part of the safety buffer which all of us as Americans have come to expect of our air transportation system, whether we are boarding in a rural area of not.
>
> In addition [most] of these aircraft . . . fly at altitudes most vulnerable to weather hazards and potential mid-air collisions. They are maintained by less sophisticated maintenance departments, they are flown by less experienced pilots, usually the first airline job of their career.

1987 *Senate Hearings on Deregulation, supra* note 46, at 81-82 (testimony of John J. Nance).

108. *See* Ahmed, *Air Transportation to Small Communities: Passenger Characteristics and Perceptions of Service Attributes*, 38 TRANSP. Q. 15, 21 (1984).

109. Dempsey, *Life Since Deregulation: It Means Paying Much More for Much Less*, Des Moines Register, Dec. 30, 1987.

110. Dempsey, *Fear of Flying Frequently*, NEWSWEEK (Oct. 5, 1987), at 12.

111. Moore, *U.S. Airline Deregulation: Its Effects On Passengers, Capital, and Labor*, 24 J. L. & ECON. 1, 15, 18 (1986).

112. Addus, *Subsidizing Air Service to Small Communities*, 39 TRANSP. Q. 537, 548 (1985).

than existed prior to deregulation."[113]

Under section 419 of the Airline Deregulation Act of 1978, small community subsidies were to last until 1988. In 1985, 142 communities were receiving subsidized service under the program.[114] Most will likely lose air service altogether if federal economic subsidies dry up.

The loss of service has an unhealthy ripple effect throughout the economy of each of these communities. As one commentator has noted, "Besides increasing transportation costs for companies already doing business in many small communities, the impact of deregulation is decreasing the attractiveness of locating new businesses in these communities."[115] A survey of executives of the 500 largest American corporations reveals that 80% would not locate in an area which did not have reasonably available scheduled airline service.[116]

Not only has airline service into and out of small towns deteriorated, but the national system of air travel is significantly worse than that which existed prior to deregulation. Even travelers who can get a super-saver fare find that the product they buy today is decidedly inferior to that which they purchased before deregulation.

Flying has become a miserable experience. The planes are filthy, delayed, cancelled, and overbooked, our luggage disappears, and the food is processed cardboard. Chronic delays, missed connections, near misses and circuitous routing all are products of hub-and-spoking, adopted by every major airline. Too often, we find ourselves stranded in airports or imprisoned in aircraft, waiting endlessly to get to our destinations. America has suffered billions of dollars in lost opportunity costs as a result of these delays. Travel delays in 1986 alone cost airlines $1.8 billion in extra operating expenses, and cost consumers $3.2 billion in lost time.[117]

Consumer abuses do not stop with miserable service. Under deregulation, management philosophy in the airline industry is dominated by the philosophy of P.T. Barnum: "There's a sucker born every minute."

Without government oversight, airlines freely engage in imaginative forms of consumer fraud, including bait-and-switch advertising, deliberate overbooking, unrealistic scheduling, and demand based flight cancellations. As the *Wall Street Journal* observed:

> Complaints about service are at an all-time high, with flight delays and cancellations provoking protest chants and even violence among angry pas-

113. Meyer, *supra* note 100, at 182. *See also*, S. TOLCHIN & M. TOLCHIN, DISMANTLING AMERICA: THE RUSH TO DEREGULATE 245-46 (1983).

114. GAO REPORT, *supra* note 104, at 31-32.

115. Meyer, *supra* note 100, at 175.

116. *Dark Side of Deregulation*, *supra* note 2, at 458.

117. *Gridlock!*, *supra* note 4, at 55.

> sengers. The alarming rise in reported midair near-collisions has sharpened demands for improved safety. Meanwhile, mergers have given some carriers so much market clout that fliers are seeing the consumer benefits of deregulation eroded.[118]

Some commentators have asserted that airline deregulation has resulted in significant economic benefits to the consuming public. A Brookings Institute study maintained that this savings was as much as $6 billion, comprised of fare discounts and opportunity cost savings realized as a result of "improved service convenience [to business travelers] attributable to the accelerated development of hub-and-spoke operations and to frequency improvements in low-density markets."[119] The overall import of the study was that airline service had *not* declined since deregulation began, but because of additional frequencies, had actually improved.

By focusing on the number of flights in larger markets as the dominant measure of airline service, the Brookings Study appears to have missed that which frequent flyers see. Whatever the improvements in the rate structure since deregulation, the consensus of most of what is written about airlines in this environment is that service has declined significantly. Moreover, the epidemic of delays which pervades the airline industry seems actually to have imposed significant opportunity costs, not benefits. As Melvin Brenner noted:

> The very increase in hub-and-spoke frequencies which played so large a part in the study's calculations has been an important contributor to the congestion and delays which by 1987 had become a matter of widespread concern. While reducing the time interval between *published* departure times, the increased hub-and-spoke frequencies have increased the actual *delay* time at the gate, and in runway queues—a form of lost time that is especially costly to business traveler productivity.[120]

Moreover, the product which consumers now purchase is today, on average, decidedly inferior to that they could purchase before deregulation. A recent survey of consumers reveals that almost 50% said that airline service had declined since deregulation; less than 20% said service had improved. Among the complaints: late departures, crowded seating, long lines at check-in, unappetizing food, overbooked aircraft, and an unacceptably long wait for baggage.[121] Another survey, this one of 15,000 frequent flyers, found even more negative attitudes of the impact of deregulation upon air service. 68% said that deregulated air service was "less convenient and enjoyable," while only 19% thought it

118. McGinley, *Bad Air Service Prompts Call for Changes*, Wall St. J., Nov. 9, 1987, at 28.

119. S. MORRISON & C. WINSTON, THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION 33 (1986).

120. Brenner, *supra* note 22, at 223.

121. *The Big Trouble With Air Travel*, CONSUMER REPORTS (June 1988), at 362, 363.

more convenient and enjoyable.[122] Still another survey, this one of 461 members of the Executive Committee (a group of corporate presidents and chief executives), revealed that 36% had lost job efficiency because of air travel delays.[123]

These results parallel those of the U.S. Department of Transportation. DOT data reveal that consumer complaints about airline delays, congestion, overbooking, bumping, missed connections, lost baggage, cancellations, and deterorating food have soared in recent years.[124] During the first six months of 1987, DOT received 15,621 consumer complaints, a 144% increase over the same period one year earlier.[125]

A recent editorial in the *Washington Post* summed up what many firmly perceive to be the results of deregulation: "Airline Service Has Gone to Hell".[126] Why? One authority on services marketing said, "It's one of those terrible debt spirals. Without profit, there can be no service and no safety."[127]

Admittedly some consumers are paying less for air service than they did before deregulation. Those who have benefitted most are vacation (discretionary) travelers in large markets served by several carriers.

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122. Brenner, *supra* note 22, at 223.

123. *Gridlock!, supra* note 4, at 55. Many said they took the precaution of arriving in a city on the night before an appointment rather than risk flight delays or cancellations, thereby saddling their firms with the cost of a hotel room. *Id.*

124. Brenner, *supra* note 22, at 223.

125. Coleman, *No Silver Lining Expected to Brighten Airlines' Stormy Skies*, MARKETING NEWS (Sept. 25, 1987, at 1) [hereinafter Coleman]. The top ten complaints, in order of number registered, were:

- *Flight Problems*: Cancellations, delays, or any other deviation from schedule.
- *Baggage*: Claims for lost, damaged, or delayed baggage; charges for excess baggage; carry-on problems; and difficulties with airline claim procedures.
- *Refunds*: Problems in obtaining refunds for unused or lost tickets or fare adjustments.
- *Customer service*: Rude of unhelpful employees, inadequate meals or cabin service, and treatment of delayed passengers.
- *Reservations, ticketing and boarding*: Airline or travel agent mistakes in reservations and ticketing; problems in making reservations and obtaining tickets due to busy phone lines or waiting in line; delays in mailing tickets; and problems boarding the aircraft (except oversales).
- *Oversales*: All bumping problems, whether or not the airline complied with DOT oversale regulations.
- *Other*: Cargo problems, security, airport facilities, claims for bodily injury, and other miscellaneous problems.
- *Fares*: Incorrect or incomplete information about fares, discount fare conditions and availability, overcharges, fare increases, and the level of fares in general.
- *Smoking*: Inadequate segregation of smokers from nonsmokers, failure of the airline to enforce no-smoking rules, and objections to the rules.
- *Advertising*: Ads that are unfair, misleading, or offensive to consumers.

Id.

126. Rowen, *Airline Service Has Gone to Hell*, Washington Post, July 23, 1987, at A21. *See also*, Dempsey, *Consumer Pay More to Receive A Lot Less*, USA Today, July 16, 1987, at 8A.

127. Coleman, *supra* note 125.

Business travelers flying between small towns served by only a single carrier have not benefitted from fare reductions. And today, both the vacation traveler and the businessman is often routed through a circuitous hub connection, causing him to consumer more time in both aircraft and in airports, and a decidedly less pleasurable consumption of his time, than before deregulation. For many, opportunity costs have increased since deregulation began. Moreover, what we buy today is a poorer product for our money.

Why has the unregulated market not corrected this deterioration in service? Some suggest that service deterioration is attributable to the decline in profitability of firms caused by the "destructive competition" unleashed by deregulation.[128] Hence, carriers haven't the resources to staff flights with more flight attendants than FAA minimums, to staff ticket counters or baggage areas adequately, to provide better food, to avoid deliberate overbooking or unrealistic scheduling, or even to clean aircraft properly. While some airlines are worse than others, the decline appears to be nearly universal.

Another explanation of the market's failure may be reflected in the nature of the item being sold. When a consumer purchases a manufactured product, he can examine it in a retail store before he spends his money, pull it off the shelf and turn it over, and make some assessment of its quality. But when a consumer buys a service, like transportation, its definition beyond a mere description of "the movement of my body from A to B," is more amorphous.

When booking a flight, most consumers do some price shopping. Where a competitive alternative exists, there has been some measure of pricing competition under deregulation, and those who price shop usually opt for the lower fare. Frequent flyers who have been through the ordeal of a hub connection may ask for a nonstop if one is available, or a one-stop, if one is not. But beyond that, how many consumers ask "(1) what kind of aircraft is being flown, how old is it, and when was it last overhauled; (2) how often is this flight late, and by how much, on average; (3) by what percentage of passengers do you usually overbook the flight; (4) what percentage of bags are usually lost on the flight, and if you don't lose them, how long will I have to wait at destination for my bags; (5) how many flight attendants are on board; (6) what's for dinner, and how tasty is it; (7) what's the average wait in the line at the airport; (8) how crowded is the flight and the waiting lounge at the gate; (9) how much knee and leg room do you give me between seats; and (10) how comfortable is the seat?" Because most of these questions are not asked by consumers

128. *See* Brenner, *supra* note 22.

before they purchase their ticket, the market has not responded to consumer desires for better service.

The U.S. Department of Transportation has authority to protect consumers from many of these evils, including deliberate overbooking, unrealistic scheduling, fraudulent ("bait and switch") advertising. But the Reagan Administration's DOT has been reticent to do much of anything to correct market failure.

Another consideration which increasingly impacts both service and fare levels is the level of industry concentration which has emerged under deregulation. With fewer carriers, with some traffic lanes and hubs now a monopoly or oligopoly, and with no government agency to protect consumers, it is quite likely that as time passes prices will rise and service will decline further.

4. *Motor Carriers*

Because of the glut of capacity in the trucking industry, and the fact that the overwhelming majority of states continue to regulate intrastate motor carriage and enforce the common carrier obligation, we have not yet seen wholesale motor carrier abandonments of small communities. We may see it yet if more states abandon their regulatory responsibility to protect the public interest. As indicated above, evidence already exists of widespread price discrimination against small shippers, particularly those located in rural areas and small towns.

The economic impact of isolation is rippling perniciously throughout rural America, making it increasingly difficult for small towns to attract new investment, or indeed, to dissuade existing businesses from leaving. The downward economic spiral inevitably leads to an outmigration of youth, as small towns wither on the vine.[129]

D. Public Safety

Serious questions exist as to whether an unhealthy industry can be a safe industry. One of the dangers of poor or nonexistent profits for transportation is the natural tendency of management to curtail costs. Among those which can be significantly diminished are maintenance costs, including mechanic's wages, spare or replacement parts, and idle vehicle time lost during inspections and maintenance.

1. *Railroads*

Unsatisfactory profits in the rail industry under regulation led it to defer maintenance on equipment and trackage as a matter of policy. The

129. Dempsey, *Deregulation's First Decade*, Journal of Commerce, Dec. 18, 1987, at 8A.

result was a series of derailments, often causing loss of human life.[130] Deregulation has enabled railroads too extract monopoly profits from captive consumers of bulk commodities such as coal and grain. This has significantly improved their economic posture, and made it possible for them to upgrade deteriorated track and roadbed, and to purchase new rolling stock, all to the substantial benefit of their level of safety. Hence, a carrier's economic health seems to bear a positive correlation with its level of safety.

2. AIRLINES

Conversely, for airlines and motor carriers, the economic strains created by the intensive pricing competition unleashed by deregulation have had a deleterious effect upon carrier safety. Carriers earning inadequate profits cut costs where they can, by deferring maintenance or replacement of defective equipment, or by pushing labor beyond federal safety standards.[131]

The father of airline deregulation, Alfred Kahn, now admits that the margin of safety has "possibly" narrowed since 1978, although fatality statistics do not yet reflect it.[132] Of course, if the body count were the only measure of victory, we would have won the war in Viet Nam.

Although passenger fatalities have not ascended to the levels one would expect in such an environment, other measures of safety paint a different picture. Since deregulation, the average age of our nation's aircraft fleet has grown sharply. The number of mechanics per aircraft has been reduced. The number of near misses has soared. 1987 saw the highest number of aircraft accidents since 1974.[133] The average age of cockpit crew members is the lowest since deregulation began, and the duration and quality of their training has declined.[134]

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. In many instances, these competitive pressures have had beneficial impacts upon carrier productivity; management has been forced to engage in hard negotiations to reduce labor costs and inefficient work rules.

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130. Professor Golbe's study established that profitable railroads have fewer accidents per mile than do unprofitable rail carriers. Golbe, *Product Safety In a Regulated Industry: Evidence From the Railroads*, 21 ECON. INQUIRY 39 (1983).

131. *Transportation Deregulation, supra* note 2, at 352.

132. Kahn, *supra* note 23, at 251.

133. *Air Safety Record Worst Since '74*, Chicago Tribune, Jan. 13, 1988, at 5.

134. Thomas & McGinley, *Airlines' Growth, Pilot Shortage Produce Least Experienced Crews In Nine Years*, Wall St. J., Nov. 20, 1987, at 28.

But cost cutting may well have had a deleterious impact on the margin of safety. Concerns have been voiced over the problem of the age and poor maintenance of jets flown by unhealthy airlines, which lack the financial resources to reequip with modern aircraft, or properly maintain their aging fleets.[135] This is particularly a concern in the commuter airline industry, seemingly plagued by endless bankruptcies, where recycled aircraft dominate the fleets of the smaller carriers.[136] Professor Frederick Thayer reminds us that "safety always has suffered when airlines were largely unregulated."[137]

Ninety-seven percent of airline pilots believe that deregulation has had a deleterious effect on airline safety.[138] Among the problems identified are: "lagging and inadequate maintenance; pressure to avoid delays; lowered hiring and experience standards for new pilots; increased use of waivers and exemptions from safety rules; increased flying hours for pilots; [and] the profusion of new, inexperienced airlines . . . ."[139] One out of every five pilots has been involved in a near miss during the last two years, and only 25% of those were reported to the FAA.

According to the U.S. Department of Transportation, the amount of resources devoted by commercial airlines to aircraft maintenance fell 30% during deregulation's first six years.[140] A survey of commercial airline pilots reveals that almost half believe that their companies defer maintenance for an excessive period of time.[141] As Chart V reveals, the number of mechanics per aircraft has declined more than 10% on average for the major airlines in the past five years.

Today, most carriers lack the resources to replace their aging fleets of aircraft. As a consequence, the average age of the industry's jets grew 21% since 1979 to 12.53 years.[142] Today, more than half the 2,767 jets in service are 16 years old or older.[143] Chart VI provides the average aircraft ages of the ten major carriers.

The new low fares which are offered in larger, competitive markets during the last decade have stimulated significant new passenger demand. Between 1978 and 1987, departures for major airlines increased

135. Welling, *The Airline's Dilemma: No Cash to Buy Fuel-Efficient Jets*, BUS. WK. (Sept. 27, 1982), at 65. P. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 90 (1987).

136. *Transportation Deregulation, supra* note 2, at 354 n.100.

137. Rowen, *Airline Deregulation Doesn't Work*, Washington Post, Apr. 8, 1982, at A27.

138. Duffy, *View From Cockpit Is Clearly Negative*, Denver Post, Dec. 7, 1987, at 2E.

139. *Id.*

140. Fischetti & Perry, *Our Burdened Skies*, 33 IEEE SPECTRUM 36, 79 (1986).

141. *Id.*

142. Valente, Harris, Jr. & McGinley, *Should Airlines Scrap Their Oldest Planes for Sake of Safety?*, Wall St. J., May 6, 1988, at 1.

143. *Id.*

CHART V — NUMBER OF MECHANICS PER AIRCRAFT

Airline	1982	1987
American	16.6	15.6
Continental	14.6	13.0
Delta	21.3	14.9
Eastern	22.1	16.9
Northwest	11.6	12.4
Pan Am	27.4	28.2
Piedmont	13.0	9.7
TWA	30.9	25.7
United	17.8	21.2
US Air	12.4	11.8
AVERAGE	18.77	16.94

Source: Wall Street Journal, July 19, 1988, at 25.

by 27%.[144] With airlines funneling their flights into "hub and choke" bottlenecks, and scheduling takeoffs and landings through a narrow window of time and space, near misses are soaring.[145] Thus, the flight paths of the nation's major airports are heavily congested during peak periods. There were 584 near misses during 1984, 758 in 1985, 839 in 1986, and 610 for the first half of 1987 alone.[146]

All of this has placed serious strains on the air traffic control system at a time when it is least capable of handling the surge in demand. In 1981, President Reagan fired 11,000 members of the Professional Air Traffic Controllers Organization (PATCO) for striking, leaving it with only a third of its work force, and the FAA has yet to replace them all.[147] Not only is the system understaffed, but many airports and navigational facilities are equipped with obsolete and aging equipment. Operational errors, or mistakes by controllers, increased by 20% during the first half of 1987 over the same period one year earlier.[148]

The level of public and media concern over the trimmed margin of safety has turned up the heat on the Federal Aviation Administration to

144. *Skies Safe Today, But Turbulence Is Brewing*, Rocky Mountain News, May 4, 1988, at 37.

145. Dempsey, *Cross Your Fingers, Hope Not to Die*, Chicago Tribune, Aug. 28, 1987, at 28.

146. *Increasing Near-Midair Incidents Spur Drive to Improve ATC Performance*, Av. WEEK & SPACE TECH. 21 (1987).

147. Morganthau, *Year of the Near Miss*, NEWSWEEK (July 27, 1987), at 20.

148. Molinari, *How Safe Is the Air Traffic Control System?*, USA Today, Nov. 17, 1987, at 12, 13.

CHART VI — AIRLINE FLEET AVERAGES IN YEARS

American	11.14
Continental	11.96
Eastern	14.49
Delta	9.76
Northwest	14.54
Pan Am	14.67
TWA	15.14
United	14.43
US Air	11.58
Piedmont	10.25

Source: *Aging Jets Problem Discussed Years Ago,* Rocky Mountain News, May 8, 1988, at 32.

become more vigilant in enforcing its safety regulation mandate, something it was lethargic in doing during the early years of the Reagan Administration. As Chart VII reveals, significant fines have recently been levied on the major airlines.

Nonetheless, the Federal Aviation Administration recently came under fire in a report prepared by the Office of Technology Assessment (OTA).[149] It found the FAA understaffed in the number of inspectors, controllers and technicians it employs, and that it maintained inadequate programs to improve the performance of aircraft crews, air-traffic controllers and mechanics. It urged the FAA to continue surprise inspections, and in particular, to engage in intensive and extensive oversight of the commuter airline industry "during the shakeout expected over the next few years."[150]

It also had a few words of criticism for the airline industry. OTA found that although all airlines profess adherence to high safety standards, there are significant variations in corporate cultures and maintenance procedures. Professed adherence to safety "means one thing to a financially well-off airline with an ample number of landing slots at airports, but something else to a financially strapped airline that must choose between spending money on discretionary maintenance on aircraft and buying

149. OFFICE OF TECHNOLOGY ASSESSMENT, SAFE SKIES FOR TOMORROW, SUMMARY (1988) [hereinafter OTA REPORT ON AIRLINE SAFETY].

150. *Id.* at 13.

CHART VII — FAA OUTSTANDING FINES

United	$1,262,100
Hawaiian	1,169,000
Continental	982,130
Eastern	893,500
Braniff	518,000
American	421,250
Northwest	371,000
Pan Am	264,500
US Air	166,100
Delta	147,250
Midway	128,000
TWA	118,000
Southwest	56,500
America West	1,500
Alaska	1,000

Source: McGinley, *Fifteen Airlines Face FAA Fines Totaling About $6.5 Million for Alleged Violations*, Wall St. J., May 12, 1988, at 4.

new slots."[151] OTA concluded that "while airline officials are concerned about safety, financial considerations drive many industry decisions and will continue to do so as strong competition exists among the airlines."[152] Further, "many airlines have lowered hiring standards, [and] increased pilot and mechanic duty time . . . ."[153]

Why then, have the fatality levels not reflected the industry's miserable economic environment? Two reasons. First, the aircraft themselves are overengineered. Even if maintenance is deferred and a critical system fails, usually a backup system will fill the void until the plane can land. Even if the plane becomes a convertible, as did that 737 Aloha Airlines jet in Hawaii, a good pilot can still land it safely. Second, there is a higher level of vigilance in the cockpit than there has even been. Hub and spoking creates intense congestion, and pilots know if they don't keep a sharp eye out, a near miss could become an actual hit. Moreover, pilots are overwhelmingly concerned about the deterioration of maintenance under deregulation. They watch more carefully for mechanical problems than they ever have. Thus, we have been spared the tragedies that the eco-

151. McGinley, *Congressional Report Warns Air Safety May Be Imperiled Without Swift Action*, Wall St. J., July 28, 1988, at 35.

152. OTA REPORT ON AIRLINE SAFETY, *supra* note 149, at 11.

153. *Id.* at 12.

nomic imperatives of deregulation suggest. Let us hope that we continue to be so lucky.

3. *Motor Carriers*

Similar conclusions have been reached by academicians who have studied the motor carrier industry. For example, Professor Daryl Wyckoff found a positive correlation between motor carrier regulation and safety; regulated carriers displayed a superior safety and compliance record vis-a-vis unregulated motor carriers.[154]

Approximately 4,500 people died in accidents involving heavy trucks in 1986. Odds are 40 to 1 that the car occupant rather than the truck driver will die in these highway catastrophes.[155] An overwhelming body of evidence suggests that trucking safety has deteriorated sharply since deregulation.

As discussed above, motor carriage does not operate in a purely competitive environment. Large shippers enjoy and exert monopsony power—the ability to dictate pricing discounts unavailable to smaller rivals. Hence, small shippers become saddled with the fixed costs of operation. That disparity of bargaining power (which demands pricing discrimination), coupled with unlimited entry (and the glut of capacity resulting therefrom) have made it difficult even for well-managed and efficient motor carriers to earn a reasonable return on investment. The losses have to be borne by someone. They have come out of the hides of labor and investors, and from deferred maintenance. Drivers must now drive longer hours to earn the same income, and too often, are pumped up on amphetamines. Firms with inadequate profits lack the resources to invest in new equipment, or repair aged equipment. As a consequence, trucking accidents have soared under deregulation. Virtually every objective study of highway safety has concluded that the rate of truck-related accidents, fatalities and injuries have increased dramatically since deregulation began, at a pace higher than the increase of truck miles traveled.

A study commissioned by the American Automobile Association [AAA] 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."[156] Professor Glaskowsky reached similar conclusions, noting that, "After five years of deregulation three

154. Motor Carrier Act of 1980: Report of the Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 641, 96th Cong., 2d Sess. 85, 100 (1980).

155. Labich, *The Scandal of Killer Trucks*, Fortune (Mar. 30, 1987), at 85 [hereinafter Labich].

156. F. Baker, Safety Implications of Structural Changes Occurring in the Motor Carrier Industry 15 (1985) [hereinafter cited as AAA Safety Study].

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."[157]

Indeed it is. Because carrier profits have been so severely squeezed, the average age of equipment on the highway has increased dramatically since deregulation.[158] In 1978, when *de facto* deregulation began, the median age of trucks operating on the highway was 6 years; by 1986, that had risen to 7.5 years.[159] Economically distressed carriers simply haven't the resources to invest in replacing (and in some instances, repairing) aged equipment. As Professor Garland Chow observed, "The carrier which eventually goes bankrupt spends less on safety and maintenance, has older equipment and depends on owner operators more than carriers not going bankrupt. As these financially distressed carriers approach their eventual demise, they spend even less on safety, on new equipment . . . ."[160]

It is not only the carrier exiting the unregulated market which poses a serious safety hazard on the highway. The new, undercapitalized, shoestring operator who naively believes that he can compete with the "big boys" 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 27% and 33% higher than established carriers.[161]

As wages are reduced by financially strapped carriers, drivers have a strong economic incentive to stay on the highway beyond the maximum hours established by the federal government.[162] The result has been sharply increased rates of trucking accidents and related deaths and injuries. 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."[163] A AAA study reveals that driver fatigue is the probable or primary cause of 41% of heavy truck

157. N. GLASKOWSKY, *supra* note 13, at 32.

158. AAA SAFETY STUDY, *supra* note 156, at 17. N. GLASKOWSKY, *supra* note 13, at 32.

159. M. Foley, *supra* note 18, at 25.

160. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*, in NORTHWESTERN UNIVERSITY CONFERENCE PROCEEDINGS, TRANSPORTATION DEREGULATION AND SAFETY 629 (1987).

161. Corsi & Fanara, Jr., *Effects of New Entrants on Motor Carrier Safety*, in NORTHWESTERN UNIVERSITY CONFERENCE PROCEEDINGS, TRANSPORTATION DEREGULATION AND SAFETY 561 (1987).

162. AAA SAFETY STUDY, *supra* note 156, at 16.

163. Daust & Cobb, *The Relationship Between Economic Deregulation of the Motor Carrier Industry and Its Effects On Safety*, in NORTHWESTERN UNIVERSITY CONFERENCE PROCEEDINGS, TRANSPORTATION DEREGULATION AND SAFETY 785 (1987).

accidents.[164]

The Bureau of Motor Carrier Safety of the U.S. Department of Transportation reported an 18% increase in trucking accidents from 1983 to 1984.[165] That is the largest increase since 1972.[166] The American Insurance Association reports 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.[167]

Nationwide surveys performed under the Federal Motor Carrier Safety Assistance Program concluded that of the 366,400 trucks checked in 1985, 29% were insufficiently safe to drive on the highway. In 1986, safety inspectors in New York and Connecticut, operating under the Federal program, have ordered as many as 60% of the trucks off the highway as unsafe.[168]

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164. AAA FOUNDATION FOR 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. As one driver noted:

> In 10 years of driving I have had no employer who expected less than twice the legally allotted number of hours. Many drivers . . . 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. . . .
>
> If the same official zeal [over drug abuse by drivers] were focused on shippers and employers who demand outlawry from drivers, the first step will have been taken toward reducing [the number of truck-related fatalities]. 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.

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

165. COALITION FOR SOUND GENERAL FREIGHT TRUCKING, THE RATIONALE FOR TRUCKING REGULATION: EXPOSING THE MYTHS OF DEREGULATION 15 (1986) [hereinafter cited as MYTHS OF DEREGULATION].

166. N. GLASKOWSKY, *supra* note 13, at 32.

167. *Id. Fortune* magazine found that both the age of trucks on the highway and the number of truck accidents have soared since promulgation of the Motor Carrier Act of 1980, and reached these conclusions:

> The growing safety problem is a lesson in the perils of deregulation . . . .
>
> Deregulation compounded the problems [of highway safety] by creating economic circumstances that made trucking far more dangerous. Price competition forced hundreds of large and medium-size companies out of business. The smaller outfits and independent owner-operators who took their place are nimbler, but these new entrants have a hard time making money . . . . To stay in business, the small operator must run each rig at least 120,000 miles a year—more than 300 miles every day . . . . In today's competitive climate, the numbers often do not add up . . . .
>
> Result: Many hard-pressed truckers have plenty of incentive to spend excessive hours at the wheel and to overlook expensive maintenance requirements . . . . [A]s many as one in three long-haul drivers resort to illegal drugs to help cope with grueling hours on the road . . . .
>
> Even a drug-free driver may be a menace on the highway because of the sorry condition of his vehicle. Roadside inspections conducted in various states in the past year regularly turned up serious problems in 30% to 40% of trucks pulled over.

Labich, *supra* note 155, at 85-86.

168. Hanley, *60% of Trucks Fail New York Area Inspections*, N.Y. Times, Oct. 8, 1986, at B1. Professor Beilock, after surveying truck drivers in Florida, reached the following conclusions:

Each of these independent studies points to a common conclusion: there has been a significant deterioration in the level of safety of motor carriers since federal deregulation began. There are reasonable grounds to believe that rate deregulation and safety deterioration are interrelated. As was revealed by Professor Glaskowsky's comprehensive study on the impact of deregulation upon motor carriers:

> Many aspects of deregulation are subject to disagreement and debate as to their effects, but safety is not one of them. Safety costs money where transportation operations are concerned and it was inevitable that deregulation would put much financial pressure on many motor carriers.
>
> Corners are being cut by financially strapped carriers and the accident rate is rising. This was a clearly foreseeable consequence of deregulation.[169]

Equipment maintenance is another major concern. Firms without adequate returns simply do not have adequate resources to fix brakes, replace worn tires, and the like. In recent years, state inspections around the nation have seen a dramatic increase in the number of trucks pulled out of service as unsafe to be on the highway because of illegal vehicles or drivers. Moreover, the average age of trucks on the highway has grown steadily every year of federal deregulation. Of course, the bottom line is that the principal cause of the deterioration of safety under deregulation is the economic anemia unleashed by overcapacity and the market power of large shippers.

Let's go a bit deeper, and look at the problem of externalities. Take a typical large manufacturer with a private fleet subsidiary of its own trucks and trailers. It will make sure that this subsidiary will earn a reasonable return on investment sufficient to allow it to maintain its equipment so as to avoid the potential liability that would be inspired by shoddy maintenance and overworked drivers. Now, suppose the large manufacturer tenders some freight to a common carrier. It has no incentive to ensure that the common carrier earns a reasonable return on investment, for any highway accident becomes a liability problem for the carrier, not the manufacturer. Instead, the manufacturer has an incentive to cut the common carrier's profit margin to the bone so as to maximize its wealth, the public be damned! With its own private fleet, the manufacturer cannot externalize the price the public pays for its greed, in terms of injuries and fatalities on the highway; with a common carrier, it can. So as to avoid the

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> Compared to those who see less difficulty, almost six times as many drivers respond that it has become more difficult to drive safely since 1980, the year the trucking industry was legislatively deregulated under the Motor Carrier Act. Although many reasons are given for increased difficulty, an appreciable number are symptoms of root causes connected with deregulation. Reasons which are or potentially deregulation-related are mentioned quite prominently by the 85 percent who specified a reason or reasons.

R. BEILOCK, 1986 MOTOR CARRIER SAFETY STUDY vi (1986).

169. N. GLASKOWSKY, *supra* note 13, at 33.

spillover effects upon third parties not participating in the transaction for either the sale of transport services or the goods the manufacturer sells in the market, responsible regulation is required.

Moreover, even if litigation were somehow able to force internalization of this injury (and for the reasons just expressed, it is not), litigation would be a poor alternative to regulation in that courts award monetary relief; innocent human beings bear the costs in terms of injuries or death. Even a generous jury award for damages cannot restore lost health or life. In contrast, regulation can prevent injury before it occurs, and this is a significant benefit indeed.

Targeted safety programs help. But unless the state is prepared to put a highway patrolman in every cab, it cannot hope to thwart the economic imperatives of inadequate returns mandated by deregulation.

Too many of us have seen the crushed accordions of twisted steel and bent chrome on our interstate highways, which were passenger automobiles before they were squashed by huge diesel-powered trucks pulling giant trailers. The kinetic energy released by a 40-ton tractor-trailer unit moving at 55 mph is approximately 16 million foot-pounds, or about 4,000 times the energy released by a high-power rifle.[170] It is quite capable of compressing a compact car into a glob of steel almost the size of a suitcase.[171]

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170. *Id.* at 32.

171. Finally, as to the impact of deregulation upon highway safety, the CBS EVENING NEWS WITH DAN RATHER reported the following:

> BILL MOYERS: Major truck accidents have increased sharply, up 18% in just the last year. And state inspections like this one [in Barstow, California] are turning up more and more hazards in every kind of truck . . . . Of the nearly 600 trucks inspected on this day, 40% were found to be "imminent hazards" and ordered off the road. The most common defect: faulty brakes . . . .
> BRIAN O'NEILL: I think it's fair to say that over half the trucks on the highway right now have defective brakes of one form or another.
> MOYERS: Over half?
> O'NEILL: Over half.
> MOYERS: These truckers will tell you the reason is economic. The deregulation of the industry has increased competition, but more trucks are hauling less freight over long distances and earning less money.
> TRUCKER: I averaged out last month what I made and I divided it by how many hours I got. I think I averaged 75 cents an hour in what I've made for myself.
> MOYERS: To cut costs in the face of cutthroat competition, some drivers are spending more time behind the wheel without sleep or rest and are cutting corners on safety . . . . Truck driving has become one of the most dangerous jobs in America.
> Washington, D.C.: a tractor trailer loses its brakes, hitting six cars. The driver is killed.
> Van Buren, Arkansas: a truck cited for defective brakes in four states smashes into a station wagon. Nine dead, including three children.
> Globe, Arizona: a runaway semi hauling two trailers loses its brakes on a mountain road. Four are killed.
> Kalamazoo, Michigan: just eleven days ago, a truck loaded with steel rams a school-bus. Four children die; 21 are injured . . . .
> It seemed a good idea at the time to deregulate trucking and increase economic competition, let the market do it. But some things the market can't or won't do and its failure

One source reports that "[v]irtually all studies of accident, fatality, and injury rates found that rates are increasing more for trucks than for other types of vehicles and at a pace higher than the increases in truck miles traveled."[172] An overwhelming body of evidence demonstrates that the motor carrier industry suffers from critical economic anemia under deregulation, and that truck-related carnage on the highways has soared since the early 1980s.

Despite the evidence, some deregulation proponents dogmatically insist that no one has proven conclusively that economic deregulation causes safety deterioration (and anyway, nothing as handsome as deregulation could give birth to so grotesque an offspring). One is reminded of the argument by tobacco companies that no one has established a conclusive link between cigarette smoking and cancer.

No one has been able to step forward with conclusive evidence to prove (or for that matter, disprove) either proposition. Nonetheless, public policy suggests that the burden of proof ought reasonably to be placed on the constituency which, common sense suggests, is harming innocent people.[173]

Simply put, if a carrier hasn't the economic resources to replace worn equipment, it will have little choice but to defer maintenance, leave the truck rolling on the highway, and hope the next load or two will improve its economic position. This, indeed, was the explicit practice of the unhealthy railroad industry under regulation. The economic imperative of survival in the Darwinian market suggests the same for the unhealthy trucking industry under deregulation. The fact is, human beings are being maimed and killed in increasing numbers in truck-related accidents on our highways.

Only a change in the economic lot of carriers will improve highway safety. Not until motor carriers earn a reasonable return on investment will they have the resources to maintain their equipment properly, or replace it with newer trucks. Not until drivers earn a decent living will they be spared the endless hours behind the wheel pumped up on amphetamines. Prudently administered economic regulation can, by controlling entry, constrict excess capacity and thereby enhance carrier productivity. By regulating rates, it can ensure that efficient and well-managed carriers earn a return on investment sufficient to maintain and upgrade equipment

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has to be reckoned now in human life and injury. That price is rising steadily for the drivers of these big rigs and for all of us who share the road with them.

I'm Bill Moyers.

CBS EVENING NEWS WITH DAN RATHER, Dec. 16, 1985 (transcript provided by CBS).

172. PUC PERFORMANCE AUDIT, *supra* note 9, at 34-35.

173. For an excellent analysis of the impact of deregulation upon highway safety, *see* D. Baker, COMMON SENSE RELATIONSHIP BETWEEN MOTOR CARRIER ECONOMIC REGULATION AND HIGHWAY SAFETY (1987).

to safe levels. By holding the Damocles sword of license revocation over their heads, the regulatory commission can ensure that such resources are spent to enhance safety.

III. FEDERAL PREEMPTION AND INTRASTATE DEREGULATION

A. *FEDERAL PREEMPTION*

Between 1976 and 1982, Congress was active, not only in deregulating interstate transportation, but also in preempting state jurisdiction over transportation within their borders. For example, Congress preempted intrastate regulation of the airline industry with promulgation of the Airline Deregulation Act of 1978. Similarly, intrastate rail regulation must meet standards established by the Interstate Commerce Commission[174] under the provisions of the Staggers Rail Act of 1980.[175] In the Bus Regulatory Reform Act of 1982,[176] Congress provided that state denials of bus abandonments and rate increases may be appealed to the ICC[177] (where they are almost always reversed).[178]

Of the major pieces of legislation deregulating the various modes of transportation, only the Motor Carrier Act of 1980 left unmolested the states' jurisdiction over intrastate commerce[179] (although the ICC has recently assaulted the states' sovereignty with an ambitious definition of interstate transportation, now on appeal in the federal courts).[180]

B. *INTRASTATE DEREGULATION*

Since promulgation of the federal Motor Carrier Act of 1980, only five states have chosen to follow the lead of the Interstate Commerce Commission by deregulating their motor carrier industries: Florida (1980), Arizona (1981), Maine (1982), Wisconsin (1983), and Alaska (1984). Note that enthusiasm for transportation deregulation began to wane at both the

174. *See* Texas v. United States, 730 F.2d 339 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 267 (1984).

175. *See* Railroad Comm'n v. ICC, 765 F.2d 221 (D.C. Cir. 1985).

176. *See* Thoms, *Unleashing the Greyhounds—The Bus Regulatory Reform Act of 1982*, 6 CAMPBELL L. REV. 75, 94 at (1984).

177. *See* Texas v. United States, 761 F.2d 211 (5th Cir. 1985).

178. For an excellent review of federal preemption of intrastate jurisdiction over transportation, *see Symposium: Intrastate Regulation*, 14 TRANSP. L.J. 179-247 (1986).

179. *See* 49 U.S.C. § 10521(b) (1980).

180. *See* Mann, *Back Door Deregulation Of Intrastate Transportation Accelerates*, 37 YOUR LETTER OF THE LAW 33 (1987). Such cases pending as the date of this writing include State of Texas v. United States (5th Cir. No. 87-4725), E & B v. Mattox (W.D. Tex. No. A-86-CA-446), Middlewest Motor Freight Bureau v. Interstate Commerce Commission (8th Cir. No. 87-2043), Steere Tank Lines v. Interstate Commerce Commission (8th Cir. No. 88-4001), and California Trucking Association, Inc. v. Interstate Commerce Commission (9th Cir. No. 87-7439).

state and federal levels in the mid-1980s, as deregulation turned out not to be as beneficial to the public as promised by its proponents.

Florida was the first state to deregulate its intrastate motor carrier industry in the contemporary era, but not because of a strong, grass-roots political movement. Instead, the two houses of the state legislature simply failed at the last minute to agree on the language of a bill to extend the life of the existing regulatory framework. Under the Florida Sunset legislation applicable to all state governmental agencies, such regulation automatically terminated at a date certain in the absence of a new statute affirmatively extending its life. In the year preceding deregulation, the Florida Public Service Commission (PSC) received only 34 complaints regarding household goods transportation; but in the first month alone following deregulation, 44 such complaints were filed.[181] Similarly, in Arizona, deregulation has resulted in more consumer complaints in the areas of household goods, taxicab and ambulance services.[182]

In Indiana, a bill was passed in 1984 to sunset the jurisdiction of the state Public Utilities Commission (PUC) over motor carriers, to be effective in 1986. However, subsequent state legislation, supported by a group comprised principally of small businesses, repealed the bill's sunset prior to its effective date. Thus, Indiana came quite close to deregulation, but reversed course at the eleventh hour, leaving the PUC's jurisdiction unmolested.

In Wisconsin, Joe Sweda, an early deregulation proponent and Commissioner of Transportation, now laments the impact of the bill he supported. Said he, "Deregulation has not been the success that many had anticipated. Most rural areas have suffered under this law. The truck service and especially the bus service to these areas has been drastically reduced. My office has received numerous complaints from rural shippers concerning the sporadic service, late shipments and the general unavailability of many Wisconsin truckers."[183] Sweda also pointed out that small shippers are disadvantaged vis-a-vis larger shippers because rates are no longer published. Hence, larger shippers are secretly able to negotiate preferential rates with carriers, while small shippers are helpless to defend themselves against rate discrimination. Loss and damage claims have escalated, and carrier safety has deteriorated, since Wisconsin decided to deregulate intrastate transportation.[184]

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181. *Transportation Deregulation, supra* note 2.

182. *Id.* at 362.

183. Letter from Joseph Sweda to Representative James Moody (Oct. 15, 1985), reprinted in 31 YOUR LETTER OF THE LAW 33 (Mar. 1986), and made part of the Oversight Hearings on the Motor Carrier Act of 1980 held by the Subcommittee of the Public Works and Transportation Committee of the U.S. House of Representatives (Nov. 5, 1985).

184. *Id.*

Unfortunately, deregulation has eliminated the monitoring functions which state agencies traditionally performed. Hence, there is precious little empirical evidence with which to evaluate intrastate deregulation.[185]

One notable exception is our nation's most populous state, California. In 1980, the California Public Utilities Commission (PUC) partially deregulated its controls over motor carrier ratemaking. Beginning in 1984, the California PUC conducted a two-year study of the impact of intrastate deregulation, and reached conclusions similar to those of Wisconsin Commissioner Sweda. Some 23 days of testimony was heard by an administrative law judge, and two days of en banc hearings were held before the full Commission. Producing nearly 4,000 pages of transcript and 2,000 pages of exhibits, California's study is the most comprehensive and detailed evaluation of the impact of intrastate deregulation to date.

The study revealed that widespread discriminatory and preferential rate cutting created a situation in which the industry's infrastructure became overaged; for-hire carriers were no longer able to maintain vehicle replacement programs or acquire new equipment; adequate financing was no longer available to motor carriers; safety deteriorated, leading to increased numbers of deaths and injuries from highway truck-related accidents; there was a serious reduction in the number of independent owner-operators; and to offset the prevailing rate cutting, drivers operated excessive hours, maintained multiple log books, overloaded vehicles, drove at excessive speeds, and reduced expenditures for equipment maintenance.[186] As we have seen, these are exactly the consequences of federal interstate transportation deregulation.

The California Commission concluded that rate deregulation was having a serious adverse impact upon the motor carrier industry and the public it serves.[187] It therefore decreed a mandatory 10% rate increase and adopted a program designed to eliminate preferential and discrimina-

185. "[A]t the state level, the total deregulation of trucking, in Florida for example, means that no reliable data on Florida intrastate trucking is available." N. GLASKOWSKY, *supra* note 13, at 1.

186. Baker, *1986 Update of Regulation of Motor Carriers by Individual States*, 33 YOUR LETTER OF THE LAW 28, 30-31 (Aug. 1986).

187. The California PUC issued a decision on April 16, 1986, in which it concluded that additional deregulation would not be in the public interest. It made the following findings:

> It is the intention to provide a regulatory system which promotes the financial health of the industry, equity, competitive opportunity and public safety . . . .
> Although competition is not and never will be perfect, . . . one of the major objectives of the regulatory policy is to prevent competitive forces in the industry from becoming destructive . . . .
>
> It is not our purpose to encourage carriers to offset losses through inadequate wages, poor vehicle maintenance or market instability. Further, if enough carriers engaged in sustaining underpricing, the industry as a whole would suffer, jeopardizing the provision of adequate, reliable service . . . .
>
> We also agree with the staff's assessment that under the prevailing circumstances, total deregulation of the state's motor carrier industry is not appropriate.

tory rates.[188]

More recently, the Ohio Public Utilities Commission (PUC) has launched an investigation as to whether stricter rate controls should be imposed.[189] The PUC's Director of Transportation said, "We are concerned that the economic problems [of the industry] may potentially affect the service available in Ohio and the safety of the highways."[190] The investigation will be conducted in two stages, the second of which will address issues such as limited and discriminatory price discounting, and below-cost pricing.[191]

Finally, the West Virginia Public Service Commission (PSC), after six years of partial motor carrier deregulation, found that the result was service deterioration and higher prices for its small towns and rural communities. In 1987, the PSC decided to return to traditional economic regulation.[192]

C. *In Which Direction Should the States Go?*

1. *Why Not Intrastate Deregulation?*

A number of state legislators and Public Utility Commissions (PUCs) have been confronted with various motor carrier deregulation proposals in recent years. Most such proposals, particularly those in Texas and California, have been supported and generously financed by coalitions of very large shippers. Any analysis of the contemporary political, legal and economic environment would be incomplete without a review of the principal costs of intrastate deregulation, and a suggestion as to what regulatory structure will accomplish desirable public objectives.

As we have seen, deregulation, while it benefits very large shippers (those with monopsony power), creates an anemic motor carrier industry, lots of bankruptcies, an aging and poorly maintained rolling stock of tractors and trailers, overworked and underpaid drivers, a growing number of highway injuries and fatalities, a high turnover rate among firms, and an oligopoly among large carriers.

A deregulated environment is not an environment of perfect competition. Distortions are created because of the size and power of both ship-

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Baker, *Does the Public Benefit from Deregulation?*, 34 YOUR LETTER OF THE LAW 23, 28 (Nov. 1986).

188. *Id.* at 31.

189. *Ohio Eyes Re-Regulation of Truck Ratemaking and Procedures in New Probe*, TRAFFIC WORLD (Nov. 10, 1986), at 58.

190. *Ohio Commission Studying Economic Controls on Trucking*, MOTOR FREIGHT CONTROLLER (Dec. 1986), at 6.

191. *Id.*

192. Public Service Commission of West Virginia M.C. Case Nos. 20376 and 20377, Middle Atlantic Conference, In the Matter of Investigation and Suspension of Tariffs (Mar. 6, 1987).

pers and carriers. The monopsony power of large shippers enables them to unilaterally dictate price discounts below established rates. By selectively tendering or withholding their vast volumes of freight, they can extort extremely low rates from carriers. For unsophisticated carriers, this sometimes results in below-cost pricing, hastening their demise. For others, made desperate for freight by trucking industry overcapacity, it means marginal cost pricing.

But the fixed costs have to be picked up somewhere. Rather than having a fair allocation of the fixed cost burden placed on large shippers, the pricing structure which emerges is highly discriminatory. The monopsony power of large shippers unleashed by deregulation has created a pricing scheme which benefits large shippers, and penalizes small shippers. Effectively, this means that large shippers enjoy marginal cost (or too often, below marginal cost) pricing, while small shippers pay a higher freight bill to cover the carriers' fixed costs. Pricing also becomes higher for shippers in small towns and rural communities. Consumers who purchase from these suppliers are disadvantaged.

Pricing discrimination is prohibited in the sale of goods by the Robinson-Patman Act. But for the sale of important infrastructure services, such as transportation, it is only economic regulation that protects the public against the pernicious effects of pricing discrimination.

What are those deleterious effects? Large shippers enjoy superior access to the broader market for the sale of the goods they produce. It gives them a pricing advantage vis-à-vis their smaller competitors, and creates another layer of economies of scale. Small businesses, which create most of America's jobs, suffer higher transport prices. And small towns and rural communities also pay the price of discrimination, exacerbating their contemporary economic plight of an outmigration of investment, jobs and population.

But not only does unleashed monopsony power have a deleterious effect upon other users of the system, it has a devastating impact upon the motor carrier industry itself. Destructive competitive exists where even efficient and well-managed carriers fail to cover their fixed costs over a long period of time and drop into bankruptcy. The interstate trucking industry is plagued with unlimited entry, tremendous overcapacity, a number of unsophisticated competitors with inadequate understanding of costs, and a large number of carriers without the ability to counterbalance the enormous monopsony power of the larger shippers which unilaterally dictate ridiculously low rates. All of this has caused the industry to suffer thousands of bankruptcies, even after the recession of the early 1980s abated and fuel prices peaked and fell, and has caused the public to suffer thousands of highway accidents.

The trucking industry is one which is inherently vulnerable to over-

capacity, for it sells a service which is, in essence, an instantly perishable commodity. When a truck leaves the loading dock, any empty space is lost forever. Unsold space cannot be shelved and sold another day, as could say, clock radios. Imagine a grocer whose store was filled with goods, which had the spoilage properties of unrefrigerated cream cheese. Whatever he couldn't sell quickly he would have to discard, for unsold inventory could not be warehoused. He would have a fire sale every afternoon to recover any portion of his investment. That's a pretty fair picture of the trucking industry in a regime of unlimited entry, overcapacity and resultant destructive competition—plenty of bankruptcy, even among efficient and well-managed carriers.

The result is an undesirable one—even many efficient carriers go bankrupt. The vicissitudes of the national market cycle are such that during periods of slack demand, many efficient firms without deep pockets fall into bankruptcy, for they are more subject to the problems of overcapacity than competitors in industries which can warehouse their unsold products. Many large carriers, with deeper pockets, are able to endure the downward slope of the market cycle even though they are less efficient. As the social Darwinist experiment with federal interstate deregulation reveals, the very big get bigger still, and their smaller rivals drop into bankruptcy. Unfortunately, size rather than efficiency too often determines which firms survive.

The empirical evidence of the federal experiment in interstate deregulation reveals market structure attributes which appear to favor carriers of size. Despite the predictions of proponents of deregulation, there are significant economic barriers to entry and economies of scale in the less-than-truckload (LTL) industry arising as a result of the high capital costs of regional terminals and distribution networks. In fact, since federal deregulation, the number of major LTL carriers has dwindled as the industry has suffered an epidemic of bankruptcies, and not a single new carrier has successfully entered the market.

The economic barriers to entry and economies of scale are such that the interstate oligopoly which deregulation has unleashed may be here to stay. Only prudently administered economic regulation can ensure the survival of small and medium-size trucking companies, whose presence stimulates a healthy competitive environment, one in which the industry is productive and innovative. The concentration resulting from deregulation is an anathema to the public's interest in the benefits of a healthy competitive environment.

Not only are distortions created by shippers with monopsony power, they are created by the market power of very large carriers as well. A carrier with a deep pocket, wanting to sacrifice short-term gain to achieve larger market share and ultimate long-term benefit, can certainly under-

price its rivals in a manner to drive them from the market. Predatory pricing can be arrested with responsible rate regulation, which prohibits a carrier from offering rates below its marginal costs, or below an average industry-wide marginal cost standard which incorporates requirements that carriers be efficient and well-managed.

Rate of return regulation prohibits the extraction of monopoly rents which a firm with market power could otherwise reap. Not only does responsible rate regulation deter firms from exploiting their monopoly markets, it also dissuades them from targeting smaller competitors for extinction via predatory pricing.

Some suggest that antitrust remedies are sufficient to deter predatory practices. They are not. Antitrust litigation is exceedingly time and resource consumptive. Even if a party can endure the years of expensive litigation, and prevail on a difficult evidentiary path, antitrust remedies only provide compensation in the form of money damages to those who have suffered from anticompetitive practices. They do not restore a competitor once lost from the market. Hence, the public's interest in a healthy competitive environment goes unsatisfied.

Healthy competition exists when entry is reasonably limited, rates are set at reasonable levels, and carriers compete fairly for business. Only very large shippers benefit when carriers are slammed against the wall. Destructive competition can be avoided by responsible regulation of motor carrier entry, rates and business practices.

The economic health of motor carriers is extremely important if they are to provide the safe, adequate and dependable service needed by the public. Allowing unlimited entry, which floods the market with capacity, and allowing large shippers with monopsony power to dictate excessively low rates, makes it difficult for carriers to devote necessary resources to discretionary equipment maintenance. The public suffers in terms of a higher level of truck-related highway accidents and fatalities.

Also, unlimited competition thins the ranks of the smaller trucking firms, whose presence provides a catalyst for productivity and innovation for the larger firms. Thus, responsible regulation can ensure the existence of a healthy competitive environment for both the motor carrier industry and the public it serves.

Viable, healthy and adequate transportation services at reasonable prices constitute an essential foundation for economic growth. Simply put, without transportation, commerce does not flow. And if commerce does not flow, that greater market for the production, purchase and sale of goods abruptly grinds to a halt. Similarly, distortions in transportation pricing or service affect that greater market by creating deleterious impacts upon the economy.

The infrastructure of transportation services facilitated by responsible

economic regulation is a framework wherein all users (no matter how small or remote) enjoy non-discriminatory access at reasonable prices to the broader market for the sale of goods. Fair access to the gateway of commerce is required by all users if we are all to enjoy a piece of the American pie. Small shippers and small towns should have the same opportunities to participate in the cornucopia of American industrial enterprise that our nation's largest corporations enjoy solely by virtue of their market power.

Equitable access to that gateway is the infrastructure which regulation protects and facilitates. Traditionally, economic regulation has satisfied this objective well, while also ensuring that the nation enjoyed a high level of dependable service adequately adapted to the evolving, contemporary needs of commerce.

Before deregulation, Americans could boast that they had the world's finest system of transportation. After deregulation, the best you could say is that it serves the nation's largest shippers well. The industry is anemic, bankruptcies are robust, safety has disintegrated, service has gone to hell, and pricing is highly discriminatory.

2. *What Form Should Regulation Take?*

The optimum form of regulation which serves the broader societal needs of all consumers, including those purchasing from small producers, those living in small towns and rural communities, those who drive on the highways, and those who do not own stock in America's largest corporations is, it is submitted, as follows:

In a nutshell, *entry* should be regulated to ensure that the market is not flooded with so much capacity that efficiency is jeopardized. The *enforcement* power to suspend or revoke licenses should be exercised where, for example, a carrier fails to fulfill its common carrier obligations, discriminates in pricing, or fails to fulfill its safety obligations. *Rates* should be filed in tariffs with the PUC before they become effective. They should be "just and reasonable" and non-discriminatory between persons and places. A zone of reasonableness should be established within which pricing would be determined by the level of competition among carriers. The pricing structure should be sufficient to allow well-managed and efficient carriers an opportunity to earn a reasonable return on investment, so that they can provide adequate service throughout their operating territories, and properly maintain their equipment. At the upward end of the zone, monopoly pricing should be prohibited, while at the lower end of the zone, predatory pricing should be forbidden. *Mergers, acquisitions* and other *corporate practices* should be scrutinized to ensure that antitrust violations do not occur. However, antitrust immunity should be conferred to allow carriers to enter into agreements which enhance effi-

ciency, encourage information flows, and facilitate the ratemaking principles discussed above.[193]

Let us take a closer look at the benefits of a responsibly and prudently administered regulatory structure. Responsible economic regulation of any regulated industry, be it electric utilities, telecommunications or transportation, allows efficient and well-managed carriers an opportunity to earn a reasonable return on investment. Usually, such regulation includes a "zone of reasonableness" within which the level of competition sets the rate charged, usually at a price approaching marginal costs. At the upward end of the zone, regulation prohibits consumers from being exploited by monopoly pricing; at the lower end of the zone, smaller competitors are shielded from the effects of predatory pricing. This keeps the market flush with competitors, and ensures that healthy competition is the driving force behind pricing, a result which benefits consumers. As we have seen at the federal level, deregulation brings about industry concentration, predatory pricing, and discrimination.

The Public Utilities Commissions (PUCs) encourage efficiency among all regulated industries—electric and gas utilities, telecommunications, and transportation—by engaging in ratemaking methodology which allows only those costs prudently incurred to be passed through to consumers in the form of higher rates, thereby allowing only well-managed and efficient firms to earn a reasonable return on investment. Imprudently incurred costs should be disallowed. Inefficient carriers should not be allowed to earn competitive rates of return on investment.

Usually, progressive PUCs which regulate entry award an applicant a certificate of public convenience and necessity if it can demonstrate that it proposes a new service not presently available in the market. Say a shipper needs special packaging, or unusual equipment, and cannot get it from the existing complement of carriers which serve it. Many PUCs authorize the new entry on grounds that the innovative service accomplishes the desirable objective of facilitating service choice.

Once the entrant receives its license, the ratemaking protections shield it from the predatory behavior of its larger rivals. They also ensure it a reasonable return on investment so long as its operations are efficient and well-managed. Thus, prudently administered economic regulation can stimulate service choices, and thereby benefit both the motor carrier industry, and the shipping public it serves.

Prudently administered regulation can also encourage efficiency by avoiding the overcapacity problems created by unlimited entry. Flooding the market with empty trailers merely drives prices down to noncompen-

193. *See Symposium: Collective Ratemaking and Consensual Decisionmaking*, 32 AM. U. L. REV. 279-469 (1983).

satory levels, causing economic injury to even well-managed and efficient motor carriers, while adding nothing in the way of efficiency or productivity to the market.

Moreover, by prohibiting predatory pricing, and allowing well-managed and efficient carriers to earn a reasonable return on investment, responsibly administered regulation keeps the market flush with small transportation competitors. Their presence continues to serve as a stimulant for cost minimization and efficiency among their larger rivals. The federal experience with interstate deregulation reveals that thousands of small carriers have been wiped out by the destructive competition which has been unleashed. Many of the strong survive under deregulation; many of the small and weak do not.

Responsible economic regulation enables small businesses, which create most of the nation's jobs, to enjoy the same non-discriminatory access to the broader market for the sale of goods that larger shippers enjoy. As the federal experience with interstate trucking deregulation reveals, the discrimination unleashed by deregulation jeopardizes the economic health of small shippers, making it more difficult for them to survive, and provide that job-creating momentum.

A prudently administered regulatory scheme also enables small towns and rural communities to enjoy adequate and non-discriminatory access to the market. Without it, their ability to attract investment and employment is jeopardized.

Economic regulation also creates a common carrier obligation that licensed carriers provide adequate and non-discriminatory rates and services throughout their territories. The threat of the various sanctions available, including certificate suspension and revocation, provides a significant impetus to abide by these common carrier responsibilities.

Another dimension of quality and availability is, of course, the stability of the firms which provide an essential service, like transportation. Turnovers caused by seemingly endless rounds of bankruptcies do shippers little good, and cause some real harm. Take a typical scenario which too often occurs these days: the trucking company to which a shipper yesterday entrusted its goods has fallen into bankruptcy. The shippers' goods disappear or get caught up in the carrier's creditors' competing claims for the assets. Or take another common scenario: its goods are strewn across an expressway because the carrier didn't have the money to repair its worn brakes. Endless bankruptcies and crashes hardly enhance the quality and availability of service, yet they are a common occurrence under deregulation.

Allowing efficient and well-managed carriers an opportunity to earn a reasonable return on investment enables them to provide adequate service throughout their service territories, to pay labor a fair wage, and to

properly maintain their equipment. Inadequate returns on investment lead to overworked drivers and shoddy maintenance, and inevitably, increased numbers of truck-related accidents and fatalities.

Deregulation enables large shippers with monopsony power to extort extremely low rates from trucking companies. Cutting trucking rates to the bone, while enabling the stockholders of a few large corporations to enjoy healthy profits, causes society to pay more in terms of health care costs arising as a result of truck-related accidents, which by the way, are growing. Of course, insurance will cover some of these costs, if the trucking company carries insurance; but many unlawful operators do not. Nevertheless, however well money can ease the pain of injury, it often fails to restore health, and never restores life.

The regulation of minimum rates, which ensures that efficient and well-managed carriers have a fair opportunity to earn a reasonable return on investment, will help improve safety. So will prohibitions against discriminatory pricing, which thwarts the ability of large shippers with monopsony power to cut rates to the bone.

Entry regulation would also have a positive effect upon the states' ability to regulate safety. Not only should a carrier demonstrate that its proposed operations are "consistent with the public convenience and necessity" in that it satisfies a public need for new service, the applicant should also prove that it is "fit, willing, and able" to properly and safely perform the proposed operations, and abide by the PUC's rules and regulations. Fitness includes, but is not limited to, having the financial resources to purchase and maintain safe equipment, and hire a suitable staff of maintenance employees.

Fitness should also be an ongoing requirement, whereby a licensed carrier which fails to satisfy minimum standards of safety should have its operating certificate revoked or suspended. For example, if a carrier is found to operate unsafely, to improperly maintain its equipment or carry adequate insurance, or to push drivers beyond federal safety standards, license suspension or revocation should be considered an appropriate sanction. No carrier should be allowed to operate without a license. Hence, the threat of license suspension or revocation is a powerful tool to stimulate compliance.

The federal experience with interstate deregulation reveals that there is a direct correlation between a carrier's financial health and its ability to devote essential resources to upgrading and maintaining its equipment, as well as the pressure placed on drivers to stay behind the wheel excessive periods of time. And there appears to be a correlation between deregulation and aging and poorly maintained equipment, exhausted drivers, and truck-related highway fatalities. Remember, the driver of the passenger automobile involved in a truck-related accident is 40 times

more likely to lose her life than is the driver of the heavy truck. All of this suggests that responsible regulation of rates is essential to avoid a deterioration in highway safety, and needless loss of life.

The principal benefits of responsible economic regulation of the motor carrier industry are that efficient and well-managed carriers are allowed to earn a reasonable return on investment sufficient to allow them to provide safe, adequate, and dependable service throughout their operating territories, at rates which are just and reasonable and non-discriminatory. As the federal experiment with interstate deregulation amply demonstrates, deregulation leads to inadequate returns on investment, a seemingly endless series of bankruptcies (even of efficient, but small carriers), deteriorating safety, poorer service, highly discriminatory rates, and a heavily concentrated LTL industry.

IV. Summary and Conclusions

Federal deregulation of transportation began a decade ago. As a consequence, things today are radically different in the air, over the rails, and on the highways. Trends toward concentration, pricing and service discrimination, and deterioration in service and safety are now readily apparent.

O *Airlines* were the first to be deregulated, with the promulgation of the Airline Deregulation Act of 1978. The industry rapidly became an oligopoly, with an unprecedented wave of mergers, consolidations and bankruptcies. Today, the top five airlines dominate more than 80% of the domestic passenger market.

Billions of dollars in aviation trust funds lay idle as air traffic control towers are still staffed below pre-PATCO strike levels. That, coupled with the industry's practice of unrealistic scheduling, funneling aircraft into "hub-and-choke" bottlenecks, and filling cockpits with near adolescent pilots, have significantly narrowed the margin of safety, and sent near misses skyrocketing.

Airline service has gone to hell during the Reagan years. We are herded aboard aerial slums, served cardboard food, overbooked, bumped, and misconnected. Our luggage is routed through the Twilight Zone, never again to be seen during our natural lives.

Business and small town travelers routinely pay several hundred dollars more than the passengers wearing the loud palm tree shirts seated next to them. The market gives us a choice, of course. We can either spend an arm and a leg, or sleep in a strange city on a Saturday night.

O The *bus* industry was deregulated with the enactment of the Bus Regulatory Reform Act of 1982. Since then, it has evolved from a duopoly into a monopoly, as Greyhound and Trailways merged. Deregulation

has allowed them to abandon several thousand small towns, and raise rates to those they still choose to serve. In much of rural America, the bus no longer stops on Main Street.

O *Railroads* were deregulated with the Staggers Rail Act of 1980. This industry has also become highly concentrated during the last decade. Today, seven megacarriers handle 86% of the industry's freight, and earn 93% of its profits. Under deregulation, they have been free to use their monopoly power to extort whatever the market will bear. Exorbitant rates for the movement of coal have been passed on to consumers in the form of billions of dollars in higher electric rates.

Since 1980, railroads have abandoned service to more than 1,200 small towns. Service curtailments by airlines, bus companies and railroads make it increasingly difficult for small towns to attract new investment, or indeed, to dissuade existing businesses from leaving.

O The *trucking* industry was largely deregulated with the promulgation of the Motor Carrier Act of 1980. It is also becoming an oligopoly, as the top 10 motor carriers move 60% of general freight, and reap 90% of its profits. Every year since 1983, more than 1,000 trucking companies have plunged into the abyss of bankruptcy.

Since most of the industry is suffering from economic anemia, many carriers haven't the money to repair or replace aged and defective equipment. Many are pushing their drivers and equipment beyond the limit. As a consequence, truck-related fatalities have soared to more than 4,000 annually in recent years. Too often these days, we are sharing our highways with trucks and drivers in no shape to be on the road.

Under deregulation, large businesses enjoy a decided advantage, as they flex their monopsony muscles to dictate pricing discounts. Meanwhile small shippers must pay the higher, published rates. With the exception of a few winners (notably the Fortune 500 corporations), deregulation has been, at best, an inconvenience, and at worst, a disaster. Small shippers and small communities now pay more for poorer service. The short-term benefits larger shippers enjoy have been taken out of the hides of employees and investors of thousands of bankrupt corporations whose carcasses now litter the market.

The surviving companies have merged into ever-larger megacarriers. Such concentrations of wealth and power would have been challenged by government during any other period of American history. Paradoxically, while the nation was initially euphoric over deregulation, experience has made the American public increasingly dissatisfied with it. Nonetheless, our federal government stubbornly adheres to its blind faith in the curative powers of Adam Smith.

Any analysis of the costs and benefits of deregulation must take into account these results. The market for transportation services is not per-

fectly competitive. Economies of scale and scope do exist. Economic barriers to new entry in several of the modes are significant. Oligopolies and monopolies have resulted. The theory of contestable markets has not been sustained by the empirical evidence.

Moreover, inequality of bargaining power is reflected in the overwhelming monopsony power exerted by large shippers against trucking companies. The Fortune 500 wield tremendous bargaining leverage by conferring or withholding freight, and unilaterally dictate prices lower than the published rates. Such discrimination gives large shippers a decided and unfair advantage over smaller rivals in the larger market for the sale of goods. Common carriers are the gatekeepers of that larger market. If a small enterprise cannot gain access to that market at a fair price, it cannot compete. If a small town cannot obtain adequate transportation service at a reasonable rate, it cannot hope to enjoy economic growth. Regulation can ameliorate that inequality of bargaining power, by prohibiting pricing and service discrimination.

Only regulation can promote public interest values which do not find a high priority in a regime of *laissez faire*. It can foster economic growth in rural areas by requiring nondiscriminatory access to infrastructure services. Fairly priced transportation services help facilitate access to the broader American economic pie by a larger number and more diverse group of participants. Both opportunities for wealth and pluralism are thereby enhanced. Regulation can also facilitate safety by ensuring that efficient and well-managed carriers are allowed to earn a reasonable return on investment.[194]

Congress partially or wholly preempted intrastate regulation of air, rail and bus transport. However, it left intrastate regulation of motor carriers to the states. Although a few states embraced deregulation in the

194. The following are the broader impacts of transportation deregulation: Carrier productivity gains predicted to result from deregulation have not materialized. Perfect competition does not exist in the industry. Economies of scale and scope, and economic barriers to entry do exist. Unprecedented bankruptcies and mergers have radically increased concentration to the point that the transport modes have become oligopolies and monopolies.

Under deregulation, pricing discrimination in favor of larger shippers and against small shippers and small communities is widespread. Many large shippers hold monopsony power to dictate pricing discounts. Increasingly, small shippers are forced to bear the fixed costs of operation.

In most transport modes, deregulation has brought about a decline in levels of service. For small towns and rural communities, prices have increased and service has declined sharply under deregulation, making it more difficult to sustain economic growth and employment. In trucking, this impact has been tempered by the fact that the overwhelming number of states continue to regulate intrastate service levels, and prohibit pricing discrimination.

As deregulation continues to jeopardize the economic health of carriers, many firms lack the resources to upgrade or repair aged and defective equipment. Many drivers are pushed beyond reasonable limits. As a result, truck-related accidents and fatalities have soared.

early 1980s, enthusiasm with the movement has waned as the American public has had more experience with it. Today, the overwhelming majority of states continue to regulate trucking companies. As a consequence, the deleterious social impact of deregulation has not been as severe for trucking as for the other, more comprehensively deregulated transport modes.

Economic regulation, responsibly and prudently administered, can foster the following social and economic policies:

O *Avoidance of Problems of Imperfect Competition*. Regulation can avoid problems of concentrations of wealth and power—the monopsony power of large shippers, and the oligopoly or monopoly power of large carriers. Market power enables a firm to maximize its profits by raising prices and/or lowering service. The transfer of wealth from consumers to producers is regressive in character, and therefore, undesirable.

O *Equality of Access*. Regulation can ensure that all users of infrastructure services, large and small, enjoy equality of access to the market for the sale of their products. Prohibitions against rate discrimination allow small shippers the same opportunity to compete that large shippers have. In a sense, this stimulates competition in the market for the sale of goods. Moreover, giving small businesses the same chance to compete may indirectly facilitate employment, for small businesses create most of America's jobs.

O *Economic Growth*. Regulation can enhance the social policy of encouraging a geographic distribution of economic growth. Thus, under regulation, small towns and rural communities enjoy adequate service at a fair price, in spite of the fact that less competition for such traffic exists than in larger markets. Adequate and reasonably priced infrastructure services are essential for economic growth.

O *Productivity*. Regulation can prevent overcapacity in the transportation industry, and thereby improve carrier productivity and economic health. Under regulation, efficient and well-managed carriers can earn a reasonable return on investment. This enhances service dependability, and gives carriers the resources necessary to maintain and replace aged and worn equipment.

O *Safety*. As noted above, by enhancing productivity, regulation can allow efficient and well-managed carriers to earn a reasonable profit, and thereby allow them the means to repair or replace equipment. Decent returns can also remove the incentive for drivers to sit behind the wheel for excessive lengths of time. The prospect of certificate revocation encourages voluntary industry compliance with established safety standards.

Adam Smith recognized that the depth and breadth of the market is

defined by the price and availability of transportation services.[195] Economist Armen Alchian notes that the competitive vitality of the market for the sale of goods is directly stimulated by transportation access thereto.[196] He observes that a nation's wealth is enhanced by the value of its cooperative resources, including transportation: "A richer country with lots of capital equipment and stable, market-facilitating institutions is a more efficient place for a given amount of labor."[197] What is true for a nation must also be true for any of its geographic regions. Government can stimulate a geographic disbursement of economic growth and competitive alternatives for consumers by insisting that all regions (small towns and rural communities included) enjoy adequate, non-discriminatory, and reasonably priced transportation. It is upon that foundation that commerce is built.

In order to have a healthy economy, all businesses and communities, large and small, must have non-discriminatory access to the infrastructure industries, or they cannot successfully compete. If a small shipper cannot get his goods to market at a reasonable rate, he simply will not survive. If a rural community does not enjoy adequate transportation service at a fair price, it will be isolated from the mainstream of commerce, and wither on the vine.

Transportation's importance to the nation's economy is reflected in the role it plays in facilitating the nation's commerce, communications, and national defense.[198] As noted by Professor Addus, "Transportation plays a vital role in economic growth. . . . [T]ransportation and economic development are mutually interdependent—transportation improvement stimulates economic growth, and advances in economic development increase the demand for transportation."[199]

These features distinguish transportation from most other industries, and explain why the provision of such services is regulated in the public interest, and has been since an early point in Anglo-American history. In its seminal decision of *Munn v. Illinois*,[200] the United States Supreme Court noted that beginning with the early common law of England, common carriers have been deemed to be "affected with a public interest" for they "stand in the very 'gateway of commerce,' and, take a toll from all who pass."[201]

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195. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 19-23 (1985 ed.).

196. A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION 275 (3rd ed. 1983).

197. *Id.* at 173.

198. P. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 1 (1987).

199. Addus, *Subsidizing Air Service To Small Communities*, 39 TRANSP. Q. 537, 551-52 (1985).

200. 94 U.S. (4 Otto) 113 (1877).

201. *Id.*

Transportation firms are the gatekeepers to the larger market for the sale of goods. This gives them the leverage to facilitate or impede commerce, and makes their rate and service offerings critically important to all who require access to the market for the sale of their products. As Professor Martin Farris has observed, "In order to flourish, it is necessary to have a reliable and financially sound motor transportation system. Transportation is the 'life-blood' of the economy—the veins and arteries through which commerce flows."[202]

Economic regulation protects public interest values that might not find a high priority in the marketplace. It treats common carriers (e.g., airline, bus, trucking, railroad and telephone companies) as industries imbued with a unique responsibility to satisfy the needs of the public for universal service at just and reasonable rates. Small and large communities and shippers are required by government to be served reasonably well and at a non-discriminatory price.[203]

By no means does this suggest that even the most omniscient regulatory commission can make all the decisions concerning levels of production and pricing. We leave that to individual, privately owned firms, with regulatory bodies identifying the broad perimeters within which the firms may lawfully operate. While the invisible hand of the marketplace makes most of the decisions regarding the level of service and price to be provided by privately owned companies competing for customers, the Public Utility Commissions in the vast majority of states regulate, in general terms, motor carrier entry, rates, and levels of service in order to protect the public interest.[204]

Regulation imposes upon common carriers both a burden and a benefit. The burden is the obligation to provide an adequate level of service to all geographic areas within their operating licenses, at reasonable prices. In return for providing just and reasonable non-discriminatory rates to small shippers and small communities, the regulated enterprise

202. *1985 Senate Hearings on MCA, supra* note 10, at 270 (statement of Prof. Martin T. Farris).

203. *See* Dempsey, *The Interstate Commerce Commission—Disintegration of An American Legal Institution*, 34 AM. U. L. REV. 1, 48 (1984).

204. As Dabney Waring has observed:

> 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 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.

Waring, *supra* note 86, at 242.

enjoys the benefit of a franchise of operating authority which shields it from predatory practices by its larger competitors.[205]

There are undoubtedly winners and losers in any war waged as passionately as this one, to deregulate a major American industry.[206] Any change in public policy as profound as deregulation inevitably produces serious social and economic dislocations. As we have seen, the winners of federal interstate deregulation are the Fortune 500—the largest carriers and largest shippers—which bask in the sun of deregulation. The losers are small businesses, small towns and rural communities, which have been left out in the cold.

Who would win if motor carriage were further deregulated? Again, large shippers would win. It is they who reap the bounty of discriminatory pricing in the deregulated interstate freight market, forcing their smaller rivals to bear the fixed cost burden of common carriers. Hence, additional deregulation would benefit the relatively modest number of larger shippers at the expense of the far more numerous small shippers.

Large interstate trucking companies would also win, for they have the economic muscle to drive out smaller rivals. As noted above, oligopolies have become the norm in all other deregulated modes of transportation.

Small businesses, small towns and rural communities would lose, paying a higher price for the same or poorer service. The existing regulatory system protects small businesses and small towns from the economic burden of pricing and service discrimination. This is a major feature of economic regulation which is well worth preserving.

Drivers of automobiles would lose, for the heavy trucks with which they share the highways would become increasingly unsafe, as maintenance was deferred, and the costs of safety were externalized. America's citizens deserve to share their interstate highways with safe trucks and truck drivers, and not be subjected to the risk of injury or death posed by unregulated truckers. Preserving the existence and vitality of efficient small- and medium-sized trucking companies will not only allow them to maintain a healthy competitive presence in the economic environment, but will also allow them to put safe vehicles and safe drivers on the highways.

Our federal experiment with deregulation should teach that transportation is not a purely competitive industry, and that the theoretical benefits of pure competition have not emerged. To the extent that some pricing competition has occurred (albeit at the expense of a sharp decline in service and safety), these benefits have been unevenly distributed in favor of

205. Dempsey, *Deregulation Stranding Residents of the Lone Prairie*, Rocky Mountain News, Sept. 14, 1986, at 73.

206. *See* R. LEONE, WHO PROFITS—WINNERS, LOSERS AND GOVERNMENT REGULATION (1986).

large shippers. Moreover, such benefits may be a short-term phenomenon, for they are seriously jeopardized by an unprecedented level of industry concentration as the dust kicked up by deregulation begins to settle. The empirical results of deregulation also demonstrate that much is lost when the government declines to promote the public's interest in achieving broader societal benefits, such as protecting market access for small shippers and small communities, and enhancing highway safety.

Prudently administered economic regulation can not only accomplish important public policy goals of correcting imperfections in the market, such as those resulting from economies of scale and scope, barriers to entry, market power, inequality of bargaining power, insufficiency of information, and externalities. It can also advance important social objectives which do not find a high priority in a regime of *laissez faire*. The primordial imperative of economic man is the accumulation of wealth, and this may conflict with society's desire to accomplish other important objectives, such as stimulating economic growth in rural communities and small towns, or enhancing safety.

Private ownership of the means of production inspires the efficient and economical allocation of scarce resources. These are important public benefits, and ought to be encouraged under enlightened regulation. But government oversight of some managerial decisions can protect other public interest values, beyond allocative efficiency. Administrative agencies with regulatory power can balance the public interest against market imperatives, can assure that the economies and efficiencies of private ownership are tapped for the public good, can avoid the problems of imperfect competition, and can foster public interest values which do not find a high priority in an environment of *laissez faire*.

Neither governmental control nor unregulated competition are perfect environments. The real choice is between imperfect regulation and imperfect competition. But if applied with a gentle touch, economic regulation ought to be able to yield the best of both worlds—the economies and efficiencies of private ownership, and the accomplishment of social and economic policies in the highest public interest.

The high-water mark of deregulation peaked in the late 1970s and the early 1980s. As the American people have had more experience with deregulation, they have become less enamored with it. "Deregulation" is no longer the popular buzzword it once was. Most politicians no longer fill their campaign speeches with such rhetoric. Let us hope they have the courage and the wisdom to expunge it from national legislation as well.

Congress and our new President should come to grips with the fact that transportation deregulation is, in many respects, a failure. An infrastructure oligopoly which provides poor service at discriminatory prices and exploits unwary consumers is hardly what the public interest de-

mands. The time has come to reform the industry, and reestablish governmental protection of the public.