Common Carriers Continuity and Disintegration in U.S. Transportation Law

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I. Introduction

Transportation has been subjected to profound technological changes during the last two centuries. From the steam engine in the 19th century to container transport in the post World War II era, new forms of technology have enabled the transportation industry to play a key role in society and the national economy. Railroads and steamboats extended markets beyond the local boundaries and made the division of labor possible and profitable, first on a national and finally on an international level. Urban mass transportation favored the separation of home and working place, of labor and family which, in turn, contributed to deep structural changes in modern society. The availability of bus, train, and airplane transportation is fundamentally important to the mobility of mankind.

In the legal framework of transportation, these dramatic changes are reflected by the fading away of the common law and the implementation of a voluminous body of legislative and regulatory law. Modern legislation, however, turns on old concepts such as the distinction between private and common carriers. This distinction is fundamental in the common law of

transportation[1] and in the modern regulatory statutes.[2]

The purpose of this article is to determine to what extent the traditional features of the law of common carriers survive in modern legislation and to what extent they have yielded to new rules specific to the various transportation modes. The first section of this analysis investigates the original common carrier concept, the policies behind it, and the reasons for its supersession by modern legislation. The second section discusses the extent to which the historical common core survives in the various statutes regulating transportation modes, in particular railroads, airplanes and ocean vessels. Finally, the third section discusses the role of the common carrier in the era of deregulation. The question posed is whether the fading away of legislative interference will strengthen the role of the common law rules and whether decontrol will result in unification or further disintegration of transportation law into branches paralleling the various modes of transportation.

II. The Common Carrier Concept At Common Law

Historically, a common carrier has been defined as ". . . any man undertaking for hire to carry the goods of all persons indifferently"[3], whether by land or by water.[4] Under common law, the common carrier, unlike the private carrier is:

(1) under a duty to contract with and to serve all who apply; and
(2) like an insurer, he is strictly liable for all damage to or loss of goods except in exceptional cases, such as an act of God or of the public enemy. Even in such a case negligent behavior makes the carrier liable.[5]

There are certain corollaries to these primary duties, namely that the service must be reasonably adequate and rendered upon reasonable terms, especially at a reasonable price.[6]

The particular legal burden of common carriers contrasts with basic notions of a free enterprise economy and raises a question as to why common carriers are obliged to serve everyone indiscriminately whereas manufacturers of the vehicles they use are not. As both the concept and the

1. Jeremy, The Law of Carriers, Innkeepers, Warehousemen, and other Depositories of Goods for Hire 4-7 (1816); Powell, *A Treatise on the Duties, Liabilities, and Rights of Inland Carriers*, 25 Law Times 196, 210, 211, 224 (1855).

2. *E.g.*, English Carriers Act, 1830, 11 Geo. 4 & 1 Will. 4, ch. 68; Interstate Commerce Act, 49 U.S.C. § 10102 (1978).

3. Gisbourn v. Hurst, 91 Eng. Rep. 220 (1710); Jeremy, *supra* note 1, at 4. *Cf.* Niagara v. Cordes, 62 U.S. (21 How.) 7, 22 (1858).

4. Niagara, 62 U.S. at 23.

5. O. Kahn-Freund, The Law of Carriage by Inland Transport 189-192 (3d ed. 1956).

6. Garton v. Bristol and Exeter Ry., 121 Eng. Rep. 656, 675 (1861); Harris v. Packwood, 128 Eng. Rep. 105, 108 (1810); *cf.* Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514, 515 (1911).

consequential duties are deeply rooted in legal history, this discussion begins with the 19th century evolution of the status of the common carrier and his special duties.

A. *The Origins Of Common Callings*

Common carriers have always shared their special duties with other enterprises such as innkeepers. These industries, named the common callings, can justly be regarded as an exception to the general rule of private business. This raises questions as to why they are "common", why they are bound to serve the entire public, and why they are held strictly liable?[7]

1. *The Middle Ages: Common Callings As Business*

The answer to the first question cannot be deduced from the definition of the common carrier, because the "undertaking for hire [to serve] all persons indifferently"[8] is the very essence of every business. It distinguishes common from private carriage, the latter including all forms of non-professional transportation, like transportation of the carrier's own goods, gratuitous transportation or exceptional carriage for reward by a person who usually is not engaged in that business.[9] But the definition does not explain why such a distinction is necessary or useful in transportation, and not in construction or banking.

The historical development of the legal concept of common callings was by no means fostered by an intention to confer a special status on some branches of business and not on others. The list of common callings was much longer in the Middle Ages than in the 19th century. As *Adler* has pointed out, in Leet Jurisdiction of Norwich during the period 1374 to 1891, there "are to be found instances of the common purchaser, common merchant, common huckster, common brewer, common fripperer, common cooker-up, common touter. In the Year Books we have the common innkeeper, common merchant, common marshal, common schoolmaster, common tavern, common surgeon."[10] *Adler* identifies approximately twenty other forms of common callings and concludes "the list is so long and contains such different callings that we are led to the conclusion that the term common did not serve to distinguish one employment from another and that all occupations could be common."[11] Thus, the "common" exercise of a certain activity indicated that a person made it his business and did not engage in it intermittently. Drawing the distinction

7. *Cf.* Jeremy, *supra* note 1, at 144-147.
8. Gisbourn, 91 Eng. Rep. 220.
9. *Id.*
10. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 149 (1914-15).
11. *Id.* at 152.

between occasional and professional activities must have been of the utmost importance to medieval society. The exchange of goods and services, especially in rural areas, rarely operated on a professional basis, but was rather based on different forms of help without direct reward, such as neighborhood, social, and charitable services.[12] The common callings were exceptional because they reflected a rising organization of economy with division of labor among various professions and trades.

In legal terms, the splitting of private and common activities resulted in the imposition of special duties on those who exercised the latter. According to Oliver Wendell Holmes, the common carrier's strict liability for loss of goods can be traced to the origins of the general law of bailments in the folklaws of Germany and England. These old laws gave a remedy against thieves, not to the bailor, but to the bailee who in turn had to respond for losses without any possibility of excluding liability.[13] However, this ancient rule explains neither the strict liability for the damage to goods nor the duty to serve, nor does it square with the observation that the common callings were by no means confined to forms of bailment.[14]

Perhaps the better view is that the special obligations of the common callings were worked out during and not before the development of assumpsit, subsequent to the introduction of the action sur le case in 1285. When a person voluntarily dealt with another and suffered damages due to his fault, no tort arose because the injured party was looked upon as accepting and exposing himself to the risk of damage. At first, an action on the case could be entertained only if an assumpsit and a breach thereof were pleaded.[15] The special duties of the common callings were based on an implied assumpsit on their part. The "holding out" to the general public was regarded as a general or universal assumpsit of both serving the public without discrimination and carrying out this service carefully.[16] General assumpsit never lost its original character and still gives rise to an action in tort,[17] whereas special assumpsit, which was used for private activities became the seed of modern contract theory. The evolution of the latter did not start until much later,[18] when the undisputed special duties of common callings were merely referred to as "custom of the realm."[19]

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12. *Id.* at 153.
13. Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 611 (1879).
14. L. GORTON, THE CONCEPT OF THE COMMON CARRIER IN ANGLO-AMERICAN LAW 63 (1971).
15. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 3 (1888-89).
16. Holmes, *supra* note 13, at 615.
17. Ames, *supra* note 15, at 2; Holmes, *supra* note 13, at 614. *Cf.* Jeremy, *supra* note 1, at 5; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 139, 180 (4th ed. 1971).
18. Ames, *supra* note 15, at 15. The doctrine of consideration came up during the 16th century and logically presupposed assumpsit. CHESHIRE & FIFOOT, LAW OF CONTRACT 1-7 (9th ed. 1976).
19. Jackson v. Rogers, 89 Eng. Rep. 968 (1684); In Pozzi v. Shipton, 112 Eng. Rep. 1106,

Thus it is erroneous to assume that the legal position of common carriers resulted from conscious policy decisions by the courts, for every business originally was a common calling and derived its special duties from assumpsit.[20]

2. *Modern Times: Common Callings As Public Employment*

The concept of common callings was gradually narrowed during the 17th century until it embraced only the common carriers and innkeepers at the close of the 18th century.[21] Using special contracts or, being regarded as doing so, more and more businessmen avoided the particular duties of common callings. Business became "private" in the sense that the word designated a profession with freedom to choose customers at negotiated conditions. In short, "private" business became distinguished from the public interest. At the same time, the few remaining common callings appeared in the new light of public employment, both "common" and "public" often being used synonymously.[22]

1110 (1838) it was decided that the custom of the realm concerning the liability of common carriers need not be mentioned in the complaint, because as a general custom and not merely a local or special one, it will be considered by the court anyway.

20. Originally, common law imposed the duty of carefully serving every customer with due care in all branches of business. Latter general business law dropped this obligation and it remained only in the law of common carriers. *See* Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 420 (1926). The rise of monopolies and the state of social emergency following the Black Death of 1348-1349 may have helped to generate the burden. But it fits in better with medieval ideas of just reward to assume that the tightened monopolistic situations of the 14th century merely stimulated a number of legal disputes in which the preexisting special duties of the common callings were expressed. Medieval thinking conceived economic relations as a part of an eternal order inspired by God, and pricing and service were seen as moral issues rather than as methods of achieving profit maximization. *Cf.* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 468-469 (4th ed. 1936).

21. The estrangement from business regulation can be ascribed to the change in economic and social conditions, in particular to colonialism and the industrial revolution which put a definite end to the centuries of short supply and for the first time created conditions of abundance favorable to a market economy. On the other hand, the Reformation and the centuries of religious disputes had shaken the belief in the divine designation and unchangeable order of medieval society. Where birth formerly had determined a man's place in society, now wealth began to play an important part, making profit maximizing the ladder towards higher social rungs. The way was free for the liberation of economic exchange from the chains of morality, a step accomplished by the writings of Smith and Bentham. Adler, *supra* note 10, at 156-158.

22. One of the earliest and clearest statements about the public interest vested in common carriers is the comparison with sheriffs by C.J. Holt in Lane v. Cotton, 88 Eng. Rep. 1458 (1701). "[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; . . . [i]f an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier. . . . Surely then where is a public employment created by law, the obligation is the greater; as if the sheriff refuse a writ, an action will lie against him. . . ." *Id.* at 1464; *cf.* New Jersey

Neither the cases nor the contemporary writings explain why general business was free from consideration of the public interest while transportation was not.[23] The space left to historical explanation has been filled by three hypotheses, one economic, one legal, and one political.

From an economic perspective, it has been argued that monopolistic tendencies in the transportation sector prevented a liberalization and maintained the public interest in this field.[24] The historical correctness of this argument is questionable. There is very little evidence of a monopolistic power of the carrier in those cases which have affirmed the duty to carry.[25]

Two legal reasons for the establishment of the common carrier's special status have been advanced: (1) the evolution of contract theory, and (2) a confusion of accident and act of God in the exemptions from the carrier's liability. As stated above, general or universal assumpsit was the legal tool used to create the carrier's duty to serve every shipper with care.[26] When assumpsit became the seed of contractual obligations, it adopted a more precise meaning and could not be maintained as the source of the common carrier's obligations. These obligations survived as custom of the realm based upon unquestioned precedent after their historical reasons had long been forgotten.[27] The second reason focuses on the exception to the

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Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 382 (1848) ("[The common carrier] is in the exercise of a sort of public office, and has public duties to perform.").

23. Benett v. Peninsular and Oriental Steamboat Co., 136 Eng. Rep. 1453, 1455 (1848); Pozzi v. Shipton, 112 Eng. Rep. 1106, 1110 (1838); Jackson v. Rogers, 89 Eng. Rep. 968 (1684).

24. *Cf.* Arterburn, *supra* note 20, at 427; *Contra* Rosenbaum, *The Common Carrier Public Utility Concept*, 7 J. LAND & PUB. UTIL. ECON. 157, 165 (1931).

25. In Sandiman v. Breach, 108 Eng. Rep. 661 (1827), the plaintiff sued a stagecoach owner who had breached a contract of carriage for damages which he had suffered from hiring a post-chaise at higher expense. Traditionally, transportation monopolies were only found in rural areas. The statute of William and Mary, 1695, 526 W. & M., ch. 22, provided for 700 hackney licenses in the cities of London and Westminister. This conveys an idea of the density of urban transportation in the 1700's. This act prohibited any one person from holding more than two licenses. Its purpose was to maintain competition, and it explicitly stated the driver's duty to serve. Moreover, monopolies in the industry cannot explain the strict liability of carriers for loss of and damage to goods. As to the duty to serve every applicant, monopoly situations could have been countered more effectively if the enforcement of this duty had been secured by writ of mandamus, a remedy usually refused. Finally, the impact of monopoly on the carrier's duty to serve was explicitly rejected in an early English railway case in which the defendant railway company acquired a monopoly for the carriage of coal by purchasing and shutting down a canal which ran parallel to its tracks. The plaintiff argued that even if the defendant's charter made service voluntary, the reference in the charter to the common law liability would require carriage in the given monopoly situation. In response to this, the court said: "The argument for the plaintiff is rather one to be addressed to the legislature. The real grievance is not the mode in which the Company manages the railway, but the shutting up of the canal which the legislature has suffered to be done without adverting to its evil consequences." Johnson v. Midland Ry., 154 Eng. Rep. 1254, 1257 (1849).

26. *See supra* note 16 and 17.

27. Holmes, *supra* note 13, at 617.

carrier's liability. It is uncertain whether the carrier's liability for damage extended to merely accidental destruction before 1700 or whether he was only liable for accidental loss. The cases leave some ambiguity due to the vague meaning of "act of God", for which the carrier was not liable in either case. It was only Lord Mansfield who read the concept in a narrow sense and stated the rule with complete clarity: "The carrier is in the nature of an insurer."[28] Both of these reasons are descriptions rather than explanations of why transportation did not follow the general path of business law toward freedom of contract.

If both monopoly and legal history furnish only partial and rather fragile explanations of the common carrier's special status, the political reasoning advanced by Oliver Wendell Holmes seems more convincing. Holmes characterized the public callings as:

> part of a protective system which has passed away. An adversary might say that it was one of many signs that the law was administered in the interest of the upper classes . . . [I]t formed part of a consistent scheme for holding those who followed useful callings up to the mark.[29]

The English feudal society, during the 17th and 18th centuries, spent only a part of the year on the land from which it derived its income. For much of the year the nobility lived in towns supported by income from the surrounding estates. Hence, the aristocracy depended heavily upon both the availability and the safety of carriage for passengers and goods. The movement of commodities could not be entrusted to the arbitrary, profit-oriented decisions of those engaged in the industry. The liability of the carrier had to be tightened to forestall collusion with thieves.[30] Although the same danger existed with respect to other bailees,[31] they were less important to the nobility. The professions which survived as common callings into the 19th century can be easily linked to the infrastructure of transportation. This is obvious for common carriers of all kinds, such as ferrymen, bargemen, wharfingers, lightermen, innkeepers, as well as farriers and smiths, who were indispensable links in the preindustrial transportation chain.[32]

Although industrial production may have been regarded as the origin of national wealth, and large scale transportation was needed for distribution of such production, transportation could not claim the same freedom of enterprise which was conceded to general business. As Sir W. Jones stated with respect to innkeepers:

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28. Forward v. Pittard, 99 Eng. Rep. 953, 956 (1785); *cf.* Beale, *The Carrier's Liability: It's History*, 11 HARV. L. REV. 158, 167 (1897-98).

29. Holmes, *supra* note 13, at 629.

30. Coggs v. Bernard, 92 Eng. Rep. 107, 112 (1703); *cf.* Lane v. Cotton, 88 Eng. Rep. 1458, 1463 (1701).

31. Holmes, *supra* note 13, at 629.

32. Beale, *supra* note 28, at 163.

> [R]igorous as this law may seem, and hard as it actually may be in one or two particular instances, it is founded on the great principle of public utility to which all private considerations ought to yield; for travelers who must be numerous in a rich commercial country, are obliged to rely almost implicitly on the good faith of inn-holders. . .[33]

In a sector of the economy where both monopoly and competition coexisted, the dependency of the upper classes on public transportation is the better explanation for the particular burden which the common law imposed indiscriminately on all common carriers. In economic terms, transportation generated positive external effects of a political, social, and economic nature which extended beyond the individual transport operation and were not sufficiently rewarded by the carrier's charges. The monopoly argument gained weight when the railroads in fact monopolized large portions of inland transport throughout the 19th century.

B. The Common Carrier Concept During The 19th Century

Before the 19th century, common carriers' legal responsibilities were still based on status and therefore uniform. Unlike other businesses, carriers were unable to adjust the legal framework of their activities to particular conditions by means of a contract.

It is uncertain whether at the beginning of the 19th century the special duties of the common carrier extended to the transportation of passengers and their luggage. Some writers contended that a carrier who conveys passengers exclusively is not a common carrier.[34] They relied either on cases which had refrained from treating the carrier of passengers as an insurer[35]

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33. W. Jones, *An Essay on the Law of Bailments*, in 8 The Works of Sir William Jones 426 (Lord Teignmouth ed. 1807). Jones refers to the same reasons in explaining the common carrier's strict liability.

This line of thought merely reflects a balance of political power which is typical for and inherent in the tripartite carriage of goods relationship. Whereas other businessmen are only confronted with the interest of their contractor, the carrier of goods has to meet the double demands of shippers and consignees, of producers and transshippers or consumers. Their pact against the carriers became obvious when they promoted legislative regulation after the construction of the railroads. *See* Ulen, *The Market for Regulation: The ICC from 1887 to 1920*, 70 Am. Econ. Rev. 306, 307 (1980). W. Jones, Cases and Materials on Regulated Industries 36 (2d ed. 1976) gives the example of the product corn which, after the Civil War, was sold at the American east coast for six or seven times the price the farmer received in the mid-west at the same time. These political pressures are sometimes attributed to the monopolistic power which the railroad companies were able to exert because of the economies of scale and their franchises. But we may safely assume that the same alliance existed before and imposed its political superiority on the lawmakers. *Cf.* Adler, *supra* note 10, at 158; M. Horwitz, The Transformation of American Law 1780-1860, 114-116 (1977) (Points out the close connection between franchise and monopoly in regard to ferries and mills at the beginning of the 19th century.).

34. Dodd, *On the Contract of Coach Proprietors*, 11 Legal Observer, 233, 234 (1835-36); Powell, *supra* note 1, at 225.

35. Boyce v. Anderson, 27 U.S. (2 Pet.) 150 (1829); Crofts v. Waterhouse, 130 Eng. Rep. 536 (1825); Christie v. Griggs, 170 Eng. Rep. 1088 (1809).

or upon the fact that a carrier of passengers, as opposed to a carrier of goods, cannot have a lien on the person of the passenger for the price of carriage.[36] However, it was decided in *Benett v. Peninsular and Oriental Steam-Boat Company*,[37] that the defendant shipowner was obliged as a common carrier of passengers to receive the plaintiff on board his ship "Montrose" and carry him to Gibraltar. American cases stressed the duty to serve more emphatically.[38]

As for the transportation of luggage, coachmen were initially regarded as common carriers only if they had held themselves out to transport both passengers and goods and had charged a distinct price for the latter.[39] The unwillingness to impose strict liability in all cases was probably due to the fact that a passenger could keep his luggage with him while traveling by coach. Later, railway passengers would deliver their baggage to the company and lose control of it until they reached their destination. In this situation the courts held the common carriers of passengers strictly liable for loss of and damage to luggage.[40]

During the 19th century, the concept of a common carrier of goods was affected by major modifications which narrowed its scope and thereby encouraged economic specialization, flexibility, and free enterprise in the transport sector. The first of these changes regards the kind of goods carried. The courts began to allow the carriers to confine their common carrier status to a class of goods irrespective of whether they were able to carry other goods.[41] To this effect, the carrier's "holding out" was given a new interpretation. It was no longer regarded as a general announcement of the carrier's profession, but acquired a meaning of a quasi-contractual offer to the general public the content of which was subject to the carrier's will.[42]

A carrier was also permitted to specialize in certain geographical areas. Thus, in the case of *Johnson v. Midland Railway Company*, it was decided that:

> [a] person may profess to carry a particular description of goods only, for instance cattle or dry goods, in which case he could not be compelled to carry any other kind of goods, or he may limit his obligation to carrying from one

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36. Dodd, *supra* note 34, at 234.

37. 136 Eng. Rep. 1453 (1848).

38. Bennett v. Dutton, 10 N.H. 481, 486 (1839); Jencks v. Coleman, 2 Sumn. 221, 224 (Cir. R.I. 1835).

39. Middleton v. Fowler, 91 Eng. Rep. 247 (1699); Jeremy, *supra* note 1, at 10.

40. Great Western Ry. v. Goodman, 138 Eng. Rep. 925 (1852); *See also* J. BROWN, A TREATISE ON THE LAW OF CARRIERS 462, 465 (1883); CHITTY & TEMPLE, PRACTICAL TREATISE ON THE LAW OF CARRIERS 15, 282 (1856).

41. *See* York, Newcastle & Berwick Ry. v. Crisp, 139 Eng. Rep. 217 (1854); Johnson v. Midland Ry., 154 Eng. Rep. 1254 (1849); Sewall v. S & M Allen, 6 Wend. 335 (N.Y. 1830); *cf.* 2 I. REDFIELD, THE LAW OF RAILWAYS 142 (5th ed. 1873); CHITTY & TEMPLE, *supra* note 40, at 24.

42. Citizens Bank v. Nantucket Steamboat Co., 2 Story 16, 34 (Cir. Mass. 1841); M'Manus v. Lancashire & Yorkshire Ry., 157 Eng. Rep. 865, 869 (1859).

place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places.[43]

A further development concerns forwarding agents who stepped in between shippers and carriers as transportation became more complex. Initially forwarders who merely acted as agents confining their services to the delivery of goods for carriers were not regarded as common carriers. In some American cases, forwarders were held liable as common carriers for the services which they actually performed.[44] By the middle of the 19th century, forwarders performed extensive and diversified services. They undertook to arrange the whole carriage until delivery to the consignee. They assumed responsibility for handling, collection, movement, and warehousing of goods. Where the forwarder collected the freight for the carriage and conveyed the goods to a railway company which was to carry out the main part of the transportation, an English court held the forwarder liable as a common carrier for the loss of the goods which occurred during the railway carriage.[45] In reaching similar results, American judges stressed the nature and extent of the forwarders' undertaking to deliver the goods at destinations that made them common carriers.[46] For all the remaining activities which preceded or followed the movement of the goods without being part of it, the forwarder was not regarded as a common carrier.[47] They were liable on the basis of special contracts rather than a general "holding out."[48] Thus, there was no strict liability. Liability was based only on negligence.

C. *The Duty To Serve During The 19th Century*

Originally, the duty to serve every applicant had been subject only to the conditions that there was room in the carrier's vehicle[49] and that the

43. 154 Eng. Rep. 1254, 257 (1849).

44. Chitty & Temple, *supra* note 40, at 18; J. Angell, A Treatise on the Law of Carriers of Goods and Passengers by Land and by Water 81 (2d ed. 1851); Platt v. Hibbard, 7 Cow. 497 (Sup. Ct. N.Y. 1827); Ackley v. Kellogg, 8 Cow. 223 (Sup. Ct. N.Y. 1828).

45. Hellaby v. Weaver, 17 Law Times 271 (1851). Similarly, in Hyde v. Trent and Mersey Navigation, 101 Eng. Rep. 218 (1793) the defendant was held liable as a common carrier for the destruction of goods by fire which occurred after the goods had been stored in a warehouse at the place of destination. The court found that the defendant owed delivery to the consignee as he had separately billed the price for the remaining cartage by a third person from the warehouse to the consignee.

46. *See* Ahearn, *Freight Forwarders and Common Carriage*, 15 Fordham L. Rev. 248, 252-260 (1946).

47. Brown v. Denison, 2 Wend. 593 (Sup. Ct. N.Y. 1829); Angell, *supra* note 44, at 81; Thompson, *The Relation of Common Carrier of Goods and Shipper and its Incidents of Liability*, 38 Harv. L. Rev. 28 (1924-25).

48. Gorton, *supra* note 14, at 9.

49. Jackson v. Rogers, 89 Eng. Rep. 968 (1684); Lovett v. Hobbs, 89 Eng. Rep. 836 (1682).

shipper or passenger offered reasonable payment before the beginning of the voyage.[50] During the 19th century, the exceptions became more and more numerous.[51] Eventually the duty was confined to the carrier's usual place of business and his ordinary business hours.[52] He was entitled to refuse goods which were in fact or at least appeared dangerous[53] and improperly packed.[54] The most important limitation on the duty to carry was the exhaustion of carrying capacity. Created in the time of horsepower, coaches, and wagons with low and inelastic capacities, this exception partially lost its justification in railroad transportation because the capacity of most railroads exceeds the normal traffic demand. Nevertheless, the courts applied the old rule to the new technology. In an Illinois case, a railroad which had facilities for offering additional transportation refused to use them in a year of great harvest and limited storage room. The Supreme Court of Illinois held that neither common law nor statute "requires anything more than that the company shall furnish reasonable and ordinary facilities of transportation. . . ."[55]

The list of exceptions to the duty to carry passengers is even longer. Carriers were held entitled to refuse drunken persons, suspected thieves and people whose behavior constituted a public annoyance,[56] those who had previously been lawfully ejected,[57] or who had not procured a ticket,[58] as well as those whose purpose was not carriage, but gambling[59] or the interference with the interests of the carrier.[60] Finally, the carrier was not bound to transport passengers on freight trains[61] or to places where their lives would be in danger.[62]

While several of these exceptions merely reflect problems of social consideration arising in mass transportation as in any other mass enterprise, some of them again stress the carrier's position as an entrepreneur in a free enterprise economy, widening his discretion as to his scope of business and as to the conditions of carriage. This is true not only for the limitation of his capacity, but also for his power to refuse transportation to the agents of his competitors or to passengers without a ticket.

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50. Jackson, 89 Eng. Rep. 968; CHITTY & TEMPLE, *supra* note 40, at 104.
51. *See* Lawson, 12 CENT. L.J. 110-112 (1881).
52. Cronkite v. Wells, 32 N.Y. 247 (1865).
53. Parrot v. Wells Fargo (The Nitro-Glycerine Case), 82 U.S. (15 Wall.) 524, 531 (1872); Brass v. Maitland, 119 Eng. Rep. 940, 946 (1856).
54. Union Express Co. v. Graham, 26 Ohio St. 595 (1875).
55. Galena & Chicago Union R.R. v. Rae, 18 Ill. 488, 489 (1857).
56. Jencks v. Coleman, 2 Sumn. 221, 225 (Cir. R.I. 1835).
57. O'Brien v. Boston & Worchester R.R., 15 Gray 20 (Mass. 1860).
58. Indianapolis, Peru & C. Ry., v. Rinard, 46 Ind. 293 (1874).
59. Thurston v. Union Pacific R.R., 4 Dill. 321 (8th Cir. Neb. 1877).
60. Jencks v. Coleman, 2 Sumn. 221 (Cir. R.I. 1835).
61. Illinois Central R.R. v. Nelson, 59 Ill. 110, 112 (1871).
62. Pearson v. Duane, 71 U.S. (4 Wall.) 605 (1866).

D. Discrimination and Reasonable Conditions

Discriminatory treatment or unreasonable conditions imposed by a carrier exercising monopolistic power is equivalent to a refusal to serve. This explains why the requirement of "reasonable conditions" and in particular of reasonable prices was imposed on the common carrier from the beginning.[63] The concept, however, remained vague and did not gain shape until the monopolistic railroad corporations tried to maximize profits by price discrimination and other selective practices.

The idea that reasonableness included equal treatment, in particular equal charges for equal cost and risk situations, was widespread. In one case, the carrier conceded an exclusive right of service to one customer, an express company, and thereby rejected all other shippers. Such an agreement was declared void because "the very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences."[64] This requirement was specifically referred to in railway charters[65] or in general statutes like the 1854 English act on railway and canal traffic which prohibited the railway companies from giving "any undue or unreasonable preference or advantage to or in favor of any particular person or company. . . ."[66] An example of such a proscribed preference was a railway company's refusal to accept goods delivered by A after 5 P.M. when it subsequently accepted delivery from A's competitor at a later hour.[67]

A counterpart of the equality principle is the assertion in early railway cases that cost differences *must* be reflected in rate differences.[68] The English courts fought price discriminating practices operated by railway companies against forwarding agents. The cost and rate structure of the railways made it cheaper to carry one big parcel than several small ones. Forwarders made it their business to collect small parcels into bigger shipments in order to benefit from the economies of scale. The railway companies frequently attempted to charge forwarders higher rates than they charged other shippers for parcels of the same size.[69] In several cases these practices were declared illegal as not reflecting differences in cost or risk.[70]

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63. *Cf.* Harris v. Packwood, 128 Eng. Rep. 105, 108 (1810); for innkeepers see Jeremy, *supra* note 1, at 147.

64. New England Express Co. v. Maine Cent. R.R., 57 Me. 188 (1869).

65. 5 & 6 Will. 4, ch. 107, sched's 167, 175 (1836).

66. An Act For The Better Regulation Of The Traffic On Railways And Canals, 17 & 18 Vict., ch. 31 (1854).

67. Garton v. Bristol & Exeter Ry., 121 Eng. Rep. 656 (1861).

68. *See* Pickford v. Grand Junction Ry., 152 Eng. Rep. 525, 535 (1842).

69. Annot., 141 A.L.R. 919 (1942).

70. Pickford, 152 Eng. Rep. 525; Parker v. Great Western Ry., 135 Eng. Rep. 107 (1844); Crouch v. The Great Northern Ry., 156 Eng. Rep. 1031 (1856).

The difficulties in applying the principle that rate differentiation had to be justified by cost or risk differences favored the railroads.[71] The distinction between price differentiation and price discrimination not reflecting cost differences was unclear. The courts did not feel competent to make these distinctions which, according to Cresswell, "assume a very complicated and difficult character, and are such as we feel but little qualifed to decide."[72] The tendency of the court to leave the determination of the reasonableness of rates, conditions, and bylaws to the jury did not solve the problem.[73]

E. The Carrier's Strict Liability During The 19th Century

While the common carrier of passengers was liable only for personal

71. G. Wilson, The Effect of Rate Regulation on Resource Allocation in Transportation, The Crisis of the Regulatory Commissions 57, 59 (MacAvoy ed. 1970); *cf.* A. Kahn, The Economics of Regulation 70 (1970).

72. Ransome v. Eastern Counties Ry., 140 Eng. Rep. 179, 186 (1857).

73. *Cf.* Crouch v. Great Northern Ry., 156 Eng. Rep. 1031, 1035 (1856); State v. Overton, 61 Am. Dec. 671, 675 (Sup. Ct. N.J. 1854).

Several cases show directions in which railroad companies may discriminate in response to alleged cost differences. Hamilton, *Discriminative Traffic Rates*, 16 Am. L. Rev. 818 (1882). They were allowed to classify freights and passengers and charge different rates for different classes, if there were reasonable grounds for such discrimination in the difference of cost of service, risk of carriage, or in the accommodations furnished, but the rates had to be the same for all persons and goods of the same class. Chicago, B. & Q. R.R. v. Parks, 18 Ill. 460 (1857); Hays v. Pennsylvania Co., 12 F. 309, 311 (N.D. Cir. 1882). It was held unreasonable to discriminate against small shippers in favor of larger shippers of the same class of goods solely because of the difference in quantity. Hays v. Pennsylvania Co., 12 F. 309 (1882). If the larger shipper undertook to furnish a certain amount of freight per week or month, a lower rate was permissible. Nicholson v. Great Western Ry., 141 Eng. Rep. 1012 (1860). Discrimination in favor of localities where there was competition in carriage, against others where there was no competition, was proscribed. Fares, however, could be lower than the aggregate of the way fares between intermediate points though this structure frequently was due to the existence of a competing carrier between the termini. State v. Overton, 61 Am. Dec. 671 (N.J. 1854); Ransome v. Eastern Counties Ry., 140 Eng. Rep. 179, 185 (1857). These cases show the difficulties of cost computation and the weakened control of the courts over ratemaking. The equality principle could not be imposed effectively if there were no clear answers to the basic question of how much a service cost. The vague limit of reasonableness finally superseded the equality principle when the courts allowed open price discrimination to the extent that the charges were not unreasonable *per se*. Garton v. Bristol & Exeter Ry., 121 Eng. Rep. 656 (1861). The Supreme Judicial Court of Massachusetts upheld a railroad rate of 50¢ per ton per mile when the same company normally charges only 20¢ per ton per mile for carrying goods of the same class on the same road. The court held that the higher price was not unreasonable *per se*, and that the reduction of rates below the level of reasonableness in favor of some shippers did not entitle every shipper to the same benefit. Fitchburg R. Co. v. Gage, 12 Gray 393 (Mass. 1859).

During the first decades of their existence, the railway companies could afford rate reductions because technological innovations decreased their costs. The courts took the view the former rates did not become unreasonable merely because fallen costs allowed lower rates. On this premise, the decisions cited above set the railway companies free to charge discriminating prices in the shadow of formerly higher and yet reasonable rates.

injury due to his negligence, the common carrier of goods was liable for accidental loss and damage to goods and was exempted only by an act of God or the King's enemies, an inherent vice of the goods, fraud of the shipper,[74] or, in the case of sea carriage, by the law of general average.[75]

Until the middle of the 18th century, contractual modification of this harsh liability for the carriage of goods could be achieved through use of special contracts.[76] During the latter half of the 18th century, however, the courts began to state the carrier's liability with increasing clarity, restricting the act-of-God exception, and finally putting the carrier into the position of an insurer.[77] From this, it followed that the carrier could charge a higher "premium" for undertaking a higher risk.[78] From about 1750 onwards, carriers hung out signs, circulated notices among their customers, or advertised that shippers should declare the value of their goods, and that higher rates would be charged for valuables. Failure to declare the full value of goods constituted fraud barring shippers from recovering damages caused from destruction or loss of the goods during carriage.[79] These early notices, designed to increase the carrier's income, often worked to limit its liability.

The next step was the publication of notices which simply restricted the carrier's liability up to a certain value, often 5£ per parcel, or only to acts of gross negligence and intent, or which excluded the carrier's liability altogether. By 1852 English courts, in consideration of the carrier's "liability of ruinous extent,"[80] had ratified limitation and exemption clauses of all kinds,[81] and their language had lost the pathos of public interest.[82]

The carriers' quest for freedom of contract was not confined to inland transport. Carriers by sea pushed through legislation in England to restrict specific liability risks to the value of their ships.[83] In 1797, Parliament re-

74. J. RIDLEY, THE LAW OF CARRIAGE BY LAND, SEA, AND AIR 15 (Whitehead 5th ed. 1978).

75. PAYNE & IVAMY, CARRIAGE OF GOODS BY SEA 154 (11th ed. 1979).

76. *Cf.* JEREMY, *supra* note 1, at 36; FLETCHER, THE CARRIERS LIABILITY 179 (1932).

77. *See* Beale, *supra* note 28.

78. Harris v. Packwood, 128 Eng. Rep. 105 (1810); Gibbon v. Paynton, 98 Eng. Rep. 199 (1769).

79. Gibbon, 98 Eng. Rep. at 200 (Opinion by Lord Mansfield).

80. Leeson v. Holt, 171 Eng. Rep., 441, 442 (1816) (Opinion by Lord Ellenborough).

81. Carr v. Lancashire and Y. Ry., 155 Eng. Rep. 1133 (1852); Austin v. Manchester, 117 Eng. Rep. 1009 (1851), (company not responsible for any damage however caused); Nicholson v. Willan, 102 Eng. Rep. 1164 (1804) (responsible for not more than 5£). Leeson, 171 Eng. Rep. 441 (at the risk of the owners).

82. A contractual view of the carrier-shipper relationship was used to explain the courts' generosity vis-a-vis a notice of exemption: "If the parties in the present case have so contracted the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question then is whether there was a special contract." Leeson, 171 Eng. Rep. at 442.

83. 7 Geo. II ch. 15 (1734); 26 Geo. III ch. 86 (1786); 53 Geo. III ch. 159 (1813); *cf.* FLETCHER, *supra* note 76, at 175-177.

jected a bill limiting shipowners' liability to cases of general negligence as unnecessary because the carrier might limit his liability in all cases by special contract.[84] This is in fact what the shipowners did. After 1797 a new bill of lading came into use which excepted "the act of God, of the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats, as far as ships are liable thereto."[85]

In the United States, the trend toward freedom of contract met with some resistance. Although most judges acknowledged the validity of simple notices limiting the carrier's liability,[86] some would not allow the carrier to exempt himself from liability for gross negligence or fraud.[87] The New York courts initially took a still stricter attitude and declared void any contractual modification of the common carrier's liability.[88] But when the United States Supreme Court indicated in dictum that carriers by giving notice could immunize themselves from liability even for gross negligence,[89] the line of opposition fell everywhere.[90]

This liberal trend was reversed in 1873 under the influence of the Grange movement when the Supreme Court held that a common carrier by land could not contract away his liability for negligence.[91] This holding, based on the public interest in the transportation industry and the court's concern for the unequal bargaining power of shippers and carriers was extended to carriers by water in 1889.[92] Shippers were subjected to the conditions imposed by carriers, especially by the railway corporations. However, the court did recognize the validity of liability restrictions for valuables, accidental losses, risk of navigation, live animals, and goods liable to rapid decay.[93]

The latter attempt of passenger carriers to reduce their liability for negligence in regard to personal injuries took a similar course. English courts restricted their inquiries to the issue of notice, and they never doubted the substantive validity of the limitation of liability.[94] In the United States, there

84. Nicholson v. Willan, 102 Eng. Rep. 1164, 1167 (1804).

85. FLETCHER, *supra* note 76, at 178 (1932).

86. Cooper v. Berry, 21 Ga. 526 (1857); Patten v. Magrath, 23 S.C.L. (Dud.) 159, 163 (1838); Beckman v. Shouse, 5 Rawle 178, 189 (Pa. 1835).

87. Beckman, 5 Rawle at 189; Camden & Amboy R.R. v. Baldauf, 16 Pa. 67, 76-77 (1851).

88. Gould v. Hill, 2 Hill 623 (N.Y. Sup. Ct. 1842).

89. New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 383 (1848).

90. Smith v. New York Central R.R., 29 Barb. 132, 138-39 (N.Y. Sup. Ct. 1859).

91. New York R.R. v. Lockwood, 84 U.S. (17 Wall.) 357, 376 (1873).

92. Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 441 (1889).

93. New York Central R.R. v. Lockwood, 84 U.S. (17 Wall.) 356, 380 (1873).

94. McCawley v. Furness Ry. 8 L.R.-Q.B. 57 (1872); Hall v. North Eastern Ry., 10 L.R.-Q.B. 437 (1875); *See* MCNAMARA, THE LAW OF CARRIERS OF MERCHANDISE AND PASSENGERS BY LAND 540 (3rd ed. 1925).

was much confusion until 1873,[95] when the Supreme Court upheld the mandatory character of the common law liability for negligence of passenger carriers.

Though the American courts adopted a more traditional view as compared with the permissiveness of the English courts, the courts of both countries had one thing in common. Unlike their predecessors, they regarded the carrier's liability as an object of contractual arrangements and not as a consequence of his status. The English and American position differed as to how far these arrangements could go. When the United States Supreme Court narrowed the scope of party autonomy, it relied neither on the mandatory character of the carrier's status nor on Lord Holt's fear of collusion with thieves.[96] Instead it advanced the argument of the unequal bargaining position which is at the root of present consumer protection in the law of contract. It is doubtful whether shippers were better protected under the ruling of the United States Supreme Court than they were in England. The contractual exemption from liability for accident, which the Supreme Court recognized, put the burden of proof of the carrier's negligence upon the shipper to whom evidence usually is not easily available.[97] Moreover, not all state courts followed the Supreme Court, and therefore uncertainty arose.[98]

F. Conclusion: The Law Of Common Carriers On The Eve Of Government Regulation

What has been described in the preceding sections may be summarized as the rise and fall of judge made business regulation. We have seen that by the end of the 18th century, the needs of the nobility and later the secret alliance of producers and consumers imposed on carriers a legal duty to serve, a prohibition against discrimination, and strict liability. In other branches of business freedom of enterprise, and negligence liability prevailed.

The obligations of the common carriers, which were initially independent, influenced each other. Strict liability, initially based upon a general assumpsit to carry safely, needed a new basis when assumpsit became the cornerstone of contract law because the carrier-shipper relationship was not contractual. The carrier was under a duty to carry. This led to an in-

95. *Cf.* R. Hutchinson, A Treatise on the Law of Carriers as Administered in the Courts of the United States and England 467, 470 (1880).

96. New York Central R.R. v. Lockwood, 84 U.S. (17 Wall.) 356, 380 (1873) ("The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events.").

97. *Cf.* G. Gilmore & O. Black, The Law of Admiralty 141 (2nd ed. 1975).

98. *Id.* at 142.

dependent legal development of the carrier's liability, the custom of the realm. When the carrier's liability later approached that of an insurer, the courts were on their way to allowing price discrimination under the concept of different risks. Another route to the same end began with the carrier's duty to serve which had to be supplemented by a prohibition against discriminatory practices. In summary, the duty to carry has been an important tool in shaping the particular liability and antidiscriminatory aspects of the law of common carriers.

Although the common law imposed a heavier duty on carriers than on other businesses, it did not provide the remedies needed by shippers and passengers to outweigh their diminished bargaining powers.

When American legislators in the states, and later at a federal level, were faced with the choices for government regulation of railroad rates, they acted because of the changed reality in transportation. The problems of rate regulation were too complex to be dealt with in an ordinary trial. Moreover, litigation against railway companies was difficult because carriers retained the necessary evidence while the burden of proof was upon the shipper. The financial and legal resources of the railroads made it risky for the plaintiff to sue if his business depended upon transportation services of the carrier.

About 1800, the law of common carriers was still centered upon a definition of status whereas economic development was beginning to demand a flexible legal framework. In other markets, contract provided for such a framework. In transportation, public interest seemed to exclude party autonomy. However, gradually the courts responded to economic pressure by allowing economic self-determination and freedom of contract to penetrate the law of common carriers. They consented when the carriers restricted or even excluded their liability altogether. Later carriers could specialize in certain branches of transportation by holding themselves out as carriers of only certain goods serving certain routes. The duty to serve was not enforced beyond the regular scope of business they had chosen even though their facilities might have allowed expansion. By prohibiting certain discriminatory practices, the courts often merely showed the carriers how to discriminate lawfully in the future. Carriers seem to have found ways around the law of common carriers, until this body of law was nothing more than an empty shell stranded on the beaches of legal history. Legislative intervention was therefore much more than a remedy for technical difficulties. It was the logical consequence of the common law courts' failure to maintain and protect the public interest against the aggregate financial power of the railroads.

III. The Law Of Common Carriers Under Regulatory Statutes

In the United States, the defects of the judge-made law were exposed to increasing criticism after the Civil War. The Grange movement among midwestern and eastern farmers, who complained of high and discriminatory rates favoring their competitors,[99] resulted in pressure for legislation. Illinois took the lead in 1871 by establishing a commission to set up a schedule of mandatory maximum rates[100] and prohibit unreasonable or discriminatory railroad rates. When the United States Supreme Court decided in 1886 that individual states lacked the power to regulate traffic originating from, or bound for, points in other states,[101] federal action became necessary, and one year later, an act to regulate commerce (the Interstate Commerce Act, "ICA") was promulgated.[102] The ICA was a landmark in the development of transportation law.

A. Early Government Regulation

Transportation has always been a promising field for the public treasurers because the infrastructure of roads, canals, bridges, and ferries either necessitated public lands and rivers or the sovereign's right of eminent domain to expropriate private property.

An early and conspicuous illustration of the fiscal motive is given by an English "Act for the Licensing and Regulating [of] Hackney-Coaches and Stage-Coaches" of 1694. The House of Commons referred to the act as "being sensible of the great and necessary expense in which your Majesties are engaged, for carrying on the present war against the French king, and being desirous to supply the same. . . ."[103] In conformity with this purpose, hackney and stage coach drivers were required to buy licenses of limited duration and to pay annual rents on them. The act also regulated service and rates in the interest of the passengers and the public. Horses had to be at least 14 hands high; coaches had to be marked with identification numbers, maximum rates were established for the first and for every subsequent hour, as well as for specific routes within London. A driver's refusal to carry was subject to penalty. Out of the 700 available hackney licenses, a person could only obtain two. Finally, a five member special commission was established to administer the licensing system, to account for the fees, to hear complaints against drivers, to fine them for unlawful

99. For the influence of the Grangers on railroad legislation see G. Miller, Railroads and the Granger Laws (1971). *Cf.* Ulen, *The Market for Regulation: The ICC from 1887 to 1920*, 70 Am. Econ. Rev. 306 (1980).

100. The legislative history of Illinois is described by W. Jones, Cases and Materials on Regulated Industries 36 (2d ed. 1976).

101. Wabash, St. L. & P. Ry. v. Illinois, 118 U.S. 557, 575 (1886).

102. 49 U.S.C. § 10101 (1978).

103. 5 & 6 W. & M. ch. 22 (1694), repealed by 30 & 31 Vict. ch. 59 (1867).

behavior, and to enact further regulations in order to avoid "disturbances" and "inconveniences" in the streets.[104]

The Hackney statute of William and Mary also contains some very modern devices for the organizational framework of regulations. The commission united the executive, legislative, and adjudicatory functions of government in one administrative body. It decided upon individual entry into the hackney business. It included specific regulations concerning the hackney traffic as a whole, and it sat as an inferior court to hear cases against or among hackney drivers in a well-defined procedure.

However, it lacked the power to fix, change, or supervise rates and this became the primary reason for the establishment of modern regulatory commissions. The predecessors of rate control have to be sought in the advisory agencies which came into being in several American states after 1844.[105] The administrative burden created by increasing railroad traffic and by rate complaints had become so heavy that the legislatures which had incorporated the railroad companies and dealt with their problems until then, delegated their tasks to the courts, selectmen, and commissions.[106] Agencies which were confined to recommendations and advice directed at the legislature were the most common form. It was not until 1873 that Illinois set up the first commission with mandatory power over rates.[107]

Some of the advantages of legislative regulation as compared with the common law are: (1) Where the common law protected the shipper or passenger from extortion only by a vague requirement of reasonable rates, the schedules fixed by a statute or an agency clearly establish what is reasonable. (2) Where the common law remedies of damages and reimbursement of overpayments are toothless sanctions in the typical mass carriage transaction of small value, the statutory menace of fines may deter the carrier much more effectively from unlawful practices.[108] (3) Rate problems are too manifold and complex to be dealt with by judges on a case by case basis. When an intervention with the market forces of supply and demand is desirable, it can be exerted more effectively by a specialized agency and ex ante investigations into the whole rate structure.

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104. This statute, designed to raise revenue for the king's war, pursued a number of classical aims of economic engineering to which modern attempts at taxicab regulation adhere. *See* Kitch, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 J.L. & ECON. 285, 302-316 (1971). *See also* Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890); Smyth v. Ames, 169 U.S. 466 (1898).

105. W. JONES, *supra* note 100, at 31-33.

106. *See* Hunter, *The Early Regulation of Public Service Corporations*, 7 AM. ECON. REV. 571 (1917).

107. W. JONES, *supra* note 100, at 37.

108. For these two points, see Kitch, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 J.L. & ECON. 308 (1971).

B. *Rail Regulation Prior To The Staggers Act*

As noted above, the Interstate Commerce Act[109] was principally promulgated in response to shipper complaints of high and discriminatory rates due to railroad monopoly.[110] This political background is reflected both by the scope of the original act and by its concentration upon rate regulation.

1. Regulated Carriers

Originally, the ICA applied "to any common carrier . . . engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or shipment."[111] The subject matter of the Act was vague as compared with the contemporaneous state of the common law. Contrary to their predecessors, especially in English courts, American judges resisted attempts to escape from the common carrier status. Supported by a number of state constitutions and statutes which declared all railroads to be common carriers,[112] the courts only exempted truly private lines like industrial, mining, or lumber roads from the ICA and common carrier duties.[113] Railroads were prohibited from splitting their lines into several parts in the hope of being common carriers on some and private carriers on the others.[114]

Twenty years later, the Hepburn Act of 1906[115] brought sleeping car and "express companies" under the control of the ICA. The United States Supreme Court interpreted this latter category as including all express firms irrespective of their corporate structure.[116] The Hepburn Act widened the range of regulated activities performed by these carriers by extending the jurisdiction of the Interstate Commerce Commission ("ICC") to terminal facilities, freight depots, and all services connected with receipt, delivery, transfer, or storage of goods.[117]

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109. 49 U.S.C. § 10101 (1978).

110. *Cf.* Texas & Pac. Ry. v. ICC, 162 U.S. 197, 210-211 (1896).

111. Today, in international transportation, all carriage inbound and outbound or which passes through a foreign country on its way to another place in the United States, is subject to the Act with regard to the part of the route in the United States. 49 U.S.C. § 10501(a)(2).

112. *See* 13 Am. Jur. 2d *Carriers* §§ 11, 12 (1964); 13 C.J.S. *Carriers* § 6 (1955).

113. Wade v. Lutcher & Moore Cypress Lumber Co., 74 F. 517 (5th Cir. 1896); Walling v. Rockton & Rion R.R., 54 F. Supp. 342 (W.D.S.C.), 146 F.2d 111 (4th Cir.), (per curiam), *aff'd cert. denied* 324 U.S. 880 (1944).

114. Brownell v. Old Colony R.R., 41 N.E. 107 (Mass. 1895); Crescent Coal Co. v. Louisville & Nashville R.R., 135 S.W. 768 (Ky. 1911).

115. 49 U.S.C. § 10501(a)(1).

116. United States v. Adams Express Co., 229 U.S. 381 (1913).

117. 49 U.S.C. § 10102(18), (23) (Supp. IV 1980).

2. Rates

The ICA of 1887 was mainly concerned with high rates; it restated the common law and empowered the ICC to investigate into and decide on the reasonableness of rates.[118] However, this authority was held not to include the prescription of maximum rates,[119] a power later conferred upon the Commission by the Hepburn Act of 1906.[120] Only four years later, the Mann-Elkins Act enabled the ICC to suspend rates filed with it, pending an inquiry, for up to seven months.[121] This act and contemporary ICC action sought to ensure rate stability. However, the need for higher railroad revenues soon became evident as the financial situation of the railroads decayed before and during the First World War. In 1920, the ICC received the additional power to fix minimum rates to prevent rate wars and further damage to the whole industry.[122]

This amendment changed the basic policy of railroad regulation. Established to defend shipper interests against rail monopolies, the ICC was given the responsibility of protecting both shippers and the regulated industry. Consequently, its discretion in finding the compromise between the contradictory interests was broadened. Formerly a tool of government policy, the Commission now became the policy maker under the National Transportation Policy as formulated in 1940. The purpose was:

> To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States postal service and the defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
> (1) to recognize and preserve the inherent advantage of each mode of transportation;
> (2) to promote safe, adequate, economical, and efficient transportation;
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
> (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
> (5) to cooperate with each State and the officials of each State on transportation matters;
> (6) to encourage fair wages and working conditions in the transportation industry.[123]

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118. 49 U.S.C. § 10701(a) (Supp. IV 1980).
119. Cincinnati, N.O. & T.P. Ry. v. ICC, 162 U.S. 184 (1896).
120. 49 U.S.C. § 10704(a)(1) (Supp. IV 1980).
121. 49 U.S.C. § 10707(c)(1) (Supp. IV 1980).
122. Transportation Act of 1920, 49 U.S.C. § 10704(a)(1). For the preceding development, *cf.* Watkins, *Outstanding Events in Railway Regulation*, 19 COLUM. L. REV. 47, 49 (1919); Pomerene, *Our Recent Federal Railroad Legislation*, 55 AM. L. REV. 364 (1921).
123. 49 U.S.C. § 10101 (Supp. IV 1980).

The system of rate regulation outlined above is still in force. The carrier must establish his rates and tariff classifications as well as rules on connected matters like packing, documents, baggage, and car service.[124] Tariffs containing all such information have to be published, kept for public inspection, and filed with the ICC.[125] If the rates fail to meet the standards of reasonableness, the ICC may impose maximum or minimum rates.

There are no clear standards for determining a "zone of reasonableness." The two poles between which rate regulation oscillates are cost-of-service and value-of-service pricing.[126] The latter is what economists call price discrimination. Rates are fixed regardless of the respective cost of carriage and merely in response to the inelasticity of demand for transportation or to what the market will bear. As long as the railroads retained a monopoly over inland transportation, this method of pricing was successfully supported by the ICC.[127] It amounted to a subsidy or a redistribution of wealth from high-valued manufactured goods to large-volume, low-valued mining and agricultural commodities. Ratemaking became a tool for defining the balance between different industries and regions at the cost of considerable losses in terms of efficiency. When motor carriers disrupted the rail monopoly, shippers of high-valued goods shifted their cargo to trucks, and the benefits of internal subsidy could only be maintained by additional regulation of motor carriers.[128]

3. *Duty To Serve*

While the original act only contained a general prohibition against discrimination, the railroad's duty to carry was expressly codified in 1910.[129] Also, the carrier's right to adopt regulations establishing the conditions, methods, time and place at which he is willing to accept goods offered for carriage, has been further recognized. If these regulations are not arbitrary, unreasonable, or discriminatory, refusal of goods not tendered in conformity with them is justified.[130]

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124. 49 U.S.C. § 10702(a) (Supp. IV 1980).

125. 49 U.S.C. § 10762(a), (b)(1) (Supp. IV 1980).

126. M. FAIR & J. GUANDOLO, TRANSPORTATION REGULATION 139 (8th ed. 1979).

127. Cottonseed, its Products, and Related Articles, 203 I.C.C. 177, 182 (1934).

128. PECK, *Competitive Policy for Transportation*, in THE CRISIS OF THE REGULATORY COMMISSIONS 72, 74 (MacAvoy ed. 1970), reports that in 1956, railroad rates ranged from a low of 15% to a high of 566% of fully distributed costs. The inefficiencies of value-of-service pricing are pointed out by Wilson, *Effects of Value-of-Service Pricing Upon Motor Common Carriers*, 63 J. POL. ECON. 337 (1955). For the legislative history of farmer protective rates see Nelson & Greiner, *The Relevance of the Common Carrier Under Modern Economic Conditions*, in TRANSPORTATION ECONOMICS—A CONFERENCE OF THE UNIVERSITIES-NATIONAL BUREAU COMMITTEE FOR ECONOMIC RESEARCH 351, 356 (1965).

129. 49 U.S.C. § 11101(a) (Supp. IV 1980).

130. Crescent Coal Co. v. Louisville & Nat'l Ry., 135 S.W. 768 (1911); Louisville & N. R.R. v. F.W. Cook Brewing Co., 172 F. 117 (7th Cir. 1909); Platt v. Lecocq, 158 F. 723 (8th Cir. 1907).

The shortage of terminal and car facilities for special cargo induced carriers to exclude these shipments from their common carriers duties. The problem of special equipment is a question of who should bear this additional cost. The concept of the railroad's "holding out" makes the railroad responsible for these costs.[131] Under the provisions of the ICA a rail carrier "shall furnish . . . adequate car service [including] special types of equipment."[132] The ICC may require a railroad to incorporate its car service rules in its tariffs.[133]

Lack of capacity due to unexpected or unusual demand is excusable only if the increase in demand was unforeseeable and cannot be matched with equipment from other sources.[134] A railroad which could not provide enough refrigerator cars to carry a bumper crop of vegetables was held liable for breach of its duty to serve.[135] In contrast with pre-ICA law, this decision stresses the railroads' capability and duty to adjust to shipper needs. To the same end, the ICC may directly interfere with the car service in order to overcome a traffic emergency in a section of the United States.[136] Even without such an emergency, the ICC may, under certain conditions, require a single carrier to supply himself with the necessary equipment to furnish adequate car service.[137]

A principal function of regulation is to ensure the availability of transportation. Regulatory action, is the most important means of achieving this aim. The common law does not provide remedies against the shutting down of unprofitable lines,[138] nor does it provide a specific frequency of trains. The solutions to these problems must be provided by statute and regulation[139] which indirectly define the scope of the carrier's duty to serve.

4. Carrier's Liability

The Supreme Court of the United States revitalized the rigidity of the common carrier's liability by containing attempts at contractual modification.[140] Congress, therefore, felt little need to interfere with the courts in

131. *See* Chicago R.I. & P. Ry. v. Lawton Refining Co., 253 F. 705, 709 (8th Cir. 1918); 13 AM. JUR. 2D *Carriers* § 147 (1964).

132. 49 U.S.C. §§ 11121(a), 10102(2) (Supp. IV 1980); *see also* Midland Valley Ry. v. Excelsior Coal Co., 86 F.2d 177 (8th Cir. 1936); Famechon Co. v. Northern P. Ry., 23 F.2d 307 (8th Cir. 1927).

133. 49 U.S.C. § 11121(a)(2) (Supp. IV 1980).

134. *See* 13 AM. JUR. 2D *Carriers* §§ 155, 157 (1964).

135. Atlantic Coast Line Ry. v. Geraty, 166 F. 10 (4th Cir. 1908).

136. 49 U.S.C. § 11123 (Supp. IV 1980).

137. Pub. L. No. 95-607, 92 Stat. 3059, 3068 (1978).

138. For comparison with a carrier by water, see Lucking v. Detroit & Cleveland Navigation Co., 265 U.S. 346 (1924).

139. *See* 65 AM. JUR. 2D *Railroads* §§ 346, 348 (1972).

140. New York Central R.R. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873).

this field in 1887, and not before 1906 was the matter subject to federal legislation by the Carmack Amendment, a part of the Hepburn Act.[141] This act, like later statutes, only covered carriage of property, not the carriage of passengers which still is a subject of the common law of torts. The reasons for legislation were twofold. First, there was great disparity of judgment in liability matters among different states. Because the Supreme Court decided not to overrule the state courts,[142] the unequal liability risks jeopardized uniform conditions in interstate commerce. Second, shippers found it difficult to file claims for loss or damage occurring during an interline shipment when they did not know where the critical event had occurred.[143]

In response to these problems, the Carmack Amendment prohibited all contractual exemptions from liability, required the initial carrier to issue through bills of lading for interline shipments, declared the carrier liable to the shipper for damage or loss occurring on any part of the route, and allowed him to recover from a subsequent carrier, if the shipment had in fact been damaged on that carrier's line. This act not only freed the shipper of doubts as to the place of damage; it also relieved him of the burdensome litigation at a distant place by allowing him to sue the initial carrier close to his own place of business.[144] In the interest of consignees, this liability was later extended to the delivering carrier.[145]

Contractual modifications of the carrier's liability, though apparently excluded by the Carmack Amendment, still raised questions. In 1912, the Supreme Court decided that the statute had only codified the common law which barred carriers from immunizing themselves against negligence liability, but did not prohibit value limitations of recovery if the shipper was granted a lower rate in consideration for the liability waiver.[146] The widespread practice of released rates based upon agreed cargo valuations which this opinion approved, was abolished by the Cummins Amendment of 1915[147] and, with modifications, reintroduced by the second Cummins

141. Act of June 29, 1906, ch. 3591, 34 Stat. 584, 595 (current version at 49 U.S.C. §§ 11707 (1978)).

142. Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903). *Cf.* Hardman & Winter, *The Interstate Commerce Act and the Allocation of the Risk of Loss or Damages in the Transportation of Freight*, 7 TRANS. L.J. 137, 138-140 (1975).

143. For a review of law prior to 1906, see Adams Export v. Croninger, 226 U.S. 491, 504 (1912); 1 KNORST, INTERSTATE COMMERCE LAW AND PRACTICE 89-90 (1953).

144. *Cf.* Kulina, *Liability of a Carrier for Loss and Damage to Interstate Shipments*, 17 CLEV.-MAR. L. REV. 251, 252 (1968).

145. Act of March 4, 1927, ch. 510, 44 Stat. 1446, 1448 (current version at 49 U.S.C. § 11707(a)(1) (Supp. IV 1980)).

146. Adams Express, 226 U.S. at 509.

147. Act of March 4, 1915, ch. 176, 38 Stat. 1196 (current version at 49 U.S.C. § 11145 (Supp. IV 1980)).

Amendment one year later.[148] The resulting law requires the carrier to pay the "actual value" of the damaged or lost goods. It also voids all exemptions or limitations of liability or recovery. There are, however, two exceptions: (1) the liability provisions are not mandatory with regard to passengers' baggage carried by common carriers and (2) the ICC may authorize or require common carriers of property to establish rates dependent upon value declared in writing where such a rate differentiation is deemed just and reasonable. The Commission developed general criteria for the appreciation of released rate applications,[149] and its action was usually upheld by the courts.[150] Except in the movement of household goods, released rates are not commonly used.

The courts and the Commission have shown great determination to stem the carriers' efforts to isolate themselves against risk. Repeated attempts to reinterpret the statutory liability as based on negligence have been rebutted. Even in the case of damage to perishable goods, there is no presumption in favor of an inherent vice causing the damage, which would except the carrier from liability.[151] Moreover, the recoverable amount not only includes the replacement costs of the merchandise, but also the shipper's profit derived from his bargain with the consignee.[152] "Concealed damage" clauses which try to apportion damages, discovered after delivery, among the shipper, carrier and consignee were found by the ICC to violate the full recovery requirement of the ICA.[153] Some courts have also invalidated "benefit of insurance" clauses in which carriers stipulated that they could reap the benefit of a shipper's cargo insurance. Such clauses do not impair the shipper's full recovery, but this is a result of the shipper's own expenses for insurance. Therefore, they were held to constitute an unlawful additional compensation of the carrier by the shipper.[154] The ICC has promulgated mandatory time tables for acknowledging (30

148. Act of August 9, 1916, ch. 301, 39 Stat. 441, 442 (current version at 49 U.S.C. §§ 11707(c), 10730 (Supp. IV 1980)).

149. With regard to motor carriers, see 49 C.F.R. § 1307.200, and concerning railroads, see *In the Matter of Express Rates, Practices, Accounts and Revenues*, 43 I.C.C. 510 (1917); *Released Rates on Stone in the Southeast*, 93 I.C.C. 90 (1924); and J. GUANDOLA, TRANSPORTATION LAW 49 (3d ed. 1979).

150. Household Goods Carriers' Bureau v. ICC, 584 F.2d 437 (D.C. Cir. 1978); *see also* J. MILLER, MILLER'S LAW OF FREIGHT LOSS AND DAMAGE CLAIMS 353-363 (Sigmon 4th ed. 1974); *cf.*, Secretary of Agriculture v. United States, 350 U.S. 162, 168-173 (1955).

151. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134 (1964). For a critical comment, see Skulina, *supra* note 144, at 255, on who shared the erroneous view that the "basic theory of liability is found in negligence."

152. Polaroid Corp. v. Shuster's Express, 484 F.2d 349, 351 (1st Cir. 1973).

153. Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515, 536 (1972).

154. China Fire Ins. v. Davis, 50 F.2d 389 (2d Cir. 1931); Salon Service v. Pacific & Atlantic Shippers, 246 N.E.2d 509 (N.Y. 1969); *cf.* Hardman & Winter, *supra* note 142, at 137, 141-146.

days), investigating (promptly), paying or declining (120 days), and reporting on (every 60 days), claims.[155] Attempts to extend the compulsory liability insurance of motor common carriers and freight forwarders to railroads and water carriers[156] may complete this picture in which the spirit of the common law still seems alive.[157]

5. *Other Regulations*

What has been described so far is the development of ancient common law obligations. However, modern legislation has considerably enlarged the scope of regulatory power. As a consequence entry into and exit from the industry as well as single route markets are subject to elaborate rules. Licenses are based upon "public convenience and necessity." New entries must conform with "public policy." The ICC, in exercising its wide discretion, may either close transportation markets and protect established carriers or open the gates to competition.[158] Questions affecting the carriers' financial resources and structure, like mergers, combinations, securities, accounting, valuation of property, are the object of other provisions of the ICA.[159] Finally, the Interstate Commerce Act establishes the whole structure of the ICC as well as enforcement procedures including civil and criminal penalties.[160] Though most of these regulations are necessary corollaries of rate regulation, they do not directly affect the carrier shipper or carrier passenger relationship and therefore may be omitted from the instant analysis.

C. Other Carriers Subject To ICC Jurisdiction

1. *Pipeline Regulation*

The first new mode of transportation to be included into the ICA by the Hepburn Act of 1906[161] was pipelines carrying oil and other commodities, except water, artificial and natural gas. Pipelines of the latter type usually

155. 49 C.F.R. § 1005.3-1005.5 (1981).

156. *Cf.* 49 C.F.R. §§ 1043.2, 1084.3 (1981).

157. *Cf.* Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515, 570 (1972) ("The virtual inelasticity of the traditional liability of common carriers is in itself a compelling force for motivating the prompt payment of claims.").

158. *See* 49 U.S.C. § 10901 (Supp. IV 1980); Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 Wake Forest L. Rev. 729 (1977); Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426 (1979).

159. *See* 49 U.S.C.A. § 11301 (Supp. IV 1980); for accounting, see 49 U.S.C.A. § 11141 (1978); for valuation, see 49 U.S.C. § 10781 (Supp. IV 1980).

160. *Cf.* 49 U.S.C. §§ 10301, 11701, 11901 (Supp. IV 1980).

161. *See supra* note 141 (current version at 49 U.S.C. § 10501(a)(1)(C) (Supp. IV 1980)).

fall under state or local public utility regulation.[162] Natural gas pipelines are subject to federal regulation.[163]

The extension of the ICC jurisdiction was mainly a response to monopolistic practices of the Standard Oil Company which refused the use of its own pipelines to small oil producers unless they sold their oil to Standard Oil at low prices.[164] To prevent such abuses, the courts extended the concept of a "pipeline common carrier" to pipeline companies which only carry their own oil.[165] Recently, pipeline regulation has been transferred from the ICC to the Department of Energy and the Federal Energy Regulatory Commission,[166] and the ICC now merely retains jurisdiction over pipelines carrying commodities other than oil, such as gasoline and kerosene and perhaps coal slurry.[167]

2. Motor Carrier Regulation Prior To The 1980 Motor Carrier Act

In 1935, Congress promulgated the original Motor Carrier Act[168] which was designed to preserve the value-of-service rate structure of railroads which in turn protected revenues of both railroads and western farmers.[169] Moreover, following a general trend of state legislation towards monopoly and protection of established carriers, Congress wanted to suppress what was thought to be excessive competition in the trucking industry itself.[170]

From the beginning, however, the regulation of motor common carriers was imperfect. Carriage of agricultural commodities has always been exempt, because the farmers were not to be deprived of the low rates resulting from rail-truck competition.[171] Also in the "commercial zones"

162. BEARD, REGULATION OF PIPE LINES AS COMMON CARRIERS 23 (1941).

163. Act of June 21, 1938, ch. 556, 52 Stat. 821 (codified as amended 15 U.S.C. § 717 (1976 & Supp. IV 1980)). For the jurisdiction of the Federal Energy Regulatory Commission, see 42 U.S.C. § 7172(a)(1)(C) (Supp. IV 1980).

164. BEARD, *supra* note 162, at 10-19.

165. United States v. Ohio Oil Co., 234 U.S. 548 (1914); *see also* BEARD, *supra* note 162, at 30-45.

166. Act of August 4, 1977, Pub. L. No. 95-91, §§ 306-402, 91 Stat. 565, 581, 583-584; *cf.* 42 U.S.C. § 7155, 7172(b) (Supp. IV 1980).

167. According to Lorentzen, *Coal Slurry Pipelines: A Railroad Perspective*, 10 TRANSP. L.J. 153, 164 (1978), coal slurry pipelines would be essentially private carriers. *But see* the text accompanying *supra* note 165.

168. Act of August 9, 1935, ch. 498, 49 Stat. 543 (codified as amended in scattered sections of 49 U.S.C. §§ 10101-11914 (Supp. IV 1980)).

169. *See*, Nelson & Greiner, *The Relevance of the Common Carrier Under Modern Economic Conditions*, TRANSPORTATION ECONOMICS—A CONFERENCE OF THE UNIVERSITIES—NATIONAL BUREAU COMMITTEE ON ECONOMIC RESEARCH 351, 363 (1965).

170. *See* George, *Principles of Motor Carrier Regulation*, 63 AM. L. REV. 72, 76 (1929). *See generally*, W. JONES, *supra* note 100, at 499.

171. 49 U.S.C. § 10526(a)(4)-(6) (Supp. IV 1980); *see also* Nelson & Greiner, *supra* note 169, at 363.

surrounding the cities, rail and trucks do not compete, but supplement each other. Consequently, these zones have always been free from regulation.[172] The principal weakness of motor common carrier regulation lies in the cost structure of the industry. Because of the low cost of entry into, and exit from trucking, high motor carrier rates prescribed by the ICC to protect the railroads[173] induce shippers to buy their own trucks and change from common to private carriage.[174] The result is that approximately 60% of intercity freight is handled by unregulated trucking operations.[175] The share of fully regulated transportation is further diminished by so-called contract carriers who transport for a limited number of patrons on the basis of continuing agreements.[176] These carriers are not prohibited from discrimination and not bound by maximum rate standards or mandatory liability rules.[177]

3. *Water Carrier Regulation*

In 1940, the next regulatory step was taken as the jurisdiction of the ICC was extended to interstate water carriers.[178] Joint rail and water services had been under ICC control since 1887.[179] Further sections of the interstate shipping industry were regulated by the Panama Canal Act of 1912, the Shipping Act of 1916 (High Seas and Great Lakes), the Denison Act of 1928 (Mississippi navigation), and the Intercoastal Shipping Act of 1933 (Panama Canal). The usefulness of these statutes was limited because they only conferred jurisdiction on the ICC or the Shipping Board in

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172. 49 U.S.C. § 10526(b)(1) (Supp. IV 1980).

173. Immediately after enactment of the Motor Carrier Act, the ICC made use of its minimum rate power to level up truck rates. *See* Fifth Class Rates Between Boston, Mass., and Providence, R.I., 2 M.C.C. 430, 547-549 (1937); Commodity Rates of Oklahoma & Texas Transfer Co., 6 M.C.C. 259 (1938); Rates over Carpet City Trucking, 4 M.C.C. 589 (1938).

174. *See* Wilson, *Effects of Value of Service Pricing Upon Motor Common Carriers*, 63 J. POL. ECON. 337-340 (1955). The express exemption of private carriage in 49 U.S.C. § 10524 (Supp. IV 1980) was added by Pub. L. No. 85-625 of August 12, 1958, to make clear that pseudo buy-and-sell techniques employed by carriers do not constitute private carriage. Rather, the transportation has to be incidental to a primary non-transportation business of the carrier to be exempt.

175. See Hayden, *Teamsters, Truckers, and the ICC: A Political and Economical Analysis of Motor Carrier Deregulation*, 17 HARV. J. ON LEGIS. 123, 125 (1980).

176. See the definition in 49 U.S.C. § 10102(13) (Supp. IV 1980); M. FAIR & J. GUANDOLO, TRANSPORTATION REGULATION 77 (8th ed. 1979).

177. In the terminology of the ICA, "carrier" refers to both common and contract carriers, 49 U.S.C. § 10102(2) (Supp. IV 1980), whereas the antidiscriminatory regulations of 49 U.S.C. § 10741 (Supp. IV 1980), expressly use the term "common carrier." For the freedom of maximum rates, see 49 U.S.C. § 10704(c)(1) (Supp. IV 1980). The liability provision of 49 U.S.C. § 11707 (Supp. IV 1980), expressly refers to common carriers, but contractual time limitations of less than nine months for filing clams against the carrier are prohibited for both common and contract carriers.

178. Act of September 18, 1940, ch. 722, 54 Stat. 898, 929. For a brief survey, *see* Moerman, *ICC Water Carrier Regulation*, 1973 TRANSP. L. SEM. 9.

179. Moerman, *supra* note 178, at 29.

an incoherent and fragmentary manner.[180] Moreover, the ICC still lacked authority to regulate port-to-port rates even where water carriers and rail were competing for the same traffic.[181]

During the 1930's, the railroads were not only faced with competition from motor carriers, but also from the Panama Canal and the construction and improvement of inland waterways. This competition drove the railroads into a deep financial crisis.[182] In another effort to protect the railroads, the Transportation Act of 1940 transferred jurisdiction from the Shipping Board and established the ICC as the principal regulator of both inland waterway and oceangoing water transportation between points in the United States.[183] However, the general exemption of bulk cargo for which water carriers have the inherent cost advantage professed in the National Transportation Policy, leaves only 10-15% of all interstate water transport operations in the reach of the ICC.[184]

4. *Freight Forwarder Regulation*

The common carrier concept received its present scope in 1942 and 1950 when freight forwarders connected with interstate surface transportation were regulated.[185] This extension apparently was adopted for the benefit of the forwarders. They wanted to be recognized as common carriers so that arrangements entered into with motor carriers for through routes and low joint rates could be legalized and continued under ICC approval.[186] Such arrangements could only be filed as binding with the ICC, if made

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180. W. JONES, *supra* note 100, at 507-510.

181. Corona Coal Co. v. Secretary of War, 69 I.C.C. 389 (1922).

182. KNORST, *supra* note 143, at 146.

183. *See* 49 U.S.C. § 10541 (Supp. IV 1980). Traffic with Alaska, Hawaii, and Puerto Rico remains under the jurisdiction of the Federal Maritime Commission. *See* Sea-Land Service, Inc. v. FMC, 404 F.2d 824 (D.C. Cir. 1968) (Alaska); Joint Rail-Water Rates to Hawaii, Matson Navigation Co., 351 I.C.C. 213 at 217 (1975) (Hawaii); Trailer Marine Transport Corp. v. FMC, 602 F.2d 379 (D.C. Cir. 1979) (Puerto Rico).

184. For the exemption, see 49 U.S.C. 10542 (Supp. IV 1980). For the cost advantage, *cf.* PECK, *supra* note 128, at 81. The estimations of the amount of exempt traffic are taken from PECK, *supra* note 128, at 78 n.12 and Moerman, *supra* note 178, at 10.

185. Act of May 16, 1942, ch. 318, 56 Stat. 285; Act of December 20, 1950, ch. 1140, 64 Stat. 1113; 49 U.S.C. §§ 10102(4)(8), 10561 (Supp. IV 1980). For ocean freight forwarders see G. ULLMAN, THE OCEAN FREIGHT FORWARDER, THE EXPORTER, AND THE LAW (1967); Ullman, *Ocean Freight Forwarders in the United States*, 7 J. MAR. L. & COM. 708 (1976). For air freight forwarders see Snow, *Air Freight Forwarding: A Legal and Economic Analysis*, 32 J. AIR L. & COM. 485 (1966); Note, *Air Freight Forwarder—Civil Aeronautics Board—Authorization*, 34 J. AIR L. & COM. 298 (1968).

186. M. FAIR & J. GUANDOLO, *supra* note 176, at 92. Special low rates for freight forwarders granted by motor carriers had been rejected by the ICC before. *See* United States v. Chicago Heights Trucking, 310 U.S. 344 (1940).

between "carriers."[187]

Even if not enacted on behalf of other common carriers, the freight forwarder regulation is not free of protective concern for them. In particular, the law restricts the forwarders to the use of direct common carriers and, thus, forestalls a partial escape from ICC regulation by joint actions of forwarders and contract carriers.[188] This regulation casts light upon the intrinsically ambiguous nature of the forwarding agents under American law. They are carriers in relation to the shipping public and shippers in relation to the performing carriers.[189]

D. Ocean Vessel Regulation

1. General Background

Maritime navigation has been regulated in a different manner and for different purposes. Legislative intervention at first concerned liability and later the control of prices and practices. The charges of maritime transportation were subjected to governmental regulation by the Shipping Act of 1916,[190] a statute which was essentially an emergency measure to counteract a shortage of tonnage and its detrimental impact on U.S. foreign commerce. Since the Civil War, the U.S. merchant fleet had shrunk due to declining investment, and by 1910, American vessels were carrying only 10% by volume of U.S. foreign trade.[191] When the First World War broke out, the European nations withdrew vessels from the U.S. trade. Consequently, freight charges soared in the United States. Rates on grain shipped from the United States to Britain rose from 5¢ to 50¢ a bushel.[192]

This was a period marked by the domination of liner conferences. In defiance of the Sherman antitrust law,[193] these shipping cartels operated on nearly every trade route in both the foreign and domestic commerce of the United States. The members of the conferences acted together to control rates, sailing schedules, and the pooling of freight and passenger fares. The competition of outsiders, "tramps" as they were called, was continued by "fighting ships" scheduled to sail in direct competition with an outsider

187. Acme Fast Freight v. United States, 30 F. Supp. 968, 973 (S.D.N.Y. 1940), *aff'd mem.*, 309 U.S. 638 (1940).

188. 49 U.S.C. § 10749(b) (Supp. IV 1980); *see also* Comment, *Intermodal Transportation and the Freight Forwarder*, 76 YALE L.J. 1360, 1367 (1967).

189. Ahearn, *supra* note 46, at 261 (1946).

190. Act of September 7, 1916, ch. 451, 39 Stat. 728 (codified as amended at 46 U.S.C. §§ 801-842) (1976 & Supp. IV 1980).

191. Sweeney, *A Short History of the American Ocean-Going Merchant Marine and the Interactions of Public Policy*, 1977 FORD. CORP. L. INST. 83, 88.

192. MANSFIELD, *Federal Maritime Commission*, in THE POLITICS OF REGULATION 42, 47 (J. Wilson ed. 1980).

193. Lowenfeld, *"To Have One's Cake . . ."—The Federal Maritime Commission and the Conferences*, 1 J. MAR. L. & COM. 21, 26, 27 (1969-70).

at lower rates, or by tying arrangements with shippers which provided deferred rebates to those who would commit themselves to the exclusive use of conference vessels. Before the war, an investigation of the so-called Alexander committee revealed that a vast majority of the shippers, though complaining of discriminatory practices, favored the existence of the conferences which were said to guarantee ample tonnage as well as efficient, frequent, and regular service.[194] Congress responded to the activities of liner conferences by establishing an administrative body, the Shipping Board which later became the Federal Maritime Commission (FMC)[195] to watch over discriminatory practices. This body, however, lacks control over entry, mergers and rates.

The regulation of ocean vessels must be understood in the contexts of antitrust policy and international competition. After the transfer of interstate functions to the ICC in 1940, it had jurisdiction over "common carriers by water in foreign commerce," irrespective of their flag or the nationality of the owners,[196] and over domestic maritime commerce between the American mainland and Hawaii, Alaska, Puerto Rico, and the American territories.[197] Because the Shipping Act did not define the term "common carrier," the courts applied the common law definition in interpreting the Interstate Commerce Act.[198] The Shipping Act narrows this broad definition by requiring transportation "on regular routes from port to port," and by further providing that tramp ships are not deemed common carriers by water in foreign commerce.[199] Tramp ships operate without any prior commitment to certain ports of time schedules and carry mainly bulk cargo under highly competitive conditions.[200]

Within the liner market, however, the statute and the enforcing agency have tried to enhance the regulatory power over as many corollary functions as possible. The Shipping Act subjects all kinds of wharfage, dock, warehouse, and other terminal facilities to the control of the Federal Maritime

194. *See* Heaver, *The Structure of Liner Conference Rates*, 21 J. INDUS. ECON. 257, 263 (1972-73). *But see*, DEAKIN SHIPPING CONFERENCES 102 (1973).

195. The Shipping Board was reorganized four times and had five different names. *See Note*, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 639-640 (1965).

196. Lowenfeld, "*To Have One's Cake. . .*"—*The Federal Maritime Commission and the Conferences*, 1 J. MAR. L. & COM. 21, 27 (1969-70).

197. *See* 46 U.S.C. § 801 (Supp. IV 1980); *supra* note 184; *see also* ANTITRUST DIVISION U.S. DEPARTMENT OF JUSTICE, THE REGULATED OCEAN SHIPPING INDUSTRY 36 (1977).

198. *See* United States v. Stephen Bros. Line, 384 F.2d 118 (5th Cir. 1967); Activities, Tariff Filing Practices and Carrier Statutes of Containerships, Inc., 9 F.M.C. 56, 62-63 (1965). In general, for the similarity of both statutes, see United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932).

199. 46 U.S.C. § 801 (Supp. IV 1980).

200. *See* The Regulated Ocean Shipping Industry, *supra* note 197, at 76-78; Agman, *Economics of Ocean Transport*, 1977 FORD. CORP. L. INST. 11, 12.

Commission ("FMC").[201] The FMC has also resisted carriers' attempts to escape from regulation by running a shipping line on the basis of "contract carriage" or tramp shipping.[202] Moreover, the FMC has extended the common carrier status to "nonvessel operating common carriers by water."[203] These carriers are persons who hold themselves out to arrange ocean transportation in their own names without owning or operating the vessel. This includes ocean freight forwarders who are subject to FMC licensing and control[204] and also rail or motor carriers who undertake to carry goods from inland point to inland point.[205]

2. Duty to Serve

Over the years, the conference system seems to have generated a considerable overcapacity of tonnage and, therefore, diminished the motivation of carriers to refuse service. The Shipping Act does not contain an outright codification of the common law duty to carry, but indirectly, it restates this duty. The carrier is inhibited from retaliation against shippers patronizing other carries, and the refusal to carry is expressly listed among the retaliatory measures.[206] More generally, a carrier declining to accept cargo tendered to him in good condition with full payment of freight charges may be refused a clearance for his vessel.[207]

3. Liability

The carrier's liability for loss of and damage to goods during the carriage by water is subject to the 1893 Harter Act.[208] Its historical background stems from the fact that American foreign commerce depended upon foreign, particularly British, tonnage at the end of the 19th century. Unlike American judges, the English courts allowed contractual exemptions from liability for negligence in bills of lading.[209] Under the prevailing conditions of maritime commerce, shifting the risk to shippers gave British carriers an advantage over American carriers. American carriers requested protection and Congress granted it. The Harter Act essentially forbids clauses which relieve the shipowner from liability for negligence in procur-

201. 46 U.S.C. § 801 (Supp. IV 1980) ("other persons subject to this chapter").
202. 9 F.M.C. 56.
203. *See* the definition in 46 C.F.R. § 510.2(1) (1981).
204. 46 U.S.C. § 841(b) (1976).
205. See G. ULLMAN, *supra* note 185, at 36-38.
206. 46 U.S.C. § 812 para. 4 (1976).
207. 46 U.S.C. § 834 (1976).
208. Act of February 13, 1893, ch. 105, 27 Stat. 445 (codified in 46 U.S.C. § 190 (1976)). Prior to 1893, there was a particular statutory exemption from liability for damages caused by fire, granted by the Act of March 3, 1851, ch. 43, 9 Stat. 635 (current version at 46 U.S.C. § 182 (1976)).
209. G. GILMORE & O. BLACK, *supra* note 97, at 141-142.

ing a seaworthy vessel including crew and outfit or in handling the cargo. Once initial seaworthiness is established, the owner is free from liability for faults and errors in the navigation or management of the vessel.[210] This legislation did not remove the differences with England, but rather stressed the need for international uniformity.[211] After World War I, this target was met by the so-called Hague Rules, officially named the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on 25 August 1924.[212] These rules follow the Harter Act, but yield to the carrying interests by a limitation of recovery to $500 (100£) per package. In 1936, the United States adopted the Convention and enacted its rules in the new Carriage of Goods by Sea Act ("COGSA").[213]

The international uniformity has subsequently given way to divergent national practice brought about by technological innovations, such as the "container revolution". Currency exchange rate developments have also distorted the uniform liability limits fixed fifty years ago. The Visby Protocol of 1968 is designed to overcome interpretive differences in the Hague Rules by some specific amendments. Although it has come into force in some countries, it has not been ratified by the United States.[214] Finally, a United Nations Conference held in Hamburg, West Germany, in 1978, adopted a new international convention on the carriage of goods by sea. It does away with the Harter Act scheme and makes carriers liable for the management and navigation of the vessel. Once this convention has received the required number of ratifications, it will replace the Hague Rules as amended by the Visby Protocol among its member countries.[215]

E. Airline Regulation Prior To The 1977-1978 Deregulation Acts

The separation of liability and economic regulation observed with regard to shipping is also true for the carriage by air.

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210. 46 U.S.C. §§ 190-192 (1976).

211. *Cf.* KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 122-123 (4th ed. 1953). English courts interpreted bills of lading under the rule of validation so as to contain an implied choice of English law, In re Missouri S.S. Co., 42 Ch. D. 321 (1889). Forum shopping has become a paramount issue of international maritime law, and the Hamburg Rules for the first time try to settle the question with regard to carriage of goods by sea in an international convention. *See United Nations Convention on the Carriage of Goods by Sea*, 10 J. MARIT. L. & COM. 142 (1978-79).

212. 51 Stat. 233, T.S. No. 931.

213. Act of April 16, 1936, ch. 229, 49 Stat. 1207 (codified in 46 U.S.C. § 1300 (1976)).

214. Protocol signed February 23, 1968, to amend the International Convention for the Unification of certain Rules relating to Bills of Lading, signed at Brussels on August 25, 1924, *reprinted in* TRANSPORT LAWS OF THE WORLD I E 15 (D. Hill & M. Evans ed. 1977); *see* DeGurse, *The Container Clause in Article 4(5) of the 1968 Protocol to the Hague Rules*, 2 J. MAR. L. & COM. 131 (1970).

215. United Nations Convention on the Carriage of Goods by Sea, *reprinted in* 10 J. MAR. L. & COM. 147 (1978).

1. *Rates and Other Economic Regulations*

The present system of aviation regulation under the Civil Aeronautics Board (CAB) was established in the Civil Aeronautics Act of 1938[216] and was renewed with minor differences by the Federal Aviation Act (FAA) of 1958.[217] In order to understand this legislation it is essential to bear in mind the infant state of the airline industry in the 1930's. Carriers were relied on mainly for the transportation of mail. Airline markets of that time have been characterized as joint-product natural monopolies because "it was economic for only one carrier to transport the mail and impossible for an airline to be viable carrying passenger traffic alone."[218] As a result of this market structure, the Postmaster General was the true regulator and subsidizing promotor of airbound commerce before 1938. Several legislative interventions tried to separate postal activities from the promotion of aviation. The mail was carried by the Army for some time, and after the return to private transportation, the Interstate Commerce Commission was charged with the supervision of airmail rates. But all of these attempts failed because the system of competitive bidding for airmail contracts was subject to repeated abuse in the form of destructively low bidding.[219]

Discontent with the experiences under the airmail legislation was one of the major motives for the Civil Aeronautics Act. Other reasons of some weight were: (1) fear of excessive competition in general, even without the airmail contract bidding system; (2) the desire to stabilize the industry in order to attract investments; (3) the protection of small communities and (4) the protection of small carriers; (5) the determination not to allow chaotic conditions which had prevailed in surface transportation before 1935; and (6) the general propensity towards carrier regulation of the post-depression years.[220]

The statute followed the pattern of the Interstate Commerce Act. It established the Civil Aeronautics Authority, now the Civil Aeronautics Board (CAB) to watch over entry,[221] rates, anticompetitive practices or agree-

216. Act of June 23, 1938, ch. 601, 52 Stat 973.

217. Act of August 23, 1958, Pub. L. No. 85-726, 72 Stat. 732 (codified in 49 U.S.C. §§ 1301-1542 (1976)).

218. Panzar, *Regulation, Deregulation, and Economic Efficiency: The Case of the CAB*, 70 AM. ECON. REV. 311 (1980). According to Levine, *Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416 n.3 (1964-65), the airline industry multiplied its output in passenger-miles by one hundred from 1938 to 1964; W. JONES *supra* note 100, at 1090 reports a multiplication factor of one hundred fifty from 1939 to 1971.

219. *Cf.* Levine, *supra* note 218, at 1417-19.

220. For a comprehensive overview of the legislative history, see *id.* and especially Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 95-108 (1979).

221. For a thorough discussion of entry control, see Dempsey, *supra* note 220, at 91.

ments, rate fixing and pooling agreements.[222] Special regulations put airmail transportation under CAB control.[223]

a. *Regulated Carriers*. The FAA regulates "air carriers" and "foreign air carriers". The activities governed by the statute, "interstate", "overseas", and "foreign air transportation", are defined as those of a common carrier engaged in the carriage of persons or property by air.[224] Though the distinction of common and private carriage is basic to FAA jurisdiction it has rarely given rise to litigation. In fact, the common carrier concept seems to encompass every possible commercial operation of an aircraft, save a true lease or bare hull charter which confers possession and operative authority to the lessee and his crew. There is no doubt that charter flights, although unscheduled and irregular, are common carriage.[225]

The CAB has made use of its power to exempt certain carriers with these limited operations.[226] When carriers acquired the bigger aircraft available at the end of World War II, their operations expanded and became a serious competitive threat to the licensed airlines. Given the refusal of the CAB to issue new certificates of public necessity and convenience,[227] the exempt carriers had to fight for their existence. After years of investigations, legal and political disputes, the supplemental air carriers were regulated and confined to all-charter and inclusive tour charter operations in 1962.[228] Other groups of carriers operating under exemptions from CAB rate regulations are the numerous air taxis including the commuter carriers[229] and the recently deregulated all-cargo carriers.[230] In both cases, the carriers are only exempt from certain provisions of the FAA.

b. *Rate Levels*. The structure of rate regulation implemented in the FAA and in force until airline deregulation was commenced in 1977 resembles that under the Interstate Commerce Act. Carriers must file tariffs in-

222. On the antitrust aspects, see W. JONES, *supra* note 100, at 1132.

223. *Cf.* Levine, *supra* note 218.

224. 49 U.S.C. § 1301 (1976).

225. United States v. Bradley, 252 F. Supp. 804 (S.D. Tex. 1966); Alaska Air Transport, Inc. v. Alaska Airplane Charter Co., 72 F. Supp. 609 (D.C. Alaska 1947).

226. *Cf.* 49 U.S.C. § 1386(b)(1) (1976).

227. Between 1950 and 1974, the Civil Aeronautics Board received seventy-nine applications for the license to provide scheduled domestic service—none were granted; *see* Dempsey, *supra* note 220, at 115.

228. Act of July 10, 1962, Pub. L. No. 87-529, 76 Stat. 143 (codified as amended in 49 U.S.C. § 1301 (1976)).

229. 14 C.F.R. § 298.11 (1981). In 1973, there were about 2,900 air taxis. *See* W. JONES, *supra* note 100, at 1089.

230. 49 U.S.C. § 1388(c) (1976).

cluding all classifications, regulations, and practices with the CAB.[231] New tariffs become effective after 30 days notice[232] unless the CAB suspends them for up to 180 more days, pending a hearing.[233] If the CAB finds after hearing that the proposed rates are unjust, unreasonable or discriminatory, it may prescribe a minimum, maximum or precise rate.[234]

In foreign air transportation, the CAB has the power to suspend new rates for a full year.[235] The Board lacks the power to prescribe rates; it may only reject and cancel rates filed by a carrier.[236] The absence of price fixing authority in foreign transportation is due to the post World War II desire to have rates fixed by an international airline cartel ("IATA") to enable smaller national flag carriers to fly in international markets for the sake of national prestige. The conception embraced the idea that the CAB would approve fare agreements and immunize them against antitrust scrutiny.[237] It was embodied in international treaties like the so-called Bermuda Agreement between the United States and Great Britain.[238] Beginning in the late 1950's, non-IATA and charter carriers diverted more and more traffic from the cartelized airlines and provoked a triple reaction. First, the cartel crumbled, its members offering numerous forms of discount fares. Second, the need for control of the non-aligned carriers became more obvious. Third, IATA faced increasing criticism. These motives resulted in the transfer of rate cancellation power to the CAB in 1972.[239]

If the tools of the Board differ with respect to domestic and foreign transportation, the applicable standards are very similar. As laid down by the FAA, "the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;
(2) The need in the public interest for adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

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231. 49 U.S.C. § 1373(a) (1976).
232. 49 U.S.C. § 1373(c) (1976 & *amended in* Supp. 1982).
233. 49 U.S.C. § 1482(g) (1976 & *amended in* Supp. 1982).
234. 49 U.S.C. § 1482(d) (1976 & *amended in* Supp. 1982).
235. 49 U.S.C. § 1482(j)(1) (1976 & *amended in* Supp. 1982).
236. 49 U.S.C. § 1482(j)(1),(2) (1976 & *amended in* Supp. 1982).
237. 49 U.S.C. § 1382 (1976), *amended by* 49 U.S.C. § 1382(d) (Supp. IV 1980); 49 U.S.C. § 1834 (1976) (repealed 1980).
238. Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between their Respective Territories, February 11, 1946, T.I.A.S. No. 1507, 3 U.N.T.S. 253.
239. Act of March 22, 1972, Pub. L. No. 92-256, 86 Stat. 96. For the history of this act, see Note, *The Ins and Outs of IATA: Improving the Role of the United States in the Regulation of International Air Fares*, 81 YALE L.J. 1102 (1971-72). For more recent studies, see Dempsey, *The International Rate and Route Revolution in North Atlantic Passenger Transportation*, 17 COLUM. J. TRANSNAT'L L. 393, 397-415 (1978); Lowenfeld & Mendelsohn, *Economics, Politics and Law: Recent Developments in the World of International Air Charters*, 44 J. AIR L. & COM. 479 (1979); P. HAANAPPEL, RATEMAKING IN INTERNATIONAL AIR TRANSPORT 82-84 (1978).

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
(4) The inherent advantages of transportation by aircraft; and
(5) The need of each carrier for revenue sufficient to enable carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."[240]

While the policy standards in foreign aviation are identical so far, here the Board must inquire in addition, "whether such rates will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation."[241]

Here again, as in railroad price control, we find potential bases for different rate policies. What the CAB in fact implements is the result of two large investigations, the General Passenger Fair Investigation of 1960,[242] and the Domestic Passenger Fare Investigation of the early 1970's.[243] Under the latter, rate computation proceeds in a classic way from the general revenue requirements of the carriers to the apportionment of these amounts to single operations. The fares must produce revenues sufficient to meet the costs, including a fair rate of return on investment, of the operations of the domestic trunkline industry as a whole. The initial step is therefore the computation not of individual firm costs, but of the industry costs. The fair rate of return is fixed at 12%.

c. *Rate Discrimination.* The prohibition of discrimination is elaborated in the FAA in a threefold way: (1) carriers must not discriminate against other carriers by prejudicial divisions of joint rates on through routes;[244] (2) carriers must adhere to their filed tariffs and not accord rebates or refunds;[245] and (3) more generally, carriers must not cause undue preference or prejudice to any particular person, port, locality, or description of traffic.[246]

2. Duty To Carry

The common law duty to serve every applicant has been codified only with respect to domestic air transportation.[247] Though the point apparently has never been decided, one could argue that air carriers are subject to the

240. 49 U.S.C. § 1482(e) (1976).
241. 49 U.S.C. § 1482(j)(5) (1976).
242. 32 C.A.B. 291 (1960).
243. *See* the extensive quotations in W. JONES, *supra* note 100, at 1185 and the policy statement of February 7, 1975, 40 Fed. Reg. 6643 (codified as amended in 14 C.F.R. § 399.31-33 (1981)).
244. 49 U.S.C. § 1374(a)(1) (1976).
245. 49 U.S.C. § 1373(b)(1) (1976).
246. 49 U.S.C. § 1374(b) (1976). *See* Annot., 41 A.L.R. Fed. 532 (1979).
247. 49 U.S.C. § 1374(a)(1) (1976).

same duty in outbound foreign transportation. This is the common law rule for international shipping.[248]

While the FAA extends the duty to all transportation for which the carrier is authorized by certificate, the CAB seems to take a narrower view. Its rules concerning embargoes on property do not cover cases where the carrier refuses to carry goods "in accordance with restrictions and limitations in the tariff or certificate."[249] Contrary to what these regulations suggest, it is submitted that the carrier's tariff can delineate his activities only insofar as its rules and regulations are of a technical nature and do not narrow the scope of the duty to serve fixed by the certificate.

3. *Liability*

The air carrier's liability for personal injury of passengers and loss of or damage to goods has three different bases. Foreign transportation of both passengers and goods is subject to the Warsaw Convention.[250] Domestic liability for interstate flights with respect to personal injury and wrongful death claims is based on the common law of torts and the statutory law of the single states. Federal law governs baggage and cargo claims.[251] The explanation given for the applicability of federal law is that Congress intended to regulate air transport comprehensively.[252] This raises a question as to why state law governs in personal injury and wrongful death actions. The explanation is that the common law regarding carriage of passengers based liability upon negligence and did not allow the carrier to contract out of it. This area remained essentially a matter of tort, and the various wrongful death statutes of the individual states claimed application to aviation accidents. On the other hand, the courts allowed the common carrier of goods to lessen his strict liability by contract and to limit it to certain amounts of money, thereby placing liability for loss of and damage to goods

248. Benett v. Peninsular and Oriental Steamboat Co., 136 Eng. Rep. 1453 (1848). The question tends to be mixed up with that of discrimination. *See* Williams v. Trans World Airlines, 509 F.2d 942 (2d Cir. 1975).

249. 14 C.F.R. § 228.1 (1981).

250. Convention for the Unification of Certain Rules Relating to International Transportation by Air of October 12, 1929; T.S. No. 876, 137 L.N.T.S. 11. The United States adhered in 1934. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 502 (1966-67) [hereinafter cited as *Warsaw Convention*]. *But cf.* Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982) in which the court held that Warsaw limits on liability are no longer enforceable in the United States.

251. Milhizer v. Riddle Airlines, 185 F. Supp. 110 (E.D. Mich.), *aff'd.* 289 F.2d 933 (1960); *see* 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW 498, 524 (1978). The more recent tendencies toward a federal common law of personal injury and wrongful death claims are discussed in Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem:* 51 N.Y.U. L. REV. 231 (1976).

252. Berkman v. Trans World Airlines, 209 F. Supp. 851 (S.D.N.Y. 1962); SPEISER & KRAUSE, *supra* note 251, at 524.

on a contractual basis[253] governed by the carrier's tariffs which, in turn, are subject to CAB control.

Under the common law governing the domestic transportation of passengers by air, the difference between common and private carriers is not decisive. Common carriers of passengers are not liable as insurers. Like private carriers, they are liable only for negligence. Yet, the distinction could be important, because some jurisdictions impose a duty of utmost care upon common carriers while private carriers have to exercise only the ordinary care under the existing circumstances.[254] Moreover, in the assessment of the common carrier's negligence, courts apply the rule of res ipsa loquitur which frequently amounts to a reversal of the burden of proof.[255]

In spite of these differences, only a few cases draw a distinction between common and private carriers. "Holding out" to the public is interpreted extensively and embraces scheduled airline flights as well as charter and air taxi operations.[256] The latter may enter the category of private carriage, if performed on the basis of particular contracts.[257] For the rest, private carriage seems to encompass only those flights which the carrier primarily performs for his own purposes.

The domestic transportation of cargo by air is exclusively regulated by the carrier's tariff which, if valid, is the contract of carriage between the parties. Thus, the shipper-carrier relationship has become a contractual one, not focusing any more on the distinction of common and private carriers. The same is true for the domain of the Warsaw Convention. It applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire," but also to "gratuitous transportation by aircraft performed by an air transportation enterprise."[258]

Airline tariffs governing the domestic air transportation of baggage and cargo were subject to CAB control until 1977.[259] Under the doctrine of "primary jurisdiction" of the Board, the courts abstained from scrutinizing approved tariffs for a long time[260] so that CAB policy had a binding effect

253. Slick Airways, Inc. v. Reinert, 175 N.E.2d 844 (Ohio 1961); Blair v. Delta Airlines, Inc., 344 F. Supp. 360 (S.D. Fla. 1972). The court in *Blair* stated "[t]he established rule is that the tariffs if valid constitute the contract of carriage between the parties and 'conclusively and exclusively govern the rights and liabilities between the parties'." 344 F. Supp. at 365.

254. SPEISER & KRAUSE, *supra* note 249, at 409, 465.

255. Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940 (D.C. Colo. 1948).

256. *See* Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); *see generally* SPEISER & KRAUSE, *supra* note 249, at 401.

257. Sleezer v. Lang, 170 Neb. 239, 102 N.W.3d 435 (1960).

258. *Warsaw Convention*, *supra* note 250, at art. 1(1).

259. 49 U.S.C. § 1373(a) (1976).

260. *Lichton v. Eastern Airlines*, 189 F.2d 939 (2d Cir. 1951). The doctrine bypasses the scope of this paper; *see generally* Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1032 (1964). It

on tariffs. Not until 1976 and 1977, however, did the Board use its power to prescribe liability regulations. Before that time it approved tariffs without an officially formulated policy on this point. According to the approved tariffs, liability for loss and damage was based on the negligence of the carrier who sustained the burden of proving his exercise of due care.[261] When the Board finally prescribed rules on liability, it set aside the different versions of negligence and declared a mandatory standard of strict liability subject to a list of exceptions, which embraced the classical common law exceptions as well as perils of the air, but not theft and fire. The deregulation of air transportation of cargo removed the Board's power to prescribe regulations, and it is now up to the courts to decide upon the lawfulness of the tariff liability provisions. As the common law, though providing for strict liability in principle, does not oppose a contractual exoneration from damages incurred without the carrier's fault,[262] the progressive strict liability approach of the CAB was only an episode.

F. The Disintegration Of The Law And The Need For Harmonization

On the eve of regulation, the growth of transportation firms into large monopolistic corporations had changed the economic and political balance in the carrier-shipper relationship. This change brought about modifications of the law which, as a whole, tended to lessen the rigor of the common carrier's duties towards the shipper and to strengthen the contractual element and thereby the carrier's position. The primary purpose of legislation and regulation was to reverse this trend and to protect the shipper. This situation remained unchanged until World War I. In fact, the amendments of the Interstate Commerce Act promulgated from 1887 to 1916 we inspired by the intention to repress the power of the railroads. The ICC received authority to prescribe maximum rates and suspend tariffs of the railroads and an increasing number of railway connected firms; the duty to serve was codified, and liability impeded. The railroads were so heavily regulated that investment declined and equipment decayed.

The state of the industry became obvious when specific transportation needs could not be satisfied in World War I, and an analogous scarcity of tonnage was felt in ocean shipping. Consequently U.S. transportation policy changed radically. Where protection of shippers had been the prevailing motive for decades, promotion of railroads and shipping now became a concern of at least equal force. After a brief and discouraging experience

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has recently been rejected in the air carrier liability case Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977).

261. *See* Blair v. Delta Airlines, Inc., 344 F. Supp. 360 (S.D. Fla. 1972).

262. In Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977), the court voided a tariff clause whereby the defendant air carrier exonerated himself from the liability for injury to live animals.

with direct government control over railroads, the Transportation Act of 1920 restored private enterprise and gave the ICC the power to prescribe minimum rates. Similarly, regulation and promotion are interwoven in the official toleration of liner conferences granted by the Shipping Act of 1916.

The entrustment of promotional tasks to the agencies in one sense completed their regulatory power. Striking the balance between shippers and carriers necessarily involved a case-by-case determination of the agency. In the administrative process, some groups of shippers prevailed over their carriers while others succumbed to the carrying interests. While the ICC had been concerned with the services, prices and the apportionment of risks between the shippers and carriers for a long time, it now took over the additional function of distributing transportation resources among different groups of shippers. Every rate proceeding became the potential forum for this general struggle.

This new function was stressed when trucks and barges broke the railroad monopoly in surface transportation in the 1930's. Intermodal competition endangered the cross-subsidization among different shipper groups as the high-charged shippers were induced to patronize cheaper motor or water carriers. As a result, the ICC tried to protect the railroads by the extension of their rate structure to other carriers who were, at least initially, deprived of the possibility to pass on their inherent cost advantages to the shipping public. The ICC consciously grappled with the exceedingly difficult task of promoting economic justice in three different relationships at the same time:

(1) between shipper and carrier;
(2) between carriers, especially those of different modes;
(3) between different groups of shippers such as different industries and different regions.

Except for the absence of intermodal competition, one finds a similar variety of regulatory aims in aviation and ocean shipping. It is easy to understand that whatever action is taken to achieve one of the listed targets, it is likely to have repercussions on the other two levels. It has become clear that economic control by means of transport regulation cannot accomplish all of its ends. This insight provided the impetus for deregulation which will be analyzed in Part II of this article, to be published in volume XIII, No.2.