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Surface Transportation and the Antitrust Laws: Let’s Give Competition a Chance*

JONATHAN C. ROSE**

I first should thank this association of ICC practitioners for including the subject of the antitrust laws in the program for your annual meeting. We, of course, believe that the antitrust laws do play an important role in the surface transportation industries, and are happy to see that your association apparently shares this view, at least to some extent.

The Antitrust Division’s basic responsibility is, of course, to protect free market competition by vigorous enforcement of the antitrust laws. The Supreme Court has repeatedly stressed that the antitrust laws represent our nation’s fundamental economic policy, a charter of economic liberty.1 That policy has as its premise that private persons, not the government, own the means of production, and that decisions as to what and how much to produce, what prices to set, and where and how much to sell are decisions made in a marketplace free from artificial constraints, either governmentally or privately imposed. The government’s only role under such a scheme is that of umpire assuring that there is no foul-play by the participants, and enforcing the rules of fair competition.

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* Remarks prepared for delivery before the Association of Interstate Commerce Commissioners, June 22, 1976.
** Deputy Assistant Attorney General, Department of Justice Antitrust Division. Formerly General Counsel to the White House Counsel on International Economic Policy. B.A., Yale University, 1963; LL.B., Harvard Law School, 1967.
However, one must in candor observe that over the years there has been a steady erosion of that basic national policy: today a substantial portion of our economy is subject to some form of federal regulation which restricts persons in their ability to enter business, and to price goods and services freely. Such federal regulation, affecting about twenty percent of our gross national product, concerns not only surface transportation, but also energy, communications, insurance, finance, agriculture, securities, air transportation, and ocean shipping.

There are some who think that the existence of regulation ipso facto eliminates antitrust as a practical concern for regulated firms in the surface transportation industries. This view, however, is a dangerous distortion of reality.

Let us examine first the impact of antitrust principles at the level of the regulatory agency. Although some conduct which is anticompetitive is specifically allowed under regulatory schemes, virtually all agencies must give some weight to antitrust principles in determining whether a particular proposed action is in the public interest. In some limited form, a procompetitive policy has been judicially mandated for a number of independent regulatory agencies, including the Federal Maritime Commission, the Civil Aeronautics Board, the Securities and Exchange Commission, the Federal Communications Commission, federal banking authorities, and the Interstate Commerce Commission. The Northern Natural Gas decision by the Court of Appeals for the District of Columbia clearly sets forth the role of competition in regulatory agency decisions. The court held that the Federal Power Commission was "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings and weigh these conclusions along with other important public interest considerations."

The Antitrust Division has been a leader in recognizing the importance of injecting competition into the regulated industries; we actively participate in numerous agency proceedings to urge decisions favorable to competition. For example, the Division is presently involved in six proceedings before the ICC involving the motor carrier or rail industry. Our efforts before the ICC, and other regulatory agencies, are directed toward

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developing a record that adequately demonstrates the likely competitive impact of agency action, alternatives available to the agency, and the relative competitive impact of the alternatives. Thus, in participating before the ICC, we seek to persuade the Commission to implement rules and issue orders that are as procompetitive as possible under the Interstate Commerce Act standards of "public interest" and "public convenience and necessity."

There are some signs that agencies like the ICC are becoming more sensitive to antitrust concerns, and within the broad discretion granted to them, are adopting procompetitive policies. For instance, the ICC's order in the Rate Bureau Investigation, *Ex Parte* No. 297, a rulemaking proceeding in which the Division participated,\(^9\) prohibits a rate bureau from protesting independent action proposals by bureau members. In a subsequent report and order on reconsideration, the Commission bluntly observed that such protests "inhibit competition."\(^{10}\) The Commission took judicial notice in its order of reconsideration that in the six-month period since its initial order in the Rate Bureau Investigation there had been a "substantial increase in the publication of independent action proposals and a decrease in the number of protests filed."\(^{11}\) We applaud the Commission for taking this step to encourage independent competitive activity within the trucking industry, and are heartened to see its procompetitive effects within such a short period of time.

Although the Division's role in agency proceedings is important, it will also take court action under the antitrust laws where firms engage in anticompetitive conduct by avoiding or abusing the regulatory scheme established by Congress. Conduct which is otherwise violative of the antitrust laws and which is not in conformity with regulatory procedures may be subject to antitrust attack.

The Division is not trying to take "pot shots" at companies or individuals who may, in a technical sense, have unwarily strayed outside the antitrust exemption granted them by regulatory legislation. Our primary concern is with those who would intentionally avoid or act in reckless disregard of regulatory processes in furtherance of anticompetitive objectives. By challenging such conduct, we not only protect competition but also the integrity of regulatory processes which Congress created in part to prevent abuses of market power by regulated firms.

In this regard, we believe that regulatory schemes should confer antitrust immunity only by explicit legislative mandates. The Supreme

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11. *Id.*
Court has consistently held that it will not find that the Congress intended a partial or total repeal of the antitrust laws with respect to a particular industry or practice unless congressional intent to do so is absolutely clear. The fact that an industry is subject to what some may term "pervasive" regulation by a regulatory agency, such as the ICC, does not mean that the participants in that industry are totally immune from antitrust prosecution. As the Supreme Court has held, it will not "lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to the industry." 13

Judicial decisions clearly establish that pervasive regulation does not completely immunize participants in the surface transportation industries from prosecution under the antitrust laws. For example, the Supreme Court decision in the Trucking Unlimited case 14 makes clear that a pattern of baseless and repetitive protests made before an agency in furtherance of a conspiracy to exclude competitors from a market are fully subject to challenge under the antitrust laws.

In 1973, a federal grand jury sitting in the District of Columbia returned an indictment charging Morgan Drive Away and two other mobile home carriers, and individual officers, with an unlawful conspiracy to restrain and monopolize interstate trade and commerce in for-hire transportation of mobile homes. As alleged by the indictment, the terms of the conspiracy were to exclude competitors from the industry, to deprive conference members of their independent action rights, and to coerce other persons to join the defendants' rate bureau, among other things. The indictment also alleged that the defendants had carried out their conspiracy by depriving other persons applying for mobile home authority of meaningful access and fair hearings before federal and state agencies and courts.

In this case, agency action and procedures were allegedly used by the defendants as a mere sham to cover up and further the unapproved, and, I might add, unapprovable anticompetitive behavior. This type of assault on competition through the purposeful avoidance or abuse of a regulatory scheme cannot be tolerated.

After the indictment withstood a broad-based motion to dismiss on the ground of pervasive regulation, defendants entered pleas of no contest to each of the three counts of the indictment. Fines totalling $170,000 were imposed by the court.

In light of the Division's commitment to maintain a vigilant watch on

the conduct of regulated firms, I should point out that violation of the antitrust laws is now a felony, and the conviction for violation of the antitrust laws may result in corporate fines of up to one million dollars and jail sentences of up to three years.\textsuperscript{15}

While discussing regulated industries and antitrust enforcement, it seems appropriate to mention the status and purpose of the Administration's regulatory reform effort in the regulated industries. I am sure that you are already aware of the enactment of the Railroad Revitalization and Regulatory Reform Act: in February of this year,\textsuperscript{16} The Department of Justice is participating in the ICC rulemaking proceedings to construe the provisions of the new Act.

The Act should have a substantial procompetitive impact upon the rail industry. First, as most of you undoubtedly know, it prohibits agreements on single line rates except as to those of general applicability. Further, the Commission's power to suspend a proposed rate change has been narrowed. The Act establishes a zone of reasonableness—seven percent the first year and seven percent the second year—within which the Commission may not suspend a proposed non-discriminatory rate change pending determination of its lawfulness. Rate changes that fall outside this zone are subject to suspension only if the protestant can carry a burden roughly comparable to that of the party in district court moving for a restraining order: that he will suffer substantial harm if the rate is not suspended immediately, and there is a reasonable likelihood of his ultimate success on the merits. Finally, the Act introduces new standards governing the ICC's rate-making authority: the ICC can exercise maximum ratemaking power only in situations of railroad market dominance; and the ICC cannot reject a rate as too low if it contributes to going concern value. Any rate which covers variable costs would carry a presumption of lawfulness under this standard.

With respect to regulatory reform in the motor carrier industry, the Administration has proposed the Motor Carrier Reform Act, which is at present pending before both Houses of Congress.\textsuperscript{17} This proposal seeks to increase individual ratemaking flexibility for members of the motor carrier industry, and ease entry barriers. Ratemaking flexibility would be achieved by an approach similar to that taken in the Rail Act: there would be a zone of reasonableness within which rate increases and decreases could be implemented by carriers without being subject to suspension by the ICC. Suspension of other rates, pending a determination of their

\textsuperscript{16} Pub. L. No. 94-210 (Feb. 6, 1976).
\textsuperscript{17} H.R. 10909 and S. 2029, 94th Cong., 1st Sess. (1975).
lawfulness, could be ordered only upon proof of three elements: that the complainant would suffer immediate and irreparable harm, there was a likelihood of success on the merits, and suspension would advance the public interest. Agreements among carriers on single-line movements would be prohibited immediately, and agreements on general rates would be illegal three years after the enactment of the bill. Rate bureaus would be allowed to continue, however, to carry on those activities which are not anti-competitive.

The liberalized entry provisions of the Motor Carrier Reform Act would have two effects. First, it would inject a competitive philosophy in setting rates by forcing carriers in a market to be aware of the possibility that, should the rates in that market get high in relation to costs, other firms would enter. That threat is faced by the vast majority of firms in the United States and is essential if price competition is to be maintained. Second, it would permit carriers to rationalize their services by removing inefficient backhaul and route restrictions.

The bill would achieve liberalized entry by broadening the focus of the present entry tests and providing a new alternative test for entry. First, the ICC would be required to favorably consider any proposed service which would produce lower carrier costs, greater efficiency, better service, satisfaction of shipper preferences for different combinations of rates and services, and generally improved competition. Second, the Commission would be required to issue a certificate if the applicant demonstrated that he was “fit, willing and able,” the revenue from the proposed service would cover the “actual costs” of the service, and the rate would not be discriminatory. The adequacy of existing service or the effect on existing carriers could not be considered.

Some of the more naive among us expected that when the Administration introduced its transportation reform bills, the business community would be uniformly enthusiastic. After all, much industrial rhetoric and emotion has been expended in denouncing the evils of control of our nation’s economy by Washington bureaucrats. However, in the case of transportation generally, and trucking specifically, the support for the Administration’s efforts to remove economic controls has been muted. Indeed, the head of the American Trucking Association accused us of “trying to tear apart the finest transportation system in the world.” We found this rhetoric somewhat startling, for none of the authors of the Administration’s program had any such idea.

Recently, however, I came across a document which gives me at least some greater explanation of why the truckers are so enthusiastic to preserve what seems to be economically wasteful regulation. This document, Accounting for Motor Carrier Operating Rights, was a petition and
brief to the Financial Accounting Standards Board, and was filed on behalf of the American Trucking Association. It concerned accounting standards for motor carrier operating rights. It expressed deep concern at the action of the accounting community in attempting to treat motor carrier operating rights as depreciating assets. This approach was all wrong, the petition protested. Rather, “operating rights are the single most important asset to the motor carrier,” and, far from depreciating in value, they seem to appreciate over time. Since 1961, the Accounting Board was told “very few carriers amortized the cost of operating rights because there had been almost no instances of loss of value." Indeed, “[o]perating rights have increased at an annual compound rate of approximately 16% . . . ."

Now, I thought, we are really on to something. Of course, the certificates of operating rights only exist because of economic regulation by the ICC. Otherwise, all citizens would have operating rights. The ICC grant of public convenience and necessity amounts to a true golden egg—an extraordinary investment opportunity. Indeed, one wonders whether those who invest in gold stocks rather than ICC certificates aren’t somewhat foolish. But why should these certificates be such a magnificent investment?

First of all, as the truckers explain, a carrier simply cannot engage in interstate over the road transportation without one of these magic pieces of paper. The country is obviously growing, and the demand for more and better surface service is increasing. If a carrier does not have the necessary operating certificates to provide through service to the ultimate destination of a customer’s shipment, it must interline the shipment with another carrier which does serve the ultimate destination. Since shippers are demanding faster and better service, motor carriers are faced with the necessity to obtain additional operating rights or risk the loss of significant amounts of business to other carriers who can provide through service. This need for operating rights certificates by a growing number of carriers of course explains why they are so valuable.

The net result, according to the Trucking Association, is that “[s]maller carriers with limited operating authorities are finding it increasingly difficult to compete effectively in today’s transportation marketplace.”

Virtually the only way for the smaller carriers to get out of this bind, and to “obtain additional operating authorities is to buy them from other motor carriers, either by direct acquisition of a particular authority or by acquisition of an entire carrier and all of its assets, including its operating authorities.”

You may ask how these operating rights came to be granted to those who now own them. The truckers are quite straightforward about it. They explain in their brief that the vast majority of operating rights existing today
were created by a grandfather clause in the original Motor Carrier Act of 1935. In that Act, they point out that the Congress made "a special provision to acknowledge and protect the interests of motor carriers [engaged] in bona fide operations prior to the passage of the Act by not requiring them to prove a public need to continue such operation."

You can see how all of this works. The ICC and its certificates of public convenience and necessity benefit the business descendants of those truckers in business prior to 1935. This is, of course, a very powerful group. Indeed, the truckers estimate motor carrier revenues for 1973 as in excess of $21 billion and accounting for approximately fifty-five percent of the total of federally regulated freight revenues.

The seller's market for scarce operating rights obviously creates enormous profits for those who own them. If an incumbent carrier does not want to sell his operating rights, he receives the valued privilege of being protected from new competition on his route. Operating rights, according to the truckers, also have many values beyond that of sale. Apparently they are often used as collateral for bank loans, and, indeed, in certain circumstances, seem to be almost a financial insurance policy. This explains the following passage of the American Trucking Association's petition:

Experience has indicated that not only carriers with viable profitable operations but also carriers with poor operating results and even carriers in or near bankruptcy are able to demand and obtain prices for their operating rights far in excess of the cost of such authorities carried on their books.

We are grateful to the Truckers Association for providing such a lucid, if perhaps inadvertent, explanation of why regulated industries have not welcomed the Administration's transportation reform proposals with open arms.

However, the Administration remains hopeful that the Rail Act, as implemented by the Commission, and the Motor Carrier Reform Act, to the extent that it is enacted into law, will restore a vitality and vigor to the surface transportation industries that has been lacking for too long. We would hope to see the return of a healthy level of competition to both of these industries. I can give you my complete assurance that it is not the goal of either the Antitrust Division or the Administration, as some critics would suggest, "to tear apart the finest transportation system in the world." We believe that competition has greatly benefited the vast majority of the American economy. All we are saying to the regulated transportation industry is give competition a chance.
The Value Capture Hypothesis: A Second Analysis*

DAVID L. CALLIES**
CHARLES L. SIEMON**.

I. INTRODUCTION

II. PUBLIC USE
   A. Eminent Domain
      1. Public purpose
      2. Necessity
      3. Colorado
   B. Public Funds

III. PUBLIC/PRIVATE PARTNERSHIPS
   A. Condemnation Of Land For Public/Private Partnership Development
      1. Excess condemnation
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IV. INTERGOVERNMENTAL COOPERATION/JOINT DEVELOPMENT

V. TAXING AND OTHER MONETARY TRANSFERS
   A. Tax Increment Financing
   B. Special Assessments

VI. CONCLUSION

* See, Value Recapture; A Rose By Another Name, 26 Zoning Dig. 5 (1974).
** Ross, Hardies, O'Keefe, Babcock, & Parsons, Chicago, Illinois.
I. INTRODUCTION

Value capture policy is as old as eminence domain, which means it is very nearly as old as organized government. Nevertheless there is somehow something threatening about pulling it all together under the title of "policy" dealing with the "capture" of "value." Capture from whom? Whose value? Whose policy?

In fact, value capture is very little more than government using its existing powers to acquire land or rights in land for a public purpose and then defraying the costs of acquisition by dealing in those values and capitalizing on increased value the government itself created by virtue of its public developmental activities. The theory of value capture policy has been dealt with at some length elsewhere. In this article it is the intent of the authors to present a technique-by-technique analysis of practical applications of value capture policy with theoretical discussions only where necessary. For convenience we have divided the "methodology" of value capture policy into four categories: (1) condemnation of land for value capture, (2) development of existing rights in land, (3) monetary transfers, and (4) joint development. These categories are preceded by an extended discussion of public purpose and public use—the legal keys to most of the techniques. While much of the research which forms the basis of this article was done for the purpose of examining the feasibility of using value capture techniques to defray the costs of fixed-guideway rapid transit systems, many of the examples from cases, statutes and experience, are drawn from other contexts—highways, redevelopment, parking structures, shopping malls, and the like.

2. U.S. DEPARTMENT OF TRANSPORTATION, A VALUE CAPTURE POLICY, (vols. 1-4, 19); Callies and Deurksen, Value Recapture as A Source of Funds to Finance Public Projects, 6 URBAN LAW ANN. 73, 81-83 (1974); Callies and Deurksen, Value Recapture: A Rose By Another Name, 26 ZONING DIG. 5 (1974).
3. The research was funded primarily by the U.S. Department of Transportation's Urban Mass Transit Administration and later the Denver Regional Transit District. Planning and financial analysis was performed by the Rice Center for Community Design and Research in Houston, Texas, under the direction of Carl P. Sharpe, Assistant Director, and Robert Eury, principal planner.
Usually government does not attempt to "go it alone" but rather forms public-private partnerships so that both sectors can benefit from governmental development. The central theory, however, remains the same. In each instance it is an investment of public funds for which a "capture" of some of the value created by the investment which traditionally accrued to private interests is sought in order to help defray the outlay of public funds.4

II. PUBLIC USE

The efficacy of value capture policies involving public participation in development opportunities along a transit route will be largely dependent upon the acquisition of property for development or the development of property already acquired. Such acquisition and use is subject to the constitutional and statutory constraints of the "public use" doctrine. This doctrine is sufficiently important that we deal with it in considerable detail, despite our avowed intent to focus on the more practical aspects of value capture.

A. EMINENT DOMAIN

Generally a public body can acquire property through the exercise of the power of eminent domain for public use or purposes. The breadth of the definition of "public use"—what is appropriate, direct, and related to governmental purposes—will, to a large measure, be determinative of the potential for value capture through public/private partnerships.

1. Public purpose.

The matter of public use and purpose has been often defined in the context of the acquisition of property not strictly needed for the purposes for which a governmental entity was created. For example, in the case of a transit district developing a fixed guideway system, enabling legislation and common sense dictate that the agency can acquire the property necessary for the construction of a fixed guideway and stations. Acquisition of land for commuter parking is also generally includable. Permissible acquisitions beyond these types of uses depend upon constitutional, statutory, and interpretive case law.

*United States v. 416.81 Acres of Land*5 contains an example of a broad definition of public use which is typical of situations involving the federal government. The government brought eminent domain proceedings to acquire land for development of the Indiana Dunes National

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4. The extent to which private landowners may be the fortuitous beneficiary of significant value without effort or investment is dramatically illustrated in an article published in Planning Magazine. Toner, *Oysters and the Good Ole’ Boys*, PLANNING MAGAZINE, August (1975).
5. 514 F.2d 627 (7th Cir. 1975).
Lakeshore. The court held that the only question for judicial review in such a condemnation proceeding was whether the purpose for which the property was taken was a congressionally authorized public purpose. It made no difference that a landowner’s conception of a public use might differ from that of the Congress.\(^6\)

As clearly demonstrated in a recent Maryland case, broad definitions of public use are not confined to cases involving the power of the federal government. In *Prince George’s County v. Collington Crossroads, Inc.*,\(^7\) the county sought to condemn land at the intersection of two major highways for the creation of an industrial park. The court was not swayed by the ultimate private use or benefits that accompanied the “economic stimulation” of the proposed development and recognized the necessity for a non-rigid definition of public use.

Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here as elsewhere that to formulate anything ultimate, even though it were possible, would, in an inevitably changing world, be unwise if not futile. [citations omitted]\(^8\)

2. *Necessity.*

The courts have long drawn a distinction between what is a public purpose on the one hand and necessity of the taking on the other. Public purpose is largely a question of why or what for, while necessity is one of how, much or which one. In most non-federal jurisdictions the “what for” public purpose question is strictly a judicial question.

In evaluating the use for which a governmental body attempts to exercise the power of eminent domain, the courts have the responsibility of enforcing the constitutional limitation that the use must be “public.”\(^9\)

On the other hand, the issue of necessity is clearly perceived as a matter of legislative discretion and is reviewed by the courts only for evidence of fraud, collusion or bad faith. In *ARCO Pipeline Co. v. 3.60 Acres of Land*,\(^10\) builders of the Trans-Alaska pipeline brought proceedings to condemn 3.6 acres of right-of-way under authority delegated to it by the State of Alaska. The court held it was without authority to review the question of

\(^6\) Id.
\(^10\) 539 P.2d 64 (Alaska 1975).
necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or abuse of discretion.\textsuperscript{11}

In a case from California dealing with the authority of an airport commission and city council to condemn property for the extension and enlargement of an airport, the Court of Appeals of California held that whether public necessity required acquisition of property for such an extension and enlargement was strictly a legislative and not a judicial question and that legislative motive was not a subject of inquiry.\textsuperscript{12}

Recently the wooden distinction between public use and necessity has become blurred as courts have recognized an expanding definition of public purpose. The courts have given increasing credence to the importance of comprehensive development or redevelopment projects essential to the health, safety and welfare of the public. In \textit{State ex rel Atkinson v. Planned Industrial Expansion Auth.},\textsuperscript{13} the court pierced through the formalistic jargon of "public purpose" and "necessity," reconciling them as follows:

\begin{quote}
[F]inal determination of the question whether the contemplated use of any property sought to be taken under the Law here in question is public rests upon the courts, but that a legislative finding under said law that a blighted or unsanitary area exists and that the legislative agency proposes to take the property therein under the process of eminent domain for the purpose of clearance and improvement and subsequent sale upon such terms and restrictions as it may deem in the public interest will be accepted by the courts as conclusive evidence that the contemplated use thereof is public, unless it further appears upon allegation and clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith.\textsuperscript{14}
\end{quote}

The distinction between "public benefit," and "public purpose" is also fading with the passage of time. In an increasing number of jurisdictions public benefits like revenue generation, are accepted as valid public purposes. A Maryland court recently held:

\begin{quote}
Under our cases, projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State, or its subdivisions, are public uses, at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide.\textsuperscript{15}
\end{quote}

In Florida, an apparent holdout jurisdiction, however, the distinction seems to be alive and well. A court recently noted that 'public benefit' is not synonymous with 'public purpose' as a predicate which can justify

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} at 68.
\item \textsuperscript{12} \textit{Breiner v. City of Los Angeles}, 22 Cal. App. 3d 382 (1975), 99 Cal. Rptr. 180 (1972).
\item \textsuperscript{13} 517 S.W.2d 36 (Mo. 1975).
\item \textsuperscript{14} \textit{Id.} at 45.
\item \textsuperscript{15} \textit{Prince George's City v. Crossroads, Inc.}, \textit{supra} 275 Md. at —, 339 A.2d at 289. (emphasis added).
\end{itemize}
eminent domain. . . .”16 Thus, in the final analysis, the breadth of the definitions of public use and public purpose depend upon the constitutional, statutory and case law provisions of the particular jurisdiction involved.

3. Colorado.

Colorado is a useful example, since the Denver Regional Transit District has recently gone through the exercise of evaluating value capture techniques.17 From a reading of the law in Colorado it appears that, while the constitution and statutes are sufficiently strict to place Colorado in the narrow view jurisdictions, interpretive case law reveals an occasional judicial willingness to move away from a narrow interpretation of “public use.”

The Colorado constitution provides in pertinent part:

Private property shall not be taken or damaged for public or private use without just compensation . . . the question whether the contemplated use be really public shall be a judicial question and determined as such without regard to any legislative assertion that the use is public.18

In addition, the constitution further provides at section 14:

Taking private property for private use.

Private property shall not be taken for private use unless by consent of the owner, except for private ways and necessity and except for reservoirs, drains, flumes or ditches on or across the lands of others by agricultural, mining, milling, domestic or sanitary purposes.19

Of course, in order to validate condemnation for public/private development schemes in support of a rapid transit district it is always possible to amend the aforesaid section 14 to add matters relating to rapid transit districts. We understand that such an amendment is a remote possibility and therefore suggest that any exercise of the power of eminent domain would need to satisfy a public purpose test bottomed on article II, section 15 of the Colorado constitution.

This constitutional provision was examined in Potashnik v. Public Service Commission of Colorado,20 where the court said:

Whatever may have been the ancient right of condemnation, it has been restrained by constitutional limitations in the protection of individual property rights. The power lies dormant in the state until the legislature speaks [citing authorities]. . . . The right to condemn private property is therefore

a creature of statute, pursuant to which it must clearly appear either by express grant or by necessary implication.\textsuperscript{21}

After quoting article II, section 15 of the Colorado constitution the court noted that:

\begin{quote}
[T]he actual purpose of this section is to place a limitation even upon legislative enactment. Under the restriction of this section the legislature itself must exercise care in declaring to be a 'public use' (and hence entitled to the right of eminent domain) only that which may meet the legal tests of such as determined by the judiciary. The general right of eminent domain, under our Constitution, depends upon, first, legislative authority and, second, judicial approval of the purpose as a public use.\textsuperscript{22}
\end{quote}

Fortunately for proponents of public/private partnership value capture techniques, later decisions seem to broaden the power of a public body to acquire land by eminent domain in Colorado. For example, the Supreme Court of Colorado, stating that the question of public purpose in condemnation proceeding was a judicial question, upheld a taking for a pipeline right-of-way as a public purpose.\textsuperscript{23} The court quoted extensively from a 1906 Supreme Court of Colorado decision, \textit{Tanner v. Treasury Tunnel Mining & Reduction Co.},\textsuperscript{24} where the court discussed the importance that the definition of public purpose change with the times.\textsuperscript{25} In addition, the \textit{Larsen} court quoted the following language from \textit{Tanner}:

\begin{quote}
No definition, however, has as yet been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. No precise line is drawn between the uses which would be applicable in all cases. Doubtless this arises from the fact that the courts have recognized
\end{quote}

\begin{footnotes}
\item[21] Id. 247 P.2d at 138.
\item[22] Id. 247 P.2d at 139, 1:40.
\item[23] Larsen v. Chase Pipeline Company, 183 Colo. 76, 514 P.2d 1316 (1973).
\item[24] 35 Colo. 593, 83 P. 464 (1906).
\item[25] Id. at 35 Colo. 594, 83 P. 464 at 465.
\end{footnotes}

In this state we have conditions to meet and resources to develop, which, in their nature, require the employment of new and appropriate means. This has opened a field for the prosecution on new enterprises. The mineral resources of the state are of prime importance. Generally they can only be reached by sinking shafts to great depth, or running tunnels of great length.\textsuperscript{26}

The general assembly has provided for the organization of companies for the purposes for which the petitioner was organized. It has provided that a corporation of this character may exercise the power of eminent domain in securing rights-of-way for its tunnel. It has evidently recognized that the business of a tunnel company may be for the benefit and advantage of the public, for we find that in designating what corporations may exercise the power of eminent domain tunnel companies have been mentioned in connection with bridge, ferry, railroad, and other companies whose business is unquestionably to serve the public. \textit{While this judgment is not conclusive upon the courts, it is entitled to careful consideration and great weight as the judgment of a coordinate branch of the government or the necessities of the state for the development of its resources and the needs of the people in this respect. [citing cases]}

\textit{Subject to the authority of the court to determine certain questions, the general assembly is the exclusive judge of the necessity or emergency justifying the exercise of the power of eminent domain.} (emphasis added).
the definition of public use must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and the ever-increasing needs of society. [Citing case] Consequently we find, in examining the authorities, that, in determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of a benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration.26

Arguably at least, the Larsen case places Colorado in the broader view public purpose camp despite the Colorado constitutional provisions which, upon first reading, imply a narrow "public purpose" definition.

In Dallasta v. Department of Highways,27 a case dealing with a proposed condemnation by the State Highway Department, the court established the following test:

[It] is the general principal of law that courts will not disturb decisions or determination by public bodies charged with the duty as to location or alignment of highways or other public projects. The feasibility or practicability of the same and similar objectives—all of which relate to the necessity for the acquisition of a particular property—is the agency’s responsibility to determine. To invoke the judiciary there must be a showing of bad faith or fraud on the part of the acquiring agency. This rule has been uniformly [sic] recognized by this court, even when objection is raised in condemnation cases by persons whose property is actually being taken.26

The court seems to be applying traditional deference toward the necessity of the taking to the definition of public purpose and thereby reflecting the modern trend towards a blurring of any distinction.

In Rabinoff v. District Court,29 the Colorado Supreme Court considered whether condemnation of property for conveyance to private parties under an urban renewal plan was a public use:

The narrow inquiry therefore, is whether the power of eminent domain can be exercised in circumstances such as the present, wherein the public authority does not intend to permanently retain the property which it proposes to condemn.30

The court concluded in the affirmative:

In concluding that the proposed action is public and not private, we are persuaded not only by the underlying object of urban renewal, but the significant fact that the grant is to a public agency which acquires the lands in question under a master plan of rehabilitation. The fact of ultimate ownership by private individuals is an incidental and secondary consideration to the public objectives.31

26. Id.
28. Id. at 521, 387 P.2d at 27.
30. Id. at 229, 360 P.2d at 118.
31. Id. at 232, 360 P.2d at 121.
While none of the above cases is dispositive of the breadth of "public purpose" in Colorado, they suggest that Colorado courts have been receptive to broad application of condemnation powers and might be expected to view a transit district's exercise of its eminent domain powers in furtherance of a public/private partnership value capture scheme in a progressive manner. 32

B. PUBLIC FUNDS

Closely related to the concept of "public purpose" in eminent domain proceedings is the use of public funds to carry out development traditionally reserved for the private sector. In this area as well, a broadening concept of the public interest is overcoming traditional distinctions. A recent Massachusetts case is on point. Opinion of the Justices 33 dealt with a proposed statute providing for the financing, construction and operation by the Massachusetts Turnpike Authority of a stadium complex, vehicular tunnel, toll road, and arena in Boston. The Supreme Court of Massachusetts held that the proposed statute was invalid, not because the proposal went beyond certain specified public purposes, but because the expenditure of public funds, extension of public privileges, powers, exemptions and uses, and the rental and operation of the project involved, were inadequately controlled by appropriate standards and principles. The court went on to set out at some length what standards and principles would render such a statute adequate. The court characterized the standards challenged as "vague and fragmentary," 34 but specifically held:

We are of opinion that a large multi-purpose stadium or an arena for public activities and events, conventions, professional and amateur athletic events, and other large gatherings may be for a public purpose if the expenditure of public funds, the extension of public privileges, powers, and exemptions, and the use, rental, and operation of the projects are adequately governed by appropriate standards and principles set out in the legislation. [I]f the legislation itself contains standards and principles governing and guiding the operation of the facilities in a manner which reasonably can be expected adequately (a) to protect all aspects of the public interest and (b) to guard against improper diversion of public funds and privileges for the benefit of private persons and entities, then such enterprises may be found to be for public objectives. 35

To the same general effect is Lerch v. Maryland Port Authority. 36

There the validity of a proposed issue of revenue bonds by the port

34. Id. at 763, 250 N.E.2d at 559.
35. Id.
authority for acquisition and construction of an international trade center was challenged. The court held that the use of property to produce revenues to help finance operation of activities that tended to achieve the purpose of a trade center development project in the Port of Baltimore was a public use.

The court noted specifically that the methods by which a public purpose may be served by a municipal corporation changes with time and that at present services were more important than edifices. There was a specific legislative finding that the location of servicing functions and activities connected with commerce and trade at a single centrally located site to protect the economic well-being of the state was in the public interest. The case relies to a large extent on Courtesy Sandwich Shop, Inc. v. Port of New York Authority,\(^37\) where the court upheld the use of condemnation power in furtherance of the New York World Trade Center project. The court concluded:

The Act is not invalid because it does not freeze future use to present circumstance. Nor does it violate the constitutional prohibition because it authorizes the use of space not needed for the purpose of the Center other than for the production of incidental revenue, when, as here, that authorization is a reasonable concomitant of a project on a public purpose. . . .

The Act as amended incorporates not only the legislative determination of the broad scope of the Center, but, at least by implication, looks to the eventual expansion of the immediate use to which the Center is to be put. No separate edifice is authorized for the purpose of raising revenues to offset the expenses of the Center. The authorized use of portions of the Center for the production of incidental revenue is not its primary purpose, but is expressly made auxiliary to the accomplishment of the main purpose, which is public.\(^38\)

It is worth noting that the Maryland Port Authority would occupy only a small fraction of the proposed building, some 30,000 square feet out of the 200,000 square feet proposed, while the remainder was to be leased to marine-oriented private businesses.\(^39\)

III. PUBLIC/PRIVATE PARTNERSHIPS

One of the most financially attractive value capture techniques involves development projects where public entities join with the private sector to carry out a joint venture. Through such associations the governmental entity has a real opportunity to share in the benefits that accrue from its work on its primary mission. Along transit routes, shopping facilities, offices and other commercial ventures will benefit considerably from installation of the transit line, and the opportunity for the transi

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\(^{39}\) Id, 240 Md. at 444, 214 A.2d at 768.
authority to share in financial consequences of those benefits could ease the economic burden of transit improvements. Essential to public/private partnership is public ownership of the land adjacent to a transit route where joint development can be carried out. Public ownership of adjacent land will be in two forms: land condemned for such purposes or land previously acquired for other purposes.

A. CONDEMNATION OF LAND FOR PUBLIC/PRIVATE PARTNERSHIP DEVELOPMENT

As set forth in earlier value capture discussions, courts have upheld the acquisition of more land than was absolutely necessary for the precise public purpose if the land was acquired for necessary ancillary services (for example, parking lots for a transit station), for demonstrated future needs, or to clear up or avoid “remnants.” In addition, the courts have upheld the acquisition of land for the economic or physical protection of a public investment.40

1. Excess condemnation.

Where the purpose of the acquisition is not solely to recoup the cost of a public venture, the acquisition of more land than is necessary for the direct purposes of an authority’s need is likely to be a valid exercise of the power of eminent domain, provided there is adequate statutory authority and a good plan sufficiently indicating the purposes and need for such land.41 The term excess condemnation is a poor one. It is clearly inappropriate. As Nichols points out at section 7.5122 the term is a misnomer because it infers that more land is being taken than can be justified for the public use. If this were really the case such a taking would be unconstitutional.

New York has been a particularly active jurisdiction with respect to excess condemnation. The local government section of the New York constitution provides limited authority to take so-called “excess” land:

E. Local governments shall have the power to take by eminent domain private property within their boundaries of public use together with excess land or property, but no more than is sufficient to provide for appropriate disposition or use of land or property which abuts on that necessary for such public use, and to sell or lease that not devoted to such use. The legislature may authorize and regulate the exercise of the power of eminent

41. VALUE CAPTURE POLICY, VOL. II, supra n. 32.
42. 2A, NICHOLS ON EMINENT DOMAIN (3d Ed. 1975).
domain and excess condemnation by a local government outside its boundaries.43

In the case of In re Flatbush Avenue,44 the City of New York sought to condemn more land than was necessary to carry out a street widening program. The court upheld the power of the city to take the excess land, although in the particular case the court barred the condemnation because no purpose had been offered for taking the additional lands: "[s]ince there is no statement of purpose this court will not attempt to conjecture as to whether a public purpose is involved. . . . [T]his is a defect which invalidates the proceeding . . . ."45

As indicated above, the federal courts interpret the authority to condemn property very broadly.46 In United States v. 187.40 Acres of Land,47 the court dismissed the landowners’ claim that the Secretary of the Army lacked statutory authority to take certain land to be used in constructing a flood control project in accordance with plans and conditions made after the commencement of the original project.48 The court was there dealing with the Declaration of Taking Act,49 which does not require proof of necessity for the taking of land. It was held that there was no constitutional bar to “excess” takings in this fashion.

In Kentucky a form of excess condemnation is clearly permitted by statute for "ancillary purposes."50 Such power appears to exist under two categories. First, a general condemnation enabling statute sets out a broad range of uses:

‘Public project’ means any lands, buildings, or structures, works or facilities (a) suitable for and intended for use in the promotion of the public health, public welfare or the conservation of natural resources, including the planning of any such lands, buildings, structures, works or facilities; or (b) suitable for and intended for use for the purpose of creating or increasing the public recreational, cultural and related business facilities of a community, including such structures as concert halls, museums, stadiums, theaters and other public facilities, together with related and

43. Article 9, Section 1, Subsection E (emphasis added).
44. 60 Misc. 2d 1062, 304 N.Y.S.2d 552 (N.Y. Sup. Cl. 1969).
45. Id. at 1068, 304 N.Y.S.2d at 558.
47. 381 F. Supp. 54 (Pa. 1974).
48. The court noted, "The judicial role in review of condemnation cases does not encompass the power of determining whether the land is actually necessary for the successful operation of the project but only extends to deciding the propriety of the public purpose of such acquisitions and the requisite statutory authority [citing cases]. Moreover, the taking of more land than necessary is no defense to condemnation acquisition [citing cases]." Id. at 57. (cases omitted).
appurtenant parking garages, offices and office buildings for rental in whole or in part to private tenants, dwelling units and apartment buildings for rental in whole or in part to private tenants, commercial and retail businesses, stores or other establishments, and any structure or structures or combination of the foregoing, or other structures having as their primary purpose the creation, improvement, revitalization, renewal or modernization of a central business or shopping community, and shall also include existing lands, buildings, structures, works and facilities, as well as improvements or additions to any such lands, buildings, structures, works or facilities.\footnote{51}

Second, a number of specific agencies are empowered to exercise the power of eminent domain for a broad range of purposes. A governmental agency empowered to develop a "capital plaza" or other public building complex is specifically authorized to condemn not only lands, buildings and public works "suitable for and intended for use as public property\footnote{52} but also:

suitable for and intended for use for the purpose of creating or increasing the public recreational, cultural and related \textit{business facilities of a community} including such structures as concert halls, museums, stadiums, theaters, and other public facilities together with related and appurtenant parking garages, offices and office buildings for rental in whole or in part to private tenants, commercial and retail business, stores or other establishments and any structure or structures or combination of the foregoing, or other structures having as their primary purpose the creation, improvement revitalization, renewal or modernization of a central business or shopping community, and shall also include existing lands, buildings, structures, works or facilities.\footnote{53}

The City of Lexington and Fayette County have created the Lexington Center Corporation to finance and develop a municipal convention center and sports facility. The center is to consist of a trade show and sports facilities complex containing a sports arena capable of seating 22,600 persons, connecting exhibition hall facilities of approximately 60,000 square feet, a restored opera house, and 70,000 square feet of commercial parking space together with adjacent surface parking for over 2,000 cars.

Another example of excess condemnation is found in California under the guise of the "protection" theory. A new eminent domain statute specifically authorizes "protective acquisitions":

(a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property

\footnotesize{\footnote{51}{KY. REV. STAT. § 58.010(l) (1970).} \footnote{52}{Id.} \footnote{53}{Id.}}
necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.54

Apparently, public agencies are now in a more favorable position to make protective acquisitions. The new Eminent Domain Law does not contain any distance limitations for protective acquisitions and basically is a codification of existing California case law which permits “taking incidental property to carry out and make effective the principal uses involved.”55 In addition, similar authority is spelled out for the California Department of Transportation:

The department may condemn real property or an interest therein for reservations in and about and along and leading to any State highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary of such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed one hundred fifty feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of one hundred fifty feet are taken, only such portions may be condemned which do not exceed two hundred feet from said closest boundary.56

2. Future Uses.

Future use is a well recognized “excess” or supplemental condemnation power.57 For example, the California state highway department (CALTRANS) is expressly empowered to condemn land for future use, and to lease such lands until they are needed for public use.

The authority conferred by this code to acquire real property for State highway purposes includes authority to acquire for future needs. . . .

54. CAL. CIV. PROC. CODE § 1240.120 (West Supp. 1976).
57. Callies and Deurksen, Value Recapture as a Source of Funds to Finance Public Projects, 6 URA. LAW ANN. 73, 81-83 (1974).
The department is authorized to lease any lands which are held for state highway purposes and are not presently needed therefor on such terms and conditions as the director may fix and to maintain and care for such property in order to secure rent therefrom.\textsuperscript{58}

The U.S. Court of Appeals for the Fifth Circuit has upheld condemnation in advance of actual need. As part of a plan for improving the port area a harbor district intended to construct a liquid storage tank on the expropriated property, even though it could not say with assurance when the land would be so used.\textsuperscript{59} The court was unmoved by the fact that only one private user might actually take advantage of the bulk storage facility. According to the court, this fact did not affect the public use nature of the taking because all potential users would have access to storage in the area.

3. Remnants.

The same reasoning is also applicable to the acquisition of more interests in land, in order to eliminate remnants, than can be justified by the particular public purpose upon which a particular acquisition is based. In \textit{Southern Pacific Land Company v. United States},\textsuperscript{60} the court upheld the decision of the Assistant Secretary of the Navy to condemn a fee simple title to a tract of land including mineral interests for the construction of a naval air station in California, despite the owner's objection that he was willing to sell the surface rights, but wanted to retain the mineral rights. The court relied on the rule cited above that the exact nature or estate to be acquired is solely within the province of the public official involved. In fact, the court propounded the rather startling theory that "advantageous liquidation of the government's interest is a legitimate consideration in determining the estate to be taken," and that "appropriate liquidation of investment for public purposes [is] itself such a public aim."\textsuperscript{61} The acquisition of land for the sole purpose of turning around and selling at a profit would presumably be illegal under the \textit{Vester} decision.\textsuperscript{62} The result of the above case, however, appears to be that a federal authority may acquire more land, or at least more interests in land, than is necessary for the public purpose, where the property perchance had to be disposed of, such further acquisition of rights or interests would protect the government's investment or increase its total value.\textsuperscript{63}

\textsuperscript{58} CAL. STS. AND HY. CODE § 104.6 (West 1963).
\textsuperscript{59} Lake Charles Harbor & Terminal District v. Henning, 409 F.2d 932 (5th Cir. 1969).
\textsuperscript{60} 367 F.2d 161 (9th Cir. 1966).
\textsuperscript{61} \textit{Id.} at 163.
\textsuperscript{62} City of Cincinnatti v. Vester, 33 F.2d 242 (6th Cir. 1929); \textit{aff'd} 281 U.S. 431 (1930).
\textsuperscript{63} Atwood v. Willacy County Navigation District, 153 Tex. 646, 271 S.W. 2d 137 (Tex. Civ. App. 1964); \textit{aff'd} 350 U.S. 804 (1965); Rindje v. City of Los Angeles, 262 U.S. 700 (1923); United States v. 2,606.546 Acres of Land, 432 F.2d 1286 (5th Cir. 1970); People v. Merced County, 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968).
California has what is probably the least restrictive case law on the subject of remnant acquisition by eminent domain. The California Streets and Highways Code provides:

Whenever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the Department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.\(^{64}\)

The statute was construed and upheld in *People v. The Superior Court of Merced County*\(^{65}\) in which the Supreme Court of California held that even a "remnant" as large as 54 acres could be condemned under the remnant theory of excess condemnation when it could probably be condemned for a little more than the cost of taking the one-half acre needed for highway purposes, and paying damages for the remnant which would thus become land-locked:

Although a parcel of 54 land-locked acres is not a physical remnant, it is a financial remnant: its value as land-locked parcel is such that severance damage might equal its value. Remnant takings have long been considered proper.\(^{66}\)

There are no outright examples of excess condemnation in our example jurisdiction of Colorado. However, the acquisition of land for public/private cooperation in development is not restricted to the industrial East. In *Duff v. City and County of Denver*,\(^^{67}\) the City of Denver sought to acquire by eminent domain Duff's land in order to expand municipally-owned Stapleton airfield. The City and County of Denver contemplated using the land sought for acquisition for supporting facilities such as airplane parking areas, taxiways and similar purposes and for leasing to base operators for activities similar to those being conducted on the property (storage and servicing of private airplanes) by Duff. The court dismissed without pause the contention that the ultimate purpose was merely to change his private ownership to the private lease of the city tenant and upheld the taking.\(^{68}\)

B. Public And/OR Private Development Of Public Land However Acquired

A second major opportunity for a transit authority to share in the benefits of a new transit route is through development of air or other

\(^{64}\) CAL. STATS. AND HY. CODE § 104.1 (West 1963) (repealed 1975).
\(^{65}\) 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968).
\(^{66}\) Id. at 210, 436 P.2d at 346. This case has been the subject of statutory modification seeking to reverse the court's decision, although the new statute has not been finally construed.
\(^{67}\) 147 Colo. 123, 362 P.2d 1049 (1961).
\(^{68}\) Id. at 123, 362 P.2d at 1049.
property rights validly acquired by the authority but not needed for current operations, i.e., land already in public ownership. There are many examples of courts upholding such development, and many more such developments are proceeding without judicial review in other rapid transit systems throughout the country. To some extent, the decisions discussed here relate to those discussed above.

It has been noted elsewhere that although a governmental authority may have sufficient power under common law to deal in air space, the safe course is the adoption of a statute specifically allowing both sale and lease of government-owned air space or land. 69 There are a number of instances, particularly involving parking, of jurisdictions which authorize the leasing or sale of air space. 70

The use of air space or other public property for private development is illustrated in the provision of off-street parking. The acquisition of property by a governmental entity for off-street parking has generally been held to be a public purpose even when such use has the effect of enabling a municipal corporation “to enter into business in direct competition with individuals who are now operating parking lots.” 71 Parking is generally considered to be public in character.

In fact, a recent Massachusetts case indicates that a municipality may undertake to lease such facilities to private entities even in the absence of statutory authority. In Ballantine v. Town of Falmouth, 72 the validity of a town’s action in taking property by eminent domain and leasing it to a private party was challenged. The court said:

Even without explicit statutory authority, municipalities have the undoubted right to lease real estate, land or buildings held for public purposes and not presently needed for such purposes. . . . . A taking of premises for municipal parking is not to be invalidated merely because some private benefit may follow from the activities of the occupants of the vehicles parked in that public parking area. 73

New York also provides an interesting legal backdrop for public/private development in the predecessor to the Courtesy Sandwich case, discussed above. The court considered whether construction by the Port of New York Authority of a 16-story building was a proper use of property condemned for Port Authority purposes. 74 The street and basement floors

71. 2 A. Nichols, On Eminent Domain, Section 7.5127, supra n. 32.
73. Id. at __, 298 N.E. 2d at 698-99.
would be used for the Union Truck Terminal while the upper 14 floors were designed for revenue production in order to make the building self-sustaining. The 14 upper stories were made available to various private businesses wholly unconnected with transportation. It was alleged that the erection and construction of the Union Terminal other than the street floor and basement was not authorized, sanctioned, nor permitted by the laws of the State of New York. The court thought not:

There can be little reason to doubt that the Port Authority was motivated by nothing but a desire to further the public interest and carry out the purposes of the compact and comprehensive plan when it caused Inland Terminal No. 1 to be erected. The addition of the upper floors was merely incidental. Without those floors it was impossible to construct the terminal. The dominant object of the structure was its use for terminal purposes. The Legislatures and Governors of both New York and New Jersey have indicated that they entertain the same views.\(^{75}\)

The courts in New York have also held that where the fee to property is in good faith appropriated for a particular public purpose, a municipality may subsequently convert it to other uses, or even abandon it entirely, without any impairment of the validity of the estate originally acquired.\(^ {76}\) New York has spoken broadly about the power to convert redeveloped land to private uses even if such land was acquired by eminent domain.\(^ {77}\)

Much the same result was reached in Florida in *City of West Palm Beach v. Williams*\(^ {78}\) where the city leased a gasoline station and restaurant in a city-owned marina to a private corporation. While the court noted that the leased lands were not "coupled with the issuance of bonds or with the acquisition of land by purchase or eminent domain,"\(^ {79}\) the court specifically held:

> It is well settled that municipalities may constitutionally acquire land by purchase or by power of eminent domain and then lease that land for public use, . . . or may use the proceeds of municipal bonds to build improvements to be leased for public use. . . .\(^ {80}\)

The court went on to say that a municipality could not constitutionally acquire land by purchase or eminent domain and then lease the land for private use.

In Hawaii, where the City of Honolulu temporarily leased a building situated on land which had been acquired for future use as a park, the

\(^{75}\) *Id.* at —, 273 N.Y. S. at 345. This case turned in part upon the fact that the Port Authority did not have power to levy taxes and assessments.

\(^{76}\) Fur-lex Realty, Inc. v. Lindsay, 81 Misc. 29, 367 N.Y. S.2d 388 (Sup. Ct. 1975).

\(^{77}\) *In re Glen Cove Urban Renewal Agency,* 84 Misc. 2d 186, 375 N.Y. S.2d 261, 264 (Sup. Ct. 1975).

\(^{78}\) 291 So.2d 572 (Fla. 1974).

\(^{79}\) *Id.* at 576.

\(^{80}\) *Id.*
court held that the rental was an appropriate exercise of due diligence in maintaining the property until the public use was accomplished.81

Finally, two cases from Pennsylvania indicate that when a downtown area is involved, especially where parking is concerned, a leasing arrangement between public and private enterprise can be made to work. In the first of the two cases, Seligsohn v. Philadelphia Parking Authority,82 the Supreme Court of Pennsylvania upheld the validity of a lease agreement between the authority and two department stores. The agreement required the authority to condemn land in the vicinity of the department stores and to erect a parking garage which would be leased to the two department stores for operation as a public parking facility. In turn, the department stores agreed to pay debt service rentals together with an additional rental of $25,000 per year plus a percentage over a fixed amount of gross receipts. Title to the project was to remain with the authority. Other merchants attacked the agreement on the ground that this property had been condemned by the authority, not for public purposes but to build the lot so that the two department stores would benefit by having a publicly financed parking facility available for use by their customers. The attacking parties' business had been condemned to make way for the project. The court held that the agreement was appropriate, noting that the authority had acted upon the advice of reputable agencies which had indicated that a real need existed for a public parking facility at that location.

A different result was reached in the later case. In Price v. Philadelphia Parking Authority83 several agreements were under consideration by the court. The first was between the Authority and National Land Investment Company providing that the Authority was to purchase a block of land in the center of Central Philadelphia. The Authority was then to demolish the existing structures and build an 8-story parking garage on the premises, with a capacity of 862 automobiles, at a cost of $8-9 million. The garage was then to be leased to National for operation as a public parking facility. The authority also agreed to lease the air space over the garage to National for the construction of a high rise complex containing over a thousand units and rising 22 floors above the garage. National was permitted the use of space on the ground and concourse levels for commercial purposes. National was to furnish three separate rental payments: debt service rentals, "Authority" rentals of about $25,000 annually, and certain excess rentals.

The second agreement pertaining to a Rittenhouse Square project was nearly identical, with the developers authorized to build a 19-story office building over an existing Authority garage in downtown Philadelphia. The developers were also given an option to purchase the entire project for a sum ranging between 1 and 1.3 million dollars after 30 years. In both instances, the Authority had failed to negotiate with its private sector "partners" through competitive bidding.

The court invalidated the National project on the ground that the private benefits greatly outweighed those of the public and that therefore the public participation and grant of governmental benefits to private parties would be impermissible. The Rittenhouse Square project was also voided because, as with the National project, it had been consummated by private negotiation rather than competitive bidding. The court did not find that the agreement constituted a private rather than a public purpose as it had with the National project.

It has been suggested that one rationale for upholding the Rittenhouse Square project and not the National project would be that the former involved the erection of a privately owned office building atop a pre-existing Authority parking garage, indicative of a real need for off-street public parking. The public benefit having already been established, it would, it has been suggested, be inappropriate to test the validity of the arrangement since the public benefit had already been proven to exist by the presence of the parking garage at that location. The National project, on the other hand, looked too much like a "package deal" since the construction of both the public and private structures were contemplated as part of one continuous activity.

In any event, it is clear that at least part of the court would have decided otherwise on the public purpose benefit issue. Writing for three of the eleven justices, Mr. Justice Musmanno pungently castigated the majority for their narrow interpretation of the public interest:

A more specific, salutary agreement, conducive to the best interests of the city of Philadelphia, in keeping with the spirit of the times, and destined to greatly benefit the motoring public, it would be difficult to find. It must be stated at the very outset that the cost of the public parking facility portion of the Academy House Project will be financed entirely by the Authority's revenue bonds. In turn, the lessee (National Land) will pay as part of the rent all sums necessary to meet the principal and interest on those bonds. Here again, and this must be emphasized, not a single penny of public funds will be expended. Here indeed, manna will be descending from the top of the skyscraper apartment house to an Authority, whose pantry needs replenishment. The lessees will pay for every expense required for the construction of the building. What does the Authority give in return? The empty air
above the garage. Could there ever be a more fruitful return than falling from invisible trees growing above the top of one’s own orchard?

What the Majority has done here is to substitute its own judgment and its own views on strictly economic and administrative matters involving the exercise of administrative judgment, for that of the Parking Authority entrusted under the law to exercise that judgment. This it has no right to do. [Schwartz v. Urban Redev., supra.] A reading of the Majority Opinion against the background of the uncontested facts reveals that the Majority is arrogating unto itself the powers and duties of a super Parking Authority, which, it is unnecessary to state, it certainly has no constitutional power to do. 84

Several jurisdictions have dealt with the problem of the leasing of city, park and/or waterfront property for such uses as fishing piers, marinas, and other private water-oriented business ventures. In Sunny Isles Fishing Pier, Inc. v. Dade County 85 the Supreme Court of Florida considered an appeal to set aside the leasing of a portion of a public park to a business firm for the construction and operation of a fishing pier. The court noted that no cost or expense to the county was involved, and that the portion of the park being used was neither required nor in fact being used for public park purposes. 86 The court frankly characterized the issues as whether Dade County had the authority to provide fishing facilities for the residents and visitors in the county and to generate revenue for the county as well. Among the key factors noted by the court:

A fishing pier is a very essential adjunct to the operation of a park of the kind which the County constructed on this mile and a half of ocean frontage. There are many benefits and advantages of such a facility in a resort area that probably attracts as many fishing enthusiasts as any other section of the world. The pier was constructed over a portion of the beach lying just north of the inlet and in an area affected by eddies and currents and undertows that render the use of the waters nearby dangerous to bathers. . . . The amount of land actually involved is less than an ordinary city lot and is in a public park comprising more than 140 acres. The amount of ocean front used is only a small fraction of the total ocean front and the construction of the pier over that small portion of the beach to all practical purposes probably adds to rather than detracts from its availability to the public. It is certainly a use incidental to the main operation of this large public park. . . . 87

With respect to the matter of revenue, the court then quoted extensively from its earlier opinion in Gate City Garage, Inc. v. City of Jacksonville

84. Id. at —, 422 Pa. at 156-59 (emphasis added).
85. 79 So.2d 667 (Fla. 1955).
86. Id. at 668.
87. Id. at 669 (emphasis added).
dealing with the propriety of a long-term lease to a private party of a filling station in a large public parking area:

Constructing and leasing a filling station in a parking lot the size of that contemplated is a mere incident, the primary purpose being to acquire and construct a parking lot to serve a public and municipal purpose. 88

Continuing with its own analysis, the court observed:

A factor of importance is that for the use of this 40 feet of beach, the County is guaranteed a minimum rental of $3,500 per year and has as security for the payment of that rent a facility worth more than $150,000, which becomes the County’s property at the end of the term of the lease or as provided in the lease in the event of a breach of material condition thereof. This type of public financing should be encouraged rather than condemned. It has a tendency to preserve private enterprise of which this Court has had much to say [cases omitted].

Moreover, had the County concluded to construct this fishing pier and run it as a part of the public park, open to the use of the public without charge, which it had the legal right to do, the situation then would have resulted in appellants, who are conducting a private enterprise of a similar nature a short distance north of the public pier, operating their enterprise in competition with a similar project financed out of public funds. 89

Largely to the same affect is the Rhode Island case of Thompson v. Sullivan, 90 where the Supreme Court of Rhode Island held that the lease of a city wharf to a yacht club was not invalid under a statute authorizing the sale of city property whenever property was, in the opinion of the City Council, unsuitable or ceased to be useful for public purpose. The court held that it was not required to pass upon the wisdom, reasonableness or propriety of the City Council’s action, once it had made the requisite findings.

A similar result was reached in D. N. Kelly & Son v. Selectment of Town of Fairhaven 91 where a town, acting by virtue of statutory authority permitting it to acquire by purchase or eminent domain approximately 3 ½ acres of wharf property, leased part of it to a private company which erected a building thereon.

The Supreme Court of Minnesota held that the City of Minneapolis had the power to lease land acquired for the purposes of a river terminal but thereafter found unnecessary for such public use. 92 In part relying upon the earlier decision of Anderson v. City of Montevideo 93 upholding the leasing of an auditorium in a municipal building for purposes of

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88. 66 So.2d 653, 658-59 (Fla. 1953).
89. 79 So.2d 667, 670 (Fla. 1955).
91. 294 Mass. 570, 3 N.E.2d 241 (1936).
92. Penn-O-Tex Oil Co. v. City of Minneapolis, 207 Minn. 307, 291 N.W. 131 (1940).
93. 137 Minn. 179, 162 N.W. 1073 (1917).
showing movies, the court affirmed the opinion of the lower court which had found specifically:

That the leasing of said premises by the defendant to the plaintiff is proper and reasonably necessary for the proper and efficient operation by the defendant of said public dock and river terminal. That the said leasing of said premises will greatly promote the business and operation of said public dock and river terminal, and that the making of said lease by the defendant to the plaintiff is within both the express and implied authority of the defendant and is a proper exercise of such authority.94

Once again, there were specific statutes and charter provisions permitting the city to take, hold, lease and convey all real, personal and mixed property as its purposes might require.

The City of Los Angeles provides another excellent example for the manner in which a city, with appropriate authority, can deal with excess public land rights. Directly over a city-owned parking lot in the middle of town, the City of Los Angeles has become the landlord of the Los Angeles Mall Shopping Center, described by an information and instruction book for potential tenants published by the City of Los Angeles as "a project of the City of Los Angeles and the parking authority of the City of Los Angeles." The site consists of a two-block area containing the shopping center, four levels of underground parking beneath the center, public parks and a series of pedestrian vehicular tunnels and bridges crossing adjoining streets. The shopping center was constructed and is operated solely by the City of Los Angeles. Lease terms are between five and twenty-five years, and basically cover an area of approximately 125,000 square feet. It was developed at a cost of approximately $42 million. Prospective tenants range from restaurants and banks to shoe repair and passport photo shops.

Some caution, however, is in order as shown by State ex rel City of Charleston v. Coghill.95 There the court held that legislation authorizing a city to determine what amount of space in a public parking facility should be leased to private enterprise was not an unconstitutional delegation of legislative power.96

In light of some of the cases noted above, it should come as no surprise that many transportation-related public entities engage in a number of development projects with various private corporations and other private groups.

96. The court noted: "Certainly the creation of aesthetically appealing, convenient, and efficient downtown urban centers is a public purpose and may be considered in determining the validity of a particular parking facility." Id at 118.
The enabling legislation for the Chicago Transit Authority is fairly typical. It expressly contemplates disposition of excess property by either sale or lease:

The grantee may lease, sell or otherwise dispose of any property in its property accounts which is no longer necessary, appropriate, or adapted to the proper operation and maintenance of the Transit System.

Any property so sold or disposed of shall be removed from the property accounts of the Grantee.

The net rental or net income arising from the leasing of any property in the property accounts of Grantee shall constitute and be part of the gross revenues of the Grantee but only so long as such property is used or useful as operating transportation property. Chicago Transit Auth. Ord. (passed April 23, 1945).

In a recently published CTA manual on real estate practices and procedures, there are several examples in which the CTA holds property used for private purposes:

1) Air spaces over transit lines and station facilities including station parking lots;
2) Surface spaces over and alongside sub-surface transit facilities;
3) Surface spaces beneath transit facilities such as aerial structures;
4) Excess land lying outside of CTA right-of-way; and
5) Surface space required for future transit development such as the expansion of parking facilities at station areas.97

The manual goes on to state with respect to the dealings in such property:

9) Sale or long term grants of excess property rights within the developing economic zones shall be deferred until substantial value appreciation has accrued as a result of this development.

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b) Generally, CTA participation will be through its land ownership, with the aim of achieving optimum return while retaining maximum control.98

Having acquired much of the system from a multitude of private rail companies in the 1940's, the CTA also acquired a number of leaseholds for activities such as newspaper and food vending. Although many of these tenancies were year-to-year in nature, many have been continued since the street railway "went public." Indeed, some of the stations are even redesigned with these concessions in mind, not only because the concessions are convenient, but because they provide income. Examples are the Bryn Mawr and Kimball, and Lawrence Avenue stops where extra water and electricity lines were installed to provide for such concessions.

97. Chicago Transit Authority Real Estate Practices and Procedures, CLAIMS LAW/REAL ESTATE DEVELOPMENTS, Real Estate Section 29 (March 1975).
98. Id. at 31.
Where the tracks of the CTA pass over Fullerton Avenue, the CTA is presently negotiating for the construction of a building to be used for a private business. This is apparently not an unusual practice. The CTA owns approximately 150 commercial buildings under its elevated rightsof-way in various parts of the city. The buildings themselves have been acquired after the ground leases have run out and range from jewelry shops to supermarkets. Income from the leasing of these properties ranges from $1,200 to $30,000 per year. The tenants pay taxes on the leaseholds so that Cook County is able to get a part of a normally exempt property interest back on the ad valorem property tax roles. Moreover the City of Chicago receives additional sales taxes, and the CTA further benefits by the presence of a commercial venture under its right-of-way, which helps to avoid what might otherwise be a high-crime location.

The Chicago Transit Authority also engages in considerable joint development through leasing or selling some of its right-of-way. The CTA permits the construction of buildings on property previously condemned for turning circles for buses on CTA’s bus routes, which it will eventually take over when the ground lease runs out. In addition, the CTA regularly leases or sells air rights over its rights-of-way and stations, often at a considerable profit.

The BART system is also contemplating adding to its revenues by leasing space in its publicly-acquired land. BART has issued several policy statements (dated February, 1975) dealing with real estate and the development of income from district-owned real property, as well as special access to BART stations, plazas and parking lots. An excerpt:

The District will lease particular properties that are deemed to be located within an economic impact area of a transit station and District real property will not be sold where there is an obvious potential increase in value as a result of the transit system.

All real property holdings shall be analyzed for alternative sale or lease potentials which would be compatible with the construction, operation, maintenance, security and aesthetic treatment of the transit system as well as with community planning and zoning patterns. Accommodation of compatible supplemental revenue-producing uses shall be considered in the design, construction and operation of the system.

Excess real property shall be analyzed as to optimum timing for disposal and for possible leasing advantages. Market analysis and timing of disposal shall reflect good business practice. When analysis indicates that disposal should be deferred, interim leasing arrangements should be pursued to:
1) maintain properties in a neat and orderly condition,
2) serve useful individual and community purposes,
3) reduce land maintenance and cleanup costs, 
4) provide District income.99

The Policy on Special Access to BART Stations, Plazas and Parking lots contains the following interesting provision:

Compensation should be obtained for all special access permitted to BART underground stations and above-ground plazas and parking lots based on the net enhancement in property or business values derived from such access where such benefits exist. Costs of developing access should be deducted from gross value increases to arrive at net enhancement values. One method of doing this would be to amortize development costs and apply them as access rental offsets. Compensation should be paid not only for physical access, but also for visual access or exposure permitted by BART such as for display cases and display windows fronting on BART facilities or for improved light, air, and view derived from BART-controlled access.100

BART has received a recommendation from one of its consultants that it develop an office building around its Lake Merritt stop to be occupied in part by BART and in part by other public agencies and private interests. BART owns three blocks around this particular stop at which it has its headquarters. BART approved a $1,000 a month rent for a visual access window for a donut shop at one stop and at another BART is leasing right-of-way space for parking. It has also received a proposal to put a restaurant over the ventilation shaft of the Ferry Building stop. BART also obtains revenue by leasing connections from its stops to commercial premises such as Woolworth's, Wells Fargo Building and California Savings and Loan Association. BART officials are quick to point out that these arrangements do not yet produce significant income. Rental income of around $100.00 per month for the first ten years of the term appears to be typical. They estimate that perhaps twenty-five such agreements have been negotiated. So far BART has not participated directly in any air rights development but only in leases for development when the whole fee, excepting sub-surface rights, was acquired above its subway right-of-way.

There is also considerable use of existing property for private developments over the rights-of-way and at interchanges with respect to various state highway programs. Most states expressly prohibit commercial establishments in rights-of-way for freeways and controlled access highways. However, in many states toll highways are expressly exempted from this provision. For example, in Illinois the Illinois Tollway Commission,

established by statute to construct and maintain a toll-highway system, is specifically permitted:

To contract with and grant concessions to or to lease to any person, partnership, firm, association or corporation so desiring the use of any part of any toll highways, excluding the paved portion thereof, but including the right-of-way adjoining, under, or over, said paved portion for the placing of telephone, telegraph, electric, power lines and other utilities and for the placing of pipe lines, and to contract with and grant concessions to or to lease to any person, partnership, firm, association or corporation so desiring the use of any part of the toll highways, excluding the paved portion thereof, but including the right-of-way adjoining, or over said paved portion for motor fuel service stations and facilities, garages, stores, hotels and restaurants, or for any other lawful purpose, except for the tracks for railroad, railway or street railway use, and to fix the terms, conditions, rents, rates, and charges for such use.\footnote{101}

Acting pursuant to such authority, the Tollway Commission has leased space for five restaurants and ten gasoline service station establishments both adjoining and over tollways in Illinois. The basic leases provide that the Commission receives a percentage of the sale of the various products. The leases run for 25 years.\footnote{102}

This practice of leasing highway right-of-way is fairly widespread according to a study on multiple uses of highway rights-of-way.\footnote{103}

Such development, however, pales in comparison with the ambitious projects undertaken by the California Department of Transportation (CALTRANS) both under and above its system of freeways. CALTRANS has broad statutory authority to permit private development on its property:

The Department may lease to public agencies or private entities for any term not to exceed 99 years the use of areas above or below state highways, subject to such reservations, restrictions and conditions as it deems necessary to assure adequate protection to the safety and the adequacy of highway facilities and to abutting or adjacent land uses. . . . Prior to entering into any such lease, the Department shall determine that the proposed use is not in conflict with the zoning regulations of the local government concerned.\footnote{81}

\footnote{101}{ILL. REV. STAT. ch. 121, § 314a34(e) (1975) (emphasis added).}

\footnote{102}{Pennsylvania's turnpike law contains a similar provision: "The Commission is hereby authorized to fix, and to revise from time to time, tolls for the use of the turnpike and the different parts or sections thereof, and to charge and collect the same, and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages, stores, hotels, restaurants, and advertising signs, or for any other purpose, except for tracks for railroad or railway use, and to fix the terms, conditions, rents and rates of charges for use." PA. STAT. ANN. tit. 36 §652.15 (Purdon 1961).}

\footnote{103}{National Cooperative Highway Research Program, Rep. 53, Multiple Use of Lands Within Highway Rights-of-Way, 55-56 (1968).}
On the strength of its statutory authority, CALTRANS has issued a series of implementing regulations, and has issued a statement concerning air space leasing and a development program which states CALTRANS' position with respect to its long-term program:

Long Term Lease Program

The primary objective of this program is to encourage the construction of building improvements on Airspace. Many prime sites for the construction of building improvements on a long term lease are available. Developers are invited to present their proposed uses for Airspace.

Acting under its broad authority CALTRANS has leased space under the Santa Monica freeway in Los Angeles for a 300 unit, 40,000 square foot warehouse. Now completed, there is a waiting list to get in. At another location along the same freeway ground was recently broken for a 40,000 square foot building with the underside of the freeway serving as a roof. The construction of two or three 15,000 square foot buildings of the same type is due to commence within the next few months.

In San Francisco the Department expects to break ground soon for a car wash and service station similarly located under a freeway. There are plans to do the same for automobile sales agencies. A $25 million project will soon be underway on air space and land in a loop of the Hollywood Freeway to contain a 16-story office building, three theatres and a 16-story hotel. We understand there is also located in Sacramento above the freeway the beginnings of a Holiday Inn.

Returning to Colorado, there are several interesting examples that might be useful as precedent and guidance for the undertaking of public/private development techniques. One of the most promising is the statute creating the Moffat Tunnel Improvement District. The purpose of the tunnel was to provide an avenue of communication through the Continental Divide to "reduce the barrier which now separates the western portion of the state from commercial intercourse with the eastern portion thereof." The project was specifically declared to be a public use even though not many persons "may enjoy it" and even though persons using the improvement must pay for the privilege. The statute specifically sets out authority to acquire not only a tunnel site but such other lands and approaches as may be necessary, and to exercise the power of eminent domain when necessary to accomplish the purposes of the Act. The Board governing the district is specifically given the power:

105. CALIFORNIA DEPARTMENT OF TRANSPORTATION, CAL. STS. HY. REGS. 70.001 (West 1975).
106. Id.
108. Millheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649 (1922).
[To enter into contracts for the use of the said tunnel, its approaches and equipment, with persons and with private and public corporations, and by said contracts to give such persons or corporations the right to use said tunnel, its approaches and equipment for the transmission of power, for telephone and telegraph lines, for the transportation of water, for railroad and railway purposes, and for any other purposes to which the same may be adapted.]

Litigation established that it was not necessary that rentals from the leases be sufficient to pay the entire cost of the tunnel—amounting nearly to a subsidy for the tunnel.

It is also interesting to note that the State Highway Department in its authorizing legislation is granted the power to acquire and dispose of property for future needs and to lease any lands which are held for state highway purposes and are not presently needed therefor, on such terms and conditions as the Chief Engineer, with the approval of the Governor, may fix.

Interestingly enough, however, a special section on Freeways and Local Service Roads provides:

No commercial enterprise or activity for serving motorists, other than emergency services for disabled vehicles, shall be conducted or authorized on any property designated as or acquired for or in connection with a freeway or highway by the State Department of Highways or any other governmental agency.

It may be that this provision is confined in its application to the particular highways noted in this section, and not to highways, turnpikes, tollroads and toll tunnels generally. In any event, the absence of such a provision dealing with rapid transit could be construed to mean that if such limitations had been contemplated, they would have been inserted in the statute. Their absence would therefore be added authority for permitting such private uses on transit district property in order to generate a revenue stream, an aspect of value capture.

IV. INTERGOVERNMENTAL COOPERATION/JOINT DEVELOPMENT

Another means by which a Transit District could accomplish "value capture" is by means of intergovernmental cooperation. This might take a number of forms. For example, a joint venture or some other type of agreement may be entered into with an urban renewal authority.

111. Moffat Tunnel Improvement District v. Denver and St. Louis Ry. Co., 45 F.2d 715 (10th Cir. 1930).
municipalities, or county and special district agencies in order to jointly participate in the land use around transit stops. If the Transit Authority is not able itself to recapture some of the value accruing to the property surrounding such a stop, it may at least see that public benefits, both financial and otherwise, accrue to other governmental entities. The ability to enter into such agreements in some jurisdictions has been largely dependent upon the existence of constitutional or statutory intergovernmental cooperation or agreement provisions, together with case law interpreting the same. The case law on intergovernmental cooperation and development, outside of service contracts, is sparse, although such cooperation is apparently being pursued successfully in several parts of the country.

The development of the Bay Area Rapid Transit System (BART) was accomplished through a unique method of intergovernmental cooperation. The California Health and Safety Code provides for limited intergovernmental cooperation in the development of transportation systems. Section 33448 provides:

In a county with a population of 4,000,000 persons or more, or in a city of 500,000 persons or more, an agency may, with the consent of the legislative body, acquire, construct, and finance by the issuance of bonds or otherwise, a public improvement whether within or without a project area consisting of a transportation collection and distribution system and peripheral parking structures and facilities, including sites therefor, to serve the project area and surrounding areas, upon a determination by resolution of the agency and the legislative body that such public improvement is of benefit to the project area. Such determination by the agency and the legislative body shall be final and conclusive as to the issue of benefit to the project area.\textsuperscript{114}

BART has had particular success with the utilization of joint powers agreements entered into with cities and various special districts. Through these, BART has regularly condemned land for transit stops not only for its own purposes but for the municipal purposes of the local government with whom it has entered into the agreement. An example of such agreement is one between BART, Oakland, Alameda County, and the not-for-profit Coliseum, Inc., to construct a walkway to the Coliseum Sports Complex from the BART station. Similar agreements between BART and CALTRANS, in which CALTRANS acted for BART, resulted in the acquisition of substantial portions of highway and rapid transit right-of-way together with BART parking areas.

In Boston, the Boston Redevelopment Authority is undertaking a venture at the old South Station, acquired in 1965 from the Penn Central Railroad. After demolishing much of the original terminal, the land was

\textsuperscript{114} CAL. HEALTH & SAFETY CODE § 33448 (West 1973).
sold for the construction of a private office building and a Federal Reserve Bank building. There are plans to construct a new "intermodel terminal" for rail, bus and subway together with commuter parking. Private conces-sionaires will be located in the complex. BRA is using HUD money for site clearing and renovation.115

The CTA has also entered into a number of agreements with other governmental entities, such as the Metropolitan Sanitary District of Chicago (MSD) whereby it leases properties from the MSD for certain of its activities and leases to the MSD property for an MSD well site. In another instance the CTA exchanged an easement, which was needed for the construction of a University of Illinois hospital near the CTA structure on Taylor Street, for land which the University held and which the CTA wanted for the construction of a station.

Again returning to our Colorado example, the constitution of the State of Colorado provides:

Nothing in this constitution shall be construed to prohibit the state or any of its political subdivisions from cooperating or contracting with one another or with the government of the United States to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt.116

The Denver Urban Renewal Agency (DURA) has the power to condemn for the purposes of redeveloping a slum or blighted area, and, for the same purpose, to engage in tax increment financing. We understand the Denver Rapid Transit District is contemplating an agreement with DURA whereby the RTD would lend to DURA sufficient funds to undertake redevelopment, perhaps including the construction of a station with RTD funds, to eventually be paid back through the instrument of tax increment financing. By such an agreement RTD would obtain a station free of charge and would make a substantial contribution to the development of the community in the immediately surrounding area. It may be that some sort of joint sharing of revenues or powers could also be worked out with applicable urban drainage and flood control districts, special districts (which may provide a range of services from flood control and public service transportation to housing)117 and with airport authorities, which have broad powers of eminent domain.118

118. Id.
Some care must be taken in drafting such agreements and the provisions by which the various parties thereto, being governmental entities, are authorized to act. There appears to be some question, for example, about multiple county districts embracing a number of home rule cities, and the powers the general assembly can give to such districts in matters of local and municipal concern. Care would need to be taken to ensure that the appropriate municipal corporations are brought into such agreements to the extent that anything falling uniquely in their province would be contemplated by the parties thereto.

V. TAXING AND OTHER MONETARY TRANSFERS

A. Tax Increment Financing

Another value capture technique involves the use of taxing mechanisms, either in connection with, or separate from, the techniques noted above. Basically, tax increment financing is a method by which one municipal agency or corporation pledges all or a portion of the incremental tax revenue generated by public improvement or development created and initially paid for by a second agency, to that agency in order to pay it back. The amount pledged is generally from the ad valorem property taxes from the district, and the incremental value thus accrued and reflected in the ad valorem property tax is used to pay off the bonds issued by the developing agency. This device is particularly popular among local and federally-funded development agencies in order to undertake major re-development projects. One of the major advantages of such a system or technique is that no new taxes are levied or collected. Rather, the burden falls upon whichever general purpose government is pledging the increments (or a portion thereof) created by the redevelopment. Unless an inflation factor is plowed into the base, though, the tax revenues may not keep pace. This device has generally been restricted legislatively to development districts. Legislation so providing may be found in California, Montana, Minnesota, Kentucky, and, in bill form, in Illinois. The Kentucky statute was recently struck down by the Supreme Court of Kentucky as technically violating the terms of the Kentucky Constitution, but the Court commented that: "We find no fault in the purpose or the theory [of tax increment financing], but for the reasons that follow it is our opinion that each of the acts transcends the limits of the Kentucky Constitution." 120

119. Four-County Metropolitan Capitol Improvement District v. Board of County Comm'rs, 149 Colo. 284, 369 P.2d 67 (1962).
120. Miller v. Covington Dev. Authority, 539 S.W.2d 1 (Ky. 1976). The difficulty encountered by the Tax Increment Act was that it permitted school districts to participate with the result that taxes collected by a school district would be subject to a tax increment transfer and the funds
As noted above, the Denver Urban Renewal Agency has such authority. It is worth noting that the constitution of the State of California was specifically amended to permit local development authorities to engage in tax increment financing theoretically obviating the misfortune of the Kentucky statute. The Constitution limits authority to engage in tax increment financing to redevelopment authorities. During the first 2 years of experience in California, $170 million worth of tax allocation bonds have been issued by 26 different redevelopment agencies. Providing the matter of legal authority could be solved, it could be useful as a technique for the development of rapid transit as well.

Examples of the use of such techniques applicable to transit districts are few and far between. As in previous sections, however, there is no intrinsic reason why it would not be possible to analogize to other situations involving local governmental agencies or, indeed, the local governments themselves, to the extent the exercise of the power does not depend upon being a general purpose governmental entity.

B. Special Assessments

The use of special assessment districts is another technique whereby a transit agency could effect value capture.

California is a pioneer in the enactment of special benefit assessment legislation, which are particularly suited to transit purposes:

The legislative body of any city or the Board of Supervisors of any city and county may establish one or more special benefit districts within the city and county pursuant to this chapter. Any special benefit district may consist of either contiguous or non-contiguous areas of plan within the city or county. Each zone within a special benefit district shall be an area adjacent to a station of the municipal transportation system or along the route or lines of said system which the legislative body or Board of Supervisors determines will receive special benefit by reason of the operation of transportation facilities but all zones within a special benefit district

would not be used directly for educational purposes. This the court held was strictly prohibited. In a particularly zealous opinion the court unfortunately went on to say:

It is no answer to say that tax increments will be money the schools would not have had anyway, because the fact is that neither could this portion of the tax increments ever be realized except through taxes levied for and in the name of the common schools. It is also irrelevant we think, that as a practical matter tax increment financing eventually will increase the revenues of a school district by enhancing its tax base, or that redevelopment of depressed areas may increase the average levels of student achievement by improving the environment in which the student lives. Id. at 5.

Hopefully the formalistic rigidity of the Kentucky Supreme Court is not contagious or legislative wisdom will overcome such difficulties through better draftsmanship or constitutional amendment.

121. Cal. Const. art. 16, § 16.
need not be adjacent to the same station or adjacent to the same portion of
the route or lines.\textsuperscript{122}

This special benefit district legislation serves several important
functions. First, it represents a declaration by the legislature that special
benefits may accrue to property along a mass transit line. Although a
property owner may claim that his land receives no special benefits,
courts generally give considerable weight to legislative determinations.
Thus, once a special benefit district is determined, should such power be
granted to a local transit district, the burden to show that certain land is not
especially benefited is placed upon the landowner. Second, the legisla-
tion specifically allows for the creation of several districts within one transit
area. The special district itself may contain separate zones. These pro-
visions give the transit district considerable leeway to apportion costs in
proportion to benefit. Instead of assessing only property adjacent to a
transit station, as would be the case with respect to the usual public
improvement situation, the district could set up zones with assessments
decreasing in proportion to distance from the transit stop, or in accord-
ance with some other formula.

We note in passing that this particular piece of legislation has never
been used, despite the fact that the most recent and modern of rapid
transit systems, the Bay Area Rapid Transit System, was constructed
during the 1960's in California. However, much of BART's acquisition
program was completed by the time the "Mills Bill", quoted above,
became law. Moreover, on advice of counsel, BART officials were particu-
larly concerned with the affect of protracted hearings and litigation over
such a new financing technique. The Mills Bill requires a two-thirds vote in
order to provide for the bonding required. Moreover, the task of establish-
ing criteria for ascertaining incremental value was thought to be too
difficult, possibly leading to arbitrary decisions. It was considered that
sufficient benefit would accrue to BART from its ability to tax real estate
values in Marin County which would presumably generate increased
revenues as BART developed. Finally, it is worth noting that the Special
Benefits Assessment Act in California pertains only to land. It was ap-
parently never contemplated that improvements thereon would be subject to
such a tax.

In New York, rapid transit lines were authorized to be constructed at
least in part by means of special assessments along the lines.\textsuperscript{123} We do
not know of any that were so constructed, however.

\textsuperscript{122} CAL. PUB. UTIL. CODE § 9900 et seq. (Deering 1968).
\textsuperscript{123} See BUILT OR IMMINENT U.S. EXAMPLES OF VALUE CAPTURE/JOINT DEVELOPMENT, supra n. 115.
Another device is downtown mall construction, which is a close analog to the transit-related special benefit assessment Mills Act in California. Louisville, Kentucky has recently completed construction of a downtown mall whereby adjacent commercial property owners were assessed a portion of the cost of constructing the mall. The non-adjacent owners could have been assessed if an appropriate finding of benefit had been made by the Board of Aldermen. This particular method of assessment was specifically authorized by a statute which comprehensively describes both the procedure and the method of ascertaining such special benefits.\(^{124}\)

The legislative findings in terms of benefit and public purpose are clear:

The general assembly of the Commonwealth of Kentucky finds as a fact that the preservation of downtown areas of cities is vital to the health, safety and material wellbeing of the citizens and inhabitants thereof, and that the construction and installation of pedestrian mall projects will contribute to the safe and effective movement of persons, and serve the public health, safety, convenience, enjoyment and general welfare. The governing body of a city, to protect and serve the public safety, convenience and welfare and the interests of the public in the safe and effective movement of persons, and to preserve and enhance the function, appearance and economic viability of the central mercantile and business areas of such city, may initiate, construct, install and establish a pedestrian mall project in the manner herein provided, at the exclusive cost of the owners of land located in the pedestrian mall benefit area, which is benefited by a pedestrian mall project.\(^{125}\)

While it has been pointed out that such a technique used in connection with a transit stop might have a more difficult time in meeting a strict benefits test, it would depend to a large extent on the law of the particular jurisdiction. The type of analog that might well serve to persuade court or legislature that property owners who are specifically benefited could legally be taxed is exemplified by a recent Court of Appeals case from Michigan. In Christoff v. City of Gladstone,\(^ {126}\) four of eleven property owners in the city complained of a special assessment levy for the laying of water mains. Despite the fact that the suit below had been for injunctive relief and that under Michigan law such equitable actions are reviewable de novo, the court found no reason to overturn the lower court’s finding. It was held that where the property owners could be benefited by increased


fire protection, assured safe water supply, and increase the market value of their property, special assessment was proper.

While it is not directly on point, the New York Supreme Court decision in Metropolitan Transportation Authority v. City of New York,127 is interesting. The report of the case sets forth the fact that income from concession revenues at Grand Central Station, and real estate income from property along Park Avenue, contributes to the operation of the two stations and is worth fighting about. There is no evidence, however, that the transit authority ever went out of its way to attempt to generate much revenue from such value capture sources. Nonetheless, the 1973-1974 New York Transit Authority’s Budget Data and Transit Fact Publication128 shows that "other than passenger" revenue, consisting mainly of advertising, rentals and miscellaneous, and station concessions, amounts to some $8 million. Of course, this needs to be compared to a total annual figure of $538,295,000.00 for 1973.

In the review of materials with respect to monetary transfers, there are several matters with respect to our example, Colorado, which might be useful to note in this section. First of all, under Public Improvements, there is a section dealing with public malls.129 Aside from providing specifically that the legislative body of the city, in connection with the establishment of pedestrian malls, may convey, lease or transfer parts of malls in various ways, make improvements of any kind, including commercial buildings and facilities and the like, it also authorizes the legislative body:

(e) To pay from the general funds of the city from proceeds of general obligation bonds from other monies available through the city from the proceeds of the assessments levied on lands benefitted by the establishment of a pedestrian mall, from funds raised through bonds issued there against or from any other source whatsoever, the damages if any allowed or awarded to any property owner by reason of the establishment of a pedestrian mall and to make other provisions to secure the payment of said monies as provided in Section 31-25-406.

(f) To pay from the general funds of the city from proceeds of general obligation bonds from other monies available to the city from the proceeds of assessments levied on property benefited by any such improvements from funds raised through bonds issued payable from such assessments or from any other source whatsoever the whole or any portion of the cost of such improvements.

(g) To levy assessments against properties benefited by the proposed pedestrian mall in an amount no greater than the total damages or compensation paid to landowners or to assess such damages as part of the total

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128. See generally New York City Transit Authority Operating Budget - 1975.
cost of the improvements made of the mall area so long as the amount assessed does not exceed the special benefits conferred.\textsuperscript{130}

While there is no particular definition of special benefits in the statute, the wording quoted above does not seem to confine the levy of an assessment for special benefits to abutting properties only.

It also appears to be the law in Colorado that to sustain a special assessment it must appear that a benefit has been occasioned to the premises assessed at least equal to the burden imposed. Nevertheless, it is also true that a presumption of validity attaches to a city council determination that benefits especially accruing to properties equal or exceed the assessments thereon, and the burden is generally on the property owners, who must affirmatively show to the council or other body by substantial evidence, that the contrary is true.\textsuperscript{131} It also appears to be the law, according to the last cited case, that remote or contingent benefits enjoyed by the general public will not sustain a special assessment. However, it does not appear that the kinds of benefits which would accrue to the owners of properties nearest or adjacent to a transit district, together with others a bit further afield, would fall into the latter category.

Finally, the case of \textit{Milheim v. Moffat Tunnel Improvement District},\textsuperscript{132} dealing with the construction of the Moffat Tunnel, indicates that the tunnel was constructed by virtue of the formation of an improvement district with the right to levy taxes for the construction of the said tunnel. Multiple challenges to the imposition of the tax were turned back, and it would appear that the case may be helpful precedent.

\section{VI. Conclusion}

The array of techniques for implementing value capture policy have long since moved from the theoretical to the practical stage. Supplemental condemnation, joint development, air rights development, special benefit assessments and tax increment financing—\textit{all} have their precedents. Indeed, all are going forward—or have gone forward—somewhere, whether beneath a freeway in California, at a central mall in Kentucky, or at a bus turning circle in Illinois. The question is no longer \textit{whether}, but \textit{how}, \textit{when} and \textit{under what conditions} will public authorities be successful in reaping the fruit of their own efforts, hopefully to perpetuate and enhance their contribution to the quality of life.

\begin{itemize}
\item \textsuperscript{132} 72 Colo. 268, 211 P. 649 (1922).
\end{itemize}
Safety Regulation Of The Concorde
Supersonic Transport: Realistic Confinement Of
The National Environmental Policy Act*

ROBERT B. DONIN**

INTRODUCTION

Rarely if ever in the past has government provided the forum for so
dramatic a confrontation between man's technological ingenuity and his
concern for environmental quality as in the controversy over the Concorde
Supersonic Transport. Depending upon the observer's point of view;
Concorde has been depicted as both an "elegant" delta-wing airplane
and a "bird of prey;" as "one of the most positive steps forward made in
aviation . . . since the industrial revolution" and "the Edsel of the
airways;" as a symbol of progress and a symbol of environmental
degradation.

On February 4, 1976, supporters of Concorde scored a partial victory
when Secretary of Transportation William T. Coleman, Jr. issued a 61-
page decision authorizing British Airways and Air France to conduct a
16-month demonstration of Concorde service with four flights per day to

* The views contained herein are those of the author and not the Department of
Transportation.
** Special Assistant to the General Counsel, Office of the Secretary of Transportation B.A.,
Colgate University, 1971; J.D., University of Pennsylvania Law School, 1974.
2. The New York Times, February 24, 1976, at 34, col. 5 (Letter to the Editor from John J.
Butler, Chairman, Heathrow Association for the Control of Aircraft Noise).
3. C. GARDNER, CONCORDE: THE QUESTIONS ANSWERED 1 (promotional booklet published by
British Aircraft Corporation, U.S.A.).
(editorial).
John F. Kennedy International Airport, New York, and two flights per day to Dulles International Airport, outside of Washington, D.C. Secretary Coleman's decision was based on an extensive environmental review under the National Environmental Policy Act of 1969 (NEPA) which centered around the preparation and release by the Department's Federal Aviation Administration (FAA) of a four-volume environmental impact statement. Like the public debate which surrounded—and continues to surround—Concord, the impact statement concentrated on four questions involving the potential ecological consequences of Concorde operations to and from the United States: (1) How would Concorde flights affect the cleanliness of the air? (2) How would Concorde flights affect the consumption of scarce fuel resources? (3) Would the emission of Concorde exhausts in the stratosphere increase the incidence of skin cancer by reducing the density of the earth's ozone layer? and (4) What would be the noise impact of Concorde flights on the residents of communities surrounding Kennedy and Dulles Airports?

It was, therefore, ironic that when the Environmental Defense Fund (EDF) petitioned the United States Court of Appeals for the District of Columbia to overturn Secretary Coleman's decision authorizing a 16-month Concorde demonstration, EDF rested its case not on the potential threats of air pollution, fuel inefficiency, ozone depletion and noise on which the nation's attention had been fixed out on the aircraft's safety. EDF contended that several serious questions cast doubt on Concorde's operational safety. Since the physical safety of passengers in the air and persons on the ground was an aspect of "the quality of the human environment," the group argued, the FAA's failure to discuss these safety questions in its environmental impact statement violated NEPA.

Having heard oral argument the same day, the Court of Appeals on May 19, 1976, issued its decision in Environmental Defense Fund v. DOT and the other cases which had been consolidated with it:

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5. Concorde flights to Dulles Airport, which is owned and operated by the federal government, began May 24, 1976. The start of Concorde service to Kennedy Airport has been halted as of this writing by a resolution of the Port Authority of New York and New Jersey, airport proprietor, banning Concorde service until SST operations have been conducted for six months at Dulles. British Airways and Air France have challenged this restriction in a suit filed in the United States District Court for the Southern District of New York. British Airways Bd. & Compagnie Nationale Air France v. Port Auth. of New York & New Jersey, No. 76-1276 (S.D.N.Y., filed March 17, 1976). Scheduled commercial Concorde service has been inaugurated on January 21, 1976 with British Airways' flights from London to Bahrain and Air France's flights from Paris to Rio de Janeiro.

7. See notes 15-22 and accompanying text, infra.
10. Additional petitions for review were filed by the State of New York (contending that the
The Secretary has decided, for the reasons stated in his opinion, "to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a period not to exceed sixteen months under limitations and restrictions set forth [in that opinion]." The purpose of the trial period is to provide additional information to assist the Secretary in his evaluation of the "environmental, technological, and international considerations" which continued operation of Concordes into this country would involve.

This court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law.

By this brief order, the Court of Appeals resolved all issues, including the issue of Concorde safety, in favor of the Government. Yet its failure to produce an accompanying opinion leaves its reasoning and the scope of its holding to speculation. The purpose of this article is to analyze whether aircraft safety is an "environmental" question within the meaning of NEPA and to review the legal bases on which the court may have concluded that it is not.

BACKGROUND

The Concorde Supersonic Transport was developed as a joint project of the British and French governments and their respective aircraft manufacturers and contractors. Although the two countries had initially given independent consideration to the development of a civil supersonic aircraft in the 1950's, they decided in 1961 to combine their efforts. In November, 1962, the Anglo-French Concorde Treaty was signed, leading to cooperation in the design and manufacture of the aircraft between British Aircraft Corporation and Aerospatiale France.

Despite aviation's experience with supersonic military aircraft for over twenty years, the airframe and engine design approved in 1965 for commercial use represented a new amalgam of trade-offs between the competing demands of economics and aeronautics. If too large, Concorde would suffer a "range" penalty rendering it incapable of flying supersonically over the long North Atlantic route for which its creators perceived a valuable market, or a "payload" penalty in the form of fewer available seats for fare-paying passengers. If too small, the attendant...
limitations on the capacity of the aircraft would threaten the profitability of operations or force the fare so high as to price the aircraft's services out of the market.

The Concorde which ultimately emerged is a four-engine delta-wing turbojet aircraft capable of carrying approximately 100 to 125 passengers—or a payload of 25,000 pounds—over a range of approximately 4,000 miles. It can cruise at approximately 1,350 miles per hour, or approximately twice the speed of sound, at an altitude of between 50,000 and 60,000 feet and reduce the seven-hour subsonic travel time between Washington and London by three hours and thirty minutes.\textsuperscript{11} The current fair for Concorde service between the United States and Europe is 20% above the comparable first-class fare on subsonic aircraft. With a pricetag of $60-62 million each, nine of the sixteen production aircraft which are either completed or in the course of construction have been sold; five to British Airways and four to Air France.

The first prototype Concorde (001) and (002) flew in 1969. These were followed by the two pre-production aircraft (01 and 02). Subsequent testing included a series of flights in 1972-1975 to Boston, Miami, Dallas-Fort Worth, Washington, D.C., Los Angeles, Anchorage, Fairbanks and other U.S. cities.

On October 10, 1975 and December 5, 1975, the French and British governments, respectively, issued certificates of airworthiness to the Concorde. The Concorde's manufacturers' application to the FAA for a U.S. type certificate—the prerequisite to purchase of the plane by a U.S. carrier\textsuperscript{12}—had been pending since 1965. However, the European certificates qualified British Airways and Air France to apply to the FAA in 1975 for permission to make two scheduled flights each per day to Kennedy Airport and one scheduled flight each per day to Dulles Airport.\textsuperscript{13}

\textsuperscript{11} Concorde is 204 feet long with a wing span of 84 feet and an overall height of 40 feet. It is powered by four Rolls-Royce (Bristol) Sncma Olympus 593 engines which are mounted in pairs in underwing nacelles and equipped with afterburners for takeoff and acceleration to supersonic speed. The aircraft is constructed principally of aluminum alloy, with titanium and steel used in power-plant areas and in landing-gear components.

\textsuperscript{12} Federal aviation regulations provide that no United States air carrier may operate an aircraft unless that aircraft is registered in the United States and carries a current airworthiness certificate issued by FAA, 14 C.F.R. § 121.153 (1976). An FAA airworthiness certificate will be issued upon a finding that the individual aircraft conforms to its underlying type certificate and is in condition for safe operation. Federal Aviation Act § 603(c), 49 U.S.C. § 1423(c) (1970). The requirements for type certificates are set out in Federal Aviation Act § 603(a), 49 U.S.C. § 1423(a) (1970).

\textsuperscript{13} Technically, the decision before the Secretary of Transportation was whether to approve amendment of the "operations specifications" of British Airways and Air France. Federal aviation regulations, 14 C.F.R. Part 129 (1976), require that foreign air carriers intending to conduct commercial operations in the United States submit for FAA approval a list including the
Anticipating that this authorization could constitute "major Federal action significantly affecting the quality of the human environment"\textsuperscript{14} within the meaning of NEPA, the FAA undertook an environmental review which included a draft environmental impact statement, released for public comment on March 3, 1975, hearings on the draft, a final environmental impact statement released on November 13, 1975, and a final public hearing which was personally chaired by Secretary Coleman on January 5, 1976.

Even before the draft environmental impact statement had been released, public debate began to center on the ecological concerns which would ultimately lead Secretary Coleman to describe the Concorde decision as "difficult and close."\textsuperscript{15} First and foremost was the airplane's noise. To observers buoyed by the significant strides the United States had made toward solving the aircraft noise problem through the introduction of the quieter widebodies\textsuperscript{16} and the requirement that all new subsonic jets manufactured in this country meet federally-prescribed noise emission standards,\textsuperscript{17} Concorde was anathema. Although there was no danger of sonic boom (civil supersonic flight over the United States is prohibited)\textsuperscript{18} the noise emitted by Concorde at subsonic speed posed a potential environmental threat. Tests indicated that while on landing the Concorde was slightly quieter than a B-707, on take-off it was twice as loud as a B-707, four times as loud as a B-747 and eight times as loud as a DC-10.\textsuperscript{19} Moreover, the low-frequency rumble of the Concorde made a types of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed. Up until the time that British Airways and Air France submitted their amendments to add the proposed Concorde operations to their operations specifications, the approval of such applications by FAA had been virtually routine. The unique circumstances surrounding the Concorde application caused a departure from this pattern.

15. THE SECRETARY'S DECISION ON CONCORDE SUPersonic TRANSPORT 59 (February 4, 1976) [hereinafter cited as SECRETARY'S DECISION].
16. The B-747, DC-10 and L-1011.
17. See 14 C.F.R. Part 36 (1976) (This regulation allows civil flight at supersonic speeds over the United States only for testing purposes).

A variety of methodologies for the measurement of noise have been developed. Two significantly different noise descriptions employed in the Concorde Environmental Impact Statement are the "single-event" method, which measures the average noise of a single fly-over in units of EPNdB (effective perceived noise level in decibels), and the "noise exposure forecast" method, which measures the noise impact of the total aircraft operations conducted at an airport each day. On a single-event basis, tests showed that Concorde subjected 47.6 square miles of land to brief noise events of at least 100 EPNdB—the noise of heavy city traffic at 25 feet—as compared with 7.49 square miles and 2.91 square miles for the B-707 and B-747, respectively. On a "noise exposure forecast" basis, however, tests indicated that little change in cumulative noise impact would be effected by the proposed Concorde operations. Nevertheless, the
qualitative as well as quantitative difference.\textsuperscript{20}

Environmentalists were also disturbed by the claim that nitrogen in the Concorde exhaust would reduce the concentration of ozone in the stratosphere, permitting more ultraviolet radiation to reach the earth’s surface and thereby causing an increase in the rate of nonmelanomic, or non-fatal skin cancer.\textsuperscript{21} Still others, including the Federal Energy Administration, criticized the relative fuel inefficiency of Concorde as compared with subsonic jet transports and urged that for this reason

Concorde Environmental Impact Statement concluded: “The perceived loudness of the Concorde will be annoying. It will interfere with communications and may cause startle.” \textit{id.}

\textsuperscript{20} Concorde sound has five times the low frequency content, and therefore five times the vibrational effect, of subsonic jet noise. This is because low frequency sound dissipates less rapidly in the atmosphere and more closely matches the resonant vibrations of man-made structures.

Tests found that while the vibrations caused by Concorde overnight would generally be barely perceptible, they might on occasion be sufficiently strong to cause “some household rattle of dishes, pictures, lamps and other bric-a-brac being disturbed.” 1 Concorde Environmental Impact Statement, supra note 19, at VI-97.

\textsuperscript{21} Analysis of this question in the environmental impact statement was based primarily on reports by DOT’s Climatic Impact Assessment Program (CIAP), \textit{CIAP Report of Findings: The Effect of Stratospheric Pollution by Aircraft} (1974), and the National Academy of Sciences (NAS), \textit{Environmental Impact of Stratospheric Flight} (1975). Both the CIAP and NAS studies found the causal link between Concorde flight and increased skin cancer clouded by theoretical uncertainties and numerous other causes of ozone variation. Because the effects of natural variations in the thickness of the ozone layer—caused principally by solar activity—for over-shadow manmade effects, the linkage between Concorde flights and ozone reduction is difficult to confirm empirically. The World Meteorological Organization concluded that 30-50 SSTs would not have an effect on the ozone layer “that would be significant or that could be distinguished from natural variations.” Statement of the World Meteorological Organization on Modifications of the Ozone Layer Due to Human Activities, Nov. 26, 1975. The situation is further complicated by the fact that aircraft are among more than 30 possible causes of change in ultraviolet radiation, including nuclear testing, volcanic eruptions, and fluorocarbons from aerosol sprays.

Assuming the validity of the theory of ozone reduction, the Concorde Environmental Impact Statement, using data from the CIAP report, calculated that six daily Concorde flights operated over a 30-year period could reduce the density of the ozone layer by about .04 percent, resulting in the addition of approximately 200 new cases of nonmelanomic skin cancer to the current rate of 250,000 per year in the United States. Concorde Environmental Impact Statement, supra note 19, at VI-120.

Secretary Coleman acknowledged this possibility for the purposes of his decision. \textit{Secretary’s Decision}, supra note 15, at 37. In resolving, nonetheless, to approve a 16-month Concorde demonstration, Coleman placed considerable weight on three factors. First, the estimate of 200 new cases of non-fatal skin cancer was based on 30 years of continuous Concorde operations; the CIAP report estimated, however, that technology could be developed within 10-15 years to reduce by half the amount of nitrogen oxides in Concorde’s exhaust, although at a cost of many millions. Second, because of rapid dispersion of stratospheric impurities throughout the hemisphere, Concorde operations anywhere in the northern hemisphere would affect the ozone layer covering the United States. Finally, among the many other potential man-made causes of ozone reduction were several that were far more deleterious than the proposed Concorde flights but which had gone so far unchecked. Fluorocarbons from aerosol sprays and refrigerants, for example, were estimated to cause 12-50 times as much ozone reduction as the proposed Concorde flights. \textit{Secretary’s Decision}, supra note 15, at 37-40.
Concorde flights to the United States should not be authorized.22

In addition to these environmental attacks, however, came a number of claims that the Concorde simply was not a safe airplane. Given the necessity for absolute assurance that any new aircraft is safe, history made the developers of the Concorde especially sensitive to claims of flaws. Just as they are pioneering today in supersonic flight, the British pioneered in the early 1950's in subsonic flight with the development of the de Havilland Comet, the world's first jet airliner.

Like the Concorde, the Comet's main attraction was speed. The aircraft's revolutionary ability to cruise at 500 miles per hour led one observer to describe it as "a sort of Wellsian time-machine."23 Boasted one executive of British Overseas Airways Corporation (the predecessor of British Airways): "When B.O.A.C. gets Comets into service, New Yorkers will be able to take a swim in Bermuda and dry themselves at home."24 To operate efficiently and attain such speed, however, it was necessary for a jet transport such as the Comet to cruise at much higher altitudes than piston-engine aircraft, about 45,000 feet. At this altitude the atmosphere is extremely thin, necessitating cabin pressurization. The strains of pressurization required, in turn, that the fuselage be very strong. But the need to accommodate enough fuel for Comet's thirsty jet engines and enough passengers to turn a profit placed a premium on lightness of construction. To solve this dilemma, de Havilland decided on a very light skin made of aluminum alloy which was glued, rather than riveted, to the plane's frame, following the technique which had been used in several slower and lower-flying aircraft.25

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22. The relative fuel inefficiency of Concorde in "per seat-mile" terms is illustrated by the following comparison of fuel consumption for a 3,000 nautical mile trip:

<table>
<thead>
<tr>
<th>Aircraft</th>
<th>Passenger Capacity</th>
<th>Fuel Pounds</th>
<th>Gallons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boeing 707-300</td>
<td>145</td>
<td>95,500</td>
<td>13,071</td>
</tr>
<tr>
<td>DC-8-61</td>
<td>200</td>
<td>94,500</td>
<td>13,500</td>
</tr>
<tr>
<td>Boeing 747</td>
<td>375</td>
<td>170,000</td>
<td>24,285</td>
</tr>
<tr>
<td>DC-10</td>
<td>250</td>
<td>98,000</td>
<td>14,000</td>
</tr>
<tr>
<td>Concorde</td>
<td>110</td>
<td>146,000</td>
<td>20,857</td>
</tr>
</tbody>
</table>

Source: Secretary's Decision, supra note 15, at 29. However, Secretary Coleman noted in his decision that Concorde's relative fuel efficiency could improve on a "per passenger mile" basis if Concorde operated with substantially higher load factors than subsonic jets. Secretary's Decision, supra note 15, at 29-30. Indeed, high load factors appeared to be a prerequisite to economically viable Concorde operations since the direct operating cost of the Concorde per seat mile was three to four times as much as that of current subsonic jets. Concorde Environmental Impact Statement, supra note 19, Vol. I at III-3.

25. Id. at 30.
The solution proved illusory. In quick succession following their entry into service, four Comets operated by B.O.A.C. crashed during 1953 and 1954, killing a total of 111 persons.\textsuperscript{26} After the entire fleet had been grounded, tests revealed a metal fatigue failure in the fuselage. Although the necessary design changes were accomplished and the plane was eventually reintroduced into commercial service, sales never regained pace with the American B-707 and DC-8. The Comet program was a failure.\textsuperscript{27}

The story of the Comet was not the only reminder to developers of the Concorde of the unforeseen hazards wrought by radical design changes. Even as the Concorde was in the final stages of development, the world was shocked by the crash of the Soviet Union’s TU-144, the Russian version of the SST, at the Paris Air Show in June, 1973. In full view of 300,000 spectators at Le Bourget Airport, the disaster resulted in the deaths of all six crew members and seven persons on the ground.\textsuperscript{28} While it may have been apparent to aeronautical engineers familiar with the design differences that the crash of the TU-144 was not an omen for the Concorde, less sophisticated members of the public associated the similar basic shapes and aerodynamic characteristics of the two planes.

Concorde’s manufacturers sought to erase any links to the past by subjecting the aircraft to the most thorough testing program ever conducted for a commercial airliner, including nearly 5,000 hours of test flying (compared to approximately 1,500 hours for the B-747). Nevertheless, critics of Concorde cited five major shortcomings.

1. \textit{Range and Fuel Reserves}

Given the enormous amount of fuel consumed by the Concorde in supersonic flight and the parameters of size and weight which limit the amount of fuel which can be carried, some commentators questioned whether Concorde could fly the Paris to Washington route and still have enough fuel in reserve to accomplish any necessary “holding” or diversion to an alternate airport in the event of emergency or inclement weather.\textsuperscript{29} Skepticism regarding Concorde’s range led, in turn, to the

\begin{itemize}
\item \textsuperscript{26} Id. at 7.
\item \textsuperscript{27} A total of 77 Comets were ultimately sold for commercial service. \textit{A. Wilson, The Concorde Fiasco} 16 (Penguin ed. 1973).
\item \textsuperscript{28} Id. at 137-142.
\item \textsuperscript{29} \textit{14 C.F.R. § 91.23} (1976), provides in part:
\end{itemize}

No person may operate a civil aircraft in IFR [instrument flight rules] conditions unless it
theory that Concorde would require preferential treatment by air traffic controllers to avoid prolonged holding patterns. Analysis by FAA indicated that Concorde would carry fuel reserves adequate to meet both its own standards and the more stringent British standards. However, EDF demanded an explanation of apparently contradictory testimony by a French aviation official at Secretary Coleman's hearing on the Concorde issue and a 1972 memorandum of “Interagency Minutes” which related a request by the British and French for an FAA exemption “to permit the Concorde to arrive at U.S. airports with less than the normal fuel reserves on the basis of the Concorde’s speed.”

2. Fuel Tank Fires and Explosions

The provision of a system to control fuel tank fires was thought by some observers to pose a particular problem for Concorde as a result of the aircraft’s unique design. Because the temperature of Concorde’s fuel rises as it circulates throughout the aircraft during flight, cooling its skin, critics charged that there was a greater risk of fire in Concorde than in subsonic jets and that the aircraft’s manufacturers had not provided adequate means for fire prevention and extinguishment. As evidence of this danger, critics pointed to the fact that Concorde was not equipped with a “nitrogen inverting” system which, they suggested, was the only adequate means of fuel tank fire suppression. The absence of such a

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30. Although 14 C.F.R. § 91.23 appears to require that aircraft carry enough fuel to “hold” for 45 minutes after flying to an alternate airport, note 29 supra, Claude Frantzen, Assistant Director for Technical Affairs of the French Secretariat Generale a l’Aviation Civile, had the following exchange with the Secretary of Transportation at the Concorde public hearing:

Secretary Coleman: What is your prediction of what the holding fuel will be once you get to the United States and where you would land?

Mr. Frantzen: Mr. Secretary, to relieve all fears, let us take the example of the longest route for which application has been filed—Paris to Dulles. In that case, let us state that both Government requirements and airline usual policy will lead to the fact that when Concorde will land at Dulles, it will have on board a quantity of fuel not less than seven tons, which would have allowed another additional 35 minutes of hold, or a diversion to the alternate airport and there fifteen minutes of hold at this alternate, an approach, a short pattern circuit and the landing. Transcript of Public Hearing 35 (January 5, 1976).

31. The so-called “Interagency Meeting of Regulatory Actions Affecting SSTs”, which was held at the Department of State on October 10, 1972, was attended by representatives of the White House, Department of State, FAA, Environmental Protection Agency, Civil Aeronautics Board and Council on Environmental Quality.
system, they charged, was one reason why the FAA had so far refused to issue a U.S. type certificate to Concorde. Defenders of the aircraft countered that Concorde’s design incorporated a number of features to eliminate the possibility of fuel tank fire and that the “nitrogen inerting” system was merely one of a number of available methods of fuel tank fire suppression. By issuing certificates of airworthiness to Concorde, the British and French had determined that the aircraft was safe from fuel tank fire, according to the plane’s operators.32

3. The Turn to “Beat the Meter” at JFK

For many years the Port Authority of New York and New Jersey, which operates Kennedy Airport, has imposed a noise limit of 112 PNdB (perceived noise in decibels) as measured at selected locations under the take-off paths in communities surrounding the field. Notices are sent to violators of the 112 PNdB standard and habitual offenders are ultimately subject to injunctive action by the Port Authority. British Airways and Air France personnel estimated that in order to avoid exceeding the prescribed noise limit when departing runway 31L,33 it would be necessary for Concorde to execute a 26 degree left turn beginning at an altitude of approximately 100 feet. The International Federation of Airline Pilots Associations, the Port Authority, EDF and others expressed serious reservations about the safety of such a sharp turn performed at such a low altitude. The FAA, however, concluded on the basis of flight tests and simulation that the maneuver was safe.34

4. High Altitude Decompression

Because of the unusually high altitude at which Concorde cruises—up to 60,000 feet—EDF charged that the aircraft posed an unusually serious threat to the safety of its occupants in the event of decompression. In the additional time required to descend to a lower cruising altitude, some maintained, all but the healthiest young adults could suffer loss of oxygen sufficient to maintain consciousness. Why, if not for this reason, EDF asked, had Concorde’s manufacture’s decided to provide passengers with conventional drop-down oxygen masks while providing the crew with special pressure-breathing equipment?35 British Airways and Air

33. In the case of Runway 31L, one of the runways from which Concorde would take off, the noise meter is located 19,251 feet beyond the start of the runway and 389 feet to the right of the runway center line on a utility pole in Howard Beach, New York.
34. Secretary’s Decision, supra note 15, App. II, at 7.
France responded that design of the aircraft according to rigid structural specifications reduced the danger of decompression to the equivalent of subsonic aircraft. By installing very small windows, for example, Concorde’s manufacturers assured that in the event of a window blow-out at cruise altitude, the pressure leak rate would be slow enough to allow an emergency descent without danger to the cabin occupants. While acknowledging that under the Chicago Convention and bilateral agreements it was bound by the airworthiness determinations of Britain and France, the FAA announced its independent finding that the Concorde had been built “to more rigid structural requirements than any present subsonic transport aircraft,” and that “passenger safety will be commensurate with that of present-day aircraft.”

The FAA found it “highly improbable” that the cabin altitude would ever exceed 37,000 feet. Conventional drop-down masks, the same system used in subsonic transports, would assure adequate oxygen at cabin altitudes of approximately 40,000 feet. The provision of pressure breathing equipment for the crew, FAA found, was an “added safety feature . . . to assure no interference with their ability to perform their duties in the event of pressurization loss.”

The FAA acknowledged, however, that before the United States would issue its own type certificate to Concorde, the aircraft would have to comply with FAA’s own, and possibly more demanding, decompression standards.

5. Temperature Shear

Dotting the stratosphere, within which the Concorde cruises, are pockets of air with temperature differing sharply from that of surrounding air. Because Concorde’s engine thrust is very sensitive to air temperature, such changes in temperature could cause the aircraft, when cruising on autopilot, to accelerate and climb or to decelerate and descend. In answer to arguments that this constituted a safety hazard, Concorde’s manufacturers responded that pilot override procedures had been developed to eliminate the difficulty.

The Legal Framework: NEPA and the Chicago Convention

To the scores of charges that Concorde was an ecological evil the Environmental Defense Fund added the charge that Concorde was simply unsafe, and that the FAA was required by NEPA to spell out its potential safety hazards in an environmental impact statement.

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36. See text accompanying notes 46-48 infra.
38. Id.
39. Id.
40. SECRETARY’S DECISION, supra note 15, App. II at 23.
NEPA does identify safety as one of its statutory goals. The Act declares that it shall be the responsibility of the Federal Government to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" and to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." These and other goals of NEPA are to be fulfilled through the preparation for all "major Federal actions significantly affecting the quality of the human environment" of a "detailed statement" which discusses "the environmental impact of the proposed action" and alternatives. Under these provisions, FAA was required to spell out "the full range of responsible opinion" regarding Concorde's operational safety in the environmental impact statement.

The extent to which FAA was required to treat Concorde safety as part of the NEPA notice-and-comment review, however, was not solely a question of domestic law. The fact that Concorde operations by British Airways and Air France were to be carried on within the framework of a multilateral treaty addressing aviation safety added another dimension to the problem. Article 33 of the Convention on International Civil Aviation (Chicago Convention), to which the United States, Britain, France and 125 other nations are parties, provides:

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

At the same time, the United States retains, under Article 11 of the Chicago Convention, the right to apply its own laws and regulations to foreign aircraft "relating to the admission to or departure from its territory" or "to the operation and navigation of such aircraft while within its territory."

47. Article IV, supra note 46, states in full:

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft
Thus, as to matters relating to entry, exit and navigation, the United States may apply its own safety regulations; as to matters relating to "airworthiness," the United States is bound to accept the safety assurances of any other contracting party so long as the test applied by that country meets the minimum standards adopted by the International Civil Aviation Organization. As applied to Concorde, this means that, the United States is free under Article 11 to apply its own regulations regarding, for example, fuel reserves, since fuel reserves is a matter relating to the "admission or departure" of the airplane, it is severely circumscribed by Article 33 in the extent to which it may examine, for example, the adequacy of Concorde's system for fuel tank fire suppression. Admission and departure is an "airworthiness" matter as to which the United States is obligated to accept the assurance of the British and French aviation authorities.48

Safety as an "Environmental" Issue

Although the Court of Appeals wrote no opinion in Environmental Defense Fund v. Department of Transportation, its order affirming the decision of the Secretary of Transportation to authorize a limited pattern of commercial Concorde flights presumably was based either on its judgment that the Department of Transportation and Federal Aviation Administration had, in fact, complied with NEPA by giving sufficient attention to Concorde safety in the environmental review,49 or its determi-

engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

Similar provisions are contained in Art. 5(1) of the Bermuda Agreement, supra, note 46 and Art. V(a) of the Paris Agreement, supra note 46. In addition, the Bermuda Agreement, supra note 46, in Art. 2(2) provides:

The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

Art. II(b) of the Paris Agreement, supra note 46 is identical.

48. The Federal Aviation Act explicitly acknowledges the force of the Chicago Convention by providing in section 1102, 49 U.S.C. § 1502 (1970), that the Department of Transportation and FAA shall exercise their powers under the Act "consistently with any obligation assumed by the United States in any treaty, convention or agreement that may be in force between the United States and any foreign country" and providing in section 1108(b), 49 U.S.C. § 1508 (1970), that "[f]oreign aircraft . . . may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States . . . ."

49. Ample evidence in the record existed to support a finding that DOT and FAA did, in fact, analyze Concorde's operating ability—including airworthiness—as an integral part of its environmental review and thereby complied with any obligations which NEPA may have imposed with regard to safety. The draft Environmental Impact Statement included discussions of whether the Concorde could operate safely and without special accommodation in the U.S. air traffic control

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nation that Concorde safety was a matter entirely outside the scope of the NEPA. Assuming the Court chose the latter theory, there are several possible bases for its conclusion.

Fundamentally, the question of NEPA's scope is one of statutory interpretation. While it is true that safety is given passing mention in NEPA and that, in a literal sense, the physical safety of human beings may be an aspect of "the quality of the human environment," the provisions of NEPA considered together and the context of NEPA's legislative history suggest that aircraft safety is not an "environmental issue" within the meaning of that Act.

If NEPA's provisions are, as some have observed, "opaque" or "woefully ambiguous," the fault probably can be traced to a lack of legislative prescience. With only an inkling of what new developments the future would bring, Congress intentionally drew NEPA broadly enough to encompass "all the factors that affect the quality of life." It declared that its purpose was to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation."

One court has declared the scope of this declaration to be "as broad as the mind can conceive." Nevertheless, operational safety does not sit comfortably among the more common connotations of "environmental impact" associated with Concorde such as noise, climatic impact, ozone

system. The final environmental impact statement discussed the safety of the controversial 25-degree turn on departure from JFK runway 31L, Concorde's range and fuel reserves, air traffic control and high altitude decompression. Simultaneous with the release of the final impact statement, moreover, Secretary Coleman issued a notice scheduling a public hearing for January 5, 1976 inviting written and oral submissions on Concorde safety, as well as environmental and international consideration. Comment was specifically invited on safety issues including fuel reserves, air traffic procedures, explosive decompression, fuel tank fire suppression, temperature shear, and the safety of the departure turn from Runway 31L at Kennedy Airport. 40 Fed. Reg. 53612 (1975). An addendum to the Environmental Impact Statement issued together with the Secretary's decision addressed the fuel reserve question and the Concorde decision itself set forth the Secretary's own discussion of and conclusions regarding the aircraft's safety along with an analysis by the FAA.

50. See text accompanying notes 42-44, supra.
56. First Nat'l Bank v. Richardson, 484 F.2d 1369, 1377 (7th Cir. 1973).
depletion and air pollution. Union of Concerned Scientists v. AEC suggests one basis for distinction. Petitioners challenged the licensing of a nuclear generating plant on the ground that the environmental impact statement prepared by the agency failed to discuss the views of several AEC scientists that the reactor’s emergency cooling system was inadequate. The Court of Appeals dismissed the challenge holding, inter alia, that the operational efficiency of the reactor was not an issue addressed by NEPA. The Court stated:

[We are unconvinced that the views here referred to by petitioner are in fact environmental views. Saying that the project won’t work is not the same as saying that it will have greater environmental impact than the impact statement] suggests, even if such failure would have environmental consequences. The basic objection is to the feasibility, not the environmental impact.

Applying this analysis to the Concorde case, it appears that the Environmental Defense Fund’s challenge was not to the plane’s environmental side-effects—the more traditional environmental impact—but to its ability to function as an aircraft. The challenge was to the plane’s feasibility, an argument that “the project won’t work.”

Even if aircraft safety is an “environmental issue,” however, it may not be the kind of environmental issue which Congress intended should be addressed in a detailed statement. NEPA states that one of the primary factors motivating Congress to mandate the preparation of an environmental impact statement was the desire to “insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.” In other words, Congress directed federal agencies to give weight to environmental costs and benefits which had previously been denied, ignored or given short shrift by federal agencies in the sometimes single-minded pursuit of their respective programs. It would be difficult to find a poorer example of such a subject than aviation safety regulation. Long established as the primary business of the FAA and its predecessor agencies, aviation safety was, in the words of NEPA, one of those “technical considerations” upon which the regulatory agencies’ attention was already focused. Assuming aviation safety was an “environ-

57 499 F.2d 1069 (D.C. Cir. 1974).
58 Id. at 1083, n.34.
mental" matter at all, it certainly was not one of those "presently unquantified" environmental subjects to which NEPA sought to give new prominence.

Considerations of basic efficiency support this view. Given the current clamoring for regulatory reform, one is reluctant to attribute to Congress the intention of forcing FAA to duplicate in its environmental review the very same safety assessment performed in its regulatory capacity.

Interestingly, a U.S. Court of Appeals decision involving the Environmental Protection Agency (EPA) provides the best example of this approach. In *International Harvester v. Ruckelshaus* 61 the Court held that EPA need not file an environmental impact statement in connection with a one-year suspension of emission standards under provisions of the Clean Air Act, provided the Administrator file a written statement that the action was in the public interest. Under Section 202(b) of that Act, 62 manufacturers of light-duty vehicles were required to reduce the exhaust emissions of hydrocarbons and carbon monoxide for 1975 models by at least ninety percent from the emission levels permissible in the 1970 model year. However, Section 202(b)(5)(D) 63 contained an escape hatch, allowing the EPA Administrator to postpone the deadline by a year if he made specific findings regarding the availability of control technology, the manufacturers' good faith in attempting to meet the deadline, and the necessity for postponement in the public interest. In holding that NEPA did not require the Administrator to prepare an environmental impact statement in connection with his decision on a suspension of the deadline, Judge Leventhal, for the Court, observed:

> The purpose of NEPA is to assure presentation to Congress and the public of the environmental impact of executive action. Here Congress has already decided that the environmental dangers require the statutory standards. The only executive decision is of a one year deferral, and the very stuff of such a decision, at least with a public interest determination, is to assess, *inter alia*, the environmental consequences of action and inaction. NEPA's objective will be fully served. As we stated in *Natural Resources Defense Council, Inc. v. Morton*, 148 U.S. App. D.C. 5, 15, 458 F.2d 827,837 (1972), the requirements of NEPA should be subject to a "construction of reasonableness." Although we do not reach the question whether EPA is automatically and completely exempt from NEPA, we see little need in requiring a NEPA statement from an agency whose raison d'être is the protection of the environment and whose decision on suspension is necessarily infused with the environmental considerations so perti-

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Just as the "raison d'etre" of EPA is protection of the environment, so the "raison d'etre" of FAA is the regulation of safety; just as the "very stuff" of EPA's decision on a suspension of auto emission standards is its environmental consequences, so the "very stuff" of FAA's decision—at least that part of the decision relating to Concorde's operational characteristics—is its safety consequences.

As a matter of administrative practice, other federal agencies have drawn the same line in complying with NEPA. For example, the Occupational Safety and Health Administration recently adopted standards for agricultural equipment, noting that "[m]achinery accidents have been a major cause of employee injury and death on the farm." Despite the significance of this standard for farm safety, OSHA prepared no environmental impact statement, following the reasoning of International Harvester that safety was the "very stuff" of the regulatory decision. The environmental impact statement prepared by the Department of Transportation's National Highway Traffic Safety Administration in connection with its proposal to require a passive restraint system such as an airbag for the protection of automobile passengers reflects the same distinction. It includes a discussion of the proposal's impact on resource consumption (consisting primarily of materials used in the airbag system itself and reduced fuel efficiency attributable to the additional weight of the airbag system) but omits any discussion of whether the system effectively promotes automobile safety (whether, for example, any danger would be created by accidental deployment of the airbag).

This pattern is repeated in the other federal agencies with responsibility for safety regulation such as the Nuclear Regulatory Commission, Food and Drug Administration, Consumer Product Safety Commission and National Aeronautics and Space Administration.

The decision in Nader v. Butterfield, one instance in which a court did require that FAA conduct an environmental assessment on a question of safety, is entirely consistent with the International Harvester rationale. The court held that NEPA required FAA to prepare a "negative impact statement" describing the radiation emissions of the X-ray devices approved by FAA for the inspection of baggage and explaining why these emissions were not sufficiently serious to require a full-blown environmental

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64. 478 F.2d at 650, n.130.
impact statement. Unlike the question of the X-ray device's ability to detect weapons, which was the "very stuff" of the FAA's decision and on which the FAA possesses substantial expertise, the question of harm from radiation was precisely the kind of environmental side-effect to which NEPA is intended to apply and which is outside the scope of FAA's "mission." Accordingly, FAA included in the Concorde impact statement a detailed consideration of the potential danger to passengers of cosmic radiation.68

If there is a major flaw in this application of the "rule of reasonableness" as a matter of either legislative intent or substantial compliance, it is that there is failure to assign sufficient weight to NEPA's processes for public participation. The agency's zeal in pursuit of its statutory goals will likely produce a decision which serves those goals, but may not be an adequate substitute for the notice, comment and hearing processes which are so vital to NEPA.69 While, in the best of all possible governments there would be no reason to doubt the skill or dedication of administrative agencies, experience justifies asking "the endemic question of 'Who shall police the police?'"70 In Senator Jackson's words, it may not always be correct to assume that the agency charged with environmental, or safety, protection will be "the good guy."71 Public scrutiny may enhance the quality of the decision-making process. Judge Leventhal, again writing for a panel of the D.C. Circuit, appeared to recognize this in his decision in Portland Cement Association v. Ruckelshaus,72 another case dealing with EPA's responsibilities under NEPA. In rejecting the association's conten-

68. Concorde Environmental Impact Statement, supra note 19, at VI-139.

Guidelines for preparation of environmental impact statements issued by the Council on Environmental Quality (CEQ), 40 C.F.R. Part 1500 (1975), stress the importance of public comment in the environmental evaluation. Draft environmental impact statements are to be circulated for comment as early as possible "in order to permit agency decision-makers and outside reviewers to give meaningful consideration to the environmental issues involved." Id. § 1500.7. Drafts are to be reviewed by relevant federal agencies, the Environmental Protection Agency, state and local governments and the public, id. § 1500.9, and final statements are to be submitted to all parties that commented on the draft, id. § 1500.10. Agency procedures "shall specifically include provision for public hearings on major actions with environmental impact, whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action." Id. § 1500.7(d).

71. 118 Cong Rec. 33710 (daily ed. October 4, 1972) (Senator Jackson quoting from National Wildlife Federation, CONVENTION RPT. (September 22, 1972)).
72. 486 F.2d 375 (D.C. Cir. 1973).
tion that EPA had violated NEPA by failing to prepare an environmental impact statement when promulgating stationary source emission standards for Portland cement plants under the Clean Air Act, the court found that the rulemaking procedures which the agency had followed provided "the functional equivalent of a NEPA impact statement." However, in finding the rulemaking procedure an acceptable substitute, the court placed considerable weight on the opportunity it afforded for public participation, stating:

Although the rule-making process may not import the complete advantages of the structured determinations of NEPA into the decision-making of EPA, it does, in our view strike a workable balance between some of the advantages and disadvantages of full application of NEPA. Without the problems of a NEPA delay conflicting with the constraints of the Clean Air Act, the ability of other agencies to make submissions to EPA concerning proposed rules, provides a channel for informed decision-making. These comments will be part of the record in the rule-making proceeding that EPA must take into account.

EPA's proposed rule, and reasons therefor, are inevitably an alert to environmental issues. The EPA's proposed rule and reasons may omit reference to adverse environmental consequences that another agency might discern, but a draft impact statement may likewise be marred by omissions that another agency identifies.

. . . .Similarly, EPA's proposed rule, and reasons therefor, are an alert to the public and the Congress who will have the opportunity to comment as to possible adverse environmental effects of the proposed rule, during the pendency of the rule-making proceeding. And finally, the courts will be able to scrutinize the analysis of environmental considerations, in assuring that a reasoned decision has been reached.74

Generally, the opportunity for public participation in FAA's safety deliberations is limited to those instances where the agency plays a legislative role through the adoption of generic rules which establish a design or performance standard. Notice and the opportunity for public comment, for example, accompanied promulgation of FAA's fuel reserve requirement. By contrast, where FAA is performing an adjudicative rule-licensing in this context is a form of adjudication or enforcement since the aircraft's performance is measured against a series of already-established rules-there would normally be no opportunity for the kind of public participation seemingly required by Portland Cement in FAA's determination that an aircraft will, in fact, meet its fuel reserve requirements. In this sense the unusual public procedures employed by the Department of Transportation and FAA in considering Concorde safety75 represented a departure from normal practice.

73. Id. at 384.
74. Id. at 386.
75. See note 49 supra.
Yet it is difficult to see how it could be otherwise or to imagine what a discussion of aircraft safety in an environmental impact statement would ordinarily contain. NEPA requires that agencies set out "the environmental impact of the proposed action" as well as "any adverse environmental effects which cannot be avoided should the proposal be implemented." Through this explication, it is intended that the decision-maker will give any potential adverse side-effects of the proposed action their appropriate weight in the overall balancing of the costs and benefits leading to an ultimate decision. Where more familiar environmental harms are alleged, the role of the impact statement in the balancing process may be easily visualized. For example, even though the impact statement might indicate that one effect of Concorde operations would be to increase the number of people exposed to high levels of aircraft noise, the decision-maker might reasonably conclude that the commercial and technological advantages of the proposal outweigh the incremental annoyance. Where safety is concerned, by contrast, NEPA balancing is simply inapposite. An aircraft is either completely safe within FAA’s judgment, in which case there are no adverse environmental effects related to safety to cast into the NEPA balance, or it is unsafe, in which case the costs of authorizing operations necessarily override any countervailing benefits and the NEPA balancing process never comes into play.

Even if it be the case, however, that aircraft safety is an environmental issue and is generally within the scope of NEPA, the need for discussion of Concorde safety in an environmental impact statement is, to a large extent, called into question by Article 33 of the Chicago Convention which provides that the United States will respect the airworthiness certificates issued by the British and French aeronautical authorities. While FAA may enforce its regulations relating to admission, departure or navigation of Concorde in U.S. airspace, Article 33 contemplates that FAA will not apply its own standards to those aspects of operation embraced by the concept of airworthiness. As applied to Concorde, this distinction is critical. Concorde’s operating range and its ability to safely execute a climbing turn from Runway 31L at Kennedy Airport, as matters relating to entry and departure, are subject to FAA scrutiny. But fuel tank fire suppression and

77. NEPA has repeatedly been interpreted to excuse agencies from describing in an environmental impact statement adverse effects which are remote or highly speculative. In Warm Springs Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974), stay granted, 417 U.S. 1301 (1974), for example, the court held that the environmental impact statement did not need to include a report on the calamity which would result from the unlikely failure of a dam and reservoir project. See also Citizens for Safe Power v. Nuclear Regulatory Comm’n, 524 F.2d 1291, 1301, n. 15 (D.C. Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1975); Environmental Defense Fund v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972). But compare Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).
explosive decompression, as matters of airworthiness, are not. Consequently, FAA may not review airworthiness determination in an environmental impact statement.

This argument may, in some eyes, represent a "crabbed" interpretation of NEPA. In *Environmental Defense Fund v. DOT*, *supra*, the petitioners argued that discussion of Concorde airworthiness in the environmental impact statement would not be an act of futility since Article 33 of the Chicago Convention did not foreclose all avenues of decision. Notwithstanding Article 33, if the discussion of Concorde's safety contained in the environmental impact statement and the public comments submitted in response to that discussion proved sufficiently troubling to the FAA, the United States could exercise its right under Article 38 of the Chicago Convention to notify International Civil Aviation Organization (ICAO) of its intention to require observance of more stringent standards than the minimum standards adopted by that organization. Further, EDF maintained that the Government's view of the environmental impact statement as a decision-making document—a document upon which the Secretary of Transportation would base his decision whether or not to authorize the requested Concorde flights—was far too narrow. Because NEPA is an environmental "full disclosure" law, the Concorde impact statement was also an educational document. Discussion of Concorde safety in the environmental impact statement would serve the goals of NEPA by informing the President, Congress and the travelling public of any dangers of Concorde operation. Such information could lead Congress to enact a Concorde ban, or reject the system of reciprocal airworthiness recognition contained in Article 33 of the Chicago Convention.

79. Article 38 of the Chicago Convention, *supra* note 48, provides:
Any state which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.
81. The fact that an alternative is beyond the authority of the decision-making agency or
Despite the natural appeal of any argument for disclosure, EDF's argument that the Chicago Convention was "irrelevant"\textsuperscript{82} in determining FAA's obligations under NEPA suffered from two serious weaknesses. The first was that FAA did not have any Concorde dangers to disclose. Having analyzed all the operational characteristics of the Concorde, including the airworthiness issues, and concluded that the airplane was safe, the FAA simply did not have any "adverse environmental effects" related to safety to report to the President, the Congress or the travelling public in the impact statement. Second, while the question of whether to ban Concorde from the United States because of its excessive noise, fuel inefficiency and stratospheric emissions has reached the floor of Congress, it is highly unlikely that concern over the plane's airworthiness would move Congress to enact a Concorde ban in the face of both Article 33 of the Chicago Convention and the contrary recommendation of this Government's aviation safety agency. Critics of Concorde safety did not pursue the course—which Article 38 virtually invites—of contesting the adequacy of the minimum safety standards adopted by ICAO. Had they done so, their objections might conceivably have led the United States to notify ICAO under Article 38 that with regard to particular areas of performance, it would require observance of more stringent standards. Instead, critics maintained either that Concorde could not meet the applicable safety standards or that the plane's failure thus far to be type certificated by the FAA proved that it was unsafe. Rejection of the aircraft by Congress on these grounds, as contrasted with the narrower Article 38 notification procedure for which the Convention makes specific provision, would be tantamount to rejection of Article 33 and the Chicago system itself. While the fact that an alternative requires legislative action does not automatically remove it from the range of options to be considered under NEPA, a number of decisions have held that the direction in Section 102(2)(C)(iii) of NEPA\textsuperscript{83} to discuss "alternatives to the proposed action" in the impact statement does not require the consideration of unrealistic alternatives.\textsuperscript{84} One court has held, for example, that an agency need not address "alternatives so remote from reality as to depend on, say, the

\textsuperscript{82} Brief for Petitioner at 25, Environmental Defense Fund v. DOT, Civ. No. 76-1105 (D.C. Cir. May 19, 1976).
repeal of the antitrust laws."\(^{85}\) The possibility that Congress would reject the Article 33 system—which has served for 30 years as a worldwide passport for U.S. airlines and aircraft manufacturers—would appear to be just as unlikely, rendering a discussion of Concorde airworthiness in the environmental impact statement an empty gesture.

Conclusion

The application of NEPA’s admittedly wide-ranging provisions must be informed by an awareness of both the enormous diversity of federal activity and the alternative procedures available for review of agency action. In *Environmental Defense Fund v. DOT*, the petitioners argued unsuccessfully that in deciding to authorize a limited 16-month demonstration of commercial Concorde operations to the United States, the Secretary of Transportation was required by NEPA to discuss Concorde’s safety in the environmental impact statement. A more effective approach might have been to challenge the decision that Concorde could perform safely in U.S. airspace under Section 1006 of the Federal Aviation Act\(^{86}\) which provides that the U.S. Court of Appeals may set aside orders of the Secretary of Transportation or Federal Aviation Administrator which are unsupported by substantial evidence.

NEPA has already cut a broad swath through federal decision-making, elevating previously neglected environmental values to their deserved place alongside the administrative agencies’ other fields of concern. But, as the Concorde case demonstrates, NEPA was neither intended nor formulated as an all-purpose elixir for the ills of government.


A Systems Approach To The Analysis of Transportation Law

RALPH K. JONES*
KENT B. JOSCELYN**

INTRODUCTION

The systems approach to solving large-scale problems has enjoyed considerable success in complex technological undertakings but has not lived up to its expectations for solving society's problems. It is hypothesized that there are two principle reasons why the systems approach has not been widely employed for legal systems: (1) lack of personnel capable of understanding the techniques of both law and science and (2) lack of suitably processed data. The authors' experiences in applying systems methodologies to the area of transportation law (i.e., legal systems dealing with highway safety) indicate that these problems can be overcome and that operationally useful results will follow. In particular, the systems approach has been found to be a practical means for clarifying legal system objectives and for coordinating legal system functions.

* Staff consultant to the Public Factor Division, Highway Safety Research Institute, University of Michigan; President of Mid-America Research Institute; B.S., Drury College, 1950.
** Director, Public Factors Division, Highway Safety and Research Institute, University of Michigan; B.S., Union College, 1957; J.D., Albany Law School, 1960.
I. THE SYSTEMS APPROACH TO SOCIETAL PROBLEMS
   A. NATURE AND ORIGIN OF THE SYSTEMS APPROACH

In 1941, Sir Julian Huxley prophesied:

As the barber-surgeon of the Middle Ages has given way to the medical
man of today, with his elaborate scientific training, so the essentially
amateur politician and administrator of today will have been replaced by a
new type of professional man, with specialized training. Life will go on
against a background of social science. Society will have begun to
develop a brain.¹

Huxley likened the evolution of society's new "brain" to the biological
process that led to the human brain, the first step in that process being the
addition of two centers of correlation in different parts of the brain (one for
sensory functions and the other for action functions) and the second step
involving the enlargement of the so-called association areas of the brain
which are essential to self-consciousness and conceptual thought. He
observed that the highest stage of evolution yet reached by any society
was, by biological standards, extremely primitive, "higher than that of a
fish, but certainly not beyond that of a reptile." To rise to a level compar-
able to the human brain, society's brain would have to greatly increase its
capability for obtaining information and for planning, correlating, and
flexibly controlling execution. He perceived that:

   some large single central organization must be superposed on the more
primitive system of separate government departments and other single-
function organizations; and that this, like the cerebral cortex, must be at one
and the same time unified and functionally specialized. It will thus contain
units concerned with particular social and economic functions, but the bulk
of its personnel will be occupied in studying and effecting the interrelations
between these various functions.²

In today's jargon, it might be said that Huxley was proposing a
systems approach to planning and controlling the functioning of the social
organism. The term appears to have originated in the early 1950's to
describe techniques being developed for managing large and complex
aerospace projects. In essence, the approach taken to such projects was
characterized by a concentration on the whole problem rather than on its
component parts. As described by one of its most successful practition-
ers, Simon Ramo,

   It is an approach that insists upon looking at a problem in its entirety, taking
into account all the facets, all the intertwined parameters. It is a process for
understanding how they interact with one another and how these factors
can be brought into proper relationship for the optimum solution of the
problem. The systems approach relates the technology to the need, the

¹. S. HUXLEY, MAN STANDS ALONE 239-40 (1941).
². Id. at 250.
social to the technological aspects; indeed, it starts by insisting on a clear understanding of exactly what the problem is and of the goals that should dominate the solution and lead to the criteria for evaluating alternative avenues. As the end result, the approach seeks to work out a detailed description of a specified combination of men and machines—with such concomitant assignment of function, designated use of material, and pattern of information flow that the whole system represents a compatible, optimum, interconnected ensemble for achieving the performance desired.3

Representative F. Bradford Morse of Massachusetts has described the systems approach as

a way of thinking about the job of management. It provides a means for arriving at the best solution to the complex problem or combination of problems by means of a logical process of identification and control of all their interrelated segments. The genius of the systems approach is its ability to bring order out of tremendous numbers of diverse and interacting elements and factors—order that not only stabilizes but creates the conditions for progress as well.

The approach has two main features. First, the problem or problems to be solved are rigorously defined, in terms of performance objectives rather than in terms of product specifications or particular technologies.

The second feature of the systems approach is its emphasis on the interrelations within a system. Rather than dividing a problem into manageable sub-problems and solving each independently, the systems approach enables the managers to develop and implement a plan capable of achieving the entire objective. It provides for comprehensive planning, traces out the effect of any set of choices and decisions upon all other relevant decisions, and then arrives at the solution to the total problem.4

It would appear that, reduced to its essentials, the systems approach is nothing more than common sense applied to large-scale problem solving, and is therefore not very new. One imagines that there were pre-historic project directors planning and organizing axe-head production, that someone was devising a pre-Christian project plan for construction of the Parthenon, and that engineers were evaluating the merits of alternative routes for the American transcontinental railroad long before any of the catchy new phraseology became popular. Yet there is a difference between the old and the new systems approach, and the difference lies mainly in the scale and complexity of the projects and in the sophistication of the tools and techniques used to accomplish them. The technological and organizational problems of placing a man on the moon in less than a decade are several orders of magnitude greater than building a Great Wall of China in 1000 years. and the management tools required to solve these larger problems are correspondingly more sophisticated.

Thus, there has appeared in recent years a new approach to planning, organizing, and accomplishing complex technological undertakings, an approach whose basic concepts are deeply rooted in the past but which is, at the same time, unique to today's technological society. The question is: can this systems approach be usefully applied to society's problems, problems which are, in many cases, more concerned with the activities and interrelationships of human beings than with the primarily technological? Is the systems approach really the beginning of a social brain? Many analysts believe that it is, and have written glowingly of its potential benefits. Ramo, a pioneer in the development of the new systems approach, calls it flatly "a cure for chaos." He speculated in 1969 that

In ten years, the battle might well have been joined, the contest being between the growing need, on the one hand, and the application of the scientific systems approach to the areas of social engineering, on the other. After that, it may take another couple of decades of strong utilization of the systems approach to get on top of these problems.5

At this point Ramo sees the dawning of a "golden age" when the "full application of logic, objectivity, and all the facets of science and technology [are used to] get solutions to society's problems. . . ."6

B. EARLY ATTEMPTS TO APPLY THE SYSTEMS APPROACH TO SOCIETAL PROBLEMS

Government agencies have also become interested in applying the systems approach to social problems, and the U.S. Senate has introduced bills to study and implement systems techniques for this purpose. In 1965, Senate Bill 2662 was introduced "to mobilize and utilize the scientific and engineering manpower of the Nation, to employ systems analysis and systems engineering to help fully employ the Nation's manpower resources to solve national problems."7 Several other similar bills were subsequently introduced in both the Senate and the House, culminating (in 1967) in Senate hearings before the Special Subcommittee on the Utilization of Scientific Manpower8 on two bills9 to study, mobilize, and utilize the systems approach in solving "national problems." Interestingly, none of these bills was ever passed.

Since the mid-1960's fragmented efforts have been conducted to apply the systems approach to non-defense problems. In November of 1964, the State of California announced a plan to apply systems engineer-

5. S. RAMO, supra note 2, at 115.
6. Id. at 116.
ing techniques to four public problems which were of major concern: transportation, waste management, crime, and information control. More recently systems techniques have been applied to many other social problems ranging from health care delivery to environmental control. In 1967, interest in such application to legal systems was stimulated by the President's Commission on Law Enforcement and the Administration of Justice, both of which offered numerous examples of the systems approach to analyzing and improving the operations of the criminal justice system. A commission task force report noted that:

There are distinct limits at looking only at the parts [of the criminal justice system]. What is also needed is a means of relating the parts to each other. The Criminal Justice System must be viewed as an integrated whole.

Subsequent passage of the Law Enforcement Assistance Act in 1968, and its requirement that participating agencies engage in comprehensive planning of their criminal justice system (CJS) activities served to further encourage the application of systems techniques. Since then, a broad spectrum of related activities have been reported in the literature. One of the earliest and best-known attempts at a systems analysis of CJS activities was a comprehensive analysis of offender cohort proceedings through various enforcement, court, and corrections agencies. This study was conducted by Blumstein and Larson (both of whom had participated in the above-mentioned task force study) in 1968. It developed and applied a quantitative model for the CJS in one state, depicting the flow of arrested persons through the system as a function of type of crime.

Activity has also been evidenced in the area of systems theory as applied to legal and other social processes. Many interesting and sometimes original systems-oriented methodologies and conceptual approaches have been described, but there have been few attempts at applying directly to legal systems the specific tools and techniques that have been used with so much success in the world of technology. Further, there is evidence of confusion on the part of some writers on systems analysis methodology as to the exact nature and uses of these tools and techniques.

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Thus, despite a growing awareness on the part of researchers and practitioners of the need for a more comprehensive and methodical approach to the analysis and engineering of the legal system, the promise offered by the systems approach has not yet been fulfilled. No social brain has materialized, and no golden age has dawned.

On the surface, this lag in the application of the systems approach to the legal realm might appear incongruous, since the legal system has long been considered an example of man’s finest effort to bring objectivity, order, logic, and reason to the management of social conflict.

C. REASONS FOR LACK OF WIDESPREAD APPLICATION OF THE SYSTEMS APPROACH TO LEGAL SYSTEMS

We hypothesize that there are two principal reasons why the systems approach has not been transferred to analysis of legal systems.

First, the application of any methodology requires manpower. The individuals who possess the requisite skills to utilize system analysis techniques effectively are for the most part unfamiliar with legal system concepts. Conversely, the individuals who man our legal systems are in general unfamiliar with system analysis concepts. The separation is perhaps even deeper. Typically, the systems analyst is a product of a so-called “hard science” background with minimal exposure to the social sciences, including law. In the same sense the legally trained individual has often scrupulously avoided intensive exposure to the sciences. Each disciplinary area has developed its own semantic structure and mystique that tends to preclude effective interdisciplinary communication. Thus, those who are confronted daily with the issues of the legal system do not realize that an effective methodology is available to them for problem solving, and instinctively avoid “scientific” applications. In contrast, many systems analysts approaching a socio-legal problem fail to recognize the subtle complexity of the issues and the flow of history that dominates legal systems. Effective application of the systems approach to socio-legal systems will be dependent upon the development of personnel capable of understanding the techniques of both law and science. Men capable of bridging the two cultures must be trained.

Second, data that is essential for meaningful analysis of system operations is stored in a manner that defies retrieval. Legal records, like most record systems, are stored or indexed in response to principal users. The present use makes individual case indexing most suitable. However, this precludes simple examination of classes of cases or other activity groupings. Thus, any system analysis effort must include a significant level of funding for the reduction or collection of data. Such a constraint is a partial explanation of why the literature is not replete with small “system studies” focused on the legal system.

The state of the data in reality is a symptom or indicator rather than a cause. The basic operational philosophy of the legal system revolves
around concern for the individual case as opposed to the system. While
distinguished scholars have expressed appropriate concern for “law
systems,” their impact has been minimized by the daily effort of the
multitudes involved in legal system activity whose concern focuses on
individual cases.

Once system personnel grasp the need for analysis of system
operations one may expect that data will be stored in different modes to
facilitate such analysis. Once the data is arrayed more efficiently it is
reasonable to expect a significant increase in “systems studies.”

II. ANALYZING AND ENGINEERING TRAFFIC LAW SYSTEMS: A CASE
STUDY OF AN APPLICATION OF THE SYSTEMS
APPROACH TO LEGAL SYSTEMS

A. INTRODUCTION

For the past several years, the authors have been examining the
application of the systems approach to the analysis and design of legal
systems. Our initial investigations have focused on the role of the criminal
justice system in the management of risk in society.

While we have been concerned with the general theory of socio-legal
systems as control or risk management systems in society, our efforts
have focused on the application of system analysis tools and techniques
to specific examples and case studies. Emphasis has been placed on the
application of existing aerospace methodologies rather than general
system theories from the social sciences. This section describes our
general approach to legal systems analysis and its specific application in
a recent study of a socio-legal subsystem: the Traffic Law System. 14

B. THE TRAFFIC LAW SYSTEM AS A SOCIAL CONTROL SYSTEM

The first step in applying the systems approach is the development of
a conceptual framework within which the tools and techniques of systems
analysis can be employed. In the Traffic Law System (TLS) study, our
conceptual framework was based on utility theory and the idea of socio-
legal systems as social control systems. We hypothesized that social
systems grow because of some utility or perceived utility to those
involved. However, associated with every social system there is some
disutility. Some of this disutility may be said to arise from activity that is
labeled dysfunctional. Events that may produce dysfunctions and create
disutility are often called “risks.” While society will tolerate some level of
disutility, a point will be reached when the disutility is so great that it cannot
be tolerated. At that point society will take action through control systems
to manage the events that create risk and produce dysfunctions in order to
reduce the disutility to a tolerable level.

14. This study was performed for the National Highway Traffic Safety Administration, U.S.
Department of Transportation, under Contract No. FH-11-7270. The study does not necessarily
reflect the official views or policies of the Department of Transportation.
Frequently, the control systems generated to manage risk will in themselves produce some disutility. Society will then constrain the control systems to ensure that the disutility of the control process does not exceed its utility. The utility of the control process would be measured by its success in managing the disutility within the basic social system. In essence, if the cure is worse than the illness, it will not be tolerated.

C. A CONCEPTUAL FRAMEWORK FOR ANALYZING THE TRAFFIC LAW SYSTEM

The TLS study applied these general principles to the development of a more formal and specific conceptual framework. Here, we were concerned with society's primary formal mechanism which operates to influence or control activity within the nation's Highway Transportation System (HTS). It was therefore necessary to define in general terms the composition of these two systems and their relationship to each other and to other affected segments of society. This stage of the work was based almost entirely on four substudies:

- A literature review to identify pertinent research,
- A field survey in two jurisdictions to define the functioning of related real-world processes,
- Conferences involving scholars from various academic disciplines and professionals in the area of highway safety and traffic law,
- An analysis of the law affecting the relationships between the HTS and the TLS.

We found that the major elements of our TLS conceptual framework were as follows:

- The Highway Transportation System (HTS), consisting of highways, vehicles, and drivers, plus their supporting elements.
- The general objective of the HTS: the provision of fast and safe road transportation.
- The economic and psychological utility of a perfectly functioning HTS to the general public.
- The existence of dysfunctions in the HTS, i.e., HTS failures to function perfectly.
- The disutility to society caused by dysfunctions in the HTS, representing a counterforce to the utility of the HTS.
- The public perception of the utility and disutility in the HTS, which in general differs from actual utility and disutility.
- The social control processes which function to manage risks that create dysfunctions and produce disutility.
- The Traffic Law System as one of these social control processes.
- The concept of risk management as the process by which control systems function.
- The existence of specific TLS missions or particular sets of TLS actions taken against a particular element of the HTS which is presumed to be a primary cause of a given dysfunction.
Figure 1 shows the basic interrelationships between these elements as they were developed in the study. The figure shows that the TLS as a whole acts to exercise control over the HTS and, as such, functions as a control system for the HTS. The TLS itself is divided into four distinct parts, each with its own specific control function. Further, each part has different agencies and methods for exercising control over the elements of the HTS.

**Traffic Law System Operation**

![Traffic Law System Operation Diagram](image-url)
The control cycle starts with the generation of dysfunction by the HTS. Dysfunctions in the HTS (crashes, traffic congestion, environmental degradation, etc.) occur in what must at the present time be considered an imperfectly defined manner. Each dysfunction generates a certain amount of real disutility (or "cost") to society, or in other words reduces the utility (or "value") of the HTS to society.

This actual disutility is observed and measured by the public, but inaccurately. Various forces intervene to make the disutility perceived by the public different from the actual disutility. The public, for instance, may not be informed of the actual cost of a certain kind of dysfunction, or of the probability of their being affected directly by this kind of dysfunction. Their knowledge, in other words, will be inaccurate or incomplete.

Despite this distortion, however, if the disfunction is sufficiently strong and persistent, public opinion about it will mount to the point where something must be done. This suggests the hypothesis that there exists a maximum tolerable perceived disutility which, if exceeded, results in a public demand for control forces to eliminate or reduce the unallowable component of disutility—which is now perceived as having become intolerable. This demand goes to the various social systems which have the task of exerting control over the HTS to restore it to equilibrium. One of these social control systems is the TLS.

**D. OPERATIONAL MODES OF THE TRAFFIC LAW SYSTEM**

In our formulation, the TLS works in three operational modes, that is, it applies its forces on three elements of the HTS:

1. Humans (drivers, pedestrians, passengers)
2. Vehicles
3. Highway environment

The TLS tries to control the disutility due to any given dysfunction by applying control forces against a selected characteristic(s) of the element(s) of the HTS thought to be a primary cause(s) of the dysfunction. Control actions are grouped together to form a TLS mission: *i.e.*, a particular set of TLS actions taken against a particular HTS characteristic(s) presumed to be a primary cause of a given dysfunction. The mission may operate in any or all of the three operational modes—driver-control, vehicle-control, or highway-control. An example of a TLS mission is the control of drinking drivers. Here, a specific set of TLS actions (*i.e.*, laws against drinking-driving, enforcement techniques, adjudication procedures, and sanctions) has been devised to reduce the disutility of crashes caused by drinking drivers. This mission is driver-oriented (that is, its operational mode is driver-control), because the driver is the element of the HTS thought to be a primary cause of the highway crash disutility.
E. TRAFFIC LAW SYSTEM FUNCTIONS AND RISK MANAGEMENT

The final essential element of our TLS conceptual framework is the existence of four top-level functions performed by the TLS in all operational modes and missions:

- The generation of laws prohibiting the activities presumed to be causing the unallowable component of disutility due to HTS dysfunctions.
- The enforcement of these laws.
- The official determination of guilt for those accused of not complying with the laws.
- The imposition of legal sanctions against those found guilty of disobeying the laws.

In performing these functions, the TLS allocates its resources among numerous missions in order to achieve a level of HTS disutility that will both be tolerable to the public and satisfactory in terms of its own rankings of the various disutilities. Because of the probabilistic nature of both disutility and the effects of the forces designed to control it, the concept of risk management was introduced in the study as being descriptive of the TLS resource allocation process.

We defined risk management as the whole process by which a social system responds to dysfunctions. It consists of three distinct stages. At the first stage, the social system must identify the risk. This means both determining accurately the cause of the disfunction and also measuring the degree of risk caused by the dysfunction. Risk can be said to have been identified only when both steps have been taken. At the second stage, the social system must determine whether to attempt to manage the risk. Some risks are too small to be worth the effort, others are not amenable to solution no matter how great the effort. This second stage, therefore, requires two judgments. First, can the social system do anything to reduce the risk? It may be better merely to accept it as inevitable or to assign the responsibility to some other social system. Second, assuming the risk can be reduced, is the attempt worthwhile? This is a matter of resource allocation. Since resources are limited, they must be allocated for maximum effectiveness. In essence, the social system must set priorities among risks, allocating resources to deal with those risks whose reduction would produce the most cost-effective reduction in the total disutility within the system. The second phase of risk management, therefore, is complete only when the priority of risks has been examined in terms of the optimal allocation of resources. Finally, the third stage may begin: the choice of methods or measures for reducing risk.

It can be seen, therefore, that any social system must accurately perceive risk, precisely measure risk, and carefully determine priorities among risks. Assuming that the overriding objective of a social system is to achieve the highest possible level of utility and the lowest possible level
of disutility, then to achieve that objective the system must perceive risks accurately and respond to them rationally.

F. FUNCTIONAL DESCRIPTION OF THE TRAFFIC LAW SYSTEM

The second major step we have taken in applying the systems approach to legal systems is the construction of a firm foundation for detailed analysis by means of a generalized functional description of the existing system. This description identifies both the activities carried out under each of the most significant functions of the system and the agencies and personnel performing the activities. In the case of the TLS analysis, this description incorporated and summarized materials developed in the afore-mentioned substudies.

The methodological tool used in developing the TLS description was lifted almost intact from aerospace technology. Known as a functional analysis, the technique divides a system into its most general (so-called "top-level") functions and describes them through flow charts, which show how the functions are sequenced and interrelated, and by a narrative discussion. Next, the top-level functions are each broken down into their next lower level of detail (first-level functions), and appropriate flow charts and narrative are provided. The process is continued until the lowest significant level of detail has been recorded. As used in this technique, the term "function" is defined as a subunit of activities which share a lesser objective thought to be important in achieving the system objective.

The top-level flow diagram used in describing the TLS operating in a driver behavior control mode is shown in Figure 2. Alternative functions are identified by "or" gates (symbolically: \(\bigcirc\)), and functions performed simultaneously are indicated by "and" gates (symbolically: \(\bigotimes\)). The symbol "G" over an output arrow indicates the path taken if the preceding function is performed ("go"), and "\(\overline{G}\)" indicates the path if the preceding function is not performed ("no-go"). For the TLS, the process starts when the citizen violates a traffic law generated by the legislative body and implemented by the various highway and enforcement agencies (function 1.0). If the citizen does not violate a traffic law, the process starts over again. Otherwise, the citizen is defined as a traffic law violator, and all future system interactions are a result of his being in this state.

After reaching the violator state, three alternative paths are presented:

1. No crash and no interaction with TLS (return to "start").
2. No crash and interaction with TLS enforcement.
3. Crash.
If a crash occurs, the citizen may not experience any contact with the TLS (e.g., low level of damage, hit-and-run) and may, as before, return to "start." Otherwise, he will interact with function 2.0, "Enforce Laws." An enforcement action (arrest or summons) may not result, because of lack of detection or other reasons, and the citizen may return to "start."

An enforcement action will lead directly to function 3.0, "Adjudicate
Laws," which is involved with the administration and conduct of the trial or hearing, and the subsequent official determination of guilt. A finding of "not guilty" will result in a return to "start" while a "guilty" finding will lead to the imposition of sanctions (function 4.0) or to other legal systems (appellate courts). Civil and criminal action may also follow.

G. OBJECTIVES AND EFFECTIVENESS OF THE
TRAFFIC LAW SYSTEM

The functional description makes it possible for one to proceed with the next step in the system analysis, the analysis of system and subsystem objectives. The objective of the TLS is, through the application of social control forces, to restrict the disutility due to dysfunctions in the HTS to a level which is societally acceptable. Subsystem major objectives in a driver control mode were subsequently defined as:

Law Generation
- Provide for operation of the TLS.
- Define risk precisely.
- Proscribe risk behavior.
- Prescribe "correct" behavior to create common expectations.

Enforcement
- Manipulate individual behavior to reduce risk.
- Initiate formal control system action (arrest/citation).

Adjudication
- Determine fact and law in a particular event involving an individual charged with an act that "Law Generation" has formally labeled as representing a risk.

Sanctions
- Apply the ultimate system response that is intended to modify behavior to ensure that risk generating events do not recur.

After outlining the present system's objectives, the next stage in our system approach involves the devising of methods to measure the effectiveness of the present system and subsystems, by comparing the present performance with its ostensible objectives. While it is desirable to make the measures of effectiveness quantitative, we have generally found that the data necessary to do so are not readily available. Nevertheless, the precise specification of needed data is in itself an essential part of the early phases of the system analysis process and should not be bypassed.

The meaningful quantitative parameters of a system are best determined through development of a systematic quantitative model, a rigorous statement of system structure relating system effectiveness and performance to system functions. Rather than presenting the surface of its subject, a quantitative model depicts the skeleton of the underlying relationships between one part of the system and the others in such a way that their workings can be observed, measured, and altered. It must be quantitative rather than qualitative, for its purpose is not merely to
describe a system but also to act as a blueprint for the redesign of the system. It is a basic tool of the systems approach, the pattern from which new modifications depart and by means of which the possible effects of new modifications can be anticipated and measured. When sufficient data are available, the quantitative model may be computerized; but whether the data are available or not, the quantitative model serves as the principal method for organizing and disciplining one's ideas about the design and engineering of any new system.

A system manager or designer needs a quantitative model because it gives him a better way of understanding the manner in which the different components of the system influence its effectiveness in achieving its objectives. It enables him to organize his thinking and helps him to be sure that his knowledge of the multiple cause and effect relationships between components is as complete as possible and thereby gives him a reasonable chance of anticipating undesirable effects.

A quantitative model also facilitates the proper exploitation of the manager's expertise. Because it is much easier to understand one part of a system than the whole, the system contains many people at the component level who possess a great deal of knowledge and experience in their own area but lack avenues and methods to forward their expertise to other components of the system, or to adapt their knowledge to information from those other components. The quantitative model provides a basic mechanism for channeling the expert knowledge of system managers into statements useful to the whole system.

Finally, the quantitative model is specific, and by providing a common and quantitative language for identifying the significant factors of the system operation, it enables each component to be evaluated in the same terms and by the standard of its contribution to these clearly stated significant factors. This, in turn, enables each component to know what data it requires and, if necessary, to remedy that lack. Simultaneously, each component can construct submodels of its own operation, which in turn describe in more detail the factors indicated as significant by the quantitative model. Thus, a constant working relationship is set up. More knowledge about component operation extends knowledge about system operation, which then facilitates component operation. The quantitative model is a basic common medium by which the system components can communicate operationally as an integrated system.

The particular kind of quantitative model developed in the TLS analysis is analytic in form. It consists of a set of mathematical expressions which describe precisely how the various TLS subsystems relate to the effectiveness of the TLS as a whole. Such a model differs fundamentally from a simulation or a game in that a unique value of system effectiveness can be determined from any physically realizable set of values of the
model's independent variables. This is in sharp contrast to simulations and games where it is necessary to compute many solutions (replications) in order to determine the expected outcome of a decision.

H. QUALITATIVE ANALYSIS OF THE TRAFFIC LAW SYSTEM

We have taken some care here to point out the value and utility of quantitative tools in the systems approach. However, it should be emphasized that the systems approach does not require the use of quantitative methods. For example, in the TLS study, we found it possible to make a qualitative evaluation of the system's malfunctioning by employing a well-known aerospace systems analysis technique called a failure analysis. The technique makes use of the previously described system functional description and makes it possible to identify those areas where the system is failing to perform its functions.

The "failures" are areas where the system is behaving inadequately or poorly. The analysis discusses in general terms the nature and location of such failures in the present system, emphasizing particularly their effects on the various subsystems. In the TLS analysis, for example, we ascertained that a major systems failure was the lack of a suitable mechanism for informing both the public and the members of the control system as to the nature of the HTS risk, for measuring their perception of that risk, and for communicating that information to the other subsystems. Thus, in qualitative terms, the major system failures were found to be administrative failures which could be met through improved management and an appropriate level of funding for the various system agencies.

I. IMPROVING OPERATIONS THROUGH THE SYSTEMS APPROACH

In applying the systems approach to so-called physical systems, the ultimate intent is nearly always one of design and operation of a new system. In the case of the legal system, the intent will usually be one of modification of subsystems and components in such a way as to achieve economically and politically acceptable improvements in the existing system, or to maintain a present level of system performance at reduced cost. The trick, then, is to devise ways of modifying the system components so that the results of all are in harmony with respect to the desired overall system improvement. Horror stories about the disruptive and counterproductive effects of well-meaning but careless tinkering with legal system components are numerous and often painfully nonfictional.

The systems approach offers several specific techniques for evaluating the expected impact of proposed component modifications. Quantitative models of the type discussed previously are an obvious tool and can often be applied even if exact or complete data are not available, since the purpose will generally be to measure changes in system performance
<table>
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<tr>
<th>COUNTERMEASURE</th>
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<td>Provide Breath Testing Devices to Patrol Units in a Sufficient Number to Allow Field Testing</td>
<td>1-Insufficient Detection 2-Insufficient Evidence</td>
<td>1-Must Authorize Use of Instrument 2-Must Authorize Use of Results</td>
<td>1-Funding Equipment Training Manpower</td>
<td>1-Increased Number of Cases 2-Shift in Case Handling a) Fewer Trials &amp; More Guilty Pleas (Plea Bargaining) b) More Complex Trials 3-Increase Arrest Rate 4-Increase Quality of Evidence 5-Clarifies Concept of a DWI 6-Simplifies Decision-Making Process</td>
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<td>1-Programs More Accurate Definition and Detection of DWI 2-Makes Decision More Accurate Because of Standard Procedure and Quantitative Measure 3-Creates Greater Consistency Between Subsystems and Reduces Ambiguity 4-Clarifies Decision with Better Evidence 5-Clarifies Concept of a DWI</td>
<td>1-Might Be Considered as Invasion of Privacy</td>
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rather than to provide absolute values. Simulations and games offer another approach to evaluating alternative modifications to components; and sometimes it will even be feasible to conduct real-world experiments in selected jurisdictions.

In our work we have found that a purely qualitative evaluation of component change effects, if done carefully, can be highly useful in the early phases of a system analysis. We have used the phrase impact analysis to describe the technique which involves the systematic examination of the system failures which the change would cause to be avoided or mitigated and then what impact it might have on the subsystem, the total system, and the public. Figure 3 illustrates a summary presentation of the results of such an analysis when applied to a proposed change in performance of the TLS enforcement function in dealing with the drinking driver. In addition, a more general analysis of the impact of a broad range of suggested techniques for improving the specific enforcement function of drinking driver detection identified issues concerning basic individual rights and the need for careful management of the interaction of such techniques with other social systems. These issues provide an excellent example of the modifications required in the systems approach when applied to social rather than technological processes. Few modifications within a social system can simply be ordered into effect. Few modifications can be tested in a laboratory. Though they can be given an in-depth theoretical investigation, eventually, since the legal system is integrated with other social systems, the ramifications of modifications can be fully explored only in real-world operations. Indeed, the achievement of system objectives under operational conditions is the true test of the systems approach when applied to any problem.

III. FUTURE APPLICATIONS OF THE SYSTEMS APPROACH TO LEGAL SYSTEMS

Our exploratory attempts at applying the systems approach to legal systems lead us to believe that it offers great potential as a way of structuring, analyzing, and improving the operational effectiveness of legal systems in this country. We find, in particular, that many of the techniques developed for technological systems are directly transferable to legal systems and can be of immediate benefit to those interested in improving the system's efficiency and performance. We believe that by providing a common framework and common objectives, the systems approach offers a powerful force for integrating the management of legal systems.

At the same time, it is clear that the present state of the art of legal systems analysis is extremely primitive and that a considerable effort will be required to move the technique from the research laboratory to the
field. Fundamental problems, such as management at the system level and the lack of availability of data describing the effect of system action on human behavior, need better solutions before the full benefits of the systems approach can be realized. Perhaps of even greater immediate importance is the need to train both researchers and system personnel in the philosophy and presently known methods of the systems approach so that there will be a better chance of its full range of tools being applied correctly and more frequently. With luck, needed improvements both in method and substance will follow, and the development of the legal component of Huxley's social brain can accelerate.
Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers

CHARLES A. WEBB*  

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I. JUDICIAL HISTORY OF ENTRY CONTROLS

The Motor Carrier Act of 19351 was not generated by the depression but by the decision of the Supreme Court of the United States in *Buck v.*

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* President, National Association of Motor Bus Owners.
Kuykendall. Following that decision, bills for the regulation of interstate motor carriers of passengers were introduced in and actively considered by six successive Congresses beginning with the 69th Congress in 1926.

In Buck v. Kuykendall, Buck proposed to operate between Seattle, Washington and Portland, Oregon as a common carrier exclusively for the transportation of interstate passengers and express. Buck’s application for a certificate of public convenience and necessity was denied by the State of Washington on the ground that existing rail and motor passenger transportation service between Seattle and Portland was adequate.

The Supreme Court held that the State of Washington could not require a certificate of public convenience and necessity to operate in interstate commerce. The primary purpose of controlling entry was to limit or prohibit competition in interstate commerce, a purpose which the Court found to be forbidden by the Commerce Clause of the Constitution. State action in determining whether competition should be prohibited was determined by a standard which the Court found to be essentially Federal in nature—the existence of adequate facilities for conducting interstate commerce. Oregon would have permitted the operation proposed by Buck, a circumstance which aggravated the obstruction to interstate commerce by the State of Washington.

As generally interpreted, Buck v. Kuykendall not only wiped out State controls on entry for motor carriers engaged in interstate commerce but also invalidated State requirements respecting insurance and standards of service. Thus, the net effect of the decision was to confine regulation of interstate motor carrier transportation to the area of State police powers: motor vehicle safety and highway conservation.

At the time of the decision in Buck v. Kuykendall, some forty states prohibited motor common carriers of passengers from using their highways without a certificate obtained by a showing that the involved service is required by the present or future public convenience and necessity. In general, State requirements for certification were imposed not only on carriers of passengers engaged in intrastate commerce but also on those engaged exclusively in interstate commerce.

3. In a related case, Bush & Sons Co. v. Maloy, 267 U.S. 317 (1925), the court held the State of Maryland could not impose entry controls on interstate motor carriers of property even though the highways over which operations would be conducted were not constructed or improved with federal aid.
4. In an investigation completed in 1928, the Commission found that forty States and the District of Columbia required motor common carriers of passengers to obtain certificates of public convenience and necessity as a condition precedent to the use of their highways. Motor Bus and Motor Truck Operation, 140 I.C.C. 685 (1928).
II. DIFFERENCES BETWEEN THE INTERCITY BUS
   AND TRUCKING INDUSTRIES (1925-1935)

On June 15, 1926, in response to the Supreme Court's decision in
Buck v. Kuykendall, the Commission launched a comprehensive investi-
gation of motor bus and truck operations. In its report, Motor Bus and
Motor Truck Operation, the Commission said:

A distinction should be recognized between motor-bus organization and
operation and motor-truck organization and operation in considering the
regulation of motor carriers. Bus lines have developed so rapidly by
consolidation and extension that in the present stage of the industry bus
lines have progressed to a point where the administration of regulatory laws
covering their operations is practicable. There is also an urgent need for the
regulation of the interstate transportation of passengers by motor vehicle.
The situation with respect to truck lines is different. They are not so well
organized. They usually consist of a small number of units, frequently a
single truck. State regulatory bodies appear to have found it much more
difficult to regulate trucks than busses.

In its report on a similar investigation concluded four years later,
Coordination of Motor Transportation, the Commission found that "[b]us
operators in keeping with their larger average size, the greater degree of
regulation to which they are subject, and the nature of the business, show
a greater degree of financial responsibility than do truck operators as a
class."

The Commission recommended, as it had in the prior investigation of
the motor bus and trucking industries,

that Congress provide at once to put Federal regulation to the test so far as
the transportation of passengers by motor buses is concerned. This would
provide an organization which would serve as a nucleus for such further
steps in motor-vehicle regulation as experience and added information
may show to be desirable and practicable.

Two of the most influential reports leading to Federal regulation of the
motor carrier industry were those of Commissioner Joseph B. Eastman
issued in 1934 and 1935 in his capacity as Federal Coordinator of
Transportation. In the 1934 report, the Federal Coordinator wrote that the
intercity trucking industry "is disorganized and much of it is in an economi-
cally unsound condition." He added:

5. Id.
6. Id. at 742.
7. 182 I.C.C. 263 (1932).
8. Id. at 281.
9. Id. at 384.
10. Regulation of Transportation Agencies, S. Doc. No. 152, 73rd Cong., 2d Sess., 14
(1934).
The foregoing analysis does not wholly apply to the intercity motor-bus industry, although it is far from prosperous. The carrying of passengers is, for the most part, a common-carrier business and lends itself to organization on a broad scale. Contract operators, so large and disturbing a factor in the trucking industry, are generally lacking. The responsibilities of the operators are greater and entrance into the industry, therefore, requires substantial financial resources. Travelers, unlike shippers, can do little shopping around and, except in a minor degree, can individually exert no pressure for special rates. The better organization of the industry has also tended to prevent such exploitation of labor as has characterized parts of the trucking industry.\footnote{11}

In the 1935 report, the Federal Coordinator noted the bus industry's desire for separate legislation for buses and trucks but concluded, "it has not seemed desirable to the Coordinator to make such a separation, but it can be done, if necessary, and without harm."\footnote{12}

Despite the differences between the motor bus and trucking industries, witnesses for NAMBO (National Association Motor Bus Owners) voiced no specific objection to the language of bills eventually embodied in the Motor Carrier Act of 1935.\footnote{13}

In weighing the benefits anticipated from the controls over entry prescribed by the Motor Carrier Act of 1935,\footnote{14} the differences between the motor bus and trucking industries should be kept in mind. The legislative history of the Act, in explaining the purpose of requiring interstate motor common carriers to obtain certificates of public convenience and necessity, usually fails to distinguish between buses and trucks.

III. Objectives Of Control Over Motor Carrier Entry

In drafting what became the Motor Carrier Act of 1935, the Congress and the Commission, in one sense, were not plowing new ground. They were filling a gap created by the Supreme Court in a long-established

\footnote{11}{Id. at 15}
\footnote{13}{From testimony presented by NAMBO (National Assoc. of Motor Bus Owners) witnesses in 1935 before the Senate Committee on Interstate Commerce, it may be inferred they expected to derive the following advantages from separate legislative treatment: (1) Legislation limited to the motor bus industry was more likely to be promptly enacted because Federal regulation of interstate motor carriers of property was more controversial; the trucking industry was split on the issue of Federal regulation and many Members of Congress believed it to be premature or impracticable; (2) Separate legislation would have authorized administration by an I.C.C. Division of Motor Bus Control, thus minimizing the possibility of confusing the regulatory problems of two dissimilar industries; and (3) Regulation of the bus and trucking industries under the provisions of a single statute would be detrimental to the former because of the complexities involved in regulating the latter.}
\footnote{14}{Pub. L. No. 255, 49 Stat. 543 (1935).}
pattern of regulation. For that reason, perhaps, supporters of Federal
regulation did not produce detailed economic data or studies showing
that control of entry was an essential feature of regulation. However, the
legislative history of the Motor Carrier Act of 1935 contains an adequate
explanation. The reasons advanced to justify entry controls are listed
below in descending order of importance.

1. Prevention of an Oversupply of Transportation

In hearings before the Senate Interstate Commerce Committee on
bills which became the Motor Carrier Act of 1935, Commissioner East-
man, testifying as the Federal Coordinator of Transportation said:

The most important thing, I think, is the prevention of an oversupply of
transportation; in other words, an oversupply which will sap and weaken the
transportation system rather than strengthen it. In the case of railroads that
was done in 1920 by the provision that prior to any new construction a
certificate of convenience and necessity must be secured from the Com-
mision. In my judgment it would have been much better if there had been
such a provision many years before. It would have prevented certain
railroad construction which tends to weaken the railroad system and
situation at the present time. The States have, I think, in all cases, found the
necessity in their regulation of motor transportation to provide for that
prevention of an oversupply. It is a provision which has been adopted in
most of the foreign countries that I have inquired into; in other words, the
granting of certificates or permits in order to prevent an oversupply which
weakens the situation.\textsuperscript{15}

Section 206 of the Act, added by the Motor Carrier Act of 1935, provides that no motor carrier may engage in operations in interstate or
foreign commerce "unless there is in force with respect to such carrier a
certificate of public convenience and necessity issued by the Commis-
sion authorizing such operations . . . ."\textsuperscript{16}

To protect regular route operators, the Congress prohibited the
issuance of a certificate to common carriers of passengers for operations
over irregular routes, except in the case of charter or special operations.
The proviso to section 207 of the Act had been urged by the Federal
Coordinator of Transportation in his 1934 report as "a necessary measure
of protection for regular route operators" because the bus industry "differs
from the truck industry in that there is no substantial need for operation
over irregular routes."\textsuperscript{17}

\textsuperscript{15} Hearings on S. 1629, S. 1632, and S. 1635 before the Senate Committee on Interstate

\textsuperscript{16} Section 309 of the Act, added by the Transportation Act of 1940, provides that "[n]o
common carrier by water shall engage in transportation subject to this part unless it holds a
certificate of public convenience and necessity issued by the Commission."

\textsuperscript{17} Regulation of Transportation Agencies, supra note 9, at 62.
Reports of the Senate and House Committees on S. 1629, enacted into law as the Motor Carrier Act of 1935, contain no specific justification for the imposition of entry controls on interstate motor carriers. Such reticence is understandable when it is considered how thoroughly legislation had been considered between 1925 and 1935 by the Congress, the Executive Branch, and the Commission.

Although limitations on entry in the 1935 legislation attracted no substantial opposition, serious misgivings had been expressed prior to that time. Senator Burton K. Wheeler of Montana, Chairman of the Senate Interstate Commerce Committee in 1935, and the generally acknowledged legislative father of the Motor Carrier Act of 1935, joined in a minority report issued in 1930 on a bill to regulate motor carriers of passengers.\textsuperscript{18} Senator Wheeler and his dissenting colleagues concluded:

This provision of the bill will establish one more bureaucratic department of the Government to interfere with the natural development of the people's business. It will mean more red tape on the part of both operators and Government officials. Worst of all, it will prevent that competition that brings lower rates and better service to the people. . . . The minority members of the Interstate Commerce Committee believe the bill should be amended by striking out the provisions requiring application for issuance of the certificate of public convenience and necessity.\textsuperscript{19}

The following views of Congressman George Huddleston were shared by most of the 115 members who voted against H.R. 10288:

The proponents of the bill admitted candidly that its main purpose was to give a monopoly, to eliminate competition. They argued that competition should be forbidden in the interest of efficiency, that an operator can not afford to adequately equip himself and to render regular and dependable service unless he is protected against irresponsible competitors. They argued that, to give good service, an operator must expend large sums for suitable buses and terminals, and that he can not afford to do this except upon an assurance of protection against those who might seek to take the cream of the business without handling the less desirable portion.

This argument is equally applicable to all other kinds of business—to the vast steel industry and to the corner grocer. The grocer, in order to give the best service, must keep an attractive and commodious store, with an ample stock and efficient clerks. It is a hardship on him to be forced to compete with an irresponsible competitor, who by underselling or some other method, seduces the most profitable customers. In principle, to forbid competition between bus lines would warrants forcing competition between grocery stores. There is the same, and no more, justification for the regulation of buses than for the regulation of the grocery stores.\textsuperscript{20}

\textsuperscript{18} Minority Report to accompany H.R. 10288, S. REP. No. 396, part 2, 71st Cong., 2d Sess. 2, 3 (1930).
\textsuperscript{19} Id. at 3.
\textsuperscript{20} H.R. REP. No. 783, 71st Cong., 2d Sess. 16-17 (1930).
Commissioner Woodlock was not convinced that the Commission's position on entry controls was sound. In his concurring opinion in *Motor Bus and Motor Truck Operation*, he stated:

Regulation is not in itself a good thing. The less regulation that is necessary, other things being equal, the better for the community. It is necessary in the case of public-service utilities because of their semimonopolistic nature. Transportation in general is not per se of such nature; transportation by railroad is. Transportation by motor bus and motor truck does not necessarily depend upon monopolistic or semimonopolistic organization or performance. It is manifest that at the present time these services are much more largely of a competitive than of a monopolistic nature. For that reason the need for regulation, except in so far as concerns the public safety, is not wholly clear.  

2. The Need for Equality of Regulation

In 1935 the railroads were fully regulated and were recognized to be a sick industry. Many argued it was unfair to burden the railroads with comprehensive regulation while turning the trucks loose to take the cream of their commerce and then expect them to offer comparable service.

In *Coordination of Motor Transportation*, the Commission concluded:

2. That there is substantial competition between rail and water carriers on the one hand and motor carriers on the other for the transportation of both passengers and freight and that this competition is increasing;

3. That such competition is conducted under conditions of inequality, particularly in regard to regulation.

It was obviously unfair to continue to regulate rail carriers without enacting a similar system of regulation for motor carriers of passengers.

Proponents of regulation also stressed the inequity in subjecting intrastate motor carriers to full economic regulation while permitting interstate carriers to be wholly unregulated. Commissioner McManamy, in his testimony before the Senate Interstate Commerce Committee in 1935, estimated 80 percent of the highway traffic at the time was regulated, and added: "[I]t is not fair to have 1 truck out of every 5 in a position to disregard State authority. That complicates the situation as to all of them."

3. Interdependence of Entry Controls and Other Features of Regulation

At various times in the debate on Federal regulation of interstate motor carriers, the value of a certificate of public convenience and

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21. 140 I.C.C. at 750.
22. 182 I.C.C. 263 (1932).
23. *Id.* at 379.
necessity as an enforcement tool was recognized. State regulatory commissions, for example, could suspend or revoke the operating authority of a carrier for failure to provide reasonably adequate service or for wanton disregard of safety regulations. Prior to 1935, the public was frequently victimized by unscrupulous brokers of passenger transportation acting in concert with unregulated interstate carriers. The solution adopted in the Motor Carrier Act of 1935 was to prohibit brokers from using carriers not authorized by a certificate of public convenience and necessity to engage in interstate commerce.

Most of the studies, reports and debates which culminated in passage of the Motor Carrier Act of 1935 dealt with Federal regulation as a whole with little consideration being given to a system of safety and economic regulation which did not include control of entry.

Congress was concerned about the failure of unregulated, interstate carriers to observe schedules; to perform the service promised to the public; to provide liability insurance; to make restitution for loss of baggage; and to a general failure to provide reasonably adequate service. However, the Commission found in its report in 1928 in *Motor Bus and Motor Truck Operation*, that intercity bus service "on regularly certified routes is generally satisfactory throughout the country." The Commission also found that so-called "wildcatters" were cutting fares below compensatory levels and engaging in reprehensible practices which discredited bus travel in the eyes of the general public. Congress and the Commission concluded that these reprehensible practices would be eliminated by Federal legislation of the type eventually enacted as the Motor Carrier Act of 1935 but neither body considered whether such practices could be prevented if virtually unrestricted entry were permitted. In any event, the Commission and Congress believed entry controls to be a useful adjunct to regulation having as its ultimate objective a reliable and efficient system of motor transport.

4. Charter and Special Operations

The legislative history of entry controls set forth above applies almost entirely to scheduled passenger service over regular routes. Little attention was paid to charter and special operations because that traffic was an insignificant part of the whole.

Most of the bills introduced prior to 1935 considered only regular-route operators to be common carriers and would not have required charter bus operators to obtain certificates of public convenience and necessity. Such operations would have been permitted under a license.

25. 140 I.C.C. 685, 702 (1928).
26. *E.g.*, section 1(a)(10) of the Parker bill which passed the House of Representatives on March 24, 1930 defined the term common carrier by motor vehicle as "any common carrier of
obtained merely upon a showing of fitness. In the Motor Carrier Act of 1935 charter operations were included within the definition of common carriage but authority to conduct them was granted either upon proof of public convenience and necessity or as an incident to a grant of regular-route authority.

As charter operations became progressively more important and as the revenues from such operations began to sustain marginal regular-route service, intercity bus operators sought repeal of the incidental charter authority provision of the Act. In 1966, Congress enacted Public Law 89-804 which amended section 208(c) of the Act to read as follows:

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part pursuant to an application filed on or before January 1, 1967, or under any reissuance of the operating rights contained in such certificate, may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed. [language added by the amendment underscored].

Abuses of the automatic charter right provision occurred when carriers sought authority to transport passengers over a short regular-route, not for the purpose of providing any significant scheduled service, but for the purpose of acquiring incidental charter authority from points on those routes to all points in the United States. Under section 208(c) of the Act, as amended, all new charter operations must be specifically authorized by the Commission upon a showing of public convenience and necessity.

IV. REGULATORY HISTORY OF ENTRY CONTROLS

Most proceedings involving applications for authority to transport passengers do not raise any clear issue of law or transportation policy. Grants or denial of authority in such cases are based on evaluation of the evidence of record and have little precedential value. Unsuccessful applicants would be inclined to find the Commission's policy of controlling entry too strict while unsuccessful protestants would be prone to find it too lenient.

In those cases, however, raising some distinct question of law or policy, decisions of the Commission and the courts have generally favored entry.

1. The Standard of Public Convenience and Necessity

From the beginning of regulation the Commission has certificated persons operating motor vehicles for compensation in interstate or foreign commerce over fixed routes or between fixed termini. H.R. 10288, 71st Cong., 2d Sess. (1930).

operations which offer innovative service to the public. In the first passenger application case decided under the Motor Carrier Act of 1935 the Commission emphasized that control of entry and competition are not antithetical concepts. In *Pan-American Bus Lines Operation*, the applicant proposed to operate through-bus service between New York and Miami catering only to long-haul traffic and restricting local service to a comparatively few points. In granting the application, the Commission said

> Nor are we impressed with the idea that a monopoly of motorbus transportation in a section of the country such as this is necessarily desirable. Public regulation can enforce what may be called reasonable standards of safe, continuous, and adequate service, but it can hardly be expected to take the initiative in experimentation and the development of new types of service. In fact the carriers would probably resist regulation in the courts, if it did undertake to follow such a line, on the ground that it was an invasion of managerial prerogatives and discretion. Competition is the best-known spur to such endeavor and we are not persuaded that Congress intended to eliminate it in the motorbus field any more than in the railroad field.

The Commission's philosophy of encouraging non-injurious competition, first expressed in the *Pan American* case, was reaffirmed in *Almeida Bus Lines, Inc., Extension*—*New York City*, where the Commission said:

> In summation, we have stated a policy that encourages the existence of sufficient carrier capacity to encourage competition and we believe that a second carrier's service, as limited by appropriate restrictions, can be added to the motorbus transportation system under consideration without the creation of excessive capacity that might adversely affect the continuance of effective operations by the existing, joint-line carriers.

Between 1935 and 1955 numerous applications of bus and truck operators were protested by railroads but few applications were denied on the ground that rail service was adequate. The question was resolved in *Schaffer Transportation Co. v. United States*, when the Court held a motor carrier's application for authority should not be denied merely because rail carriers were able to handle the traffic. To do so, said the Court, would give one mode of transportation unwarranted protection from the competition of another.

In recent years the conventional standard of public convenience and necessity appears to have been altered somewhat in cases in which the applicant is a member of a racial or ethnic group and proposes a service.

27. 1 M.C.C. 190 (1936).
28. Id. at 208.
30. Id. at 327.
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1976] tailored to the particular desires of members of his group. In Transpores Hispanos, Inc., Common Carrier Application,32 the Commission over the protest of large carriers providing frequent, regular service in modern over-the-road coaches between Chicago and Laredo, Texas, granted the application of a Spanish-speaking applicant who proposed to serve the Spanish-speaking community with Spanish-speaking drivers in minibuses operated over irregular routes on a non-scheduled basis. Although the Commission has not consistently predicated grants of authority on ethnic or racial considerations,33 the Transpor tes Hispanos case and several others cannot be explained on any other ground.

2. Exemptions

For intercity bus operators the most significant exemption provision of the Act is section 203(b)(1) which excludes from economic regulation—

(1) motor vehicles employed solely in transporting school children and teachers to or from school;

the scope of the exemption is not illuminated by its legislative history. In Motor Carrier Safety Regulations—Exemption,34 the Commission summarized that history as follows:

Section 203(b)(1) exempts from the general provisions of the act 'motor vehicles employed solely in transporting school children and teachers to or from school'. No representatives of carriers engaged in this form of transportation appeared and testified at the hearings. Well-informed witnesses stated that, in their opinion, but few, if any, common and contract carriers were engaged solely in transporting school children and teachers to and from school in interstate commerce. It is obvious that each State provides schools for the children living within its borders and therefore transportation of school children and teachers in interstate commerce to and from school does not occur frequently.35

With the tremendous increase in transportation to school athletic events and on school-sponsored trips to points of historical, educational, and cultural interest, the Commission was required to decide whether such transportation was within the scope of the exemption or whether the words "to or from school" meant only "to or from the school building." The broader interpretation was sustained by the Supreme Court in Keller Common Carrier Application.36

32. 117 M.C.C. 894 (1973).
33. See generally: Elegante Tours, Inc.—Broker Application, 113 M.C.C. 156, 160 (1971).
34. 10 M.C.C. 533 (1936).
35. Id. at 536-37.
After the decision in *Keller*, the Commission further broadened the exemption by holding that the exclusive use requirement of section 203(b)(1) does not preclude from use under the exemption buses which may be employed at other times in transporting persons other than school children. In other words, the court held that the word "solely," in section 203(b)(1) merely excludes from the exemption transportation of other persons in the same vehicle and at the same time with school children and their teachers. *Schoolbus Exemption*.37

Section 203(b)(7a) of the Act exempts from economic regulation "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft. . . ." In *Motor Transportation Service Incidental to Air*,38 the Commission found, first, that the exemption applies only to the "transportation of passengers who have had or will have an immediately prior or immediately subsequent movement by air."39 Second, the Commission defined the area of exemption to be a radius of 25 miles from the airport plus the municipalities served by the airport if any part of a municipality falls within that radius.40 In adopting the 25-mile limitation, the Commission noted in its report that practically every major city and its airports could be served under the exemption.

3. **Charter and Special Operations**

In *Ex Parte No. MC-29, Regulations, Special or Chartered Party Service*,41 the Commission undertook to define charter service and to establish rules under which it might lawfully be conducted. Under the regulations a charter bus operator must deal with a preformed group which contracts for the exclusive use of the bus and the group may not be formed by the carrier through the sale of individual tour tickets. In *Fordham Bus Corp. Common Carrier Application*,42 the Commission noted that grants of authority to conduct special operations were generally limited to round trip, sightseeing and pleasure tours, and drew the following distinction between special operations and charter operations:

The terms "charter" and "special" operations as applied to motor carriers of passengers under part II of the act are frequently confused and sometimes erroneously used as virtually synonymous. It is clear, however, that, properly employed, each identifies a particular and distinct type of service. Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone rather than the carrier, who collectively contract for the exclusive

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37. 113 M.C.C. 258 (1971).
38. 95 M.C.C. 526 (1964).
39. Id. at 527.
40. The text of the regulation is embodied in 49 C.F.R. 1047.45(a) (1975).
41. 29 M.C.C. 25 (1941).
42. 29 M.C.C. 293 (1941).
use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier.43

In its landmark decision in *Tauck Tours, Inc., Extension—New York, N.Y.*,44 the Commission held that a carrier authorized to engage in charter operations (but not permitted to transport groups formed by it through the sale of individual tickets) by a tour broker whether the broker's license is limited to special operations only or charter operations only. The decision had the practical effect of greatly enlarging the authority of both charter bus operators and tour brokers.45

4. Adequacy of Service

Certificates authorizing service over regular-routes specify the routes and the intermediate points, if any, which must be served. For carriers holding certificates issued prior to completion of the Interstate Highway System, the Commission established a simplified procedure for obtaining authority to operate on interstate highways. In general, carriers could acquire such authority where the distance over the interstate highway was not less than 90 percent of the distance over the carrier's regular service route, and where adequate service would continue to be provided at all authorized points on the regular service route.46 Motor carriers of property were permitted to conduct such operations without specific authorization and under a more liberal deviation standard because there is generally less intense competition existing between carriers of property than between passenger carriers.47

The Commission has no power to compel a carrier to continue operations in interstate commerce if the carrier desires to abandon its entire operation but it may prohibit discontinuance of a part of the authorized operation.48

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43. Id. at 297.
45. But see Greyhound Corp. v. Edwards, 100 M.C.C. 453 (1966). The Commission has held that shopping or other trips arranged by brokers are not lawful where members of the group have little community of interest and their common purpose is chiefly the desire for direct and expeditious transportation between two points.
The Commission’s authority to require continuance of service at particular points stems from the carrier’s obligation set forth in its certificate to render reasonably continuous and adequate service at all authorized points. In a recent case, applicant proposed to re-route its service to make use of a more direct highway and to provide new service at a town which had no public transportation. However, this change in routing would have deprived residents of towns located on the old route of service for which there was a continuing need. Concluding that the needs of neither town could be ignored, the Commission denied applicant’s request to discontinue operations along the old route and granted authority to operate along the new route conditioned upon the rendering of a reasonable amount of service along both routes.49

On July 17, 1975, the Commission published a Notice of Proposed Rulemaking in Ex Parte No. MC-95 looking toward issuance of comprehensive service standards for the intercity bus industry.50 The proposed regulations would require regular-route operators to have a bus terminal in every community served having a population of 15,000 or more regardless of the volume of traffic generated; to provide toll-free information service throughout the area served by the carrier; and to add or improve facilities and services at some 7,000 bus stations located in restaurants, gasoline stations, and drug stores. If the regulations proposed by the Commission are adopted, entry for many prospective regular-route operators would be foreclosed as a practical matter.

V. CONCLUSIONS

The legislative and regulatory history of entry controls supports a presumption for their retention. Entry controls were not thrust upon the intercity bus industry for the first time in 1935 but had been an integral part of State regulations since at least 1920. Between 1925 and 1935 intercity travel by bus was predominantly intrastate51 and certificates of public convenience and necessity were required to provide the service. The Motor Carrier Act of 1935 was the product of ten years’ of Congressional and Commission labor, which was based in turn on a relatively uniform system of controlling entry by 45 of the 43 States.

51. For example, of the 31,975 buses engaged in common carrier operations in January, 1926, 30,475 were operated over intrastate routes and only 1,500 over interstate routes; of the 2,308,805 passengers transported by bus in Minnesota in the first half of 1926, only 61,379 were interstate passengers; and of the 99 certificates issued in 1926 by North Carolina bus operators, only 17 were held by carriers engaged in interstate commerce. Motor Bus and Motor Truck Operations, 140 I.C.C. 685, 698-99 (1928).
Perhaps it would have been better if the States some 75 years ago and the Congress 50 years ago had devised a system of economic regulation permitting virtually unrestricted motor carrier entry. Even so, the intercity bus industry has provided for 40 years, without government subsidy, the most economical and efficient of public passenger transportation available.

In any event, we must come to grips sooner or later with the intrinsic merits and demerits of limitations on motor carrier entry. The chief reason given for requiring certificates of public convenience, citing the railroad experience, was to prevent an oversupply of transportation. The second most important reason advanced in the legislative history for controlling entry was to establish regulatory equality as between unregulated interstate motor carriers of passengers and regulated passenger carriers, both rail and motor. Equality of regulation as between rail and motor carriers of passengers no longer exists since AMTRAK is not subject to the entry, rate, and finance provisions of the Interstate Commerce Act. Equality of regulation as between intrastate and interstate motor carriers was a sound objective in 1935 when the States were responsible for regulating the vast majority of operations. Since intercity bus transportation is predominantly interstate today, it is reasonable to assume that regulatory inequalities resulting from an easing of federal controls on entry would be alleviated by state action or by appropriate language of preemption in the Federal statute.

Economic regulation, including control of entry, was also urged in the interest of achieving the following objectives: prevention of destructive and discriminatory pricing practices; protection of the public against the fraudulent or improvident issuance of carrier securities; the provision of reasonably adequate service to passengers; and protection of both passengers and the general public by requirements for liability insurance. The legislative history of the Act implies that entry controls are required to attain the foregoing objectives but fails to explain why. In fact, there is no reason why regulations designed to achieve such objectives could not be applied effectively to carriers who obtained a permit to operate in interstate commerce merely upon a showing of fitness and ability.

The one conclusive argument against removal of controls on entry by motor carriers of passengers stems from their obligation to provide service to thousands of small cities and towns and to vast rural areas either without profit or at a loss, and from the fact that it would be unconscionable either to permit new entrants to skim the cream of the traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation. This justification for entry controls is alluded to in the legislative history but not emphasized, probably because the service obligations of most motor
carriers of passengers at that time were being enforced in accordance
with the terms of certificates of public convenience and necessity issued
by the States.

The action of the 74th Congress in restricting entry into the business
of transporting passengers by bus does not differ essentially from the
action of the First Congress in restricting the right to transport mail
creating the post office. The difference is only one of degree since the
entry provisions of the Motor Carrier Act of 1935 are not designed to
foreclose all competition.

To date, no one has suggested unrestricted entry for motor carriers of
passengers, the unrestricted right of exit, and subsidization of intercity
bus service at places where discontinuance results from the unrestricted
rights of entry and exit. Such a position, however, is the one to which
advocates of free entry ultimately must come. It would be grossly unfair to
permit new entrants to engage in "cream-skimming" while requiring
existing carriers to continue marginal or unprofitable service. It would not
be socially desirable or politically feasible to discontinue intercity bus
service to thousands of rural and small urban areas. Service to such
communities, in the absence of industry cross-subsidies, can be con-
tinued only by a large, new Federal subsidy program entailing at least as
much regulation as administration of existing controls on entry.

Finally, entry controls unquestionably benefit existing motor carriers
or passengers. The benefit, however, is offset by a bundle of regulatory
burdens. If the present degree of insulation against competition is
deemed undesirable, the quid pro quo should be the modification or
repeal of burdensome economic regulation.
Liability Insurance Coverage of Leased Trucks

FRANKLIN D. BREWE*

SCOPE

The collision of a truck with another vehicle, person or object raises difficult issues of fact and liability. A lawyer who grapples with these issues must sift through such doctrines as negligence, contributory negligence, last clear chance, and failure to keep a proper lookout. This task is difficult enough. But when the truck is leased, a new dimension is added. The lawyer is no longer confronted with the sole issue of whether the truck driver is liable. It must now be determined whether there is another party upon whom the law will impose liability for the driver’s negligence.

The rules of law that courts apply to determine which parties are liable are called the “rules of allocation.” Although this article examines these rules of allocation, the primary focus is upon the conditions under which the parties’ insurance companies assume the liability. The scope of the article is confined to liability losses arising from bodily injury and from damage to the property of third parties. Consequently, there is no analysis of loss allocation for damage to the leased vehicle itself. In addition, there is no attempt to analyze liability for damage to cargo carried by the leased vehicle. In other words, those losses normally covered by the cargo liability, fire, theft, comprehensive, combined additional coverage and collision coverages of an automobile insurance policy are not at issue.

* Associate, Murphy, Griffen, and Dixon; Aurora, Illinois.
Finally, this article is confined to the lease of trucks to property carriers for hire, i.e., motor carriers which transport the property of others for compensation.

I. INTRODUCTION

In the last three decades, truck leasing has grown to such an extent that by 1975, 800,000 trucks were leased or rented.¹ During this period, the nature of truck leasing has varied in accordance with the needs of the truck lessee. Today, the most common types of truck leases include:

a) the lease of trucks (generally without drivers) from an equipment leasing firm by the day, week, month or longer;
b) the long-term lease of one or more trucks with drivers from a contractor, (when the lessor-contractor is also the driver, such a contractor is called a "bobtail," "broker," "owner-operator," "driver-owner" or "lessor-driver");
c) "trip leases," which include initial hauls, return or "back hauls" and round trips; and
d) the most sophisticated leasing arrangement, the equipment interchange or "interline" agreement.

As businessmen, the lessor and lessee of a truck are interested in their costs of doing business. Of course, neither the occurrence of accidents nor the monetary liability for judgments arising therefrom can be foreseen with any degree of precision. Therefore, the truck lessor and lessee cannot estimate their future costs, and this inability hampers business planning.

The lessor and lessee can, however, take out insurance to protect them against liability claims. In so doing, their insurance premiums become a cost of their operations. Thus, they change an uncertain future cost of unknown amount into a present and known cost.

In order to arrange for appropriate insurance coverage, the lessor and lessee must know the rules for allocating liability losses. These rules of allocation allow the lessor and lessee to determine which of them may be liable for injury to the person or property of third parties. On the other hand, the insurance companies for the lessor and lessee must know the rules of

¹ AUTOMOTIVE FLEET, March, 1975, at 23.

For a general work covering all aspects of the trucking industry, see C. Taff, COMMERCIAL MOTOR TRANSPORTATION (4th ed. 1969); and for a series of articles devoted to the business and financial aspects of equipment leasing, see 1 ILL. L.F. (1962).

allocation in order to charge a premium commensurate with the probability that the insurer may have to pay for such losses. And in a given case, where a prospective insured will bear all of the liability, the insurer may choose not to offer insurance at all.2

The common-law rules of such concepts as master-servant,3 independent contractor,4 and tort liability5 are sources of these rules of allocation. Additional sources include the Interstate Commerce Commission’s rules and regulations,6 the insurance policies covering the lessee and lessor,7 and the lease.8

In applying the rules of allocation, there are essentially five parties upon whom the courts may impose liability: the driver (whose negligence must be established if any of the parties is to be held liable), the lessor (who may be the driver if a bobtail lease is involved), the lessor’s insurer, the lessee property carrier, and the lessee’s insurer. Of course, the peculiar facts of a case may present additional parties for shouldering the liability such as sublessees, shippers, truck manufacturers, and retailers.

II. THE STANDARD INSURING AGREEMENT

Unlike the fire insurance field, there is no statutorily-required liability insurance contract. Nevertheless, an insuring agreement similar to the following is found in every insurance policy providing automobile liability coverage:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Coverage C. bodily injury or Coverage D. property damage to which this insurance applies, caused by occurrence and arising out of the ownership, maintenance or use, including loading and unloading of any automobile . . . .9

9. Comprehensive Automobile Liability Insurance Coverage Part, GLA-A-1013 (Ed. 1-73). At the outset, it should be noted that many of the cases cited in this paper do not involve construction of liability insurance provisions. They are, nevertheless, relevant to the issues of liability insurance coverage. As the insuring agreement cited above indicates, a
III. LIABILITY OF LESSOR

Given the framework provided by the insuring agreement just quoted, we turn to a brief survey of cases imposing liability upon the truck lessor. At common law, the lessor is liable when he is deemed an independent contractor\textsuperscript{10} or when he is the master of the leased vehicle's operator.\textsuperscript{11}

In practical terms, the right to control is determinative under both the independent contractor and respondent superior concepts. If the lessor retains the right of control over the driver, the lessor is liable.

A. JOINT LIABILITY WITH THE LESSEE

The lessor and lessee may both be liable. For example, the lessor and lessee are liable when they have retained joint right of control over the negligent driver.\textsuperscript{12} Moreover, when the lessee is liable under ICC regulations,\textsuperscript{13} the lessor may be liable if he joins with the lessee in ignoring safety

finding of legal liability on the part of the insured constitutes a precondition for application of a liability insurance policy. Hence, a case that merely imposes liability on the lessee or lessor, as opposed to construing a policy provision, is highly relevant to the liability insurance field. Once the insured lessee or lessor is found liable, then the question arises as to whether the lessor's or lessee's liability policy will cover the loss.

10. Louis v. Youngren, 12 Ill. App. 2d 198, 138 N.E.2d 696 (1956). The lessor is an independent contractor when it retains the right to control the details of the work to be performed.


The courts have regularly stated that the attributes of the master-servant relationship which must be present, either singly or in combination, if either the lessor or lessee of a motor vehicle or machine is to be held the master of, and liable, under the doctrine of respondent superior, for the acts of, an operator furnished to the lessee in connection with the lease, include these: the right to select the operator; the right to discharge the operator (and this is given especially great weight); the right to supervise and direct, not merely the work to be done, but the method by which it should be done; and the manner in which the operator is paid, whether by the lessor directly, by the lessee indirectly through the lessor (the former compensating the latter for the operator's wages), or by the lessee directly. \textit{Id.} at 1395.


regulations while appearing to comply with ICC requirements\(^{14}\) or if he is found to have "practical control" over the truck's driver.\(^{15}\) Liability may also be imposed on the lessor if he is found to be an independent contractor\(^{16}\) or if the applicable state law contains an owner's liability statute.\(^{17}\)

**B. 'Bobtail' Leases**

One variety of truck lease worth particular note is the one-man "bobtail" lease, where the lessor and driver are one and the same. The term "bobtail" refers to a tractor return from a haul without a trailer—"bobtailing" or "deadheading." Hence, the insurance policy that covers such a contractor under lease is referred to as "bobtail" or "deadhead" coverage, since it was originally intended to provide coverage for the bobtail operator when returning empty from a haul.\(^{17a}\) The peculiarity of the owner and driver being the same person gave rise to the nomenclature of "driver-owner,"\(^{18}\) "owner-operator,"\(^{19}\) "lessee-operator,"\(^{20}\) and "lessee-driver."\(^{21}\)

The bobtail lease is generally long-term\(^{22}\) and usually provides for the lessor's compensation in terms of a percentage of the gross freight revenues generated by the use of the tractor.\(^{23}\) Although the nature of bobtail leasing may suggest a small-scale aspect of truck leasing, several of the largest truck lines procure all or almost all of their power equipment through this means. Whether or not subject to the ICC's regulations regarding identification,\(^{24}\) a tractor under a long-term bobtail lease is usually marked with the same color scheme and decals as regular,

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company-owned equipment. Furthermore, the lease frequently provides that the lessor is responsible for securing bobtail or deadhead liability coverage in addition to material damage coverages (collision, fire, theft, and combined additional coverage or comprehensive). 25

With reference to the bobtail operator’s liability, the lessor will be liable whenever the driver is negligent since the lessor and driver are one and the same. As the court indicated in *Hartford Accident & Indemnity Co. v. Allstate Insurance Co.* 26 the lessor-driver of a tractor could be found personally liable to third persons for his own negligence whether he was the servant or agent of the lessee, or an independent contractor and regardless of whether the tractor was being used in the business of the lessee.

C. **SUMMARY**

In general, the lessor is liable when he retains the right of control over the driver, when he violates ICC safety regulations, when the applicable state law contains an owner’s liability statute, or when the lessor is also the driver. As might be expected, the most frequent reason for imposing liability upon the lessor is the finding that the lessor retained the right of control over the negligent driver. Given the need for predictability by the parties to a truck lease, as well as by the parties’ insurers and the public, it seems unfortunate that so weighty an issue as public liability should turn on so artificial a concept as “control.” By avoiding the attempt to squeeze a variety of factual situations into the artificial pigeonhole of “control,” the statutory proposal outlined in the conclusion of this article would be more practical.

IV. **LIABILITY OF THE LESSOR’S INSURER**

In the previously discussed standard insuring agreement, the insurer promises to respond when the insured is found legally liable. As a general rule the insurer is liable up to its policy limits for the liability of its insured.

The breadth of this insuring agreement is narrowed by several exclusions. One of these, the “lease exclusion,” is primarily designed to exclude liability when the insured lessor has relinquished control of the insured vehicle to another party. 27


27. For specific formulations of this exclusion, see American Indem. Co. v. Richland Oil Co., 273 F. Supp. 702 (D.S.C. 1967) (coverage excluded while vehicle is “subject to any lease, contract of hire, bailment, rental agreement or other similar contract or agreement either written or oral, express or implied. . . .”), E.T. & W.N.C. Transp. Co. v. Virginia Sur. Co., 129 F. Supp. 305 (E.D. Tenn. 1955) (liability insurance “does not apply in the event that . . . “).
Whether the use of the leased vehicle falls within the purview of an exclusion such as the lease exclusion depends upon the special facts of each case.\textsuperscript{26} It has been held that the operation of the lease exclusion is confined to rentals that are "commercial in nature,"\textsuperscript{29} e.g., if a lessor went on vacation, and left his truck with a friend for safekeeping and the friend's incidental use, for which the friend paid the lessor $10 a week, the insurer of coverage would remain in effect.\textsuperscript{30}

Of course, the lease exclusion relieves the insurer of liability whenever the insured is plainly operating under a lease. For example, the insurer is not liable when the leased tractor is pulling one of the lessee's trailers loaded with merchandise destined for one of the lessee's patrons.\textsuperscript{31} Similarly, the lessor's insurance does not apply when the leased tractor is en route to pick up a load of cargo at the lessee's direction.\textsuperscript{32}

A. \textit{Maintenance of the Leased Vehicle}

One of the recurring fact situations involves an accident occurring when the leased tractor is en route for servicing. In analyzing a mainte-

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the named insured shall rent, hire or lease any automobile, truck, or tractor and trailer described in or covered by the policy to any other person, firm or corporation. . . .

Protective Ins. Co. v. Dart Transit Co., 293 Minn. 402, 197 N.W.2d 668 (1972) ("No coverage is granted if the equipment is operating under orders of any trucking company."); Brun v. George W. Brown, Inc., 289 N.Y.S.2d 722 (Sup. Ct. 1968) (coverage excluded "while the automobile is being used in the business of any person or organization to whom the automobile is rented. . . ."); Overly v. American Fidelity & Cas. Co., 184 N.E.2d 925 (Ohio Ct. App. 1961) ("The insurance does not apply while the automobile is being used in the business of any person, or organization, to whom the automobile is rented.").

Employing the same kind of terminology developed in E. Patterson, Essentials of Insurance Law (1935), an early case construed a provision that the insured vehicle would not be rented to others as a "promissory warranty." Neilson v. American Mut. Liab. Ins. Co., 111 N.J. 345, 168 A. 436 (Ct. Err. & App. 1933). Modern cases have treated the provision as simply an exclusion that narrows the insuring agreement. \textit{See e.g.}, Protective Ins. Co. v. Dart Transit Co., \textit{supra}. The result is the same under either approach. But a case could turn on the construction of the provision as a "warranty" or "exclusion" if a state were to enact a statute making warranties ineffective as an insurer's defense to direct actions by injured third parties who have secured a judgment against the insured.


29. Christensen v. State Farm Mut. Auto. Ins. Co., 52 Haw. 80, 470 P.2d 521 (1970) (construing an exclusion which read "while the owned automobile is rented or leased to others by the insured. . . .").

30. \textit{id}. 470 P.2d at 527. It should be noted that the \textit{Christensen} case involved an automobile rather than a truck. But a case involving the hiring of a car may well serve as precedent for a case involving the hiring of a truck. Annot., 17 A.L.R.2d 1388, 1393 (1951).

31. Travelers Ins. Co. v. Siddle, 186 F. Supp. 8 (W.D. Ark. 1960); Brun v. George W. Brown, Inc., 289 N.Y.S.2d 722 (Sup. Ct. 1968) (under the exclusion in both cases, the insurer was not liable while the vehicle was "being used in the business of any person or organization to whom the automobile is rented. . . .").

32. Johnson v. Angerer, 160 Ohio App.2d 16, 240 N.E.2d 891 (1968) ("insurance did not apply while vehicle was being used in the business of any person or organization to whom the vehicle was rented. . . .")
nance case, the courts consider the lease and the wording of the particular lease exclusion, but the cases turn on which party has control over the vehicle. If the lessor has control at the time of the loss, the lessor’s insurer is generally liable. 33

B. THE EQUIPMENT LESSOR

The case of Keithan v. Massachusetts Bonding and Insurance Co. 34 points up some basic distinctions between the contractor-type lessor and the equipment lessor. The equipment lessor’s interest centers in the equipment itself rather than the service offered by the equipment and its operator. As was true in Keithan, the equipment lessor generally contracts to furnish a substitute unit to the lessee for any leased equipment temporarily out of service. Moreover, the equipment lessor usually services the leased vehicles in his own facility. The equipment lessor is geared to provide rentals on a daily, weekly or monthly basis without drivers. On the other hand, a lease contract is generally long-term with drivers furnished.

In Keithan, an accident occurred while one of the equipment lessor’s mechanics was returning a crippled tractor to the garage for repairs. The

33. In Carriers Ins. Co. v. Griffie, 357 F. Supp. 441 (W.D. Pa. 1973), a bobtail operator was directed by the lessee-carrier to proceed to a garage for inspection prior to picking up a load. While at the station, the bobtail operator injured the plaintiff. Since at the time of loss the bobtail, (1) was bearing the carrier’s name and ICC number, (2) was at the garage selected by the carrier under the carrier’s direction, and (3) was operating under a three-year lease which provided that during its continuance, “vehicles shall be in the exclusive possession, use and control” of the lessee carrier, the insurer of the bobtail operator was relieved of liability.

In a case where the lessor’s driver left the lessee’s prescribed route to effect repairs, the Ohio Court of Common Pleas held that as between the liability policies of the lessee carrier and the lessor, the lessor’s policy must respond for damages. Smith v. Massachusetts Bonding and Ins. Co., 142 N.E.2d 307 (Ohio Comm. Pleas 1957). The lessor had trip-leased to the carrier for a single load of steel. When the truck broke down, the lessor instructed his driver to leave the carrier’s loaded trailer, reverse directions and effect repairs. The lessor was liable since his driver had made a clear and complete deviation from the scope of the lessee’s business. The lessor’s insurance policy in this case (as well as in Griffie, supra) excluded liability “while the automobile is being used in the business of any person or organization to whom automobile is rented.”

The bobtail operator’s policy in Protective Ins. v. Dart Transit Co., 293 Minn. 402, 197 N.W.2d 668 (1972), on the other hand, contained the following exclusion: “No coverage is granted if the equipment is operating under orders of any trucking company.” The insured bobtail operator had collided with another vehicle while en route to a garage for repairs. The Minnesota Supreme Court held that the bobtail operator’s policy covered the loss. The bobtail operator’s insurer argued that since the lease imposed a duty to maintain upon the lessee, the lessor was necessarily operating under the lessee’s “orders.” The court strictly construed the above-quoted exclusion and rejected the argument.

34. 159 Conn. 128, 267 A.2d 660 (1970).
court held that the lessor’s policy, which did not apply while vehicles were rented or leased to others, covered the lessor’s employee as an insured.

In a case applying Texas law, the Tenth Circuit Court of Appeals faced an equipment lessor which had leased a truck to a firm named Sonoco Products Company. The policy covering the equipment lessor contained the common provision that insurance would not apply “while the automobile is used as a public or livery conveyance.” This clause has generally been construed to exclude the insurer’s liability when the vehicle is used indiscriminately to haul members of the public for a consideration, but the Tenth Circuit construed the provision as excluding the insurer’s liability while the vehicle was leased. The court noted that under Texas law, “the car rental business was essentially the same as the old livery stable where horses and vehicles were kept for hire.”

C. LESSOR HAULING FOR HIMSELF

Ayers v. Kidney is a case construing the most restrictive of the lease exclusions. When the owner-operator in Ayers purchased his liability policy, he was engaged primarily in leasing his vehicle under contract. Accordingly, the lessor’s insurer issued him a bobtail policy with liability excluded “while the automobile or any trailer attached thereto is used to carry property in any business.” At the time of the loss, the insured was hauling coal in conjunction with his own business. Under a rigid construction of a harsh exclusion, the Sixth Circuit Court of Appeals held that the above-quoted exclusion relieved the lessor’s insurer of liability.

D. TRIP LEASES

The trip lease situation raises a new element. In the contractor or equipment lease, the lessor is usually not a property carrier for hire. But in the trip lease situation, the lessor is often a motor carrier that has its own

36. Id. at 128.
38. Sonoco Products Co. v. Travelers Indem. Co., 315 F.2d. 126,128 (10th Cir. 1963). This line of Texas authority belongs in the days of the horse and buggy and should be overruled. First, the plain language of the quoted policy provision does not exclude the normal lease and rental of vehicles. Consequently, the insured is misled as to the extent of coverage afforded by his policy. Second, the plight of the lessor who has been able to persuade his insurer to eliminate the lease exclusion from his policy should be considered. He quite reasonably assumes that he is now covered while leased. But in the event of an accident, he may find his insurer denying coverage on the strength of the above-quoted exclusion, which appears in virtually all automobile liability insurance policies. Thus, there is no reason to continue such a construction of the exclusion.
39. 333 F.2d 812 (6th Cir. 1964).
40. Id. at 813. Heretofore, the lease exclusions encountered did not relieve the insurer of liability while the lessor hauled on his own, as opposed to hauling “for hire.”
state or ICC permit to operate as a property carrier for hire. If not subject to
ICC regulation, the trip lease may be exactly that—a lease for a single trip.
The utility of such a lease stems from the fact that "deadheading" or "dead
hauls" are eliminated. A "dead haul," of course, is the unprofitable
situation where the property carrier has lined up a load for only one leg or a
round trip and must return empty. 41

Generally, the same rules of law that govern the contractor or equip-
ment lease also govern the trip lease situation. But, the ICC has imposed a
number of restrictions on the practice of trip leasing. Most importantly, the
ICC requires leases to be of a minimum duration of thirty days 42 and
requires lessees to assume complete responsibility for the equipment
during the lease term. 43 Lessee-carriers have attempted to avoid the
substance of this provision by executing a thirty-day lease whereby the
lessee assumes responsibility for the leased vehicle only while cargo is
actually being hauled. Such a lease is void, however, since in effect it
contemplates the kind of one-way lease prohibited by the substantive
requirements of the ICC regulations. 44

The interaction of trip leasing with the lease exclusion was examined in
Pickett v. Hawkeye-Security Insurance Co. 45 The issue presented by
the case was whether a loss occurring while the tractor was trip-leased
was covered by the lessor's liability policy. Although the precise wording
of the exclusion is not set out in the opinion, "[t]he substance of the
endorsement was that the insurance should not inure directly or indirectly
to the benefit of any lessee or bailee, or his employees or agents. . . ." 46
The court held that the policy provision did not excuse the insurer from
liability since it did not mention in express language a trip lease or trip
lease arrangement.

E. SUMMARY

Generally, the lease exclusion in the lessor's insurance policy
excludes coverage whenever the lessor relinquishes control of the
insured vehicle by renting to another party. The reason for this is that
insurers tend to exclude coverage of those aspects of a risk that are either

41. For further information about trip leasing, see American Trucking Ass'n v. United
States, 344 U.S. 298 (1952), and House Comm. on Interstate and Foreign Commerce, Motor
Cong. & Ad. News 4304.
44. Duke v. Thomas, 343 S.W.2d 656 (St. Louis Ct. App. 1961) (consequently, the lessee
motor carrier had control over the lessor-driver on the empty return trip and was liable for a loss
occurring during the return trip).
45. 282 F.2d 294 (10th Cir. 1960).
46. Id. at 301.
unknown or that present too great an exposure to loss. As an example, consider a truck owner who hauls groceries fifty miles from a warehouse to the truck owner’s grocery store. The truck owner’s insurer knows the nature of its risk and can charge the truck owner a premium with some degree of confidence that the premium is commensurate with the exposure. But if the same truck owner also held his truck out for lease, then the insured vehicle could be used for hauling explosives one day, a flammable cargo the next day, and so on. Unless the insurer excludes such indiscriminate rental, thus forcing an insured to report variations from the originally reported usage of the vehicle, the insurer may end up underwriting exposures which it had no desire to cover.

V. THE LESSEE’S LIABILITY

Consistent with the common law principles governing liability of the lessor, the lessee is liable at common law when it has the right to control the driver of the leased vehicle. Liability may be imposed upon the lessee because of provisions in the lease agreement. Moreover, where a lessor motor carrier trip leases to a lessee carrier, both carriers may be jointly and severally liable under a joint enterprise theory.

In an effort to insulate itself from liability, the lessee often asserts the defense that the lessor is an independent contractor. Under the doctrine of respondeat superior, it is axiomatic that an employer is not liable for the negligence of an independent contractor.

If however, the lessee is required to have a state or ICC permit, liability

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47. Braden v. Turner, 284 F. Supp. 379 (E.D. Tenn. 1968) (applying Tennessee law); Iowa National Mut. Ins. Co. v. Coltrain, 143 F. Supp. 87 (M.D.N.C. 1956); American Fidelity & Cas. Co. v. Johnson, 336 S.W.2d 351 (Ky. 1960) (lessee’s agent gave instructions to driver and lease provided direction and control of truck under lessee); Tindall v. Perry, 283 S.W.2d 700 (Ky. 1955) (lessee had the actual and potential control of lessor’s truck and driver).

48. Beer v. Indianapolis Forwarding Co., 43 Ill. App. 2d 303, 193 N.E.2d 473 (1963) (lessee contracted to accept full responsibility. This provision made lessee liable even when its hired driver had swapped trailers so that lessee’s driver was no longer pulling lessee’s trailer); American Fidelity & Cas. Co. v. Johnson, 336 S.W.2d 351 (Ky. 1960) (lease placed direction and control of truck under lessee); Brown v. Park Transp. Co., 382 S.W.2d 467 (Mo. App. 1964) (lessee solely liable since it had failed to purchase insurance in violation of lease agreement).

At first glance, it is surprising that there are not more cases holding the lessee liable because of its contractual obligations under the lease. Practical considerations explain this dearth of cases. In the typical truck lease, the lessee is in a position to proffer its own form lease on a “take-it-or-leave-it” basis. Consequently, few leases contain a provision under which the lessee agrees to assume liability. When the lease does play a determinative role in a case, it is usually a situation where the lessor has agreed to indemnify or hold the lessee harmless.


50. Venuto v. Robinson, 118 F.2d 679 (3rd Cir. 1941).

is imposed upon a lessee even if the lessor is an independent contractor.\textsuperscript{52} An individual or a corporation carrying on an activity for which the law requires a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused by the activity.\textsuperscript{53} Naturally, the leased vehicle's driver must be operating within the scope of his employment.\textsuperscript{54}

\textit{B. Lessee's Liability Under the ICC}

Pursuant to 49 U.S.C. § 304 (1970), the ICC adopted a regulation requiring an ICC-authorized carrier and the leased unit's owner to execute a written contract\textsuperscript{55} which "[s]hall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . . ."\textsuperscript{56} Of course, the regulation's requirement cannot be altered by the lease.\textsuperscript{57}

In construing this regulation, the courts have stressed an intent to protect the public,\textsuperscript{58} prevent accidents, and provide financially responsible defendants. Courts have also noted an intent to ensure that interstate operations would be supervised directly by persons familiar with federal safety regulations and amenable to the ICC's jurisdiction,\textsuperscript{59} and put the use and operation of leased vehicles on a parity with equipment owned by the authorized carrier and operated by its own employees.\textsuperscript{60} Furthermore, the regulation eliminates the independent contractor concept from lease arrangements\textsuperscript{61} and, in effect, makes the leased unit's driver a statutory

\textsuperscript{52} \textit{Restatement (Second) of Torts} §428 (1965).
\textsuperscript{53} Gudgel v. Southern Shippers, Inc., 387 F.2d 723 (7th Cir. 1967); Kaplan Trucking Co. v. Lavine, 253 F.2d 254 (6th Cir. 1958); War Emergency Co-op. Ass'n v. Widenhouse, 169 F.2d 403 (4th Cir. 1948); Venuto v. Robinson, 118 F.2d 679 (3rd Cir. 1941); Griffith v. George Transfer and Rigging, Inc., 201 S.E.2d 281 (Sup.Ct.App. W.Va. 1973).
\textsuperscript{54} Kaplan Trucking Company v. Lavine, 253 F.2d 254 (6th Cir. 1958), Griffith v. George Transfer and Rigging, Inc., 201 S.E.2d 281 (Sup.Ct.App. W.Va. 1973)(court sustained jury determination that lessor taking leased tractor home for repairs was within scope of employment); Louis v. Youngren, Jr., 12 Ill. App.2d 198, 138 N.E.2d 696 (1956) (substantial deviation from scope of employment did not exist even though iccs occurred away from most direct route suggested by lessee).
\textsuperscript{56} 49 C.F.R. § 1057.4(a)(4) (1975).
\textsuperscript{57} Vance Trucking Co. v. Canal Ins. Co., 249 F. Supp. 33 (D. S.C.) aff'd, 395 F.2d 391, cert. denied, 393 U.S. 841 (1961) (omission of provision from lease does not excuse lessee of liability for the negligent driver); Duke v. Thomas, 343 S.W.2d 656 (St. Louis Ct. App. 1961)(lessee liable even though lease provides for the lessor’s assumption of control after delivering the cargo).
\textsuperscript{60} Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524 (Mo. 1968).
\textsuperscript{61} Proctor v. Colonial Refrigerated Transportation, Inc., 494 F.2d 89 (4th Cir. 1974).
employee of the lessee.  

As Judge Francis of the New Jersey Supreme Court held in the leading case of Cox v. Bond Transportation, Inc.:  

The statute, 49 U.S.C. § 304(e) and the regulations based thereon, when applicable, eliminate the common law distinction between an independent contractor and an employee. They create a type of statutory employment under which the franchised carrier becomes responsible for the negligence of the owner-operator at least when he is engaged in the activities of the carrier. In view of the public policy expressed by the regulations it can be argued persuasively that even when owner-operated equipment is leased by a carrier, the exclusive possession, control and use thereof, and "complete" assumption of responsibility imposed on the carrier for the "duration" of the lease, subjects it to liability for the lessor's negligent operation so long as the lessor is on the public highway with the permission of the carrier.  

Despite this seemingly cautious approach, Judge Francis and others have been liberal in imposing liability upon the lessee, even in cases where the leased vehicle was being operated for the personal use of the lessor's driver. And some courts have gone so far as to hold that when an ICC lessee has relinquished control of the leased unit, the lessee is still liable until it has both removed its identifying markings and decals from the leased unit and obtained a receipt for the equipment.  

C. LIABILITY UNDER INTERLINE AND INTERCHANGE AGREEMENTS  

In Gilbertville Trucking Co. v. United States, the U.S. Supreme Court outlined the nature of and distinctions between "interlining" and "interchanging":  

"Interlining" is the practice whereby a carrier, whose certificated routes do not reach the shipment destination, transfers the shipment to another carrier for delivery. "Interchanging" is a form of interlining whereby the two interlining carriers switch trailers at the point of transfer. An interchange is most common where the shipment involves a truckload quantity, and the

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63. Id. 53 N.J. at __, 249 A.2d at 589.  
64. Id. See generally Felbrant v. Able, 80 N.J. Super. 587, 194 A.2d 491 (1963) (driver "off further service" to attend ailing wife). But see Schmidbauer v. Baltimore & Pittsburgh Motor Exp. Co., 228 Md. 637, 181 A.2d 325 (1962) (lessee not liable where owner-operator, between interstate movements, was returning from movie to bunk room).  
exchange of trailers obviates the necessity of unloading the shipment from the trailer of the transferor and loading it on the trailer of the transferee. The trailer taken in exchange for the shipment-trailer may be either empty or loaded with an interline shipment in the other direction. A further form of interlining involves the use of a trip-lease for the transferee's leg of the journey. There the shipment-trailer is taken by the transferee, but no trailer is given in exchange; instead the transferor will lease the shipment-trailer to the transferee for the completion of the trip.

Equipment interchanges are often difficult to distinguish from trip leases. When the ICC regulations are applicable, the distinction is crucial. If a court finds the arrangement to be a trip lease, liability of the parties is governed by 49 C.F.R. §1057.4 and the lessee will probably be held liable. But if the arrangement is viewed as an equipment interchange, the governing ICC regulation is 49 C.F.R. §1057.5. Since 49 C.F.R. §1057.5 does not contain a provision making the lessee completely responsible, the case result is dictated under common law principles.

D. Summary

In considering the liability of the lessee, the rules of allocation applied by the courts seem needlessly complex. As an illustration, consider the following hypothetical case. First, an accident victim sues a lessee on the theory that the lessee had the right of control over the negligent contractor. The accident victim asserts that even so, the lessee is liable under Restatement of Torts §428. The lessee contends that §428 should not be applied because the case is governed by the ICC regulations. Further disputes could revolve around whether the lessee was subject to the ICC regulations and if so, whether he had relinquished control to the lessor, removed his decals or received a receipt for the leased vehicle. Such a convoluted framework for solving the simple problem of who should compensate the accident victim should be replaced by a rule of joint and several liability such as is proposed in the conclusion to this article.

VI. Liability of the Lessee's Insurer

Insurance companies have, at various times, adopted conventions which are designed to simplify resolution of liability questions and thus

69. Simmons v. King, 478 F.2d 827 (5th Cir. 1973).
eliminate costly litigation. Rule 29 is such a convention. Under Rule 29 many insurance companies agreed that the lessee’s insurer should have primary coverage. If one of the insurers is not a signatory to the convention, however, then resort to customary settlement methods is required.72

In contrast to truck lessors, many of which are individuals owning a few trucks, lessee motor carriers generally operate large fleets. Due in part to the premises liability hazards generated by the truck terminals necessary for dispatching, servicing and storing fleet vehicles, fleets have greater liability exposures. Accordingly, the lessee carriers usually purchase more inclusive policies such as the comprehensive general liability policy (with automobile liability coverage included or purchased separately), the gross receipts policy, or the retrospective rating policy.

Given the uncertainty and complexity of the law governing truck leasing, one wonders why the lessee doesn’t resolve this problem by naming the lessor and its drivers as additional insureds under its liability policy. There are, however, practical considerations that militate against this solution. First, the lessee’s insurer is reluctant to accept an additional exposure to loss over which it has little control. Assume, for example, that in addition to hauling for the lessee, the lessee makes hauls for another motor carrier or even hauls on its own. By naming the lessor as an additional insured, the insurer would be insuring an operation unrelated to the business of its own insured and possibly more hazardous.

But most important, such unrestricted coverage of the lessor would deprive the insurer of meaningful control of the exposure. With its own insured, the insurer knows its exposure, through the insurance application, the agent’s report, investigations reports and its engineer’s evaluation. Through these devices, the insurer can ascertain such task factors as the mileage radius in which the lessee operates, the commodities hauled and the routes traveled. Based on its evaluation of these risk factors, the insurer can charge a premium commensurate with the risk it is asked to underwrite. But unrestricted coverage of the lessor as an additional insured would allow the lessor to haul such things as explosives, without the insurer’s knowledge and would obligate the insurer to respond for losses it had no intention of underwriting.

The lessee, however, is often a very large motor carrier, and hence a potentially desirable and profitable insured. Since an insurer often goes to great lengths to keep a desirable insured happy, one must wonder why the lessee cannot persuade its insurer to name the lessor as an additional insured. The answer perhaps lies in the fact that the additional exposure to loss caused by the unqualified addition of the lessor as an insured will

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lead, in theory, to higher losses. Higher losses, in turn, will cause the insurer to increase the premium of its insured lessee. Since the lessee doesn’t want to see an increase in the costs of his already expensive insurance, he is usually sympathetic to his insurer’s position.

A. Insurance Provisions Covering Hired Automobiles

When a motor carrier leases trucks from another party, it must make certain that its liability for the leased trucks is insured. There are two commonly encountered endorsements regarding the extension of policy coverage to hired automobiles. An example of the first reads:

The insurance with respect to any person or organization other than the named insured does not apply:

(d) with respect to any hired automobile to the owner thereof or any employee of such owner. . . .

The endorsement was construed by the District of Columbia Circuit Court of Appeals as follows:

The intent is clear: if an injured party sues the named insured . . . and recovers, the insurance company will be liable; but if he brings suit solely against the owner of a hired vehicle . . . the company assumes no responsibility either to the owner of the vehicle or to the injured party.

In short, the lessee’s insurer will incur liability only if the injured person prevails in an action against the lessee.

The second commonly encountered endorsement reads:

The insurance with respect to any person or organization other than the named insured does not apply:

(d) With respect to any hired automobile, to the owner or any lessee of such automobile, or to any agent or employee of such owner or lessee, if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority, or (2) after arrival of the automobile at its destination under a single-trip contract which does not provide in writing for the return of the automobile.

As a corollary to the latter policy provision, a lessor and its driver are insured while the leased vehicle is being used exclusively in the business of the lessee carrier.

B. EXCLUSIVE USE IN THE LESSEE’S BUSINESS

Under the second endorsement, there is one overriding issue in determining whether the lessor and his driver are insureds under the lessee’s policy. If the leased vehicle was in the “exclusive use” of the lessee’s business at the time of the loss, then the lessee’s insurer is required to defend a suit against the lessor and/or its driver. The leased vehicle is being used exclusively in the lessee’s business if it is en route to pick up cargo for the lessee or hauling freight for the lessee. Similarly, the lessee’s complete control over all aspects of a trip warrants a finding that the lessor-driver was operating exclusively in the lessee’s business. Exclusive use is found even when the use at the time of loss could only be characterized as beneficial to the lessee.

The Court of Appeals for the Seventh Circuit decided a case where a loss occurred while the leased tractor was en route to a garage for repairs and while in between trips for the lessee. In holding that the lessee’s insurer must respond for damages, the court stressed: “1) the lease’s prohibition of personal use by the lessor; 2) the lease’s requirement that the lessor hold the tractor in readiness for the carrier’s service; and 3) the duty imposed by the ICC upon the lessee to maintain the tractor ‘in safe and proper operating condition’ and to assume complete responsibility for the tractor.” The court stated that the lessee’s duty to maintain the tractor “in safe and proper operating condition” could not be delegated so as to relieve the lessee of liability.

The preceding cases show how courts and juries tend to extend the

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78. Walter v. Dunlap, 368 F.2d 118 (3rd Cir. 1966).
81. Lessor was on Fourth of July layover at home when he struck another vehicle while en route to his cousin’s to obtain grease for his “fifth wheel,” the slotted disc at the rear of a tractor for coupling a tractor to a semi-trailer. The “fifth wheel” was not necessary for operating the tractor, but was necessary for coupling the tractor to one of the lessee’s trailers. Since this item of maintenance was not part of the maintenance agreed to by the lessor, the lessee’s insurer was ordered to defend against the lawsuit; Annot., 31 A.L.R. 2d 298 (Supp. 1975); Cosmopolitan Mut. Ins. Co. v. White, 336 F. Supp. 92 (D.Del. 1972) (Although loss occurred while lessor was hauling for another, the lessee was aware of, assisted, and encouraged its lessors to “hustle” loads on their own when the lessee was unable to provide work. By so doing, the lessee offered added inducement to its lessors to continue in the lessee’s service.).
82. Freed v. Travelers, 300 F.2d 395 (7th Cir. 1962).
84. Id., (citing GENERAL ORDER OF THE ICC, Ex Parte No. MC43, 49 C.F.R. § 207 et seq.). The rule is now embodied in 49 C.F.R. § 1057.4(a)(4).
84. Id. For other cases holding generally that the lessee’s insurer provided coverage, see Continental Casualty Co. v. American Fidelity & Cas. Co., 159 F. Supp. 311 (S.D. Ill. 1958), modified, 186 F. Supp. 173 (S.D. Ill. 1959); American Transit Lines v. Smith, 246 F.2d 86 (6th Cir. 1957).
protection afforded by the "deep pocket"—the lessee and its liability insurance policy. Nevertheless, there are cases that relieve the lessee’s insurer from liability. The lessor will not be considered an additional insured under the lessee’s policy, for example, when the lessor is hauling for another carrier at the time of loss.\footnote{Compare Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131 (8th Cir. 1974) with Cosmopolitan Mut. Ins. Co. v. White, 336 F. Supp. 92 (D. Del. 1972).} Such use is not exclusive use in the business of the named insured, the lessee.

C. Authorize Route

In most cases a finding that the leased vehicle was used exclusively in the business of the named insured, will be decisive. However, many endorsements require that in order to be an additional insured, the lessor must also be operating “over a route the named insured is authorized to serve by federal or public authority.”\footnote{See, e.g., Cosmopolitan Mut. Ins. Co. v. White, 336 F. Supp. 92, 100 (D.Del. 1972).} The importance of this provision is illustrated by \textit{St. Louis Fire & Marine Insurance Co. v. Aetna Insurance Co.}\footnote{283 F. Supp. 40 (S.D.W. Va. 1968).} In \textit{St. Louis}, the lessor of “initiating carrier” gave the driver permission to bypass an interchange point provided for in an equipment interchange agreement. As a result of ignoring the interchange point, the trip exceeded the authority granted by the ICC both to the lessor (“initiating carrier”) and the lessee (“receiving carrier”). Consequently, the initiating carrier and its driver were not additional insureds under the receiving carrier’s policy.

D. Back Hauls

In (d)(2) of the second endorsement, set out above, the lessor and its drivers are not additional insureds under the lessee’s policy “after arrival of the automobile at its destination under a single-trip contract which does not provide in writing for the return of the automobile.” In \textit{Allstate Insurance Co. v. Liberty Mutual Insurance Co.}\footnote{368 F.2d 121 (3rd Cir. 1966).} the court gave effect to the preceding policy provisions, thus relieving the lessee’s insurer of liability. Although the lease in \textit{Allstate} was for a term of one year, the lease provided that:

The terms of this lease as to any unit involved shall be considered effective when such vehicle is so delivered and shall be considered terminated when such vehicle is released.\footnote{id., at 123.}

Thus, the one-year lease contemplated the making of one-way, single-trip contracts. Since the loss occurred while the lessor’s driver was returning
VII. INDEMNITY AGREEMENTS

An example of an indemnity or "hold harmless" agreement is found in *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*:

The Lessor agrees to reimburse the Lessee for any payment made on account of any accident, claim, or suit arising out of the operation of said equipment during the term of this lease. 91

Because the lessee generally occupies a superior bargaining position, indemnity agreements usually run against the lessor and in favor of the lessee. Nevertheless, indemnity agreements are enforceable at common law.

For situations subject to the regulation of the ICC, there was a split in the circuit courts as to whether an indemnity agreement was enforceable. 92 In *Transamerican Freight Lines, Inc. v. Brada-Miller Freight Systems, Inc.*, 93 the Supreme Court resolved this split by holding that such indemnity agreements did not contravene the regulations of the ICC.

90. Unless exempted, lease arrangements such as this could be voided as violations of the ICC's requirement that leases be of a minimum 30-day duration, stated in 49 C.F.R. § 1057.4(a)(3) (1967). However 49 C.F.R. § 1057.4(a)(3)(ii) (1975) exempts car carriers from this requirement and both lessor and lessee in this case were interstate car carriers. See also Duke v. Thomas, 343 S.W.2d 656 (St. Louis Ct. App. 1961).


Although the lessor was not named as a party defendant, the lessor's insurer was held liable since the lessee was an omnibus insured under the lessor's policy. The court further held that in a case where concurrent coverage existed, the pro rata clause applied instead of the excess coverage provisions. See also Continental Cas. Co. v. American Fidelity & Cas. Co., 159 F. Supp. 311 (S.D. Ill. 1958), modified, 186 F. Supp. 173 (S.D. Ill. 1959).


The Seventh Circuit later upheld an indemnity agreement, stating that *Alford* was "inappr- osite" and that an indemnity agreement "serves a useful purpose and must be upheld." Watkins Motor Lines, Inc. v. Zero Refrigerated Lines, 381 F. Supp. 363 (N.D. Ill. 1974), aff'd, 525 F.2d 538, 540 (7th Cir. 1975).

93. 96 S.Ct. 229 (1975). The facts before the Court involved an indemnity agreement between two authorized motor carriers. Accordingly, the applicable ICC regulation was 49 C.F.R. § 1057.3(a) (1967), which required the lessee to assume "control and responsibility" for the equipment.
VIII. SUBROGATION

An insurer that has paid its insured's liability may be able to shift its loss through subrogation. Where the lessee's insurer paid a judgment arising from the negligence of the lessor's driver, for example, subrogation may entitle the lessee's insurer to indemnification from the lessor's insurer.\(^\text{94}\) Even when the lessee is liable because of 49 C.F.R. §1057.4, the lessee's insurer is entitled to reimbursement from a party otherwise liable by virtue of the common law or the lease agreement.\(^\text{95}\) Moreover, the lessee's insurer is subrogated to the rights of its insured even when its policy contains the ICC endorsement providing for the insurer's liability for "final judgment" against its insured.\(^\text{96}\)

However, an insurer's subrogation rights may be barred. If the lessee agreed in the lease to provide liability insurance, for example, neither the lessee nor its insurer has a right of indemnity against the lessor.\(^\text{97}\) Furthermore, an initiating carrier's promise in an equipment interchange agreement to indemnify the receiving carrier deprives the initiating carrier's insurer of its right of subrogation.\(^\text{98}\) Lastly, the lessee's insurer cannot recover by right of subrogation from the lessor or the lessor's driver where the lessor and driver were deemed additional insureds under the lessee's policy.\(^\text{99}\)

CONCLUSION

It should be thus apparent that the present state of the law is unsatisfactory to the lessor, the lessee, and their insurers. The confusion and uncertainty generated by the complicated rules of allocation preclude the parties from ascertaining the limits of their liability. As a result, the lessor and lessee can't be sure that they've adequately insured their liability risks. The insurers, moreover, are forced to spend far too much in litigating their rights against other insurers.

And from the standpoint of the accident victim, the present state of the law is also unsatisfactory. Since either the lessee, the lessor, or the driver may be solely liable, the victim encounters two barriers to recovery. First, the victim may sue the wrong defendant. For example, assume a


\(^{97}\) War Emergency Co-op Ass'n v. Widenhouse, 169 F.2d 403 (4th Cir. 1948); American Fidelity and Cas. Co. v. Simmons, 153 F. Supp. 658 (M.D.N.C. 1957), aff'd, 253 F.2d 634 (4th Cir. 1958).

\(^{98}\) Aetna Ins. Co. v. Newton, 456 F.2d 655 (3rd Cir. 1972). Consequently, the initiating carrier's insurer was not liable for loss assumed by its insured.

\(^{99}\) Miller v. Kujak, 4 Wis. 2d 80, 90 N.W.2d 137 (1958)(based on the principle that an insurer cannot recover from its own insured on either a theory of indemnity or subrogation).
situation where the lessee is solely liable. Suit against the lessor would be both unproductive and potentially disastrous in that the statute of limitations may bar a subsequent suit against the lessee. Proper joiner of parties, of course, eliminates the problem of suing the wrong defendant.

The second barrier to recovery is an unsatisfied judgment. The risk of an unsatisfied judgment is particularly great when the lessor or driver is solely liable, since the lessor (and driver) tend toward a weak financial position with few assets. The chances for recovery are slim when the owner-operator involved has as his only asset a heavily mortgaged tractor rig.

In addition, lessors (particularly owner-operators) are notorious for failure to have liability insurance in effect at the time of an accident. The reasons for this phenomenon include:

a) poor finances;
b) mistaken beliefs that they don't need their own liability insurance;
c) the policy's renewal premium falling due while the lessor is on the road; or
d) a general distaste for "paperwork" like paying insurance premiums on time.

As a result, the accident victim may face a defendant with no insurance and no assets from which to satisfy a judgment.

Even if insurance is in effect, the liability limits may be inadequate. Worse yet, the negligent party (particularly the owner-operator or the lessor's driver who is solely liable by virtue of being on a frolic) may disappear. If the negligent party is solely liable and has fled the jurisdiction, the victim cannot obtain a judgment and hence cannot reach the insurer. Of course, the preceding problems could also occur with the lessee who is solely liable.

As a solution to these problems, states should adopt a statute with the following provisions. First, the statute should make the driver, the lessor, and the lessee jointly and severally liable. Second, the statute should require lessees to carry insurance naming lessors and their drivers as additional insureds. The practical effect of such a statute is to shift liability losses to the lessee's insurer and to eliminate the need for the lessor to purchase insurance. The lessor would only need insurance when he hauled on his own in addition to hauling for the lessee.

In addition, the statute would largely eliminate the risk of an unsatisfied judgment. A judgment would remain unsatisfied only if the lessee's insurance was ineffective (lapsed or voided by some action by the insured) or if the assets of the driver, lessor, and lessee were inadequate to satisfy the judgment. Moreover, simplification of this area of the law is not the least of the advantages to be gained from the proposed statute.
There are, of course, a number of objections to such a statutory scheme. One of the first objections that comes to mind is the resultant disparity between the motor carrier's liability in the lease context and the regular master-servant context. If the proposed statute were adopted, the motor carrier would be liable when the lessor-driver was off on a frolic, whereas the same motor carrier would not be liable for its own employee when the employee is off on a frolic.

This disparity presents a logical inconsistency. But to the extent that this inconsistency is intolerable, it should be cured by adding an owner-consent or owner's liability provision to the statutory scheme. When a non-lease situation is involved, the owner-consent provision would make the vehicle's owner liable for the negligence of a person legally operating the car with the permission, express or implied, of the owner. Thus in both the lease and nonlease situations, the motor carrier would be liable for a driver off on a frolic.

Although the owner-consent provision cures one disparity, there remains a larger one. Motor carriers can and will object to the inequity of carving out the trucking industry as an exception to the respondeat superior doctrine. Why should a motor carrier be liable for a drunken driver en route to a red light district while a general contractor, for example, is not?

It can be answered that it is equitable to treat the trucking industry as an exception. The many sources available to the trucking industry for screening drivers make the industry chargeable for poor driver selection even when the cause of loss is a driver's drunken frolic.

First, the motor carrier can check the employment record of all drivers in its service through former employers. Such employment checks will often turn up a history of drinking on the job. If the former employer is also a trucker (which would usually be the case unless the driver is very young), there would be a record of the driver's accidents. Other trouble spots such as a lack of cooperation, a poor attitude toward safety, or a tendency to abuse the equipment should also turn up in an employment check.

Second, the motor carrier can obtain motor vehicle records on any drivers who might drive rigs in the motor carrier's service. Every state provides these records upon presentation of the driver's name, license number, date of birth, and a nominal service fee (generally from $2 to $6). Such records vary in quality from state to state, but generally a record of the driver's traffic citations and, in many cases, his traffic accidents are listed. Most automobile insurance companies base their rates and eligibility requirements on such records since there's an understandable correlation between the number of past accidents and citations and the probability of future accidents. And a driver who is prone to drinking on the
job will, more often than not, have a motor vehicle record that shows "drive-while-intoxicated" or "open-bottle" citations.

Third, the motor carrier can usually call upon the expertise of its insurer’s engineering department. The insurer’s engineer is only too happy to inspect the personnel files of the drivers in the carrier’s service. A conscientious insurer will even order and evaluate motor vehicle records for the carrier. Moreover, the insurer’s engineer will also inspect the logs and charts that are completed when the driver is on the road. Careful inspection of these materials will often expose a driver who is dishonest, loafing on the job, or who has a poor safety attitude. One of the most important safety contributions provided by the insurer is road reports of the motor carrier’s vehicles while observed on the highway.

Lastly, when a motor carrier has accrued some experience with a driver, the carrier has the benefit of his own personal evaluation. The value of such observation varies in accordance with the degree of supervision exercised by the carrier. To the extent that the driver is inadequately supervised, the risk of loss caused by the driver should rest with the motor carrier.

As for the motor carrier’s insurer, which will bear the brunt of the liability losses, the proposed statutory scheme would at least eliminate some of its mounting litigation expenses. More importantly, the additional losses could be absorbed through higher premiums charged against insured motor carriers. In turn, the motor carrier could shift some of its increased insurance expenses to the lessor by lowering the lessor’s percentage of the freight revenue. The remaining expense would be shifted to the public through higher freight rates. And since lessors would no longer need liability insurance, the lessor’s loss in revenue would be offset in part by its savings in liability insurance premiums.
Treatment of Finance Leases of Equipment
in Rate-Making Determinations

WAYNE M. LEE*

I. INTRODUCTION

Leasing as a method of acquiring equipment has achieved remarkable popularity over the last quarter century in American business. Of the two basic lease categories, finance and operating, finance leases have created substantial confusion over their treatment in the balance sheet and in ratemaking determinations. The controversy arises when finance leases are treated like periodic business expenses, as the operating leases are, rather than being treated as a capital expense.

Sharp distinctions between the operating and the finance lease call for separate and different economic treatment. An operating lease is utilized by businesses where purchasing would be uneconomic for various reasons, chiefly temporary need. A finance lease is employed as an alternative to purchasing, mainly due to financing considerations. The most prominent distinction between the two types is based on term length and cancelability. An operating lease lasts either for a short term or is cancelable at will, upon proper notice. A finance lease is not terminable at will and extends for a term approximating the useful life of the asset. Under a finance lease, the

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* Associate, Morgan, Lewis & Bockius, Washington, D.C.; J.D., College of William and Mary; M.B.A., George Washington University; B.A., University of Virginia.
lessee is generally committing himself on a noncancelable basis for substantially all the economic life of the property under lease, or possibly for a shorter period when the payments under the noncancelable commitment cover the full purchase price of the property. In either case, the lessor generally expects to receive under the lease terms the full normal sales price of the property after giving effect to the interest element in the lease rentals. The value of any future rights of the lessor at the time he enters into a [finance] lease are generally nominal.¹

Finance leases, then, could be treated as purchases of equipment.

The issue which this article addresses is whether finance leases should be capitalized and included in the rate base of regulated industries, or whether such leased property should be excluded from the rate base and allowed only as an expense item.¹⁰

II. FINANCE LEASES IN THE RATE BASE: TREATMENT BY REGULATORY AUTHORITIES

The treatment of leased assets by regulatory authorities for ratemaking purposes is lacking in consistency. The reported decisions do not reflect a detailed, analytical inquiry into the economic realities of finance leasing. Either a blind reliance upon precedent or a coin-flipping approach seems to dominate the judicial reasoning.

Traditionally, regulatory authorities have tailored the allowable "rate of return" to what is referred to as the "rate base". Guidance given by the courts in determining these two concepts began with Chicago, Milwaukee, and St. Paul Railway v. Minnesota:¹¹

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and insofar as it is thus deprived, while other persons are permitted

¹. Wyatt, Accounting for Leases, 1972 Ill. L.F. 497.
¹⁰. It should be noted that guidelines for the treatment of finance leases have been established by the American Institute of Certified Public Accountants, the Internal Revenue Service, and the Uniform Commercial Code. A complete discussion of these guidelines can be found in Symposium: Commercial Leasing, 1972 Ill. L.F. 433; Professional Standards, Accounting (CCH), § 5351.01 et seq. (1975); Hawkland, The Proposed Amendments to Article 9 of the U.C.C.—Part 5: Consignments and Equipment Leases, 77 Com. L. J. 108 (1972); Landis, Tax Aspects of Leasing, 79 Com. L. J. 8 (1974). Guidelines of the Securities Exchange Commission impliedly recognize that finance leases are substantially identical to purchases and should be reported in a similar manner on financial statements. 17 C.F.R. § 210.3-16(q) (1974), but see Interpretation of Accounting Series Release, No. 132, Federal Securities Law Reports (CCH) ¶ 72, 154 (1973).
to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.\textsuperscript{2}

Various methods of calculating this reasonable rate of return have been embraced by the Supreme Court. In Smyth v. Ames the Court asserted "that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public" (emphasis added).\textsuperscript{3} The above case indicated what is in effect the "rate base" for regulated industries. In Federal Power Commission v. Hope Natural Gas Co.\textsuperscript{4} the Court indicated that the proper rate of return should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. In Bluefield Water Works and Improvement Co. v. Public Service Commission, the Court laid down a comparable business standard:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . .\textsuperscript{5}

It could be inferred that a proper rate of return, then, will be comparable to similar businesses, as well as be sufficient to attract capital.

In implementing the mandates of the Supreme Court with regard to ratemaking, generally, regulatory authorities continue to use the traditional procedure of fixing a percentage rate of return to be applied to a rate base which represents property value, investment in property, cost of property, or some other attribute of property.\textsuperscript{6}

A. THE FEDERAL REGULATORY ENVIRONMENT

1. Interstate Commerce Commission

In 1918, the Interstate Commerce Commission confronted the lease treatment issue for railroad equipment in Texas Midland Railroad.\textsuperscript{7} It distinguished between leased property which was "merely incidental" to the business, such as rented space for ticket offices, and tracks which are not incidental. The former were excluded from the rate base, whereas the

\textsuperscript{2} 134 U.S. 418, 458 (1890).
\textsuperscript{3} 169 U.S. 406, 546 (1898).
\textsuperscript{4} 320 U.S. 591, 605 (1944).
\textsuperscript{5} 262 U.S. 679, 692 (1923).
\textsuperscript{7} 75 I.C.C. 1 (1918).
latter were included. With regard to other than incidental property the Commission stated: "[i]t is now universally accepted that it is the fair value of the property used by the public service corporations in serving the public which is to govern in fixing rates."[6]

This holding was followed in *Excess Income of Jonesboro, Lake City & Eastern Railroad Company*, where leased freight cars were included in the rate base:

The respondent is entitled to a fair return upon the value of property employed by it in the public service. The equipment which a carrier leases for its own use... is obviously property used by the lessee in the service of the public and its value, therefore, should be included in the rate base.[9]

2. *Civil Aeronautics Board*.

In a statement of general policy issued in 1971, the Civil Aeronautics Board indicated how leased aircraft would be considered for the purpose of ratemaking: "[t]he Board’s policy to recognize actual rental expenses."[10] In cases of corporations with unusually large amounts of leased aircraft, a slight profit element would be added. In its notice of proposed rule-making,[11] the Board rejected the constructive ownership approach as not recognizing the carriers' true revenue requirements.[12] The reason given for not adopting the capitalization method is muddy—it is expressed to be that the theory of such treatment is invalid:

[T]he underlying theory [of capitalization of leasehold interests] appears to the Board to be of questionable validity. The carrier does not have to raise capital to acquire the leasehold interest, since the owner lessor provides the necessary capital. Thus, inclusion of a capitalized interest leasehold interest in the investment base would result in compensating the carrier for a cost of capital which it does not incur. Of course, the rental expense reflects the capital costs of the owner-lessee and, since the carrier would be reimbursed for rental payments expense as an operating cost item, the public would in effect be required to pay twice for capital costs.[13]

Although it is true that the lessor provides the capital, the omitted point by the C.A.B. is that through higher rental payments the carrier lessee pays the lessor for providing this capital. The service of providing financing offered by the lessor is no different than a conditional sales contract vendor providing financing by allowing periodic payments. In the

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8. *Id.* at 23.
9. 175 I.C.C. 786, 794 (1931).
12. The Board was correct in this contention. It is irrelevant, except perhaps for coincidence, what the lessor paid for the property. It is the cost to the lessee (regulated) firm which is relevant.
latter case, the vendee pays a higher price in interest charges for the
same service the lessor renders, that is, providing capital. This C.A.B.
statement failed to make this distinction, although it would not seriously be
contended that aircraft purchased through a conditional sale contract
would be excluded from the rate base.

The second difficulty in the above-quoted passage is that by allowing
a rental expense, the public would pay twice for capital costs. The proper
treatment would be to disallow the rental payment as an expense item; it
should only be used as capitalized for rate base inclusion. This way there
would be no double payment. The method adopted by the C.A.B.,
expense only treatment, prohibits the carrier from being allowed a return
on capital equipment used in its business in a situation where the carrier is
paying the cost of capital employed by it. Clearly, this result is unfair and
should be deemed confiscatory.


The Federal Maritime Commission has indicated that it subscribes to
the "expense only" theory previously encountered: "[I]n the earlier deci-
sion in this case (6 F.M.B. 14) the Board determined, correctly we think,
that the value of terminal facilities used but not owned by the carriers
should not be included in the rate base."14 The Federal Maritime Commis-
sion then justifies its conclusion using the same reasoning applied by the
Civil Aeronautics Board. "The carriers are not devoting their capital to the
public use insofar as such property is concerned."15 The Commission
failed to recognize that, in financing equipment acquisitions by employing
finance leases, the capital costs of carriers are paid over a period of time
by being included in the rental payments.

The Commission then proceeded to recognize the impropriety of
both allowing rentals as an expense and including them in the rate base:

It is proper to include as expenses the rentals paid and other expenses
of the carriers which arise by reason of the use of the facilities. However, to
include the value of non-owned property in the rate base and owner's
expenses, instead of rentals as expenses, results in a windfall to the carriers
at the expense of the shipping public.16

This contention is correct; no double counting should be allowed. It is
the expense items, however, which should be disallowed, not the inclu-
sion of the leased property rate base.

The Federal Maritime Commission employed this reasoning again in
General Increases in Alaskan Rates and Charges:

14. Atlantic & Gulf—Puerto Rico General Increase in Rates and Charges, 7 F.M.C. 87
(1963).
15. Id. at 110.
16. Id. at 110.
Only owned property will be considered for inclusion in the rate base. Expenses in the form of rent or charter hire of ships are allowable charges to shippers for non-owned property, but shippers should not, in addition, pay for a return on such property where no investment is at stake.\textsuperscript{17}

Thus, although it might appear that this erroneous reasoning is well entrenched at the FMC, the Commission could change its position in a case now pending. In \textit{Significant Vessel Operating Common Carriers in the Domestic Offshore Trade: Reports of Rate Base and Income Account},\textsuperscript{17a} an initial decision by an administrative law judge considered various alternatives to the Commission's past rulings that leases should not be capitalized. The initial decision offered only the equivocal position that no rule should be applied generally, but rather a case-by-case approach should be used in evaluating leases. Several comments on this decision are appropriate.

The Commission should not follow the decision's recommendation that no rule be adopted: "Any recognition of the capital cost of leasing assets which the Commission may deem desirable can best be achieved on an individual basis rather than by a rule uniformly applicable to different capital structures."\textsuperscript{17b} To the contrary, a case-by-case determination deprives the regulated firm of knowing in advance the regulatory treatment of its investment decisions regarding leasing as an acquisition method. This treatment causes uncertainty and precludes rational management decisions on how best to employ limited resources to obtain optimal firm, and ultimately, public benefit.

Another flaw in this decision is its apparent one-sided reliance on business risk as a component of allowable rate of return:

The risk of business, whatever it may be, is to be compensated for by the allowed rate of return. If the risk of utilizing a leased asset increases the risk of the equity investor then the Commission can properly take that increased risk into account in determining an appropriate rate of return for the equity investment without necessarily including the leased asset in the rate base.\textsuperscript{17c}

This approach overlooks the fact that the business risk is not the only component of allowable return; value of assets employed in the business is included as well. A firm that leases ninety percent of its assets may not increase its risk by so doing, but certainly increases the value of the assets employed in the business. Moreover, the risk associated with leasing an asset for its total economic life under a noncancelable finance lease is virtually identical to the risk associated with owning that asset—particularly owning it under an installment sale contract.

\textsuperscript{17} 7 F.M.C. 563, 582 (1963).
\textsuperscript{17a} 14 S.R.R. 1063 (1974).
\textsuperscript{17b} \textit{id.} at 1086.
\textsuperscript{17c} \textit{id.} at 1085.
In response to the contention that the tax benefits received by the lessor enable him to reduce rental payments to the lessee, the administrative law judge expounded his double rate of return theory:

What is beyond argument is that the builder/lessor is charging a rental which will return his capital investment (rate base) plus a return thereon. To that extent the rate payer is being charged for the dedicating of that property to the public service. If in addition the cost of the lease is to be included in the carrier's rate base and a return be allowed thereon then the rate payer is burdened with a double rate of return for the same asset dedicated to serving him.17d

This theory ignores the fact that lessors are not sui generis in charging a price which will return capital investment and a return thereon—vendors do exactly the same. Whenever a regulated firm purchases an asset from any vendor, and uses it in his business, the vendor presumably has made a return on its investment in manufacturing the asset, and the regulated firm is allowed a rate of return on its use. The theory is specious. Furthermore, significantly omitted from this opinion is an explanation for the disparate treatment of installment sales as opposed to finance leases that arises from not allowing capitalization of finance leases.

Another myopic view expressed in the decision should not be followed by the Commission: "No discernible benefits to the rate payer by capitalizing leased assets appear in this record, and accordingly, no discernible reason exists to issue a rule permitting it."17e Beyond the fact that it is highly questionable whether the rate payer does not benefit by lease capitalization (the cited record may have been deficient), this logic completely ignores the benefit to the regulated firm providing service. It is fundamental that the interest of both the regulated firm as well as the rate payer should be considered in setting fair rates.

B. \textit{State Utility Cases}

1. \textit{Inclusion in Rate Base.}

As early as 1927, the New York Department of Public Service indicated that there was a split of authority regarding inclusion of leased equipment within the rate base. \textit{United Traction Co.} stated:

There are differences of opinion as to the proper treatment of physical property under [lease]. The trend of decisions indicates, however, that property leased by a public utility, used exclusively in its business, proved to be used and useful, should be valued upon the same basis as the other property, the rental for such property under lease being excluded from operating costs.18

In that case, the Commission adopted the proposition that if the

17d. \textit{Id.} at 1083.
17e. \textit{Id.} at 1086.
rentals were not included in the operating expenses, then the rented property should be included within the rate base.

This case was followed by Yonkers Railroad Co. v. Public Service Commission of New York, which cited United Traction in elucidating its standard: "[e]ither the rented equipment should be omitted from the rate base and the rent included as an operating expense or the equipment should be treated as a part of the rate base and the rental eliminated from the operating expenses." The Court then made its choice from what it apparently considered equally viable alternatives:

The statute says that the rate shall be fixed upon the value of the property actually used in the public service. These cars were actually used in public service and it seems fair to have included them in the rate base and to have excluded the rental from the operating expenses.

The majority opinion failed to critically examine the economic realities of leasing, nor did it consider policy reasons for choosing either of its alternatives. It simply picked one alternative because it seemed "fair," neglecting to state whether the other alternative was likewise fair. The dissenting judge appeared to give the problem more thought in arriving at his novel solution:

It is stated in the opinion of Justice Crasper that the value of these cars and equipment should be included for the reason that the statute says that the rate shall be fixed upon the value of the property actually used in public service. It seems to me, however, that in determining the value of property actually used in the public service, the statute and decisions have reference to the property of the operating company. It seeks a return upon its capital invested, not upon the capital or property of some other concern. So far as these rented cars and equipment are concerned, the petitioner has invested or expended only the amount of the rentals paid by it and such rentals constitute all of the property of the petitioner devoted to public use, in relation to such cars and equipment. The reasonable rental value thereof should, therefore, be included and the actual value of the property itself should be excluded.

Judge Rhoades appears to have recognized the problem of treating rentals as expenses, but his solution is still inadequate. He does not advocate capitalizing leases for inclusion in the rate base, but only shifting the rental amount paid from an operating expense to inclusion within the rate base.

A different result was reached in Residents of Binghamton v. Triple Cities Traction Corp. There the New York Public Service Commission capitalized leases of omnibuses whereby annual rental was slightly more than 25 percent of the cost of the buses, with an option to purchase at the

20. Id. at 4.
21. Id. at 8.
end of five years for $5 each. The Court reasoned that "in practical effect, these leases constitute nothing other than a conditional sale of the buses with payments spread over a period of five years. . . ." 23 This was a quite accurate consideration by the Commission, generated by the facts which virtually demanded this result.

The North Carolina Utilities Commission in Citizens of Bryson City v. Smoky Moutain Power Co. 24 recognized that a power plant leased by the power company for thirty years should be included in the rate base. The Court indicated that such treatment was in accord with the trend of decisions, but neither cited cases, nor gave reasons for its choice.

In the case of Pennsylvania Public Utility Commission v. Equitable Gas Co., 25 it is unclear whether the Commission felt the treatment of leases was so well settled that it did not merit discussion, or whether it did not feel it made any difference. At any rate, it treated the gas company's eighty percent leased property as if it were 100 percent owned by the company, with little clue as to its reasoning.

The issue of whether to include leased buses in the rate base was faced in Minneapolis Street Railroad Co. 26 By the terms of the lease, annual rental would equal the cost of the buses in four years, hence the Minneapolis Ry. and Warehouse Commission refused to allow the rent as an expense item, ordering the value of the buses to be included in the rate base. This result obtains from employing a constructive ownership theory.

A foggy treatment of the lease issue was presented in North Carolina Telephone Co.:

The Company is presently leasing (apparently on a "rental purchase" plan) certain plant properties from its president. We find that these properties are used and useful in rendering service to the public and that title, perhaps only equitable title or a lesser estate than fee simple, is vested in the company . . . . Accordingly, we shall add the simple average cost of these properties to the average gross book investment . . . . 27

The Commission's view of the nature of the interests here involved is probably due to its belief that any property "used" should be included in the rate base.

The New Mexico Public Service Commission follows the "used in public service" tests as illustrated in Moyston: "[a]s this property is used and useful in the public utility operation, it should be included in the rate base. The rental expense . . . should be eliminated from the expenses to be allowed in this proceeding." 28

23. Id. at 96.
Without indicating why, the Pennsylvania Public Utility Commission included in the rate base of a light company the original cost of a plant which was leased to the company for 99 years. While not allowing the rental payment as an operating expense, it did, however, allow this payment in the "other income deductions" category, which appears to have the same result as allowing it as an operating expense. This inference, if true, leads to the erroneous result of allowing the item to appear both in the rate base and as a subtraction item from current income.29

2. Exclusion from Rate Base.

Union Electric Light & Power Company30 involved a pole yard leased by the utility which was excluded from the rate base because the rentals were included as an expense item. No explanation was given to the leasing matter. In Princeton Water Co., the New Jersey Commission, with no explanation, stated: "[t]he Board is of the opinion that the amount represented by the leased lands . . . should be deducted . . ." from the rate base.31

The Parkville Water Company case represents the classic reason for excluding leases from the rate base. A water reservoir and main were leased by the water company. The court held that "[s]ince this property does not represent any capital outlay on the part of the company . . . we do not consider it a proper element of the rate base, but will allow the rental paid to the lessor as an operating expense."32 This case represents the reasoning of the "expense only" regulatory authorities.

V. CONCLUSION

Leasing should not be discouraged in regulated industries by failure to allow a return on leased equipment when identical owned equipment is allowed a return. Moreover, the economic reality of finance leasing transactions affords no valid basis for distinguishing them from treatment accorded to purchase transactions.

The accounting profession, the Uniform Commercial Code, the Internal Revenue Service and the Securities and Exchange Commission have indicated that the form of a lease transaction should not govern the legal consequences arising therefrom. If the economic characteristics of such a transaction cannot distinguish the transaction from a purchase, it should not be treated differently from a purchase. Regulating authorities should borrow from these fields the ability to characterize leases correctly.33

33. See generally Symposium, Commercial Leasing 1972 12 L.F. 433, 446, 482, 497.
The regulated industry opinions examined are split: some include leases in the rate base whereas others do not. Although this article lauds the inclusion of finance leases in the rate base, and concludes that those authorities who only allow “expense only” treatment are erroneous, it appears that even those decisions including leases in the rate base are not always well-reasoned. Many of these cases appear to rely upon the “being used by it for the convenience of the public” standard enunciated long ago by the Supreme Court. This vague guideline must be employed with caution. Certainly, the court meant to include within that phrase only capital items—not pencils, rented telephones or other non-capital equipment.

It is recognized that capitalization of finance leases presents problems of implementation. Determining the proper interest rate will be challenging for regulatory authorities. Determining where to draw the line between operating leases and finance leases which occupy opposite ends of a continuum is a formidable task. These problems, however, are not insurmountable, and should not stand in the path of according finance leases their proper position in ratemaking proceedings.

There is a wide variety of reasons for leasing rather than purchasing equipment. Some, such as unavailability of credit, can be considered “pure” reasons. Others, such as passing of tax advantages, might be deemed “artificial”, at least from a policy viewpoint. It should be recognized that both pure and artificial reasons for leasing are legitimate, because they are based upon rational business judgments.34

It could be claimed that by capitalizing leases in regulated industries, encouragement of leasing will result, and consequently, the public will pay more for its goods or services in order to compensate the unnecessary third party, the lessor. This would not be correct. The regulated firm will choose to lease rather than purchase only if there is a rational business reason for so doing. This reason may be due to an overall lower cost (e.g., where tax benefits traded to lessor make lease terms more attractive than purchase) or may be due to a legal restriction (e.g., indenture restrictions on future borrowing). So long as the expected return from the lease is greater than the opportunity cost of not leasing, the public will benefit from the firm’s lease decision. The lessor is not a featherbedding third party, but a contributor to the public benefit by the service he performs for the regulated firm. His service may well decrease the overall costs of the regulated firm, allowing a lower cost to the public.

34. Id.
Featherbedding on the Railroads:
by Law and by Agreement

J.A. LIPOWSKI*

I. INTRODUCTION

The concept of "featherbedding" or make-work rules involves the conflict between two ideals: efficiency, usually necessary for the profitable operation of an enterprise, and job security, which is the desire of every worker and the hope of any union interested in maintaining its membership rolls. These conflicting ideals must be reconciled at some point.

In the railroad industry, where the controversy over featherbedding has been most pronounced and the consequences most strongly felt, the carriers argue that the increased labor cost resulting from this practice is crippling the industry. In 1963 it was estimated that featherbedding...

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* B.A., Lindenwood College; J.D., University of Tulsa College of Law, 1976.

1. Featherbedding has been defined as "[T]hose work rules which require the employment of more workers than needed for the job. In addition, when technological advances eliminate positions, unions often insist that the workers be retained and receive their regular pay for doing nothing." A. PARADIS, THE LABOR REFERENCE BOOK 71 (1972).

The United States Department of Labor says that featherbedding is:

a derogatory term applied to a practice, working rule, or agreement provision which limits output or requires employment of excess workers and thereby creates or preserves soft or unnecessary jobs, or to a charge or fee levied by a union upon a company for services which are not performed or not to be performed. U.S. DEPT. OF LABOR, BULL. NO. 1438, GLOSSARY OF CURRENT INDUSTRIAL RELATIONS AND WAGE TERMS 31 (1965).
provisions in railroad contracts cost the carriers $592 million annually.\textsuperscript{2} This compares with industry earnings in that year of $681 million.\textsuperscript{3} More recently, in 1970, two of the last full-crew laws (in Wisconsin and Indiana) cost the railroads operating in those states $35.5 million.\textsuperscript{4} The long-anticipated merger of the New York Central and Pennsylvania Railroads into the Penn Central Railroad was intended to be cost-saving, but a job security agreement won by unions in the deal cost the new railroad $93 million from 1968 to 1970.\textsuperscript{5}

Employees and unions offer their own counterarguments. One claim is that a massive discharge of workers would bring economic havoc to these individuals and their families, and also to society as a whole, which would bear the responsibility of either finding new jobs for them or starting retraining programs. There is also the standard argument that a train cannot be safely operated without firemen, brakemen and other helpers. A third argument is that some of the carriers are too heavy with an excess crew of vice-presidents, department heads and managers.\textsuperscript{6}

Recent legislation has not improved the deteriorating situation in the railroad industry. A proposed National Railway Act is set out at the end of this article to serve as a guideline for the necessary changes.

II. \textsc{Statutory Basis of Featherbedding}

Featherbedding practices, although often arising from contracts or agreements between management and labor, have been encouraged in large part by state and federal laws. State regulation of labor agreements between railroads and their employees has been characterized for many years by full-crew and “train consist”\textsuperscript{7} laws which, through the pressure of organized labor, remained on the books long after any useful function they may have served had vanished.

A. \textit{Full-Crew Laws}

The Arkansas full-crew laws\textsuperscript{8} were illustrative not only of the endurance of these laws, but also of the burden which was placed on the railroads. In the Arkansas statute a crew of six was required on freight operations: “an engineer, a fireman, a conductor and three brakemen,

\begin{itemize}
\item \textsuperscript{2} \textit{A. Paradis, supra} note 1, at 71 (1972).
\item \textit{Moody’s Transportation Manual} 1974 at a5.
\item J. Daughen \& P. Binzen, \textit{The Wreck of the Penn Central} 221 (1971) (The cost of the agreement was supposed to have been $78.5 million over an eight-year period).
\item \textit{Business Week}, September 29, 1975, at 63.
\item Train consist laws limited the maximum number of cars that could be connected in a single train.
\end{itemize}
regardless of any modern equipment of automatic couplers and air brakes." The two exceptions to this rule were carriers whose lines were less than fifty miles in length or freight trains with less than twenty-five cars. There appears to have been no plausible reason for conferring such special treatment upon carriers which were less than fifty miles long.

Equally ludicrous were the requirements for switch crews. These consisted of an engineer, a fireman, a foreman, and three helpers. The exceptions to this provision were that only first and second class cities had to have such a crew and railroads that operated less than 100 miles were not required to abide by the regulation. The Arkansas legislature also found it necessary to point out that "nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this act."

The full-crew laws have been litigated frequently but never overturned. The Arkansas law, for example, was the object of lawsuits for over fifty years. In the case of Chicago, Rock Island & Pacific Railway Co. v. Arkansas, the United States Supreme Court upheld the law while saying that it may not have been necessary at all to have such a law. The reasons for sustaining the statute were that it was not unreasonable, there was no federal legislation to preempt state regulation, and it did not discriminate against any carriers, even though those with lines shorter than certain minimum lengths were exempt from the full-crew laws in certain instances.

Today the full-crew laws are no longer an issue. The laws have been changed, since the brotherhoods no longer oppose repeal or nonenforcement. In their stead the unions have obtained protective agreements with the carriers.

9. Id. at § 73-720 (emphasis added).
10. Id. at § 73-721.
11. Id. at § 73-726.
12. Id. at § 73-728.
13. Id. at § 73-727.
15. Id. Two other attempts were made to invalidate the Arkansas full crew laws. In the case of St. Louis, Iron Mountain & S. Ry. v. Arkansas, 240 U.S. 518 (1916), the railroad argued that a terminal railroad less than 100 miles in length had switching operations over the same tracks as they did, but was exempt from the full crew requirement. How did the United States Supreme Court circumvent this argument? It held that "[T]he distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary . . . ." Id. at 521.

In the second attempt, Missouri Pac. R.R. v. Norwood, 283 U.S. 249 (1939), the Supreme Court was totally unsympathetic to the carriers, stating that "the same or greater need may now exist for the unspecified number of brakemen and helpers in freight train and switching crews . . . ." Id. at 255.
16. In Arkansas there was no need for such an agreement. When the full crew laws were
B. **TRAIN CONSIST LAWS**

Closely akin to the full-crew laws are the state train consist requirements. Although these laws were never as profuse as the full-crew laws, they still imposed a burden on the railroads. Limiting the size of a train forced a railroad to add more trains to its schedule and this in turn required more crews. Arizona's train consist law was voided in the case of *Atchison, Topeka, & Santa Fe Railway Co. v. La Prade*,\(^{17}\) although this case was reversed on procedural grounds by the Supreme Court.\(^{18}\) Twelve years later, in 1945, the Arizona train consist law was held to be preempted by federal regulations and the national control of interstate commerce in *Southern Pacific Co. v. Arizona*.\(^{19}\) The Court made an attempt to distinguish state train consist laws, which were invalid from the full-crew laws, which were still valid. The Court regarded the national interest as sufficient to override the state interest in the former case but not in the latter.

C. **JOB PROTECTION**

Another method of securing the retention of excess labor has been the enactment of federal laws which guarantee compensation for employees who are either laid off or transferred into another job category. The first such legislative enactment was the Emergency Transportation Act of 1933.\(^{20}\) This Act was promulgated during the depths of the depression when many of the Nation's railroads were faltering. This innovative piece of legislation provided that a carrier was not permitted to reduce its employment by more than five percent per year or lessen employee compensation.\(^{21}\) This, however, was only a temporary measure which originally was to be effective for only one year unless renewed by the President.\(^{22}\)

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finally repealed in 1972 the second section of the Initiative Act, supra note 6, stated: "[n]o railroad employee who has seniority in train, engine or yard service in this state on the effective date (November 7, 1972) of this Act shall be discharged, laid off, furloughed or suffer a reduction in earnings by reason of this Act."

21. *Id.* § 7(b). This section in full states that:

The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the payrolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he held during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

22. *Id.* at 217.
The next federal law enacted to protect employees was the Transportation Act of 1940. This Act was preceded by the landmark case of United States v. Lowden, wherein the United States Supreme Court held that it was permissible under the Commerce Clause to regulate the conditions upon which an employee could be dismissed or retained. The basis for the Court’s decision was not simply the welfare of the individual involved, but also the effect on interstate commerce.

The Transportation Act, which has become a part of the Interstate Commerce Act, gave four years of protection to employees of carriers which merged or consolidated. Using the same terminology as the Emergency Act of seven years earlier, it also stated that employees are not to be placed in a worse position with respect to their employment.

The legislative history of the Transportation Act of 1940 indicates that a much more punitive measure against the carriers could have been passed. One proposal that was given serious consideration provided protection for employees not only in a consolidation action, but also in cases of abandonment of lines where there was a substitute form of transportation. The substitute transportation would have the burden of employing the workers who lost their jobs. These workers would be protected by law from dismissal by the substitute company for an indefinite amount of time. Congressman Lea stated that such protective conditions were “about as wild a proposition as this House was ever asked to approve.” He feared that such protective agreements would be extended to other employees in other industries when there was no need to retain them.

As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

25. Id. at 240.
27. The relevant portion of the Act, § 5(2)(l), which deals with the rights of employees in a rail unification or merger states:
29. Id.
proposal, said his reason for offering it was that railroad labor had no protection. He also was concerned about the public. Railroad consolidations and abandonments resulted in "economic deflation of communities."\textsuperscript{30} He even felt it would be beneficial for the carriers since it would "stay the hand of railroad financial interests...bent upon reducing the physical plant of our great railroads."\textsuperscript{31}

A major problem during the hearings was an interunion fight. Some of the railroad unions desired to secure as much legislative protection as the most pro-labor Congressman would sponsor. Other unions felt that only a modified protection plan for railroad employees would gather the necessary support for passage.\textsuperscript{32} As finally passed and enacted the legislation was admitted to be very favorable to labor.\textsuperscript{33}

The leading case interpreting this unique protective provision of the Interstate Commerce Act is \textit{Railway Labor Executives' Association v. United States}.\textsuperscript{34} In this case it was decided that the section did not mean that the ICC could require only four years of protection, but rather it had "power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years..."\textsuperscript{35} The case extended the theory of \textit{Lowden} to a logical conclusion: if the government has the power under the Commerce Clause to specify that employees be protected from being discharged without compensation, then it also has the power in a given case to specify the duration of protection beyond the statutory period. The legislative history is unclear as to whether this was the intention of the Act. All that the Act said was: "[T]he employees have the protection against unemployment for four years, but the Interstate Commerce Commission is not required to give them benefits for any longer period..."\textsuperscript{36}

\section*{III. Featherbedding By Agreement}

In addition to the statutory protection conferred upon railroad employees, private contracts have been created which entitle employees to hold their jobs beyond the time they are needed or, in the alternative, allow for favorable severance allowances. These contracts form the basis for present job protection agreements between labor and management in railroading.

\begin{footnotesize}
\begin{itemize}
\item 31. Id. at 5871.
\item 32. See 86 Cong. Rec. 5869 (1940).
\item 33. "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement." Id. at 10178 (remarks of Rep. Lea).
\item 34. 339 U.S. 142 (1949).
\item 35. Id. at 155.
\item 36. See note 33 supra.
\end{itemize}
\end{footnotesize}
A. WASHINGTON AGREEMENT

The first such contract of importance was the Washington Agreement, executed on May 21, 1936. Under this pact employees who were displaced were given protection. An employee was allowed the difference between his average monthly earnings before displacement from his former position and his current monthly earnings following the salary diminution. Protection is also offered in a "coordination" if the employee loses his employment entirely. When this occurs he is entitled to sixty percent of his former earnings for from six months to five years, depending on his length of service. However, any amount a terminated employee receives from other railroad earnings has to be deducted from his severance allowance. Even if a worker has worked for less than one year he is entitled to a lump sum payment based on sixty days' salary.

A retained employee can receive other benefits, such as moving expenses, loss on the sale of a home, free railroad transportation, a pension, and hospitalization. Any disputes between the parties arising from a Washington-type agreement is referred to a committee of the parties. If the parties are unable to agree, a neutral referee is selected either by them, or if they are unable to choose a referee, the dispute goes to the National Mediation Board.

Not everyone was pleased with the terms of the Washington Agreement. Representative Harrington, in his distaste for the terms of the Agreement, oversimplified the Agreement by saying that all it involved was a surrender of a life's work for a "mere" sixty percent of an employee's salary.

B. OKLAHOMA CONDITIONS

Another common pattern for setting compensation terms in the railroad industry is the one found in the Oklahoma Conditions. The

38. Displacement is defined in terms of the employee:
A displaced employee is one who is retained in service but who, because of the coordination, is placed in a worse position with respect to compensation and rules governing working conditions that he occupied at the time of such coordination. Displacement is usually associated with the effects of "bumping" whereby employees with greater seniority exercise their rights to jobs previously held by the displaced employee. D. ROBB & J. LUSTIG, RIGHTS OF RAILROAD WORKERS 406 (1968).
39. A coordination is defined as:
[J]oint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities in any of the operations or service previously performed by them through such separate facilities. Id. at 407.
40. Id. at 406-09.
41. 86 CONG. REC. 5869 (1940). Representative Harrington in his parochial view of railroad management added: "The 1936 jobs agreement constitute only what railroad financiers voluntarily accepted." Id. at 5870.
Oklahoma Conditions are applicable when a railroad abandons either part or all of its operations and some of its trackage is sold to another company. The basic difference between the Oklahoma Conditions and the Washington Agreement is found in the treatment of pay allowances when an employee is either dismissed or demoted. Under the Oklahoma Conditions the protective period is four years—the same as found in the Interstate Commerce Act. Unlike the Washington Agreement, which allows a dismissed employee only 60% of his former earnings, the Oklahoma Conditions call for giving a dismissed or demoted employee 100% of his former wages, minus earnings in any other employment or any benefits collected from unemployment insurance. The Oklahoma Conditions are very defective in the provisions for settling disputes. If a controversy arises which cannot be settled it may be referred to an arbitration committee by either party. This committee is one whose formation, duties, procedure and compensation are agreed upon by both parties.\textsuperscript{43} Considering the past inability of labor and management in the railroad industry to agree on nearly any issue, this definitely is not a workable proposition.

C. \textit{New Orleans Conditions}

The third type of agreement commonly used is known as the New Orleans Conditions.\textsuperscript{44} These Conditions are basically a combination of the Washington Agreement and the Oklahoma Conditions. If the employee is adversely affected within four years of an ICC order the Oklahoma Conditions apply. If more than four years elapse the terms found in the Washington Agreement are applicable.\textsuperscript{45}

No discussion of agreements is complete without mention of the agreement between the unions, the Pennsylvania Railroad and the New York Central Railroad.\textsuperscript{46} These conditions are \textit{sui generis}. To appease the unions the two railroads practically had to guarantee lifetime employment to any worker affected by their proposed merger. All employees who wished to continue their employment with the merged company could do so for as long as they desired. An employee's position could not be worsened with respect to compensation, working conditions or fringe benefits. Employment could be reduced only if business contracted more than five percent in any thirty-day period.\textsuperscript{47}

\textsuperscript{43} Id. at 197-201. The Oklahoma Conditions are almost entirely identical to the Burlington Conditions and the names for these two agreements are often used interchangeably. Chicago, B. & Q. R.R. Abandonment, 257 I.C.C. 700 (1944).

\textsuperscript{44} New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952).

\textsuperscript{45} Id. at 280-2.


\textsuperscript{47} Id. at 543. The ICC would frown upon using a term such as job guaranty: Under its terms, although the merged company is restricted severely in reducing its
What was the *quid pro quo* here? Besides allowing the merger to occur, the unions gave the consolidated company the right to transfer employees throughout the system. Transfers across seniority lines, however, could only occur within a craft.  

D. **Work Rules**

One of the most pernicious featherbedding practices in the railroad industry developed from inflexibility in the face of changing times. In 1916 Congress passed the Adamson Act to establish the eight-hour work day for railroad employees. A practice soon developed of defining a work day both in terms of hours and miles traveled. An employee completed a regular work day when he had either worked for eight hours or traveled on a freight train for 100 miles. This work rule, so sensible in the days when a freight train could scarcely make 100 miles in an eight-hour day, became an obnoxious and expensive featherbedding provision when train speeds greatly increased. Now a day’s pay may be for much less than eight

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48. *id.* at 543.
   Eight hours shall, in contracts for labor and service, be deemed a day’s work and the measure or standard of a day’s work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, provided that the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are engaged themselves in transfers of freight between railroads, or between railroads and industrial plants.
50. The passage of the Adamson Act was the culmination of railroad brotherhood demands for wage increases. From the turn of the century to 1916 the unions were in constant disagreement with the carriers on wages. Strikes were averted only by binding arbitration. In all likelihood the aversion to arbitration by the railroad unions stems from this time when they had to settle for wage increases they felt were not satisfactory. In 1916 the brotherhoods strongly insisted on an eight-hour day and increased wages. The railroads opposed both, but were willing to arbitrate, which the unions refused to do. When an impasse was reached the brotherhoods set a strike for September 4, 1916. President Wilson asked for a postponement of the strike, but he was turned down. The mode of operation he chose for preventing a strike was to ask Congress to enact an eight hour day law. This was done, and he was able to sign the Adamson Act on September 3, 1916. S. Perlman & P. Taft, *History of Labor in the United States 1896-1932, IV Labor Movements* 374-85 (1935).
51. The agreements between the carriers and the brotherhoods no longer even make a pretense that eight hours is a day. It is not uncommon for an agreement to say that less than eight hours is the work day.

In all classes of freight service, 100 miles or less, 8 hours or less (straight-away or turn-around) shall constitute a day’s work; St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Locomotive Engineers 18, Effective January 19, 1920, Revised effective January 16, 1950.
Passenger Service. One hundred miles or less (straight-away or turn-around), five hours
hours of work. According to the Association of American Railroads there are a number of instances in which a work day consists of less than two hours.\textsuperscript{52}

One critic of the "100 miles equals a day of work" rule has said that the railroads missed an opportunity to have this rule modified at the time the Adamson Act was passed: "[t]he roads failed to take advantage of the opportunity to trade a reduction of the day in hours for an increase in the day in miles . . . ."\textsuperscript{53} The reason that this trade-off did not occur was that the speed-up in freight service had not yet started and the railroads did not yet anticipate it. At that time the carriers usually were not able to run a freight train 100 miles in eight hours. Increasing the number of miles in an eight-hour work day would have meant overtime payments.\textsuperscript{54}

Unfortunately, the railroad industry is subject to a spectrum of work practices which either constitute featherbedding or encourage featherbedding. A common practice in many industries is to allow workers of one craft to do work in another craft, especially if it is closely related. This is not so in railroading. In the disputes between the carriers and the brotherhoods a major point of contention has been clauses such as "where regularly assigned to perform service within switching limits, yardmen

\begin{itemize}
\item or less, . . . shall constitute a day’s work, miles in excess of 100 will be paid for at the mileage rate provided, according to class of engine.
\item Six hours and forty minutes or less shall constitute a day in suburban service. St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Locomotive Firemen and Enginemen 11, (effective May 16, 1910, revised June 16, 1947).
\item Brakemen, in passenger service, have to do more work to earn a day’s pay. For them it is 150 miles or less. However, on freight service 100 miles or less will meet the requirement of a day’s pay for a day’s work. St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Railroad Trainmen 4, in effect March 15, 1920, as revised March 1, 1953.
\end{itemize}

\textsuperscript{52} Loomis, RAILWAY DIGEST, April, 1959, at 19. According to the AAR very little work was being done by the various types of employees. And the amount of work that was being done was constantly diminishing. The AAR prepared the following chart showing the decline in work hours.

\begin{center}
\begin{tabular}{|l|c|c|c|c|}
\hline
 & 1922 & & 1957 &  \\
 & Hrs. & Mins. & Hrs. & Mins. \\
\hline
Passenger engineers & 4 & 31 & 2 & 57 \\
Passenger firemen & 4 & 28 & 2 & 50 \\
Passenger conductors & 5 & 45 & 3 & 55 \\
Passenger brakemen & 5 & 43 & 3 & 40 \\
Passenger baggagemen & 5 & 45 & 4 & 05 \\
Through freight engineers & 6 & 36 & 4 & 05 \\
Through freight firemen & 6 & 35 & 4 & 08 \\
Through freight conductors & 6 & 31 & 3 & 56 \\
Through freight brakemen & 6 & 32 & 3 & 57 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{53} S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 191 (1941).

\textsuperscript{54} Id., n. 73.
shall not be used in road service when road crews are available..."55 or "[e]xcept as otherwise provided all work done exclusively within switching limits will be given to the yardmen from that seniority list."56 Another requirement that encourages the retention of workers that are not needed or may not be wanted for a particular assignment is the rule that "[a] yardman shall not be removed from his position by reason of defective eyesight or hearing, if...he is found competent for the service he is engaged in."57 Then there is the work rule that allows a railroad employee to be employed by a union in its activities. This "shall be considered as in the service of the railroad on leave of absence..."58 Consequently seniority will continue to accrue. Still another work rule prohibits trainmen from loading more than three bales of cotton at any one station.59

An analysis of these rules reveals that they are archaic and no longer serve the purposes for which they were intended. In some instances the result may be the exact opposite of what was intended. A rule which states that members of one craft cannot do the work of other crafts is meaningful if the two crafts are so unrelated as to render incompetent the performance of one who is not a member of that craft. Otherwise craft distinctions only promote featherbedding, especially when the amount of work to be done in all crafts of an industry is declining. These rules also do not bear a reasonable relationship to such goals as safety and welfare of workers. Seniority rules may be of paramount importance in protecting labor. However, if seniority distinctions are set rigidly by divisional boundary lines the employees will not benefit. Carrier operations may be hampered by an inability to move workers to districts where they will be more useful.

A rule which states that a worker who has poor eyesight or poor hearing must be retained in his position defeats the purposes of safety and welfare, not only for the worker, but also for fellow employees who may be endangered by him. The goal of long-term financial protection of employees is also defeated. If too many employees become a burden on a railroad the carrier loses its competitive position, not as to other railroads that are burdened by the same work rules, but as to other forms of transportation such as trucks and airlines. In any line of business, marketplace economics dictate who will be able to reap the profits. If the railroads have to charge higher prices for their services because of high labor costs or discriminatory governmental regulations, they either have to

55. St. Louis-San Francisco Railway Company Agreement with United Transportation Union, Yardmen’s Schedule 5 (effective January 1, 1973), as revised October 28, 1972.
56. Id. at 34.
57. Id. at 29.
58. St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Railroad Trainmen 50 (effective March 15, 1920), as revised March 1, 1953.
59. Id. at 19.
pass on the increased costs to their clients or simply cease doing business. In the latter case employees are left without a job. On the other hand, by adjusting with the times the railroad brotherhoods may be able to save more of their members’ positions than by adhering to rules that produce only short-term results.

Not much credit can be given to the brotherhoods for being flexible. There are some instances in which there has been a slight degree of adjustment. This is illustrated by the elimination of a past rule that required the payment of arbitraries to yardmen who carried portable radios as part of their employment. Still, even with the elimination of the rule, vestiges of it remain “for individual service not properly within the scope of yard service.”

IV. FEATHERBEDDING PROSCRIBED

A. FEDERAL STATUTES

Two federal laws of general application and one applying specifically to railroads have made half-hearted and ineffectual attempts to control or diminish featherbedding. Of the general laws, the Labor-Management Relations Act of 1947 (LMRA) explicitly prohibits the payment of wages or salaries which are not for work done:

It shall be an unfair labor practice for a labor organization or its agents—to cause or attempt to cause an employer to pay or deliver . . . any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

60 This is exactly what has happened to railroad employees. In 1920 slightly over 2 million workers were employed by the railroads. By 1974 the payroll figure had declined to 525,000. Moody’s Transportation Manual 1975, at 43.

61 This is a view that has often been expressed by labor arbitrators and various courts. It was well put in the case of Austin v. Painters’ District Council, 32 L.R.R.M. 2595, 2595-596 (1953), aff’d, 339 Mich. 462, 64 N.W.2d 550 (1954). cert. denied, 348 U.S. 979 (1955).

The defendants also seem to be alarmed that the use of the pressure and/or pan roller will bring about a great reduction in the employment of painters in this area. With this reasoning the court does not concur. From the very beginning of our industrial age, down to the present day labor saving devices, it has always been the position of those connected with the various trades affected that the use of these mechanical devices would greatly reduce employment. However, history has proved the contrary; that they have constantly and steadily improved employment, brought about the reduction of costs and the making of a better product, enabling the public to buy a better product at a lesser price and consequently in far greater quantities.

62 See note 58 supra, at 42. Arbitraries are special allowances paid to railroad workers for additional service performed “during the course of or continuous after the end of regularly assigned hours.” Id. at 5.

63 Id. St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Railroad Trainmen, supra note 58 at 5.


The policy considerations behind this provision are important to the railroad industry since the arguments pro and con are basically the same. This anti-featherbedding clause, simple and to the point on its face, is revealed by the legislative history as one of the more controversial aspects of the LMRA. In the House version of the bill, 66 five different activities were defined as featherbedding: employing more persons than necessary, making a payment instead of employing an excess number of individuals, paying more than once for a service that is performed, paying for services not performed and paying a tax for using or agreeing to restrictions on the use of certain machines. In the Senate bill there was no provision dealing with featherbedding. The Senate felt that matters concerning how many workers are required to perform a function was something that a court of law could not determine because of variations from industry to industry. 67 Senator Taft, a staunch supporter of the measure to prohibit featherbedding, believed differently. He asserted emphatically that it was "quite clear" the aim was to forbid "extortion by labor organizations or their agents." 68

The opponents of the provision were just as adamant. Senator Pepper of Florida believed it would eliminate clauses in contracts which called for paying workers who reported at a work site and then were told by the employer that there was no work. The end result, according to the Senator, would be to "wreck" unions. 69 Senator Murray of Montana indicated that health and safety measures that had been instituted would have to be sacrificed. 70 Other opponents went so far as to say that employees' vacation time and their minimum number of hours of work per week would be endangered. 71 Another individual who vehemently opposed the anti-featherbedding clause was President Truman. One of the reasons he vetoed the entire 1947 LMRA was because he felt that employees' rest periods, safety provisions and other legitimate practices were threatened by the language used in drafting the section concerned with featherbedding. 72 The Act was passed over his veto. 73

This law could have been very useful for regulating labor-management relations, especially if it were more specific. 74 Surely it need

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70. 93 Cong. Rec. 6503 (1947) (remarks of Sen. Murray). Senator Murray believed, as many still do, that the solution to featherbedding is in the collective bargaining process.
71. Id. at A2916, quoting an article by Alfred Friendly in THE WASHINGTON POST, June 15, 1947.
74. A possible criticism of the provision is that there is no uniform method of applying
not have been relegated to the unimportant role that the courts have given it.\textsuperscript{75}

Another general statutory proscription on featherbedding is found in the Hobbs Act.\textsuperscript{76} It prohibits the obstruction, delay or movement of an item in commerce by robbery, extortion, violence or threat of violence. In United States v. Kemble\textsuperscript{77} the Hobbs Act was construed to encompass labor activities involving "imposed, unwanted and superfluous services" if commerce were obstructed,\textsuperscript{78} but it is clearly of very narrow applicability.

A. \textit{Public Law 88-108}

The only federal proscription relating specifically to featherbedding on the railroads comes from Public Law 88-108.\textsuperscript{79} The background for this standard criteria since conditions differ from industry to industry. This need not be so. Under a statutory grant of power from Congress, the Department of Labor can promulgate rules proscribing featherbedding. Then it can publish in the Federal Register, in precise detail for each industry, the specific practices which constitute featherbedding. Although it would be impossible to formulate guidelines for every existing type of work, it would be a good step to delineate featherbedding practices where they are most common—for example, in the maritime, printing, entertainment, and construction industries, as well as in the railroads. The enforcement procedures for the railroads should be the same as for other industries, except that statutory authority for such procedures should arise under the Railway Labor Act. 45 U.S.C. § 151 et seq. (1970).

There is precedent for such a procedure. In the environmental field, not only are standards for pollution control being promulgated by industry by the Environmental Protection Agency, but also industry subcategories are often treated separately.

\textsuperscript{75} Much of the blame for this situation can be placed on two cases. In American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951), affd, 345 U.S. 100 (1953), it was decided that it was not an unfair labor practice under the appropriate section of the LMRA, § 8(b)(6), to set bogus type. The court reasoned that the employee actually worked in setting the bogus type and was not merely hired for that purpose alone. Furthermore, it took only five percent of his working time.

American Federation of Musicians v. Gamble Enterprises, Inc., 92 N.L.R.B. 1528 (1952), concerned the employment of stand-by musicians. The National Labor Relations Board found that the musicians were not guilty of a featherbedding practice. The decision was based on the fact that if they were given employment they would do actual work. The Board interpreted § 8(b)(6) to mean that a violation would occur only if no work were performed or no work was to be performed. On appeal, sub nom Gamble Enterprises, Inc. v. NLRB, 196 F.2d 61 (6th Cir. 1952), the court equated forcing someone to use services that were not needed to an exacting. Therefore, the musicians would fall under the featherbedding proscription. When the case came up to the Supreme Court, 345 U.S. 117 (1953), the Board's view was adopted and the Court of Appeals was reversed. The Supreme Court deftly avoided the issue of featherbedding. Since the offers to work by the musicians were in good faith there was no need to determine whether they were demanding an exacting.

The dissent felt that "[C]ongress surely did not enact a prohibition whose practical application would be restricted to those without sufficient imagination to invent some 'work.'" 345 U.S. at 126.


\textsuperscript{77} 198 F.2d 889 (3rd Cir.), cert. denied, 344 U.S. 893 (1952).

\textsuperscript{78} \textit{id.} at 891-92.

law was a dispute that arose between the carriers and the unions in 1959 when changes in existing work rules and pay structures were sought. Once the possible consequences of the dispute were realized, President Eisenhower appointed a commission of fifteen members, five each from the public sector, railroad management and the railroad brotherhoods. After thirteen months of studies and hearings the commission recommended against the carriers as to work rule changes, while favoring a modification in pay structures. The carriers accepted the findings and were willing to abide by them; the unions were not.\textsuperscript{80}

In 1963, with the prospects of a strike looming, President Kennedy established an emergency board that was to submit proposals for the resolution of issues. The board's recommendations, like those of the commission, were not binding on the parties. The brotherhoods objected strongly to one of the suggestions, arbitration. On July 10, 1963, the eve of a strike deadline, President Kennedy asked the parties to permit a subcommittee of the President's Advisory Committee on Labor-Management Policy to review and report on the issues involved. This was agreed to by all concerned and the threat of a strike was temporarily averted.\textsuperscript{81}

This committee basically reiterated the findings of the board and of the commission. Its report listed eight issues in the controversy, of which the most important were the disputes over firemen and crew consists. The Presidential commission had come to the conclusion that firemen were not a necessity for safe train operations. However, it recommended firemen with ten years of seniority should be retained while those with less seniority should be given other railroad job assignments, retraining, or severance pay. The Presidential board had recommended that there should be a determination of when firemen were needed for safety. The second controversy was over crew consists, where the differences were narrow. The difficulty was that the unions did not want a determination by arbitration of the disagreement over crew consists for branch lines.

One of the lesser issues concerned the combination of yard crews with road crews. The unions wanted these disputes handled locally while the railroads felt that a national determination would be better. The parties were also in dispute over compensation, with dissatisfaction being aroused by widespread inconsistencies in wage structures among the various railroads. The railroads did not want to discuss this issue until the two major issues involving the firemen and crew consists were resolved. The other issues were the manning of motor cars and self-propelled vehicles, interdivisional runs, employment security and apprenticeship programs.\textsuperscript{82}

\textsuperscript{81} Id.
\textsuperscript{82} Id. at 1546-549.
In conclusion, all the committee accomplished was to state the issues that were preventing the parties from coming to an agreement. For this the carriers and the brotherhoods did not need a Presidential committee. The indications are that the main purpose of the committee was to stall for time; however, procrastination does nothing for the resolution of disputes that have been in the making for decades.

Shortly after the report, President Kennedy, in a special message to Congress on July 22, 1963, submitted proposals for the settlement of the on-going dispute between the railroads and the unions. The President envisioned catastrophic effects from a prolonged strike: food shortages in large population centers, weakened national defense and national security, crippled industry, massive unemployment and, quite possibly, a recession.

With these disastrous possibilities in mind, the President proposed that for a two-year interim period work rules changes be submitted for approval, disapproval or modification to the Interstate Commerce Commission. According to the President this would not be compulsory arbitration, but rather "would preserve and prefer collective bargaining and give precedence to its solutions."

Congress responded to the President's initiative by enacting Public Law 88-108 which was divided into nine sections. The first section stated that neither party to the 1959 dispute would make any change in compensation or work rules "except by agreement, or pursuant to an arbitration award." The second section established an arbitration board which was to consist of seven members, two each chosen by the carriers and by the brotherhoods and three chosen by the four arbitrators designated by the parties. The third section required the board to make a decision in respect to firemen and crew consists. The decision reached would be binding on all parties to the dispute and would be a final disposition of the issues. The fourth section adopted the procedures found in the Railway

83. Id. at 1537; 109 Cong. Rec. 13004 (1963).
84. The President elaborated on this statement by citing some statistics.
85. The Council of Economic Advisers estimates that by the 30th day of a general rail strike, some 6 million non-railroad workers would have been laid off in addition to the 200,000 members of the striking brotherhoods and 500,000 other railroad employees—that unemployment would reach the 15 percent mark for the first time since 1940—and that the decline in our rate of GNP would be nearly four times as great as the decline which occurred in this Nation's worst postwar recession. Id. at 1538-539, 109 Cong. Rec. at 13005.
86. Id. at 1538-539, 109 Cong. Rec. at 13005.
87. Id. at 1541, 109 Cong. Rec. at 13006.
88. Id., 109 Cong. Rec. at 13007.
90. Id. § 1.
91. Id. § 3.
Labor Act to the extent that they were consistent with the specific provisions of Public Law 88-108. The disposition of the issues was to be made in the United States District Court for the District of Columbia and any award was to continue for two years from the date it was granted unless the parties agreed otherwise. The other sections addressed themselves to such issues as the beginning of hearings, the resumption of collective bargaining, the public interest involved, enforceability by the courts and the expiration of the law.

The arbitration board came to a decision that was filed with the court on November 26, 1963. The award started with a saving clause: "all agreements, rules, regulations . . . and practices . . . with respect to . . . firemen (helpers) shall continue undisturbed except as modified by the terms of this Award," and this considerably weakened the Award.

Substantively, the award first attacked the problem of firemen. The decision was a major setback for the unions. The board asserted that railroads would no longer be required to employ firemen "in any class of freight service" (steam power excepted). As a small concession to the unions, ten percent of the firemen were to be retained as part of the carriers' freight crews. Once this foundation was laid the board considered what provisions were to be made for the terminated individuals. If a fireman had less than two years' seniority on the effective date of the award he was only entitled to a lump sum separation allowance. Those with more than two years' seniority who had average earnings as firemen of less than $200 per month were given the option of receiving a severance allowance of 100% of their earnings in the preceding 24 months or remaining on the seniority lists and performing functions for which they were qualified. Those in this category who had performed no services could be terminated without a severance allowance. All other firemen with less than ten years of service retained their rights and seniority continued to accrue to them. Those employees with more than ten years' seniority who were retained were fully protected and did not have to fear the loss of their positions.

92. Id. § 4. Briefly, the pertinent provisions of the RLA provide that controversies between a carrier or carriers and employees which are not settled by representatives of the parties or an adjustment board be submitted to a board of arbitration composed of either three or six individuals, one or two arbitrators chosen by each side, and the remaining arbitrator or arbitrators chosen by the already designated arbitrators. In addition, each party will be given an opportunity to be heard, the agreement to arbitrate will state the specific questions to be resolved, and an award of the board will be conclusive unless a petition for impeachment is brought within ten days. 45 U.S.C. §§ 157-159 (1970).
95. Id. at 675.
96. Id. at 675-77.
The decision on crew consists was inadequate and evasive. The board said that the issue should be resolved at the local level through negotiations between individual carriers and the brotherhoods. Then if the parties were unable to agree on a disputed issue, it could be referred to a special board of adjustment. The arbitration board laid down guidelines to be considered by the special board. These included such factors as safety, crew workload, special conditions that might exist, number of railroad crossings to be protected and state, county and municipal ordinances.\(^{97}\)

In one aspect this award was groundbreaking: featherbedding, as exemplified by firemen, was no longer sacrosanct. Courts, labor arbitrators and unions were placed on notice that firemen were not a privileged class to whom marketplace economics did not apply. Otherwise, the award was of minimal value. A number of states still had full-crew laws which mandated not only the use of firemen but also other workers, usually brakemen. In those states in which there were no such laws, railroad employees were covered by various protective agreements between them and the carriers.

Surprisingly, the Supreme Court held that Public Law 88-108 did not preempt a state full-crew law in *Chicago, Rock Island, & Pacific Railroad v. Hardin*\(^ {98}\) where the Arkansas full-crew law was at issue. The district court decision had gone against the Arkansas law because the court found it was the purpose of Congress to preempt state laws in this area. The primary evidence of this was said to be the omission of a saving provision in the federal law, in addition to the finding of the court that the arbitration award was in direct conflict with the Arkansas law.

The Supreme Court agreed with the lower court dissent in finding no preemption. The Court stated that the disagreement between the carriers and the unions that had been before the arbitration board did not exist in states that had full-crew laws, since those laws were decisive on the question and precluded practical disagreements over hiring full crews.

This appears to be faulty reasoning. The carriers had never conceded the validity of the state laws and had previously challenged them in court. Justice Douglas, in his dissent, found it “inconceivable that Congress intended to solve only part of the problem when it directed the Arbitration Board to make a binding award which ‘shall constitute a complete and final disposition of the . . . issues.’”\(^ {99}\)

In the crew consist issue the creation of another board, in a situation in which so many boards had already failed, only added more confusion to

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97. Id. at 678-79.
99. 382 U.S. at 447.
an already disorderly state of affairs. Such a restricted and limited resolution of the problems did not mollify the parties. The unions were least pleased since the loss of even some firemen meant that union ranks would start to dwindle. The carriers were not completely satisfied because they still had excess labor.\footnote{Railroads v. Operating Bhd., 41 Lab. Arb. 673, 680 (decision by board) (1963). The opinion of the neutral members was very revealing as to the limitations and shortcomings of the decision. In a statement which may have been calculated to exonerate them from any defects which their decision may have had, the neutral members stated:

[.]The limitations under which we must deal with these issues should immediately be made clear . . . . There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview.

In approaching our task we have been fully aware of the handicaps imposed upon us not only by our relative unfamiliarity with the complex problems of railroad operation but also by the narrow time limits within which we have been compelled by the Joint Resolution to complete our work. We have had to base our judgments entirely upon the evidence and arguments presented to us by the parties in the formal context of adversary proceedings.

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\footnote{225 F. Supp. 11 (D.D.C. 1964), aff'd, 331 F.2d 1020 (D.C. Cir. 1964), cert. denied, 377 U.S. 918 (1964). This decision did not apply to engine service. However, it was applicable to assistant conductors, ticket collectors, brakemen, flagmen, and others.}


[!]It is an unfair labor practice for an employee, individually or in concert with others to:

\ldots [d]emand or require any stand-in employee to be hired or employed by an employer, or to demand or to require that the employer employ or pay for an employee to stand by or stand in for the work being done by other employees, or to require the employer to employ or pay for any employee not required by the employer or necessary for the work of the employer.


[!]It is an unfair labor practice for an employee, individually or in concert with others to:

\ldots [d]emand or require any stand-in employee to be hired or employed by an employer, or to demand or to require that the employer employ or pay for an employee to stand by or stand in for the work being done by other employees, or to require the employer to employ or pay for any employee not required by the employer or necessary for the work of the employer.}

\footnote{CAL. LAB. CODE \S\S 6900-6910 (West 1971).}]

Litigation over the board’s findings quickly developed. In \textit{Brotherhood of Locomotive Firemen and Enginemen v. Chicago Burlington & Quincy Railroad Co.},\footnote{225 F. Supp. 11 (D.D.C. 1964), aff'd, 331 F.2d 1020 (D.C. Cir. 1964), cert. denied, 377 U.S. 918 (1964). This decision did not apply to engine service. However, it was applicable to assistant conductors, ticket collectors, brakemen, flagmen, and others.} decided before the effective date of the board’s decision, the union challenged the constitutionality of Public Law 88-108. They also contested the arbitration board’s findings on the ground that they did not conform to the statute. Neither challenge was upheld.

\section{C. \textit{State Statutes}}

State laws that proscribe featherbedding are extremely rare. There are statutes in some states which may be construed as not allowing make-work practices. However, the state courts have not had to decide whether such construction is appropriate. An example is a statute found in North Dakota that makes it a misdemeanor for an individual to force an employer “to limit or increase the number of his hired foremen, journeymen, apprentices, workmen, laborers, servants, or other persons employed by him . . . .”\footnote{ND Cent. Code \S 34-01-05 (1970) (amended 1975). A non-criminal statute is found in Colorado. Under the Colorado Labor Peace Act, Colo. Rev. Stat. \S 8-3-101 to 123 (1973):

[!]It is an unfair labor practice for an employee, individually or in concert with others to:

\ldots [d]emand or require any stand-in employee to be hired or employed by an employer, or to demand or to require that the employer employ or pay for an employee to stand by or stand in for the work being done by other employees, or to require the employer to employ or pay for any employee not required by the employer or necessary for the work of the employer.}

A unique statute is California’s Railroad Anti-Featherbedding Law of 1964.\footnote{CAL. LAB. CODE \S\S 6900-6910 (West 1971).} This law adopted the findings of President Kennedy’s arbitration
board, created pursuant to Public Law 88-108, and declared it to be the public policy of the state of California "that featherbedding practices in the railroad industry should be eliminated and that national settlement of labor controversies relating to the management of trains should be made effective in California. . . . ."104

Under the California law, carriers which run more than four trains each way every 24 hours are required to employ on their passenger trains only one conductor, one brakeman (these two must be on all passenger trains) and an engineer and fireman for diesel locomotives (or a motorman instead of the latter two if the train is propelled by electricity) and two brakemen when four or more cars are hauled.105 The statute remains silent on the requirements pertaining to freight operations. Another aspect of the California law is a provision dealing with the qualifications and work experience needed for engineers, conductors, and brakemen.106

The California statute has to be commended for taking a stand on a controversial issue that had engendered intensive opposition from labor. However, the accolades must stop at this point. The statute fails to come to terms with all the work practices and work rules that constitute featherbedding or make-work. It may be that some of these issues may have to be solved on the national level, but if the courts and arbitration boards are going to insist that areas such as crew consists are items to be negotiated by individual carriers, then it may fall to the states to regulate such agreements.

V. CONCLUSION

The problem of featherbedding has three sources: labor, management and government. Labor has become so powerful in railroading that it is usually able to dictate the conditions of a work agreement. This does not mean that the union members necessarily benefit from the agreement, and, in fact, are more often harmed than helped. The problem with management is that it is an entrenched bureaucracy and in many ways acts like the myopic labor leaders it deals with. Railroad management does not adjust with the times and is unwilling to innovate or do anything that would jeopardize the status quo. Government, mainly through the Interstate Commerce Commission, is a heavy contributor to the abominable conditions prevalent in the railroad industry. It is true that when the ICC was created, the railroads were extremely powerful and were not loath to flex their muscles. However, over the ensuing years a number of changes occurred which precipitated the railroads’ fall from prominence.

104. Id. § 6900.5.
105. Id. § 6901.
106. Id. § 6906.
The heavy hand of the regulators did not allow the railroads to do anything without the Commission's permission.

At the present time the situation is changing only for the worse. The physical plant of the railroads is rapidly deteriorating, their position in the market place is declining, and employment is only a fraction of what it once was. The attitudes of management, labor and government have not ameliorated the situation. For its part government has started to recognize some of the problems. Nevertheless, new railroad legislation only sweetens the protective measures. In the Rail Passenger Act of 1970 the protective conditions of the I.C.A. were adopted. In addition the carriers are required to provide fair and equitable arrangements for training or retraining programs and to give assurances of priority in reemploying laid-off or terminated employees. Under the Regional Rail Reorganization Act of 1973 railroad employees who lose their jobs have a guaranteed income if they have more than five years of service. The implications of this type of agreement are obvious. Rather than trying to meet the tough problems of railroad unemployment head-on, the government is attempting to mollify all the parties by financially bailing out the industry. This is a disturbing trend. If railroad employees are entitled to special government protection then employees in other industries that have faltered will also want favored treatment from the government. This is not how problems are solved. This government action only mitigates conditions for a short period while the basic problems remain.

This is not to say that the government should be silent while the railroads roll into oblivion. A radical solution is needed, though the necessary remedies will doubtless prove distasteful both to labor and management. The following proposal is offered in the belief that it will help in solving the problems discussed in this article. A particular goal is to limit government interference in the railroad industry in a way that will be as fair as possible to all parties. However, the ICC under this proposed law would

107. As late as 1939 the railroads handled over 62% of the total freight shipped. In the peak war year of 1943 the figure rose to 71%. In 1974 it has fallen to 38.6%. MOODY'S TRANSPORTATION MANUAL 1975 at a12.

108. See also note 60 supra.


110. id. § 565(b).


112. id. § 775(c).

The monthly displacement allowance ... shall continue until the attainment of age 65 by a protected employee with 5 or more years of service on January 2, 1974, and, in the case of a protected employee who has less than 5 years service on such date, shall continue for a period equal to his total prior years of service.

An employee with less than 5 years of service but more than three years of service may elect to take a lump sum payment of up to $20,000. id. § 775(e).

Under this Act a protected employee is also entitled to benefits based on any wage increase he would have received had he continued in his prior position. id. § 775(b)(1)(C).
still serve a useful regulatory function. The goal for the 15-year duration of the law is to rehabilitate the railroad industry at least to the point where it will not have to reduce its employment. When this is accomplished the railroad industry might even become a growth industry!

PROPOSED NATIONAL RAILWAY ACT OF 1976

Section 1: Title.
This Act shall be known as the National Railway Act of 1976.

Section 2: Declaration of Congressional Policy.
(a) Findings—The Congress finds and declares that:
   (1) An emergency exists with respect to the condition of railroads in the United States today.
   (2) Essential rail service in the United States if being provided by railroads whose financial viability is questionable.
   (3) The physical plant of railroads in the United States has deteriorated to a point where many communities are being deprived of efficient, safe and modern rail service.
   (4) The railroads of the Nation are being unfairly discriminated against by local taxing authorities.
   (5) The work rules that govern labor and management in the railroad industry are archaic and only serve to further the deteriorating state of railway affairs.
   (6) The public convenience and necessity require adequate and efficient rail service throughout the Nation to meet the needs of commerce, the national defense and the environment, and the service requirements of passengers, the United States mail, shippers, states and their political subdivisions and consumers.113
   (7) Continuation and improvement of essential rail service is necessary to preserve and maintain an efficient national rail transportation system.114
   (8) Rail service and rail transportation offer economic and environmental advantages with respect to land, use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such an extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.115

(b) Purposes—It is therefore declared to be the purpose of Congress to provide for:

113. This section is based on 45 U.S.C.A. § 701(a)(3) (Supp. 1975).
114. This section is based on 45 U.S.C.A. § 701(a)(4) (Supp. 1975).
115. This section is identical to 45 U.S.C.A. § 701(a)(5) (Supp. 1975).
(1) A viable rail system that is competitive with other forms of transportation.
(2) The establishment of a Railway Trust Fund.
(3) An end to the constant disputes between rail labor and rail management which have plagued the industry and the Nation.
(4) An end to discriminatory taxes that have siphoned off much needed capital for the rehabilitation of the Nation’s railway system.
(5) The establishment of a Railway Study Group to formulate and propose solutions to railroad problems in the United States.

Section 3: Railway Trust Fund.
(a) Congress hereby establishes a trust fund to be known as the Railway Trust Fund.
(b) Three cents of every four cents that currently goes into the Highway Trust Fund from gasoline taxes shall from May 1, 1976, be diverted into the Railway Trust Fund.\(^\text{116}\)
(c) There shall be an additional two cents levy on every gallon of gasoline sold which shall go into the Railway Trust Fund.\(^\text{117}\)
(d) The Railway Trust Fund shall be administered by the Interstate Commerce Commission.
(e) Any railroad company or corporation, including switching and terminal railroads, are eligible for funds from the Trust if the purpose for which the money will be used is:
   (1) Rehabilitation and maintenance of right-of-way;
   (2) Purchase of new and modern operating equipment;
   (3) Retraining of labor that may be necessitated by any provision of this Act;
   (4) Any other purpose which meets with the approval of the Interstate Commerce Commission.
(f) Funds from the Trust shall not be used for any of the following purposes:
   (1) Salaries of employees or management;
   (2) Reduction of corporate debt;
   (3) Activities unrelated to rail transportation;
   (4) Any other purpose which does not meet with the approval of the Interstate Commerce Commission.
(g) Any railroad that uses funds appropriated from the Railway Trust Fund is a “participating railroad”.

Section 4: Railroad Property Taxes.

\(^{116}\) The 4-cent tax on every gallon of gasoline sold, along with some highway use taxes on trucks, yield $6.5 billion a year. Foeress, "Billions for Concrete," November 1, 1975, p. 74.
\(^{117}\) This should bring the total yearly amount in the Railway Trust Fund to about $7.5 billion.
(a) All property taxes levied by local taxing authorities on railroad property are hereby suspended, subject to the following conditions:

Such tax money is to be used for the improvement of the properties upon which they are levied, if these properties are:

(A) Rights-of-way;

(B) Railroad yards.

(2) Any tax money not so used belongs to the appropriate local taxing authority and shall be used for activities consistent with this Act.

Section 5: Railway Labor.

(a) A participating railroad shall have the right to assign, allocate, and consolidate work to any location, facility, or position on its system.

(b) Said work in Paragraph (a) may be removed from the coverage of a collective bargaining agreement.

(c) Labor organizations of participating railroads shall have the right to name one director for every three management directors currently on the board of directors of any participating railroad.

(d) Section 5(2)(f) of the Interstate Commerce Act does not apply to this Act. However, before any participating railroad removes an employee because of automation or similar reason, it shall have the obligation of:

(1) Retraining such employee for any other work he is capable of performing in the railroad's system, without any reduction in wages or benefits during and after the time the retraining takes place.

(2) Finding a position for such employee in the participating railroad's non-rail operations without any reduction in wages or benefits if no work can be found in the rail operations.

(3) A non-participating railroad is not exempt from Section 5(2)(f) of the Interstate Commerce Act.

Section 6: Railway Study Group.

(a) Congress hereby establishes a Railway Study Group.

(b) The Railway Study Group shall consist of the following members:

(1) Three directors chosen by railroad labor;

(2) Three directors chosen by railroad management;

(3) Three directors chosen by the President from the community at large. These individuals shall have knowledge of railroad problems and may be, but are not limited to, labor arbitrators, economists and transportation experts.

(c) The Railway Study Group shall examine and propose solutions to current railroad problems. The Group shall examine, but not be limited to, the following problems:
(1) Methods of facilitating movement between railroad crafts;¹¹⁸
(2) More efficient utilization of present railroad facilities;
(3) Restructure of railroad management;
(4) Reformation of existing federal laws governing railroads
and railroad labor;
(5) State laws governing railroads;
(6) Work rule arrangements between railroad labor and rail-
road management.
(d) The Group shall report all findings and recommendations to the
President and the Interstate Commerce Commission.
(e) Funds for salaries and any studies made by the Group shall be
appropriated from the Railway Trust Fund.
(f) This Section shall in no way be construed to limit the Railway
Study Group to problems of participating railroads.

Section 7: Penalties.
A violation of any provisions of this Act is punishable by:
(1) Suspension of future aid to a participating railroad; and
(2) Return of any financial aid given to a participating railroad;
or
(3) A fine and/or imprisonment for any individual found in
violation of this Act.

Section 8: Expiration.
This Act shall expire on May 1, 1991.

¹¹⁸ Suggestion of Harry N. Casselman, former Regional Director of the National Labor
Relations Board and presently labor arbitrator and permanent umpire for John Deere, Inc. and
the United Automobile Workers.
Urban Freeways and the Interstate System*

GARY T. SCHWARTZ**

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** Professor of Law, UCLA. B.A. 1962, Oberlin College; J.D. 1966, Harvard University. The author served as Legal Assistant to the Under Secretary of the U.S. Department of Transportation during 1968-69.

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In researching this Article, I interviewed the following persons:

These interviews will hereinafter be referred to as Clay Interview, Fallon Interview, and so on. Paul Sitton had served as the transportation budget examiner at the Bureau of the Budget during the late 1950's, and he allowed me to read through the various papers and memoranda he preserved from those years; this fund of documents will hereinafter be referred to as the Sitton Papers. Sitton was Administrator of the federal Urban Mass Transportation Administration in 1968-69.

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When eventually completed, the federal Interstate Highway System—a product of the Federal-Aid Highway Acts of 1944 and 1956—will consist of 42,500 miles of modern freeways, with over 8,800 miles located in urban areas. More than 88 percent of the System is presently open to traffic. Yet well over 34 percent of the total cost of the System has not yet been expended, and Interstate construction will almost certainly continue at least until the early 1990's. Congress recently declined to act on a major Administration proposal concerning the restructuring of the Interstate program's financing, choosing instead to extend the program

4. Id. at 1.
5. Id.
6. See note 311 and accompanying text infra.
7. For the details of the Administration's proposal, see note 241 infra.
in its present general form on an interim basis, while agreeing to consider the issues raised by that proposal within the next few years. As we await further consideration of the Interstate program, the time seems ripe for an independent effort at review and evaluation.

In a 1970 essay, Daniel Moynihan ventured this dramatic but conclusory appraisal of the Interstate System:

One of the received truths of contemporary liberal history is that no domestic initiatives of any consequence occurred during the Eisenhower Presidency. I will not contest the general point that it was a period of relatively “low governmental profile,” as the phrase now goes, following twenty years of the alarums and exertions of the New Deal and Fair Deal. Even so, there was one program of truly transcendent, continental consequence. This was a program which the twenty-first century will almost certainly judge to have had more influence on the shape and development of American cities, the distribution of population within metropolitan areas and across the nation as a whole, the location of industry and various kinds of employment opportunities (and, through all these, immense influence on race relations and the welfare of black Americans) than any initiative of the middle third of the twentieth century. This was, of course, the Interstate and Defense Highway System. It has been, it is, the largest public works program in history. Activities such as urban renewal, public housing, community development, and the like are reduced to mere digressions when compared to the extraordinary impact of the highway program.

Most of the urban freeways in the United States belong to the Interstate System, and even a merely intuitive grasp of the impact of urban freeways upon metropolitan welfare seems sufficient to validate Moynihan’s exuberant judgments; certainly, it can be fairly said that most of the urban transportation legislation which Congress has enacted in the years since 1956 has amounted to one ongoing amendment to the 1956 Act, attempting to improve the Interstate program, correct its mistakes, and rectify the imbalances for which it may be responsible.

Although the implications of the Interstate program clearly rank as profound, a library search uncovers the surprising fact that the scholarly literature on the program is glaringly thin. Until the late 1960’s, there was

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10. See text accompanying notes 89-90 infra.

11. Sections 132-44 have been added to 23 U.S.C. since 1956, typically one or two sections in each biennial highway act (the 1973 Act adds §§ 145-50). Even the Federal urban mass transit program initiated in 1964 (see note 539 infra) can be seen as an effort at equilizing subsidies for competing urban transportation modes. See D. Netzer, Economics and Urban Problems 155 (1970).

12. The legal commentary on the System has been modest in its ambitions. A law review
a comparable meagerness in the writings on the program intended for the general public. The only pre-1968 articles worthy of mention were those authored in 1958 and 1960 by Lewis Mumford and Daniel Moynihan, article was written by a lobbyist while the 1956 Act was in the midst of congressional consideration. Martin, Proposed Federal Highway Legislation in 1955: A Case Study in the Legislative Process, 44 Geo. L.J. 221 (1956) (hereinafter cited as Martin). A second article authored by one of the program's in-house lawyers appeared three years after congressional approval was secured. Levin, Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377 (1959).

Both articles are cursory in their treatment of the urban Interstates. After their publication, the Interstate program vanished from the law reviews for almost a decade. The last few years have witnessed the appearance of a number of legal articles. E.g., Johnson, The 1962 Highway Act: Its Long Term Significance, 1970 Urban L. Annual 57. Although some of these have been researched impressively (see, e.g., Gray, Section 4(f) of the Department of Transportation Act, 32 Mo. L. Rev. 327 (1973)), almost all have been limited to individual features of the program—usually, one or more of the various reforms enacted in the 1960’s. A recent general discussion of highway policy which does not partc ularly focus on the Interstate System is Mashaw, The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction, 122 U. Pa. L. Rev. 1 (1973).

The only sustained review of the Interstate System by an economist concludes that the urban Interstates are economically "justified." A. Friedlaender, The Interstate Highway System—A Study in Public Expenditure 3 (1965) (hereinafter cited as Friedlaender). However, this conclusion is based on an implicit definition of economic justification so narrow as to render all but meaningless its apparently favorable finding. Ms. Friedlaender volunteers that the urban Interstates have resulted in the "externalities" of smog, visual ugliness, dislocation hardship, and increase of central business district congestion, but she asserts that since these costs are unquantifiable, they are irrelevant to economic "justification." Id. at 3, 64, 115. Moreover, her "justification" conclusion comes from merely comparing the existing six- and eight-lane urban Interstates to an alternative system of urban highways: of only four-lane width; she expressly declines to test out the urban Interstates against alternative investments in urban public transportation. Id. at 84.

Political scientists have prepared case studies of many of the important legislative enactments of the 1950's and 1960's. See, e.g., Congress and Urban Problems (F. Cleaveland ed. 1969). However, none of them has chosen to deal either specifically with the 1956 Act, or with the Interstate program more generally. Professor Colcord's brief discussion of the 1956 Act in A. Lupu, F. Colcord & E. Fowler, Rites of Way: The Politics of Transportation in Boston and the U.S. City 184-85 (1971) [hereinafter cited as Lupu, Colcord & Fowler], completely confuses the A-B-C program and the Interstate program. See notes 31-72 and accompanying text infra for a discussion of the A-B-C program.

By now, the 1950's have receded far enough from the present to make them a fit subject for historians; there have not yet been, however, any significant historical works on the 1956 Act. A book by Professor John Rae, the research for which was financed by the American Manufacturers Association, contains a short, unanalytic subchapter on the Interstate System. J. Rae, The Road and the Car in American Life 187-94 (1971) [hereinafter cited as Rae]. The two scholarly histories of the Eisenhower Presidency which have so far appeared devote only two paragraphs to the Interstate program in the course of their collective 1000 pages. C. Alexander, Holding the Line: The Eisenhower Era, 1952-1961, at 41-42 (1975); H. Parmet, Eisenhower and the American Crusades (1972). The Interstate program is totally ignored in Peter Lyon's biography, which in general is very short on the domestic side of the Hero's Administration. P. Lyon, Eisenhower: Portrait of the Hero (1974). A recent anthology of papers from the Eisenhower Library compiled by two historians treats the 1956 Act merely as an instance of Presidential-Congressional relations, and not a particularly revealing instance at that. 1 The Eisenhower Administration 1953-1961: A Documentary History 537-62 (R. Branyan & L. Larsen eds. 1971) [hereinafter cited as Eisenhower Documents].
respectively.\textsuperscript{13} Since 1968, however, there has occurred nothing less than an outpouring of books and articles.\textsuperscript{14} These works have provided us with an assortment of useful anecdotes and information about the Interstate program in operation. They also have developed a set of allegations about the Interstates that are almost unrelievably and unqualifiedly negative in terms of the Interstates' urban effects—including air pollution, massive displacements, public transit declines, and excessive suburbanization. This body of literature clearly has achieved success; its multicount indictment against the urban Interstates has gained acceptance among a large section of the informed public.\textsuperscript{15} However, if one starts out by assuming the truth of these various accusations, one can only be astonished to learn of the nonpartisan landslide votes by which the program swept through the Congress in 1956—388-19 in the House, and 89-1 in the Senate.\textsuperscript{16} With these votes in mind, one discovers with interest that there is a single important issue on which the critics are badly divided—the extent to which what now are perceived as the real consequences of the urban Interstates were appreciated or intended by those responsible for the program's creation. The leading spokesman for one point of view is Daniel Moynihan. Writing in 1960, his position was: "It is not true . . . that the sponsors of the Interstate program ignored the consequences it would have in the cities. Nor did they simply acquiesce in them. They exulted in them."\textsuperscript{17} The leading spokesman for the opposite point of view is also Daniel Moynihan. In his 1970 essay he lists the Interstate program as the prime example of a program whose actual "policies" were entirely "hidden" from those who originally established it.\textsuperscript{18}


\textsuperscript{15} See A.B.C. Whipple's flattering review of \textit{LEAVITT}, \textit{supra} note 14, on the front page of the \textit{N.Y. TIMES BOOK REVIEW}, May 17, 1970, \textsection 7, at 1.

\textsuperscript{16} See notes 209-10 and accompanying text \textit{infra}.

\textsuperscript{17} \textit{New Roads}, \textit{supra} note 13, at 19.

\textsuperscript{18} \textit{Policy vs. Program}, \textit{supra} note 6, at 93-95. "Had anyone realized what they were in fact
My own initial and more conventional scholarly purposes were effectively frustrated by the absence of an adequate body of literature on the Interstate System; moreover, the questions suggested in the preceding paragraph, when I became aware of them, aroused my historical curiosity. For these reasons I undertook the general Article on the System which follows. Part I of this Article sets forth certain relevant information about the traditional elements of the federal highway program, the development of urban freeways in the United States, and the employment of highway-user taxes as a way of financing highway construction. Part II depicts the legal framework within which the Interstate program operates. It also presents, in a structured way and with an eye for thematic interest, a description of the Interstate program and a narrative account of its progress from the 1930's to the present. In light of the existing state of the literature, both the description and the narration should be of value in their own right. They also serve to lead into the "Evaluation" section of Part II, which deals with the financing of the Interstate program, the utilization of the Trust Fund device, and the recognition of the program's system character. Part III of the Article is exclusively concerned with the urban Interstates. It first elucidates the traffic purposes which the sponsors of the urban Interstates perceived they would satisfy—purposes which turn out to be more complex than might have been expected. Part III then gives appropriate recognition to the indictment against the urban Interstates, explores certain general issues which the indictment raises, and comes to grips with its most salient counts. My basic purpose in this Article is to promote an honest understanding of the urban Interstates, and it is as such an effort that the Article itself should be understood.

19. My original intention was to prepare a straight equal study of 23 U.S.C. § 134 (1970), the comprehensive planning requirement added to the Interstate program in 1962. What I quickly realized was that any significant study of § 134 would need to draw on a thorough understanding of the Interstate System upon which § 134 belatecly had been superimposed. See text accompanying notes 361-62 and 637-41 infra.

20. The urban Interstates are an integral part of the Interstate System as a whole. Technically, there is no such thing as the "urban Interstate program." However, there is an urban division within the Federal Highway Administration, and certain statutory provisions (e.g., § 134) apply to the System only with respect to its urban routes. Although occasionally, for convenience's sake, this Article will speak of the "urban Interstate program," it will usually make reference instead to the "urban portion" of the Interstate program, or employ some similar phrase.

Urban Freeways

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I. BACKGROUND

A. THE TRADITIONAL FEDERAL-AID HIGHWAY PROGRAM

There has been a federal "interstate" program of sorts ever since 1921. In 1916, just 3 years after Henry Ford began mass producing the Model T, Congress approved the first program of continuing federal aid for highways; the 1916 statute apportioned funds among the states for half the construction cost of "rural post roads," those roads over which mail was carried. The Federal Highway Act of 1921, in superseding the 1916 Act, began by stating that when considering state proposals federal officials should "give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character." It then called upon each state to designate a formal system of highways for federal aid purposes. These highways were to be of two sorts: "primary or interstate highways," which "shall not exceed three-sevenths of the total mileage which may receive Federal aid"; and "secondary or intercounty highways," constituting the remaining mileage. Obviously, a tension existed between, on the one hand, the Act's stated "interstate" preference, and on the other, its explicit "interstate" ceiling. This tension was resolved in a curious way: the three-

25. Act of July 11, 1916, ch. 241, § 2, 39 Stat. 356. The limitation of federal expenditures to such roads probably was primarily due to a congressional desire to bring the program within the coverage of the "establish . . . post Roads" grant of power. U.S. CONST. art. 1, § 8; see P. BURCH, JR., HIGHWAY REVENUE AND EXPENDITURE POLICY IN THE UNITED STATES 219 (1962) [hereinafter cited as Burch]. As of 1916, congressional spending authority under the general welfare clause had not yet been judicially clarified (see United States v. Butler, 297 U.S. 1 (1936)), and a cautious Congress may have been reluctant to rely on 28-year-old Supreme Court dicta (see California v. Central Pac. R.R., 127 U.S. 1, 39 (1888)) concerning the extent of its highway-building powers under the commerce clause. The constitutional issue is whether the power to "regulate" interstate commerce includes the power to invest public funds in ways which are thought to promote that commerce.
27. Id. § 6, 42 Stat. 213.
28. Id.
29. There is some ambiguity as to whether the base figure—expressed in terms of "the total mileage which may receive Federal aid" (id.)—meant to refer (1) to all the routes on the designated system of state highways from which individual federal-aid projects were to be drawn, or (2) only to those state highways actually approved for federal funding.
sevenths limitation was “wisely ignored” by the involved federal and state officials, who made “[n]o distinction . . . between classes of roads within the [federal-aid] system; all [were] considered primary arteries.”30 While there are difficulties in pinning down the exact practical effects of this deliberate flouting of the law,31 it seems clear that the aggregate amount of highways funded under the 1921 Act contained “interstate” highway mileage in excess of the supposed three-sevenths limitation.32

In late 1944, the approaching close of World War II led Congress to involve itself in the preparation of a postwar highway program.33 The resulting Federal-Aid Highway Act of 1944,34 drafted to take effect in the first “post-war fiscal year,” specified three distinct categories of federal highway expenditure—categories which quickly became known as A-B-C.35

Category A, which would annually receive 45 percent of the authorized federal funds, was to be the existing “Federal-aid [primary]” highway system.”37 The 1944 Act declined to spell out criteria for inclusion of particular routes within this system. When Congress eventually codified


31. In classifying all federal-aid highways as “primary, some states may simply have been relying on “primary highway” as that term was customarily used in state highway law. See Hearings on H.R. 2426 Before the House Comm. on Roads, 78th Cong., 2d Sess. 59-60 (1944) (testimony of F.R. White, Chief Engineer of the Iowa State Highway Commission) [hereinafter cited as 1944 House Hearings]. As a matter of state law phraseology, a primary highway was one which was part of the state’s own highway system and which accordingly was under the jurisdiction of the state highway department. See Burch, supra note 25, at 140, 144, Highway Research Board, Highway System Classification: A Legal Analysis—Part I, at 3-4, 6 (1969). Primary highways of this sort were very often the kind of “intercounty” facility which the 1921 Act would have described as “secondary.” Noteworthy is the fact that the entire post-1921 federal-aid program was commonly understood as redoubling to the benefit of the farmer. The program’s administration was in the Department of Agriculture (see Act of July 11, 1916, ch. 241, § 1, 39 Stat. 355), and its slogan was “to get the farmer cut of the mud.” See, e.g., Levin, Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377, 379 (1959); Policy vs. Program, supra note 6, at 94.

32. We are told that federal and state officials from the first regarded the three-sevenths allotment as “wholly inadequate” for the needs of cross-state traffic. Burch, supra note 25, at 230.


35. Another innovation of the 1944 Act was that it rendered rights-of-way acquisition costs eligible for federal aid, although the federal share ceiling was set at only one-third. Id. § 5(a), 58 Stat. 840. The federal share ceiling was lifted to one-half by the Federal-Aid Highway Act of 1950, Act of Sept. 7, 1950, ch. 912, § 7, 64 Stat. 789.

36. The word “primary” was added by the Federal-Aid Highway Act of 1952, ch. 462, § 1(a), 66 Stat. 158, but this was understood as merely restating and clarifying existing law. See, e.g., H.R. Rep. No. 1730, 82d Cong., 2d Sess. 6 (1952).

the highway title in 1958, the "primary system" was quite tersely defined as an "adequate system of connected main highways." The federal primary system frequently is assumed to consist of the U.S.-numbered roads—routes 1, 20, 66, and so forth. This assumption, though understandable, is technically incorrect. U.S. numbering is a designation enterprise carried out by states acting cooperatively, but on their own; a number of routes bearing the U.S. emblem are not part of the primary (or any other federal-aid) system, and there are individual routes within the primary system which lack a U.S. designation. Most federal-aid primary highways, however, carry a U.S. number, and vice versa; hence the map of U.S.-numbered routes provides a workable image of the primary system.

The second or B element consisted of principal "secondary and feeder roads," which were expected to receive 30 percent of the annual federal funds. The post-1944 "secondary" or B program had antecedents in the secondary routes ineffectively provided for by the 1921 Act, and also in the secondary highways furnished with special funding by the 1934 Act. This latter Act illustrated secondary highways as "farm to market roads, rural free delivery mail roads, and public-school bus routes," and the 1944 Act's description of secondary roads was patterned after the 1934 Act's illustrations. The 1944 Act was in turn expanded by later acts, with the result that "nearly every rural road in the United States" currently falls within the secondary category.

The final element of the tripartite 1944 federal program was the C category, which the 1944 Act characterized as "projects on the Federal-aid highway system in urban areas." This recognition of the C routes was the culmination of years of development. The original 1916 and 1921 highway legislation had been explicit in rendering all roads in urban areas ineligible for federal aid. Not until a major depression set in was this urban...
exclusion successfully challenged. Public works legislation enacted by Congress in 1932 and 1933 afforded one-shot funding to the federal highway program to which the exclusion did not apply; the legislative purpose was to provide employment, and the unemployed were to be found in the cities. A year later, in the 1934 Act, Congress took the further step of eliminating the urban exclusion from the highway program in its ongoing operation. This meant that full discretion now lay with state highway departments as to the inclusion of urban routes within their federal-aid system; federal law stipulated neither a maximum nor a minimum urban figure. A fundamental fact about traditional state highway programs is their antiurban orientation; because of this orientation, in the years following 1934 the state departments placed little emphasis on city projects in exercising their federal-law discretion. The 1944 Act, by mandating the expenditure of 25 percent of a state's federal aid for urban C projects, thus accomplished a significant change.

Two quite distinct interpretations of the new C program quickly surfaced. Under one interpretation, the basic criterion for C projects was that they best serve the highway needs of the individual metropolitan area; under the other, an urban area route would qualify for C status only if its function was to "extend" into a city an otherwise intercity highway which itself belonged to the A federal-aid system. The federal Bureau of Public Roads, charged with administering the program, originally favored the

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53. Id. § 13, at 995-96. Professor Warner thus is not correct in stating that "[u]ntil 1944 no federal highway funds were expanded on urban" roads. WARNER, supra note 23, at 38.


55. See 1944 HOUSE HEARINGS, supra note 31, at 756 (testimony of Frederick MacMillan, Executive Secretary of the League of Wisconsin Municipalities).


57. See BURCH, supra note 25, at 234-35.

58. This phrase should be used with caution, since the concept of "highway needs" is one which is frequently abused. See Hearings on Economic Analysis and the Efficiency of Government Before the Subcomm. on Economy in Government of the Joint Economic Comm., 91st Cong., 2d Sess. 1129 (1970) (statement of Peter Craig).

59. As between the two interpretations, the legislative history of the 1944 Act is indecisive. See, e.g., S. REP. No. 1056, 78th Cong., 2d Sess. 4, 8 (1944); H.R. REP. No. 1597, 78th Cong., 2d Sess. 2, 5, 9 (1944); 1944 House Hearings, supra note 31, at 74-76, 417, 576, 755-61.

60. Until 1939 the Bureau was located in the Department of Agriculture. In that year it was
intrametropolitan interpretation, and attempted to require the states to adopt general highway plans for each metropolis—an "urban system" of highways. In this effort, however, the Bureau encountered stern resistance from the states. In 1955, responding to a hint in the 1954 Act, the Bureau gave up on its earlier position and administratively ruled that all C routes must be "extensions" of either the A or the B facilities. This result was expressly confirmed by Congress in the 1956 Act, which drew the 45-30-25 percent distinctions among the "Federal-aid primary highway system," "the Federal-aid secondary highway system," and "extensions of these systems within urban areas."

The general structure of the A-B-C program was continued intact through the Federal-Aid Highway Act of 1968, with funding gradually increasing to $1.1 billion annually. That structure finally was altered by the 1970 Act which raised the federal share to 70 percent and added a new federal-aid system called the "urban system"—essentially the independent urban program which the Bureau had originally sought to read into the 1944 Act. The 1973 Act, which Congress gestated over a

shifted to the Federal Works Agency, a New Deal creation. A transfer or two later, the Bureau wound up in the Department of Commerce in 1949. Leavitt, supra note 14, at 23-26. In 1955, Congress authorized the appointment of a Federal Highway Administrator to manage the Bureau, which until then had been run by its own Commissioner. See Act of Aug. 3, 1956, ch. 937, 70 Stat. 990. As part of the Department of Transportation, created in 1966, an entire Federal Highway Administration was set up, with the Bureau of Public Roads as only one of its components (the National Traffic Safety Bureau was another). Department of Transportation Act of 1966, Pub. L. No. 89-670, § 3, 80 Stat. 931-32 (codified as 49 U.S.C. § 1652(l) (1970)). During President Nixon's first term, the National Highway Traffic Safety Administration was given independent status within the Department (Highway Safety Act of 1970, Pub. L. No. 91-605, tit. II, § 201, 84 Stat. 1739), and the Bureau of Public Roads, veteran of so many bureaucratic intrigues, was dissolved by merger (H.R. Rep. No. 91-1554, 91st Cong., 2d Sess. (1970)) into the Federal Highway Administration (often referred to as FHWA, an acronym which visually too much resembles YHVH, and hence will be avoided in this Article).

61. In expanding the C program to include urban routes on the secondary (as well as the primary) system, the Act's precise language referred to "approved extensions of the Federal-aid secondary systems within urban areas." Federal-Aid Highway Act of 1954, ch. 181, § 1(c), 68 Stat. 71.


64. Id. § 102(a)(1).


66. Id. § 5(1), 82 Stat. 816.


68. Id. § 108, 84 Stat. 1718.

69. Id. § 106, 84 Stat. 1716.

2-year period, is an endlessly complicated enactment with provisions for
everything from mass transit to bicycle trails; one of these provisions
allows "urban system" funds to be spent for urban public transportation
projects. The proposed 1976 Federal-Aid Highway Act is expected to
cynify and consolidate somewhat these several highway program
elsents.

B. THE HISTORY OF URBAN FReeways

Urban freeway building did not begin in this country until the late
1930's; the Arroyo Seco Freeway in Los Angeles (now the Pasadena
Freeway) was among the very first. In the 1944 Act Congress provided
special federal funding for urban facilities, and in its early administration
of the C program the Bureau of Public Roads assigned to urban freeways
a considerable priority. Although the C program grew in its federal
authorization from $125 million in 1944 to $175 million in 1954, such
sums divided into 48 shares resulted in only $2.6 million ($3.6 million)
annually for the average state—amounts which did not go very far towards
covering the cost of expensive urban freeways. For this reason and
despite the Bureau's priorities, the total mileage of federally aided urban
freeways as of 1956 was relatively limited.

During the 1944-56 interval, state highway programs were responsi-
ble for the building of some urban freeways, but not very many. In earlier
years state statutes had withheld from state highway departments all
authority to build highways within city limits; as late as 1956, these
departments were allowed to do no more in cities than build "extensions"

71. Id. § 121(a), 87 Stat. 259-60 (codified at 23 U.S.C. § 142(a)(2) (Supp. III, 1973)). The
states have proven slow in availing themselves of their urban-system opportunities under the
Cong., 1st Sess. 9 (1975).
73. See J. ROBINSON, HIGHWAYS AND OUR ENVIRONMENT 79 (1971).
74. See text accompanying note 56 supra.
75. In the first year and a half under the 1944 Act, the Bureau approved 144 urban freeway
miles, which alone accounted for almost half of the available C funds. See Barnett, Progress in the
National Status of Urban Arterial Routes, 2 TRAFFIC Q. 80, 87 (1948).
76. Federal-Aid Highway Act of 1944, ch. 626, § 3, 58 Stat. 838; Federal-Aid Highway Act of
1954, ch. 181, § 1, 68 Stat. 70.
77. See HIGHWAY RESEARCH BOARD, HIGHWAY SYSTEM CLASSIFICATION: A LEGAL ANALYSIS—PART
of state and rural highways,78 and even this extension power was frequently circumscribed.79 In 1956, state funding for urban highway projects remained meager; occasionally, rurally dominated legislatures budgeted no more than the minimum necessary to match the federal C apportionment and thereby entitle the state to the C program federal aid.80 Moreover, in distributing funds earmarked for urban projects, it was common for the state departments to discriminate in favor of small cities and against the major metropolitan areas.81 Such state programs apart, cities did not build many freeways on their own; they could not be expected to do so, in light of the obvious need to plan and develop urban highways at a governmental level higher than the municipality.82

For whatever the complex of governmental reasons, by 1956 there were only 480 freeway miles completed or under construction in the country’s 25 largest cities.83 Two hundred ninety of these miles were confined to New York, Los Angeles, and Chicago.84 There were no freeways completed or even under construction in four of the 25 cities, and eight other cities had a combined total of less than 33 freeway miles.85 Few of these freeways were built to what are now conceived of as modern urban freeway standards; many of them belonged to the “Interstate System” preliminary established in 1944 and 1947.86

With the modern Interstate program assuming jurisdiction via the 1956 Act for (eventually) 8,600 urban freeway miles,87 it is unclear how much of the C-program billions spent since 1956 has gone for urban freeways, rather than for more conventional urban highways.88 In some states, such as California, state urban freeway programs flourished during the late 1950’s and 1960’s. Elsewhere, the Interstate System was allowed to take over most of those urban freeways which state and local officials were especially eager to proceed ahead on.89 Presently the total national

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78. Id.
79. See W. Owen, The Metropolitan Transportation Problem 59 (1st ed. 1956) [hereinafter cited as Owen].
80. Burch, supra note 25, at 225.
81. Id. at 154, 226.
83. See Owen, supra note 79, at 47. The figures relate to the central cities only, not to entire metropolitan areas.
84. Id.
85. Id.
86. The 1944-47 System is discussed in notes 121-50 and accompanying text infra.
87. See note 25 infra.
88. The freeway which was judicially halted in the case of Named Individual Members of San Antonio Conservation Soc’y v. Texas Highway Dep’t, 446 F.2d 1013 (5th Cir. 1971), was a federal-aid C highway rather than an Interstate.
89. See, e.g., A. Altshuler, The City Planning Process 22 (1965) (dealing with St. Paul);
amount of non-Interstate urban freeways can be estimated at less than 4,000 miles. Therefore, when we speak of urban freeways in this country, we are speaking largely of the urban Interstate.

C. THE GAS TAX

As far back as 1919, Oregon became the first state to levy a gasoline tax, set initially at 1 cent per gallon. All other states quickly followed suit, and substantial state gas taxes have been with us ever since. From the first, the justification for these special state taxes on gasoline seems to have been that their proceeds would be ticketed for highway construction and maintenance—herein the "linkage" principle. A few state legislatures did, however, "divert" gas tax funds into general revenue, and the incidence of diversion began to rise during the early 1930's. In the 1934 Act, Congress responded to these events by proclaiming that diversion was "unfair and unjust" and by threatening to cut off partially federal highway funding to states which diverted excessively. This statute was curiously hypocritical, since at the time of its enactment the federal government was by far the country's largest single diverter. Moreover, the statute's bark was worse than its bite. Its definition of excessive diversion—once the execrable syntax was untangled—turned out to be surprisingly tepid, and there has never been occasion to invoke the funding cutoff. At the state level, however, diversion was attacked during the middle and late 1930's in a far more effective fashion. By the end of that decade, a majority of the states had inserted amendments into their constitutions barring the diversion of gas tax proceeds to nonhighway purposes. These "antidiversion" amendments typically insist that the tax's proceeds be spent "exclusively for highway purposes." this latter

LUPO, COLCORD & FOWLER, supra note 12, at 13-14 (ECSTON inner belt); J.S. BRAGDON, INTERIM REPORT, PROGRESS REVIEW OF NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS, MAR. 5, 1960, at 9-10 (BRAGDON PAPERS, EISENHOWER LIBRARY) [HEREINAFTER CITED AS INTERIM REPORT].

90. This is based on my review of maps of a number of metropolitan areas. Most of the non-Interstate urban freeways have probably received at least some federal support from the C program.
91. See Burch, supra note 25, at 36.
92. Id. at 37, 47-49.
93. Rae, supra note 12, at 77.
95. See Burch, supra note 25, at 73.
96. In effect, the statute merely says that if in 1934 a state spent $X out of its highway user revenues for highway purposes, in future years it must spend at least $X from such revenues in order to avoid the disqualification.
97. Cf. Rae, supra note 12, at 78-79.
99. E.g., Wash. Const. art. 2, § 40.
phrase has generally been given a limited interpretation by the state judiciary.100

The modern federal gas tax was inaugurated at the level of 1 cent per
gallon as part of the Revenue Act of 1932,101 which was entirely separate
from the federal highway program.102 The gas tax was regarded as a
simple excise tax.103 While the tax was understood to be an emergency
depression measure,104 it escaped repeal as the years wore on. In 1941
the tax was increased to 1.5 cents,105 where it remained until 1951, when it
was pegged at 2 cents.106 Over the years the gas tax proceeds continued
to be unearmarked, funds for the highway program continued to be drawn
from general revenue, and annual tax revenues vastly exceeded the
program’s expenditures.107 Once it became clear that the federal tax was
not merely a temporary phenomenon, it aroused the opposition of many
groups, including the American Association of State Highway Officials
(AASHTO),108 the automobile manufacturers, the trucking industry, the
petroleum industry, and certain farmer organizations.109 This opposition
movement reached its peak in 1952 and 1953, when it gained the support
of the prestigious Governors’ Conference, which in each of those years
issued formal resolutions calling for the “return” of the gas tax to the
states.110 At the same time, however, the gas tax was sliding, if somewhat
silently, in the direction of linkage. In 1955 federal gas tax revenues and
federal highway expenditures were just about equal,111 and this was
apparently other than mere coincidence.

100. See, e.g., the cases reported in Soloman, Towards Balanced Urban Transportation:
Reform of the State Highway Trust Funds, 4 URBAN LAW. 77, 90-101 (1972).
102. This Act also imposed a new federal tax of 2.25 cents per pound on tires and 4 cents per
pound on inner tubes. Id. § 602, 47 Stat. 261.
103. See 1955 House Hearings, supra note 62, at 48 (testimony of Commerce Secretary
Sinclair Weeks).
104. See Burch, supra note 25, at 71; 1955 House Hearings, supra note 62, at 48 (testimony of
Commerce Secretary Weeks).
tire tax to 5 cents per pound and the inner tube tax to 10 cents per pound. INT. REV. CODE OF 1954,
§ 4071.
107. See Leavitt, supra note 14, at 35. The 1941 and 1951 tax increases were undoubtedly
occasioned by the need to raise revenues during wartime.
108. Renamed, in 1974, the American Association of State Transportation Officials
(AASTO).
Association); id. at 1267-73 (statement of American Petroleum Institute); id. at 328 (testimony of
American Farm Bureau Federation). 1955 Senate Hearings, supra note 82, at 492 (testimony of
Automotive Manufacturers Association).
110. See R. Zettel, FEDERAL HIGHWAY LEGISLATION OF 1956 AND ITS IMPACT ON CALIFORNIA 7
(1957).
111. See 1955 House Hearings, supra note 62, at 328 (testimony of American Farm Bureau
Federation).
II. THE INTERSTATE SYSTEM

A. THE 1944 ACT—ITS ANTECEDENTS AND SEQUELAE

The earliest traces of the Interstate System can be found in a map drawn by General Pershing at the close of World War I, based on a War Department study, sketching out a nationwide system of advanced highways thought to be of value in the transportation of military materials and personnel. But the Pershing map had been largely forgotten by the late 1930's, when the modern history of the Interstate System began in earnest with the Federal Aid Highway Act of 1938. That Act commissioned the Bureau of Public Roads to conduct a study of a set of six superhighways—three east-west and three north-south—to traverse the country; one specific question the Bureau was ordered to explore was the "feasibility of a toll system on such roads." The Bureau's report, Toll Roads and Free Roads, was submitted to Congress in early 1939. Part I of the report described a 14,000-mile system of four-lane divided highways which complied with Congress' three-by-three mandate. The report's conclusion, however, was that less than 200 miles of this system would generate tolls equal to costs, and that on barely one-fifth of the mileage would the tolls even recoup half of the original cost; the central finding underlying these conclusions was that the volume of transcontinental or even "semicontinental" traffic was surprisingly light. In Part II the report considered the "free" road possibility, as applied, however, not to the three-by-three system which Congress had referred, but rather to a more ambitious system of 27,000 miles. The resulting "Master Plan of Free Highway Development" received the Bureau's endorsement. The Bureau's report placed considerable emphasis on the idea that this highway system would go into, through, and closely around the country's major metropolitan areas.

112. See generally New Roads, supra note 13, at 13; Turner Interview.
116. Id. at 2-4.
117. Id. at 5-7.
118. See the Bureau's justification of this proposal, id. at 4.
120. Id. at 90-102.
The Bureau's plan lay dormant until 1941, when President Roosevelt appointed an Interregional Highway Committee, whose membership was of distinguished caliber,\textsuperscript{121} to reinvestigate the entire question of a national superhighway system.\textsuperscript{122} The Committee's report, \textit{Interregional Highways}, the result of 2-years' work, investigated five possible freeway systems of differing lengths. It was the third largest of these (33,920 miles) which the Committee concluded was "optimal",\textsuperscript{123} this system would connect all cities of over 300,000 population, and almost all cities of over 100,000.\textsuperscript{124} Over 4,400 of the proposed miles would be located within city boundaries; this mileage was intended to "provide direct connection into and through all of [the] cities" reached by the interregional system.\textsuperscript{125} The Committee went on to indicate the general desirability of additional circumferential and distributing routes within metropolitan areas; it recommended up to 5,000 miles of these as a supplement to the basic 33,920 miles.\textsuperscript{126}

\textit{Interregional Highways} was submitted to Congress in January 1944. Congress proceeded to place the following simple section in the already ambitious 1944 Act:

\begin{quote}
Sec. 7. There shall be designated within the continental United States a National System of Interstate Highways not exceeding forty thousand miles in total extent so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, and to serve the national defense . . . . The routes of the National System of Interstate Highways shall be selected by joint action of the State highway departments of each State and the adjoining States . . . . All highways included in the National System of Interstate Highways as finally approved, if not already included in the Federal-aid highway system, shall be added to said system without regard to any mileage limitation.\textsuperscript{127}
\end{quote}

\textsuperscript{121} The Committee consisted of the head of the Bureau of Public Roads, two state highway officials, a former state governor, a federal natural resources official, and two city planners (one of them Rexford Tugwell, a member of the President's original Brian Trust, and in 1941 the Chairman of the New York City Planning Commission). See the Committee's Letter of Submittal of its Report, in \textbf{NATIONAL INTERREGIONAL HIGHWAY COMMITTEE, INTERREGIONAL HIGHWAYS, H.R. DOC. NO. 379, 78th Cong., 2d Sess., ix (1944)} [hereinafter cited as \textit{INTERREGIONAL HIGHWAYS}].

\textsuperscript{122} In creating this Committee, Roosevelt acted on his own authority. In 1943 legislation, however, Congress directed the Bureau to conduct a "survey of the need for a system of express highways throughout the United States . . . ." Act of July 13, 1943, ch. 236, § 5, 57 Stat. 561. Since the Bureau's Commissioner was already serving as chairman of Roosevelt's Committee and since the Bureau was doing the Committee's staff work, the Bureau adopted the Committee's report as its own. \textit{INTERREGIONAL HIGHWAYS, supra} note 121, at iv.

\textsuperscript{123} \textit{INTERREGIONAL HIGHWAYS, supra} note 121, at 3-4. The lengths of the other systems considered were 14,200, 26,700, 36,000, and 48,400 miles. \textit{Id.} at 4.

\textsuperscript{124} \textit{Id.} at 6. The Committee's recommendation was that every route on the system should enjoy limited access. \textit{Id.} at 78.

\textsuperscript{125} \textit{Id.} at 51.

\textsuperscript{126} \textit{Id.} at 52.

\textsuperscript{127} \textit{Federal-Aid Highway Act of 1944, ch. 626, § 7, 58 Stat. 842.}
The "interstate" language of this section is, of course, familiar, resembling the statutory definition of the primary or A program. The 40,000-mile limitation on mileage, however, combined with the assumption of limited access, signified that the Interstate System was extremely serious about its "interstate" intentions in a way quite unlike the A program; one 1944 witness aptly referred to the proposed Interstate System as a "primary-primary system."

In 1947 agreement was reached by the Bureau and the states on 37,800 of section 7's 40,000 miles. By this section 7 "joint action," the designations were made official and a map was published. Almost 3,900 of the 37,800 miles were in urban areas; these were the embodiment of the 4,400 mile allowance in _Interregional Highways_ for highways which "carry" traffic "through" the cities. In response to _Interregional Highways_' supplemental up-to-5,000 miles proposal for circumferential and distributing highways, the System's remaining 2,200 miles were reserved for later designation within urban areas; the reason given for postponing decision on these urban routes was to allow time in which to secure better urban traffic information.

Because of limited funding, very few of the Interstates were built between 1944 and 1952. In 1955 Congress began serious consideration of legislation which would provide adequate Interstate financing. With such legislation pending, the time had obviously come to reach decision on the remaining 2,200 miles. An invitation from the Bureau drew proposals totalling 3,500 miles from at least 38 states. In early June a Bureau memorandum set forth the criteria for selection of these remaining urban Interstates. Noting that the 1947 designations had been rather vague as to the location of the urban routes, this memorandum indicated that proposals for new Interstate mileage should be accompanied by the

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128. See text accompanying notes 27-32 supra.
130. 1955 Senate Hearings, supra note 82, at 676-80. The system officially designated in 1947 is quite similar to the system originally mapped in INTERREGIONAL HIGHWAYS, supra note 121, at 7.
131. See generally 1955 Senate Hearings, supra note 82, at 671 (testimony of Bureau of Public Roads Commissioner C. D. Curtiss).
132. 40,000 miles less 37,800 miles.
133. See 1955 Senate Hearings, supra note 82, at 177 (testimony of Bureau Commissioner Curtiss).
134. See text accompanying note 147 infra.
135. See text accompanying notes 151-97 infra.
136. Circular Memorandum from A.C. Clark, Deputy Commissioner, to Division and District Engineers, Subject: Criteria for Selection of Additional Interstate System Routes at Urban Areas, June 9, 1955 (on file with the author) [hereinafter cited as 1955 Bureau Memorandum].
137. Id. at 1.
fixing of somewhat more specific corridors for those routes already approved.\textsuperscript{138} Pursuant to this recommendation, all the urban interstates originally approved in 1947 were given a thorough restudy—even though none of these 1947 approvals were in the end rescinded.\textsuperscript{139} In September 1955, the Bureau announced its decisions as to the remaining 2,200 urban miles. It then released a document entitled \textit{General Location of National System of Interstate Highways} (known within the profession as the \textit{Yellow Book}\textsuperscript{140}), which contained a national map of the entire System and individual maps of 100 urban areas, showing the approved urban Interstate routes in each locality. For the major metropolitan areas the maps generally display an "inner belt" encircling all or part of the downtown areas, an "outer belt" encircling all or part of the entire metropolis, and one or more "radial" freeways leading outward from the inner belt.\textsuperscript{141} In a typical medium-size metropolitan area the proposed Interstate splits in two as it approaches the city, one branch going through the city and the other around it, with the two branches then reuniting at a point beyond the city.\textsuperscript{142} For many smaller cities the maps show a single freeway "spur" connecting the city with the Interstate as it sweeps by some distance away.\textsuperscript{143} All of these Interstates having been designated by the "joint [federal-state] action" procedure contemplated by section 7. It has been the understanding of federal highway officials that neither they nor the states possess the unilateral legal power to delete routes from this predesignated system.\textsuperscript{144}

The Interstate System was thus in a real sense legally established in 1944, 1947, and 1955, and hence the frequent statements that it was "created" by the 1956 Act are inadequate.\textsuperscript{145} It is true, however, that the

\begin{footnotesize}
\textsuperscript{138} Id. at 1. See also 1955 Senate Hearings, supra note 82, at 674 (statement of Bureau Commissioner Curtiss).

\textsuperscript{139} Turner Interview.

\textsuperscript{140} This was due to the color of its cover.

\textsuperscript{141} See, e.g., the map for Boston in BUREAU OF PUBLIC ROADS, GENERAL LOCATION OF NATIONAL SYSTEM OF INTERSTATE HIGHWAYS 37 (1955).

\textsuperscript{142} See, e.g., the map for Flint, Mich. Id. at 42.

\textsuperscript{143} See, e.g., the map for Battle Creek, Mich. Id. at 40.

\textsuperscript{144} As to the absence of federal power, see 1955 Senate Hearings, supra note 82, at 982 (testimony of Henry Kaltenbach, Chief Counsel for the Bureau). For the absence of state power, see Hearings on H.R. 11619, H.R. 12633, H.R. 13442, and H.R. 13585 Before the Subcomm. on Roads of the House Comm. on Public Works, 90th Cong., 1st Sess. 35 (1967) (testimony of Federal Highway Administrator Lowell K. Bridwell) [hereinafter cited as 1967 House Hearings]. The state might possess de facto power in this regard, however, by refusing to submit a route for actual funding under 23 U.S.C. § 106 (1970). The Secretary would also undoubtedly be reluctant to insist on a route which the state clearly does not want. This latter point is implicit in the Bridwell testimony. See 1967 House Hearings, supra at 34-53.

\textsuperscript{145} E.g., R. GOODMAN, AFTER THE PLANNERS 72 (1971) (Interstate System "signed into law" in 1956); READINGS IN URBAN TRANSPORTATION 231 (G. Smerk ed. 1968) (introduction to ch. 6); WARNER, supra note 23, at 43. The film which is shown visitors at the Eisenhower Library in Abilene, Kansas, claims in its soundtrack that the 1956 Act "initiated" the Interstate System.
\end{footnotesize}
1944 Act provided no special funding for the System, nor did it in any way establish a distinct Interstate program. Instead, the Act merely included the entire System within the federal-aid primary system, making it eligible for federal funding under that program's ordinary operation. Only 1 percent of the System was completed to full Interstate standards in the 5 years after the 1947 designations. The Interstates were, of course, extremely expensive to build, and the states preferred to deploy their limited primary apportionment over a larger number of ordinary highway projects rather than exhausting it on a very small number of Interstates. In 1944 this slow rate of progress had been forecast by only a very few. It was only in the early 1950's that federal officials came to realize that special funding would be needed if the System were to be built within the reasonable future. With auto registrations having nearly doubled in the years after World War II, and with the view becoming widely accepted that the country's road system was "functionally obsolete," the need for superhighways came to be regarded as especially urgent.

B. THE 1956 ACT

To "expedite" the System, the 1952 Act budgeted a separate $25 million for each of the next 2 years—really only a pittance—for System construction. The 1954 Act, the first highway legislation of the Eisenhower era, added a special $175 million for each of the next 2 years and increased the federal share for this special Interstate expenditure to 60 percent. Obviously, these measures were capable of speeding up the System's construction only slightly. The real impetus for an accelerated Interstate program came in the form of a Presidential address delivered on July 12, 1954, by Vice President Nixon to the Governors.

147. See supra note 13, at 14.
148. See 1944 House Hearings, supra note 31, at 189 (testimony of State Highway Commissioner Cox of Connecticut, to the effect that the failure to provide special funding for the Interstate System would be "fatal").
149. See President's Advisory Committee on a National Highway Program, a 10-Year National Highway Program, H.R. Doc. No. 93, 84th Cong., 1st Sess. 8 (1955) [hereinafter cited as Clay Committee Report].
152. Id. § 2, 66 Stat. 159.
154. Id. § 2, 68 Stat. 72.
155. Even with the help of the 1952 and 1954 funding, by 1956 only 3,000 miles of the System had been completed. See Hearings on H.R. 8836 Before the Subcomm. on Roads of the House Comm. on Public Works, 84th Cong., 2d Sess. 55 (1956) (information provided by Bureau Commissioner Curtiss) [hereinafter cited as 1956 House Public Works Comm. Hearings].
Conference at Bolton Lake, New York. This address proposed in very general terms a vast expansion of the nation’s highway program, and especially the Interstate System’s share of that total program. Contemporaries observed that the address had an “electrifying effect” and furnished the often mundane highway issue with “a remarkable degree of grandeur.” It left open, however, almost all questions concerning the specifics of a federal legislative proposal. In September the President established an outside committee of blue-ribbon private citizens chaired by General Lucius D. Clay, a longtime Eisenhower confidant, to give these questions their initial study. The Clay Committee’s report submitted to the President in January 1955, priced the System at $27 billion, $15 billion of which would be allotted to the System’s urban routes.

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156. This was 2 months after the signing of the Federal Aid Highway Act of 1954. Vice President Nixon spoke from President Eisenhower’s notes; Eisenhower was unable to attend because of a death in the family. See Public Papers of Presidents of the United States: Dwight D. Eisenhower, 1954, at 629 (U.S. Government Printing Office 1960).

157. Address by Vice President Nixon, Governors’ Conference, July 12, 1954, in Proceedings of Governors’ Conference 1954, at 87 (1954). The address recommended that over the next 10 years all levels of government spend $50 billion more on highways than was otherwise being planned. Id. at 90.


159. Letter from John Peter Flynn to Sherman Adams, Nov. 15, 1954 (Files of the President’s Advisory Committee on a National Highway System, Eisenhower Papers, Eisenhower Library).

160. After having served as a special deputy to General Eisenhower in 1945, General Clay had been selected by Eisenhower to administer the American zone in Germany. 1 Who’s Who in America 1972-73, at 585 (37th ed. 1972). In 1951-52 Clay was influential in persuading Eisenhower to run for the Presidency. See H. Parmet, Eisenhower and the American Crusades 45-56 (1972). The idea of an outside committee had been urged on the President by Sherman Adams. See J. S. Bragdon, The Interstate Limited Access 90/10 Federal Aid System with Special Reference to Toll Financing and Intra City Routing, 1961, at 4-5 (manuscript which Bragdon unsuccessfully tried to have published in national magazines) (Bragdon Papers, Eisenhower Library) [hereinafter cited as Bragdon].

161. Clay Committee Report, supra note 149.

162. This latter figure involved expenditure of $11 billion for the already designated urban portions, and $4 billion for additional “feeder and distribution routes” within urban areas. Id. at 14, 18. Although the second part of this recommendation was purportedly based on the Committee’s own investigation (id. at 18-19), it amounted to an endorsement of the 2,200 urban miles of the original System left undesignated in 1947.
It took 2 years, several government studies, and both sessions of the 84th Congress to figure out what the sources would be for this $27 billion. The ultimate congressional decisions in this regard became incorporated into the 1956 Act. 163 The highlights of that Act were: first, the fixing of a 90 percent federal share for Interstate construction; 164 second, the raising of a variety of federal highway-user taxes, including the gas tax (from 2 cents to 3 cents a gallon) and the tire tax (from 5 cents to 8 cents a pound), and the levying of a new annual licensing tax on all vehicles heavier than 26,000 pounds; 165 and third, the creation of a Highway Trust Fund into which all these revenues would be automatically funneled, to be available for expenditure without need for further congressional authorization. 166

While a full history of the 1956 Act is beyond the scope of this Article, it is important to take notice of three financing alternatives which were explicitly considered and rejected. In 1955 the rubber manufacturers, the American Automobile Association (AAA), and the petroleum industry, all noting the "defense" justification for the Interstate System, 167 argued that the program ought to be financed out of general revenues. 168 But this proposal was entirely unacceptable to the Administration, and elicited almost no interest in Congress. 169

The second alternative was tolls. President Eisenhower's memoirs disclose that he "originally preferred a system of self-financing toll highways" for the System. 170 Eisenhower's address to the governors envisioned that the entire national highway program would be based on the principle of "self-liquidation of each project, whenever that is possible, through tolls or an insured increase in gas tax revenues." 171 By the

164. Id. § 108(b), 70 Stat. 378 (codified at 23 U.S.C. § 120(c) (1970)). The states are required, however, to provide for the "maintenance" of the System. 23 U.S.C. § 116 (1970). Over the years, maintenance expenses may well exceed the state's original 10% contribution.

The 1956 Act allows the state to claim above 90% (but never higher than 95%) to the extent that "unreserved public lands and nontaxable Indian lands" exceed 5% of the state's total area. See 23 U.S.C. § 120(c) (1970). Burch's figures for 10 states show the federal share ranging from 90.71% to 95% (Nevada). Burch, supra note 25, at 261.

166. Id. § 209, 70 Stat. 397-401. It is not true, as Burrus claims, that the trust fund idea was "just dreamed up" by Alf Johnson of the American Association of State Highway Officials. Burrus, supra note 14, at 298. The possibility of a highway trust fund had been extensively discussed in Congress in 1953. See Subcomm. on Roads of the House Comm. on Public Works, 83d Cong., 1st Sess., Summary of Hearings, National Highway Study 9-10 (Comm. Print No. 9, 1953).

167. See text accompanying notes 392-97 infra.
169. In the Senate's 89-1 approval of the 1956 Act, the lone dissenter was Senator Russell Long, whose view was that motorists were too heavily taxed already. See 102 Cong. Rec. 10,966 (1956).
mid-1950's, this country was in the midst of a burgeoning toll road movement; the number of toll superhighways was rapidly increasing, and the experience with toll roads had been almost uniformly auspicious.\textsuperscript{172} Within the Administration, the chief toll apostle was Major General John S. Bragdon, a West Point classmate of the President. Bragdon joined the Council of Economic Advisors in 1954 with special responsibility for federal highway policy, and then was shifted a year later to the White House staff as Special Assistant for Public Works.\textsuperscript{173}

In acclaiming tolls, however, Bragdon was breaking with the tradition of the federal highway program. The very first paragraph of the 1916 Act had required that all federally funded roads be "free from tolls of all kinds."\textsuperscript{174} That requirement had been expressly reaffirmed in the 1921 Act\textsuperscript{175} and continued forward in all subsequent highway legislation.\textsuperscript{176} Bragdon also found himself at odds with both the Clay Committee and the federal Bureau of Public Roads, both of which in their 1955 reports recommended against the possibility of toll financing.\textsuperscript{177} What the Clay Committee proposed, instead, was a third alternative: that the 90 percent federal share be financed primarily by 30-year bonds to be issued by a


\textsuperscript{173} See Bragdon, supra note 160, at 1; Historical Materials in the Dwight D. Eisenhower Library, 1972, at 7 (document prepared by the staff of the Eisenhower Library for persons using the Library's research facilities, copy on file with the author).


\textsuperscript{175} Federal Highway Act of 1921, ch. 119, § 9, 42 Stat. 214.


\textsuperscript{177} See Bureau of Public Roads, supra note 172, at 4-17; Clay Committee Report, supra note 149, at 13-14.

Technically, both the Committee and the Bureau recommended only that toll routes should not receive federal aid. They declined to adopt the more drastic position that such routes could not, if self-supporting, become part of the System. The reports also identified (besides the 1,000 toll miles already open to traffic) over 7,200 miles of economically feasible toll facilities on routes paralleling the System which either were under construction or at least had been authorized or taken under study by the states. Still, the reports' basic recommendations were calculated to undermine the toll possibility. If 90% federal aid was to be available for an Interstate facility, but only if the facility was operated on a toll-free basis, anyone could predict that the states would abandon their toll road plans. Certainly the AAA appreciated this. See Martin, supra note 12, at 253. Of the over 5,500 miles of toll routes either "authorized" or being "considered" by the states in 1954 (see Bureau of Public Roads, supra note 172, at 23) the only project that has since been built is a 50-mile segment of I-95 in Delaware and Maryland. See generally Rae, supra note 12, at 181. Of the 2,700 miles of toll roads already completed or under construction by 1954, most were incorporated into the Interstate System—but without any sort of reimbursement to the states—in 1957. See Federal-Aid Highway Act of 1956, ch. 462, §§ 113-14, 70 Stat. 384-85; American Ass'n of State Highway Officials, The First Fifty Years: 1914-64, at 191-92 (1965); New Roads, supra note 13, at 17-18.
new Federal Highway Corporation. The anticipated 30-year revenues of the existing federal gas and tire taxes would be sufficient to pay off the indebtedness. The Clay Committee's proposal thus accepted the philosophy of financing highway construction through highway-user taxes. However, by relying on the indebtedness technique, the Committee was able to avoid suggesting that any of these taxes should be raised; it evidently regarded any such tax increases as unacceptably impolitic.

The clarification (and modification) of the President's position—on the side of highway-user taxes rather than tolls—was disclosed to the public in his February 1955 message to Congress, in which he forwarded the Clay Committee Report and stated somewhat noncommittally that he was "inclined to the view" that the Committee's financing proposal was desirable. That message had been written in a February 1 meeting attended by Sherman Adams (evidently representing the President), Treasury Secretary George Humphrey, Commerce Secretary Sinclair Weeks, General Clay, General Bragdon, and three others. At that meeting, the toll issue was "very warmly discussed." The discussion dealt partly with the political fact that a toll proposal predictably would arouse the ire of the AAA, state highway officials, and the state governors, particularly in the West; with these enemies, it was argued, the proposal would stand little chance of succeeding in Congress. By the end of the meeting, Governor Adams was clearly agreeing with Clay, and the matter was in this way resolved.

The Administration, in rejecting tolls, thus came to support the Clay Committee's bonding proposal. However, this proposal turned out to be

178. CLAY COMMITTEE REPORT, supra note 149, at 26. While the Corporation would raise the revenue for the Interstates, the administration of the Interstate program would remain with the Bureau. Id. at 23.

179. See Martin, supra note 12, at 227.

180. See CLAY COMMITTEE REPORT, supra note 149, at vi.


182. Id.

183. General Bragdon returned to his office and drafted a forlorn memorandum, which ended as follows:

So this ends the matter as far as the toll roads are concerned. In other words, the American people will have a $27 billion bill for something which they could have gotten for nothing, all because of (a) political feasibility, and (b) the horse-and-buggy anti-toll road sentiment in the Bureau of Public Roads.

Id. at 2.

In all his White House efforts, Bragdon was handicapped by an ineptness at bureaucratic maneuverings. Beginning with his inability to establish a good working relationship with Sherman Adams (Peterson Interview), Bragdon's entire White House career was marked by frustrations and failures. See Memorandum of Introduction to the Bragdon Papers (Eisenhower Library). In later reviewing his activities as a toll advocate, Bragdon himself saw fit to comment, "How naïve!" Bragdon, supra note 160, at 12.
 unacceptable to Congress, where it was defeated in both chambers—by a 31-60 vote in the Senate,\textsuperscript{184} and by a closer margin, 193-221, in the House.\textsuperscript{185} Interestingly, little of the bill's congressional opposition came from those organizations which supposedly had been working for the abolition of the federal gas tax. The bill's acknowledgement of “linkage”\textsuperscript{186} managed to dissolve the impressive coalition which previously had objected to the federal gas tax;\textsuperscript{187} only the petroleum industry and one farmers’ association remained within the ranks.\textsuperscript{188} All of the counter-proposals for Interstate funding given serious congressional consideration in 1955 and 1956 conceded the idea of dedicating federal highway-user taxes. What provoked antagonism were several other aspects of the bill;\textsuperscript{189} the most important of which was its reliance on indebtedness. Senator Harry F. Byrd, chairman of the Senate Finance Committee, endorsed a policy of “pay-as-you-go” (as contrasted to a bonded debt), and made great political capital of the fact that the $20 billion indebtedness would eventually require the payment of $11.5 billion in interest.\textsuperscript{190}

\textsuperscript{184} The Republican vote was 30-13 and the Democratic vote 1-47. The unlikely Democratic maverick was Senator John F. Kennedy. CONGRESSIONAL QUARTERLY, CONGRESS AND THE NATION 1945-64, at 530 (1965).

\textsuperscript{185} Both of these votes were on motions to substitute the Administration's bill for the bill reported out by the respective Senate and House committees. In the House, the party breakdown was Democrats, 7-214; Republicans, 186-7. These two votes were the most party-partisan of all the events that transpired during 1955-56. Federal highway legislation traditionally had been a nonpartisan issue. See BURCH, supra note 25, at 223; 1955 Senate Hearings, supra note 82, at 34-35. Senator Harry F. Byrd, who led the fight against the Administration's bill, was a southern Democrat who usually aligned himself with the Republicans.

\textsuperscript{186} See text accompanying note 92 supra.

\textsuperscript{187} See 1955 House Hearings, supra note 62, at 900; text accompanying notes 109-10 supra. The key was the response of the Governors to the President's address. The evening of the address, the Governors were overtly critical, but after pondering the matter for a day or two, they began to regard the President's proposal as acceptable. See N.Y. Times, July 13, 1954, at 1, col. 1; id., July 14, 1954, at 1, col. 2; id., July 15, 1954, at 1, col. 4. The Conference's eventual official resolution was basically friendly. STATE GOV'T., Aug. 1954, at 175-76. The Conference also established a highway committee to formulate a more precise position for the Governors.

\textsuperscript{188} See 1955 House Hearings, supra note 62, at 328 (testimony of American Farm Bureau Federation); id. at 1268 (statement of American Petroleum Institute).

\textsuperscript{189} Since the indebtedness would belong to the Corporation rather than to the federal government itself, it would not count against the congressionally enacted debt ceiling—a procedure which struck many in Congress as disingenuous notwithstanding its probable technical legality. See, e.g., 1955 Senate Hearings, supra note 82, at 550 (statement of Sen. Stuart Symington); id. at 610-11 (statement of the Comptroller General). Many in Congress were allergic to the idea of an outside corporation taking authority away from regular federal agencies. Id. at 260 (remarks of Sen. Albert Gore). The Administration's bill involved placing a monetary ceiling on the A-B-C program for the following years, a ceiling which disturbed that program's constituency. See, e.g., Hearings on H.R. 9075 Before the House Comm. on Ways and Means, 84th Cong., 2d Sess. 59 (1956) (statement of Rep. George Fallon) [hereinafter cited as 1956 House Ways and Means Comm. Hearings].

\textsuperscript{190} See 1955 Senate Hearings, supra note 82, at 497. In Representative Fallon's view, this was the most "glaring" weakness of the Administration bill. 1956 House Ways and Means Comm. Hearings, supra note 189, at 59.
Byrd's apparent view was that interest payments were nothing more than a wasted expenditure.

The bill the Senate finally approved in late May 1955 was the one which its Public Works Committee had reported out, authored by one of its members, Albert Gore. In light of the constitutional requirement that tax legislation begin in the House, the Administration bill studiously avoided the question of where the needed additional revenue would be found and thus comprised much less than a full program proposal. The Administration bill was given serious attention by the House Public Works Committee. However, once that bill had been rejected by the Senate, the House committee's leadership concluded that even if the bill were approved by the House, it would stand little chance of surviving a House-Senate conference. The committee accordingly held new hearings on a new bill hastily drafted by committee chairman George Fallon with the help of data supplied to him by Frank Turner, then the Assistant to the Bureau Commissioner. It was this Fallon bill which was the first major proposal to embrace the strategy of financing the System by increasing the federal taxes levied against highway users. H.R. 7474, a later version of the original Fallon bill, was reported out by committee to the full House. The Administration, speaking through Treasury Secretary George Humphrey, effectively acquiesced in this bill. Nevertheless, when the vote finally came on the House floor, H.R. 7474 was soundly defeated by a nonpartisan vote, 123-292. While several explanations can be found for the bill's defeat, the overriding cause was the bitter opposition which the bill evoked from the

192. 1955 Senate Hearings, supra note 82, at 493 (statement of Sen. Clifford Case).
194. Fallon Interview; Turner Interview.
195. Since this was the strategy which prevailed in 1956, and since Fallon was deeply involved in the preparation of the 1956 bill as well, he deserves to be recognized as a principal architect of the Interstate program. There is irony in this, since Fallon dislikes driving—freeway driving especially. Fallon Interview. The irony is not unique: Robert Moses, New York City's great freeway builder, "except for a few driving lessons he took in 1926, . . . never drove a car in his life." Caro, supra note 14, at 12.
197. The Democratic vote was 94-128; Republican, 29-164. CONGRESSIONAL QUARTERLY, CONGRESS AND THE NATION 1945-64, at 530 (1965).
198. One cause of the ultimate vote was committee ill-will within the House. The bill had not been sent to the Ways and Means Committee, despite its general jurisdiction over revenue measures. While an arrangement was worked out whereby a handful of Ways and Means Committee members would participate in the Public Works Committee hearings, that arrangement turned sour after petty debating about committee member prerogatives. Fallon Interview. See also 1955 House Hearings, supra note 62, at 1104. One squabble was over where in the committee room the Ways and Means members would sit. Fallon Interview. Shades of the Paris peace talks!
various interests and industries which would have carried the burden of the tax increases. The bill’s tire taxes led all the branches of the rubber industry to condemn it. The petroleum refiners and sellers denounced the bill because of its gas taxes. Its proposed taxes on diesel fuel brought down the wrath of diesel fuel sellers and users. The intercity bus companies, the trucking industry, and even the Teamster’s Union rejected the bill because it taxed large vehicles too heavily, while the AAA was critical that its taxes on large vehicles were so modest.

From the day of introduction of [the Fallon bill] there occurred one of the most intense pressure campaigns observed on Capitol Hill for many years. This campaign moved with increasing intensity until the revised tax bill was defeated on the floor of the House.

All during this period of congressional consideration of highway proposals, an event of major importance was unfolding within the federal and state highway bureaucracies—the 1955 urban designations. One probable effect of these designations was to render the Interstate program more attractive to Congressmen from urban areas where Interstates were specifically displayed in the 1955 Yellow Book. Certainly, when highway legislation was introduced early in the 1956 session, the congressional mood proved to be far more receptive. A new bill, authored by Representative Fallon and captioned the Federal-Aid Highway Act of 1956, was considered by the House Public Works Committee. A separate bill, the Highway Revenue Act of 1956, was considered by the House Ways and Means Committee; it carried the name of committee member Hale Boggs, although Fallon claims that it originated in his office. Like H.R. 7474, the idea of the Revenue Act was to levy new or increased taxes on highway users and motor vehicle commodities, although there were

200. Id. at 1163-64, 1267-73.
201. Id. at 1293-95, 1297-1305, 1307-16.
202. Id. at 1108-10, 1151-53, 1290. The bill would have taxed more heavily large tires and inner tubes, which of course are purchased both by trucks and by other vehicles of similar size. See note 218 infra. The general reason for a two-tiered tax is that the heavier the vehicle, the greater the burden it places upon the roadway. While heavier vehicles also consume more gas and hence produce more revenue in the form of gas taxes, the gas tax differential falls considerably short of equaling the burden differential. Additional taxes on large vehicles thus are advisable if tax equity is to be achieved. See generally id. at 982-94 (testimony of American Railroad Association).
203. Id. at 1277.
204. Martin, supra note 12, at 252.
205. See text accompanying notes 136-44 supra.
206. It was General Bragdon’s suspicion that the Bureau undertook the 1955 designation process partly in order to commit the urban Interstates before the Act was passed, and partly to enhance the System’s congressional popularity. See Bragdon, supra note 160, at 20.
208. Fallon Interview.
appreciable differences between this new bill and H.R. 7474 in the exact distribution of the tax burden. The two bills—the Highway Act and the Revenue Act—after respective committee approval were consolidated by the Public Works Committee and sent to the House floor. The resulting bill was approved by the House on April 27, 388-19.209 The Senate Finance Committee considered, and largely accepted, the House’s Revenue Act; the Senate Public Works Committee worked certain changes in the House’s highway bill, but did not significantly tamper with its basic provisions on Interstate expenditure. This two-part bill was then approved by the Senate in a voice vote. The differences between the House and Senate bills were ironed out in conference, and the conference bill was then approved by a voice vote in the House and by an 89-1 roll-call vote in the Senate.210

What is the explanation for this dramatic reversal in the legislative result between 1955 and 1956? While the 1955 designations were not without some influence in this regard, the major reason for this reversal was an astonishing reversal in the direction of the lobbying effort. The violent lobbying against the 1955 bill has been described above. However, in 1956 the “highway lobby swarmed, trade association by corporation president, all over Capitol Hill”211 in support of the highway bill, and not a single major interest group actively lobbied against the legislation.212

If this lobbying reversal accounts for the ease of the 1956 Act’s passage, how is this reversal itself to be explained? The explanation lies in a congeries of circumstances which, between 1955 and 1956, resulted in the mobilization of the program’s proponents and the neutralization, and in some instances even the conversion, of its 1955 antagonists. The “proponents” included those interest groups, particularly the highway construction industry,213 which had obvious reasons for favoring the Interstate program. On the whole these groups had not mounted much of an effort in 1955, but a year later they indeed “swarmed.”214 The mobilization of these groups between 1955 and 1956 is easily understood. It had

211. Burby, supra note 14, at 298.
212. See, e.g., Hearings on H.R. 10660 Before the Senate Comm. on Finance, 84th Cong., 2d Sess. 184 (1956) (statement of the American Petroleum Institute, acquiescing in the legislation) [hereinafter cited as 1956 Senate Hearings].
213. Other important interest groups included the auto companies and the state highway departments. The auto companies had been promoting an Interstate-type program for too many years to back away because of the prospect of increased taxes on auto users. See New Roads, supra note 13, at 14. State highway officials had decided early in 1954 that an expanded highway program justified the disadvantage of greater federal control. See American Ass’n of State Highway Officials, The First Fifty Years: 1914-64, at 182 (1965).
214. See text accompanying note 211 supra.
been late in the first session when H.R. 7474 materialized as the one crucial bill; the opposition to H.R. 7474 then had erupted suddenly, not giving the Interstate program's natural supporters much of a chance to organize their own campaign. The intermission between sessions afforded them ample opportunity for this kind of organizing. 215

The antagonists consisted chiefly of those interest groups which had been singled out by H.R. 7474 to bear the burden of the Interstate program's taxes. Certain of the 1955 antagonists were neutralized in 1956 only because the new Fallon bill did in truth treat them more gently than had H.R. 7474. 216 More interesting and more important, however, are those interest groups which between 1955 and 1956 basically changed their minds, even in the face of nonchanging tax proposals. The tire industry can serve as a prominent example: after having opposed the 1955 bill, the industry publicized its support of the 1956 bill, 217 even though the latter bill's tire taxes may well have been higher in total than those contained in the 1955 bill. 218 Such changes in industry or interest-group position are also capable of explanation. The highway-user organizations had adopted their positions in some haste in 1955, reacting to the sudden Fallon proposal, with its substantial and unexpected increases in highway-user taxes. 219 The intersession gave these industries a chance to think their positions through more thoroughly. The result of this reconsideration was that they were more willing to accept the general idea of increased highway-user taxes and to confine their arguments to the question of a fair distribution of the tax burden. 220 With respect to the small/large vehicle tax differentiation, a provision was placed in the 1956 bill calling on the Bureau to conduct a thorough 3-year study of the highway costs and benefits associated with vehicles of different "dimensions, weights, and other specifications." 221 The implication was that Congress would then modify the tax structure in light of the study's findings and recommendations. The existence of this promised realloca-

215. Fallon Interview. Representative Fallon also volunteers that in 1955 he lacked the time to adequately "educate" his fellow Congressmen, but they did a very good "educational" job in 1956.

216. For example, diesel fuel interests had railed against H.R. 7474 because it would have fixed the diesel fuel tax at 4 cents per gallon, 1 cent more than the proposed 3 cent gas tax; the 1956 bill set the fuel tax at 3 cents across the board.


218. The pre-1956 tire tax was 5 cents per pound for all tires. See note 106 supra. H.R. 7474 would have left this tax alone for automobile-sized tires, but would have raised the tax to 8 cents for medium-large tires and 15 cents for very large tires. H.R. 7474, § 4(d), 84th Cong., 1st Sess. (1955). The 1956 House bill (and the 1956 Act) raised the tax uniformly to 8 cents for all tires.


tion of the tax burden—to be effected in the near future and on the basis of informed professional judgment—made it difficult to oppose the 1956 bill for small/large vehicle reasons.222

In any event, through this rather complicated process a remarkably broad consensus was achieved in support of the 1956 Act. Its financing provisions would make possible the "early completion" of the System, which the Act declared to be "essential to the national interest."223 Thanks to the 1955 designations, in 1956 the entire Interstate System as officially approved was available to every Congressman in convenient Yellow Book form.224 These designations served to convert the urban Interstates from somewhat vague and abstract policy into quite specific plans before Congress took its decisive financing action on the Interstate program; by the same token, the 1956 Act entailed, at least in a general way, a congressional ratification of the System as already designated. The 1956 Act, in addition to its basic financing arrangements, established a number of particular rules applicable to the building of the Interstates. For example, "construction standards" for the Interstates were to be developed and promulgated "as soon as practicable" by "the Secretary of Commerce in cooperation with the State highway departments," and these standards "shall be adequate to accommodate" the 1975 traffic forecasts.225 Also, federal funds would be available to reimburse the states for 90 percent of any relocation payments made by the states to public utilities which the Interstates would uproot.226 As observed above,227 the "Interstate System" was itself set up by the 1944 Act, but in light of the foregoing, and other provisions in the 1956 Act, it is entirely appropriate to say that the modern "Interstate program" originated in 1956.

The ambitiousness of that program merits special attention. President Eisenhower himself described it as the largest public works program "ever undertaken by the United States or any other country."228 The program contemplated was a nationwide system of 40,000 miles, its

222 See 1956 Senate Hearings, supra note 212, at 37 (testimony of American Automobile Association).
224 See text accompanying note 206 supra.
225 Federal-Aid Highway Act of 1956, ch. 462, § 108(i), 70 Stat. 380 (codified at 23 U.S.C. § 109(b) (1970)). Design standards were duly approved in July 1956, and have since been revised several times. See AMERICAN ASS'N OF STATE HIGHWAY OFFICIALS, A POLICY ON DESIGN STANDARDS: INTERSTATE SYSTEM (undated pamphlet) (on file with the author). From an engineering (and at a cost) point of view, these standards are an integral part of Interstate program "law."
227 See text accompanying note 145 supra.
228 D. EISENHOWER, MANDATE FOR CHANGE 548 (1962). The amount of concrete poured to form these roadways would build eighty Hoover Dams or six sidewalks to the moon. To build them, bulldozers and shovels would move enough dirt and rock to bury all of Connecticut two feet deep.

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routes determined in advance by the cooperative action of federal and state officials, every mile to be built to the highest freeway standards. The program also included financing arrangements purporting to provide both complete funding and a complete timetable for System construction. 1969 would be the final year in which the Secretary would be authorized to pledge federal funds for upcoming projects, and 1972 would be the last year in which those pledges would be honored; on July 1, 1972, the taxes would expire (or lapse back to their pre-1956 levels) and the Trust Fund would self-destruct.\textsuperscript{229} Clearly, all of this comprised an extraordinary instance of the federal government attempting to "Think Big," to develop and carry out a "Grand Plan," as President Eisenhower put it.\textsuperscript{230} The following subsection describes the developments which have ensued in the score of years between 1956 and today, and will permit an evaluation of the results achieved in carrying out such an ambitious effort.

C. \textit{After 1956}

1. \textit{Expansion of Funding}

Within 2 years after the 1956 Act, it had become clear that the effort at complete financing attempted in the 1956 Act would not be successful. By 1958 the Bureau had reestimated the total cost of the System to be $41 billion, an increase of $14 billion over the original figure.\textsuperscript{231} Given this cost reestimate, the 41,000 mile system 231A obviously needed additional funding. This funding could be provided in one of two ways: by "stretching out" the program and collecting its special taxes beyond the original 1972 termination date; or instead by raising tax rates (or imposing new taxes) so as to collect more revenue within the originally contemplated period. Of course, there was another policy alternative: the $27 billion originally budgeted for the Interstates could itself be reaffirmed and appropriate reductions made in the original 41,000-mile System so that a less extensive System could be completed with the original funding. Within the White House, General Bragdon made an effort to delineate a higher priority "first stage" of the System which could be constructed within the $27 billion figure.\textsuperscript{232} This possibility, however, was given scant attention by the Administration and the Congress,\textsuperscript{233} both of which tended to rely on the assumption that the completion of the entire System remained the basic federal goal. As for financing, in 1959 the government elected to temporize: the 1959 Act raised the gas tax from 3 cents to 4


\textsuperscript{230} See CLAY COMMITTEE REPORT, supra note 149, at 1.


\textsuperscript{232} The 1956 Act added 1,000 miles to the original 41,000 miles. See note 250 infra, and accompanying text.

\textsuperscript{233} See, e.g., Hearings on Financing the Federal-Aid Highway Program Before the House...
cents but only until 1961.\textsuperscript{234} The Bureau’s cost estimate remained at $41 billion in 1961,\textsuperscript{235} and in that year whatever doubts remained concerning the federal purpose were resolved by the Kennedy Administration, which strongly favored completing the entire system.\textsuperscript{236} Funding was to be accomplished in both of the available ways—the 1961 Act boosted several of the highway-user taxes, and a:os somewhat extended those taxes’ duration.\textsuperscript{237}

Since 1961 the cost estimate for the System has skyrocketed, reaching $76 billion in 1972.\textsuperscript{238} Nevertheless, the 1961 decision to build the complete System has never been questioned. In 1965, 1966, 1968, 1970, and 1973, Congress voted additional authorizations for the System,\textsuperscript{239} and has correspondingly stretched out the life of the Interstate program and its taxes. The 1973 Act establishes 1979 as the final authorization year.\textsuperscript{240} In August 1975 the official cost estimate was increased once

\begin{quote}
\end{quote}

\textsuperscript{234} Federal-Aid Highway Act of 1959, Pub. L. No. 86-342, § 201, 73 Stat. 613. The Federal-Aid Highway Act of 1958 had increased program authorizations (but not its taxes) for the next 3 fiscal years. Act of Apr. 16, 1958, Pub. L. No. 85-331, § 7(a), 72 Stat. 93. Part of Congress’ purpose was to keep the Interstate program on schedule, but the major reason for the increase was to take action against the 1958 recession. See \textit{S. Rep.} No. 1407, 85th Cong., 2d Sess. 4-5, 26 (1958).


\textsuperscript{237} The tire tax was raised from 8 cents to 10 cents per pound and the large vehicle tax from $1.50 to $3.00 per thousand pounds, while the gas tax was continued at 4 cents per gallon instead of being allowed to return to 3 cents. Federal-Aid Highway Act of 1961, Pub. L. No. 87-61, §§ 201-07, 75 Stat. 124. This initial extension was only ‘or 3 months.

\textsuperscript{As indicated, the 1956 Act ordered the Bureau to prepare an Interstate cost allocation study by 1959. See note 221 and accompanying text supra. At the Bureau’s request, in 1958 Congress deferred the due date for this report until January 1966. Act of August 28, 1958, Pub. L. No. 85-823, § 2, 72 Stat. 983. The lengthy document which the Bureau submitted in that month was incomplete, since one set of tests remained to be conducted. H.R. Doc. No. 54, 87th Cong., 1st Sess. 152 (1961). The results of these tests were reported to Congress by the Bureau in 1961 testimony. \textit{Hearings on Title II of H.R. 6713 Before the Subcommittee on Finance, 87th Cong., 1st Sess. 54-91} (1961); \textit{Hearings on Federal-Aid Highway Financing Before the House Comm. on Ways and Means, 87th Cong., 1st Sess. 114-36 (1961). The study, as so completed, was equivocal as to the respective tax burdens which should be borne by large and small vehicles. The Kennedy Administration drew inferences which were somewhat anti-large vehicles, but Congress resolved the uncertainties in a manner distinctly favorable to large vehicles. \textit{Compare S. Rep. No. 367, 87th Cong., 1st Sess. 16-19 (1961), with id. at 54-57} (dissenting views of Sen. Paul Douglas, advocating the Administration’s position).


\textsuperscript{240} Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, § 102, 87 Stat. 250. So far, the
again, this time to $89 billion.\textsuperscript{241} Because this estimate was deliberately based on 1973 calendar year prices,\textsuperscript{242} it was already badly out of date at the time of its release. In September 1975 the Comptroller General, making varying assumptions about inflation rates and annual authorization levels, predicted a total system cost of anywhere between $111 and $184 billion.\textsuperscript{243} Half a year later, Congress, acting on the assumption of 7


\textsuperscript{241} House Comm. on Public Works and Transportation, 94th Cong., 1st Sess., Revised Estimate of the Cost of Completing the National System of Interstate and Defense Highways 9, 12-13, 16 (Comm. Print No. 94-14, 1975).

The month before, the Administration had advanced a major proposal concerning the Trust Fund and Interstate financing. See Dep't of Transportation 1975 Documents, supra note 72, Explanation. The proposal requested only a 1-year extension of Interstate authorizations, until 1980. It also asked that existing termination dates for the special highway-user taxes and the Trust Fund be removed, so that the taxes would continue indefinitely until further congressional action. However, after October 1976 the Trust Fund would receive only 1 cent of the federal gas tax; Trust Fund revenues, so depleted, would then be spent exclusively for Interstate purposes. Although the Trust Fund would continue to receive the tire and large vehicle taxes, loss of most of the gas tax would reduce its income by 50%. While this partial depletion of the Trust Fund would slow the rate of the System’s ongoing progress, the Trust Fund would remain available until the eventual (though undetermined) date when the System is finally and truly completed. (The proposal additionally hinted that the Trust Fund would continue even after that date to finance the reconstruction of those Interstate routes which had physically deteriorated. Id., Section by Section Analysis at 20; id., Explanation at 1. Compare the burden of Interstate route “maintenance” placed on the states by existing law. See note 164 supra.)

Under the Administration’s recommendation, the 3 cents of the existing gas tax excluded from the Trust Fund would go into the general federal treasury—except that the federal gas tax would be lowered by 1 cent in any state which increased its own gas tax by at least 1 cent. For states electing this option (and most probably would), the state constitutional antidiversion amendments (discussed in text accompanying notes 98-100 supra) could be expected to channel the new state gas tax proceeds into highway construction. The traditional elements of the federal highway program would continue although considerably revamped. However, they would be financed out of general revenues rather than from the Trust Fund and hence would be subject to the annual congressional appropriations process.

For the congressional response to the Administration’s proposal, see text accompanying notes 7-8 supra.

\textsuperscript{242} House Comm. on Public Works and Transportation, 94th Cong., 1st Sess., Revised Estimate of the Cost of Completing the National System of Interstate and Defense Highways 9 (Comm. Print No. 94-14, 1975).

\textsuperscript{243} The Comptroller General noted that $60.9 billion had been obligated by June 30, 1975. He estimated the future costs as:

<table>
<thead>
<tr>
<th>Annual authorization</th>
<th>Annual inflation rate</th>
<th>Completion year</th>
<th>Cost-to-Complete</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3.75 billion</td>
<td>0%</td>
<td>1985</td>
<td>$38.9 billion</td>
</tr>
<tr>
<td></td>
<td>5%</td>
<td>1987</td>
<td>$50.2 billion</td>
</tr>
<tr>
<td></td>
<td>10%</td>
<td>1996</td>
<td>$83.4 billion</td>
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<tr>
<td>$3.25 billion</td>
<td>0%</td>
<td>1986</td>
<td>$38.9 billion</td>
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<tr>
<td></td>
<td>5%</td>
<td>1990</td>
<td>$52.4 billion</td>
</tr>
<tr>
<td></td>
<td>10%</td>
<td>2009</td>
<td>$123.4 billion</td>
</tr>
</tbody>
</table>

percent annual authorization, voted authorizations through 1990 which project a total system cost of close to $120 billion.\textsuperscript{244} Congress also approved an interim 2-year extension of the program’s taxes.\textsuperscript{245}

The Interstate cost overrun is, of course, of eyebrow-raising proportions. Some of the explanations for the overrun relate to expense-producing changes made in the Interstate program since 1954,\textsuperscript{246} but it also appears that the 1954 cost estimate was hastily and amateurishly prepared.\textsuperscript{247} While cost overruns of the magnitude described are difficult to tolerate, it should be noted that major public transportation projects have also regularly suffered from severe problems of cost underestimation.\textsuperscript{248} A significant share of the Interstate overrun is attributable to inflation. The Interstate cost estimates have traditionally been insensitive to the inflation factor, but it is also true that the extensions of the program’s duration have compounded the effects of inflation,\textsuperscript{249} and that the unprecedented inflation of the last several years has wreaked havoc on cost estimates throughout the economy.

2. The Status of the System

One of the House-Senate negotiated compromises in the 1956 Act added 1,000 miles to the Interstate System, for a total of 41,000.\textsuperscript{250} When more careful engineering studies were conducted of the 40,000 miles of freeways approved in 1947 and 1955, it was learned that their true length needed to be only 38,550 miles; this placed an additional 1,450 miles into the pool of designated mileage. In October 1957 the Bureau approved


\textsuperscript{246} These include: (1) the 2,500 miles added to the System since 1954; (2) utility relocation payments imposed on the program by the Federal-Aid Highway Act of 1956 (see text accompanying note 226 supra); (3) the family and business relocation allowances mandated in 1962 and 1968 (all the relocation guarantees in the federal highway program have now been merged into the Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601-55 (1970)); and (4) the provisions of § 116(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 385) and the implications the Bureau saw therein. See text accompanying notes 427-28 infra.


\textsuperscript{248} The Bay Area Rapid Transit System (BART) in San Francisco, priced at $295 million when it was approved by referendum in 1962, instead costing at least $1.6 billion. See Wall Street Journal, Sept. 16, 1974, at 12, col. 2. Metro in Washington, D.C., budgeted at $2.5 billion as late as 1969, will cost at least $4.7 billion, and perhaps as much as $5.8 billion; in light of this cost prospect, construction may be halted after completion of 41 of Metro’s planned 89 route-miles. See L.A. Times, Feb. 15, 1976, § 1, at 3, col. 4.

\textsuperscript{249} Rae, supra note 12, at 189.

\textsuperscript{250} Federal-Aid Highway Act of 1956, ch. 462, § 108(1), 70 Stat. 381.
new Interstate routes, including beltways for 13 metropolitan areas. In the 1968 Act, Congress boosted the System's mileage to 42,500, and a round of additional designations was subsequently made, including some in urban areas. In the aggregate, the 42,500 mile system has ultimately acquired over 8,800 urban miles. By June 30, 1976, 37,717 miles, or 88.8 percent of the System, were open to traffic; an additional 2,054 miles (4.8 percent) were under construction. Of the planned urban routes, 7,697 miles or 87 percent were open to traffic. Only 341 miles, or less than 1 percent of the overall System, had not yet reached the public hearing stage.

This data may mislead, however, to the extent that it suggests the placidity of the System's progress; that progress has not been placid at all, especially in the major urban areas. Almost as soon as Interstate construction began in urban areas, community opposition to particular urban Interstates began to develop: in 1958, Reno, Nevada was the first trouble spot. In 1965, the local antifreeway movement achieved its first major victory, in San Francisco. By 1970 scheduled urban Interstates had become entangled in controversy in 13 different metropolitan areas. As Moynihan correctly points out, "it is [now] just about impossible to get a major highway program approved in most large American cities." The change in public understanding of urban freeways, and the legal problems posed by these Interstate controversies, will be dealt with below.

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256. Id. at 2.
257. The Quarterly Report indicates that 26,192 miles of the routes already open to traffic are in need of certain "improvements," in most cases minor, before they can fully comply with Interstate standards. Id.
259. See note 295 and accompanying text infra.
261. Policy vs. Program, supra note 6, at 94.
262. See text accompanying notes 286-310 infra.
3. White House Review

As Moynihan notes, the Eisenhower Administration was one which characteristically shied away from innovations in domestic policy. More particularly, during his Presidency, Eisenhower displayed a clear indifference to urban problems and a reluctance to involve the federal government in efforts to deal with them. One is therefore curious as to why he signed into law the 1956 Act, providing as it did for substantial freeway mileage in every major metropolitan area. This urban curiosity can be simply, if rather startlingly, explained. The truth is that in 1956 Eisenhower was operating under the incorrect assumption that the Interstate program had adopted the policy of bypassing urban areas. Ignorant of the fact that the urban Interstates would intrude into inner cities, he was quite disturbed when his ignorance was finally dispelled. According to two reports, this did not happen until 1959, when he chanced to query urban planners who were showing him the freeway network planned for the District of Columbia, while a third report tells the story differently, it is to the same effect. Eisenhower's immediate reaction was a phone call to the Director of the Bureau of the Budget (BOB), Maurice Stans. This call found a receptive ear, since Stans was already appalled by the extraordinarily high cost of the urban Interstates; in his view the 90 percent federal share was "a horrible thing." BOB immediately began looking into the matter, and General Bragdon was also alerted. The early returns on the Bragdon and BOB efforts were strong enough to persuade the President on July 2, 1959, to order a formal White House study of the urban Interstates, under the direction of General Bragdon in coordination with Stans and the Secretary of Commerce.

This Bragdon review organized itself into a major project staffed by 19 full-time professionals and three consultants. On certain matters Brag-
don and the Bureau negotiated agreements involving changes or clarifications in the Bureau's Interstate policies, but with respect to other issues which the Bragdon unit raised, it and the Bureau were unable to resolve their conflicts. In late November 1959, Bragdon met with the President, and it was agreed that Bragdon would prepare and submit an Interim Report. After going through many drafts, that Interim Report was finally completed in March 1960. Its strongest recommendation was that the Interstate program should reaffirm responsibility only for those routes whose chief function was to carry intercity traffic around and into cities. From this basic recommendation Bragdon derived several specific recommendations: (1) that inner belts be eliminated; (2) that circumferentials be preferred over arterials or spurs; (3) that spurs be substituted for routes going all the way through the city; and (4) that spurs be kept to minimum length. According to Bragdon's calculations, acceptance of these recommendations—even on a prospective basis—would permit the elimination of 1,700 miles of urban freeways from the System, freeways whose justification Bragdon thought could only be in the service they would provide for intrametropolitan traffic. The Bragdon Interim Report also urged a comprehensive planning requirement for the urban Interstates. And faithful to Bragdon's original beliefs, the Report once again espoused tolls: its suggestion was that for Interstates not yet in the final planning stage, toll financing should be offered to the states on an optional basis, with state motorists receiving an appropriate "remission" of the federal gas tax if their states elected the toll option. With regard to all of its proposed reforms, the Report insisted that immediate action was necessary if they were to be effectuated meaningfully. The Bureau resisted Bragdon, point by point.

With the issues so joined, the Interim Report was formally presented to the President in a 55 minute meeting on April 6, 1960. At that meeting Bragdon made a rather fancy presentation (with 17 charts). According to the meeting's minutes, Eisenhower indicated that "the matter of running

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272. See notes 431-33 and accompanying text infra.
275. Id. at 7.
276. Id. at 32-33, 38.
277. See text accompanying note 173 supra.
278. Interim Report, supra note 89, at 53-54 & Attachment 1.
279. Id. at 4 (Letter of Transmittal).
280. In attendance were General Bragdon, Secretary of Commerce Frederick Mueller, Federal Highway Administrator Bertram Tallmard, and White House aide Robert Merriam. See J.S. Bragdon, Memorandum for the Record, Apr. 8, 1960, at 2 (Bragdon Files, Eisenhower Papers, Eisenhower Library).
281. Id.
Interstate routes through the congested parts of the cities was entirely against his original concept and wishes." However, he also noted that "the Yellow Book depicting routes in cities had sold the program to the Congress," and he took account of the Bureau's view that it lacked the legal power to unilaterally delete System routes. The conclusion Eisenhower came to was that the program "had reached the point where his hands were virtually tied." The meeting was then adjourned "due to other [Eisenhower] appointments." Scorned by Bragdon was able to emerge from this meeting with the idea that its outcome was encouraging, and he began working on a final report.233 A few weeks later, however, President Eisenhower offered to appoint Bragdon a Commissioner on the Civil Aeronautics Board, and Bragdon accepted.234 With the responsibility now devolving upon Floyd Peterson, Bragdon's successor, the final report fizzled out into a 12-page report submitted on January 17, 1961, almost the last day of the Administration.235 This report was in both style and substance a classic of bureaucratic aridity.

4. **Congressional Afterthoughts**

The 1944 and 1956 Acts imposed on highway officials a certain legal obligation to complete the Interstate System. A 41,000 (later 42,500) mile System was mandatory,236 and routes on the System, once designated by Section 7 "joint federal-state action," could not be deleted or replaced, at least by federal or state officials acting unilaterally.237 Since 1956, however, the times have wrought changes, especially in attitudes towards the urban Interstates. The public's present perceptions of urban freeways, and the accuracy of those perceptions, will be discussed more fully in another section.238 It suffices here to say that urban freeways are now widely understood as being far more complicated and problematical than they were assumed to be back in 1956.

Does the law of the Interstate program allow for revision of the program in light of such changes in public understanding? In raising his

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282. Id. Although these minutes speak of Bragdon in the third person, he was their apparent transcriber.

283. Peterson Interview.

284. Peterson believes that both Eisenhower and Bragdon regarded this as a promotion. Id.

285. Memorandum from Floyd Peterson to Geneta Wilton B. Person, Jan. 17, 1961 (Sitton Papers). Peterson explains that he was occupied by other important matters, that the Eisenhower Administration was entering its terminal phase, and that the Vice President (nominated by his party to succeed Eisenhower) displayed little interest in the operation of federal program. Peterson Interview.

286. See note 223 and accompanying text supra. See also 1967 House Hearings, supra note 144, at 35 (testimony of Federal Highway Administrator Bridwell).

287. See note 144 and accompanying text supra.

288. See notes 437-653 and accompanying text infra.
argument against the urban Interstates, General Bragdon tried to take advantage of what may have been a congressional accident. In codifying its highway legislation in 1958, Congress included in Title 23 general language drawn by the codifiers from the 1921 Act,\footnote{289} which authorized the Secretary of Commerce to "require modifications or revisions" of any of the federal-aid highway systems.\footnote{290} In early 1960, Bragdon secured an opinion from an Assistant Attorney General which concluded that this language did indeed apply to the Interstate System,\footnote{291} even to the extent of permitting the Secretary to cut thousands of urban miles from the overall system, as Bragdon then was recommending.\footnote{292} The Secretary of Commerce, however, advised the President at the April 6 meeting that he did not accept this new interpretation,\footnote{293} and the opinion was never made public or communicated to Congress. Moreover, the Secretary of Commerce (since 1966, the Secretary of Transportation) apparently never has sought to exercise the power which the interpretation would recognize in his office,\footnote{294} which means that there has never been occasion to test out its validity.

The first explicit alteration in the structure of Interstate law was instigated by the citizenry of San Francisco. In 1965, in response to citizen protests, the San Francisco Board of Supervisors cast a vote that effectively stymied the Embarcadero Freeway\footnote{295}—then part of the Interstate System. There was uncertainty as to how the Interstate program should

\footnote{289} Federal Highway Act of 1921, ch. 119, § 6, 42 Stat. 213.
\footnote{291} See Memorandum from Henry J. Kaltenbach to General Bragdon, Subject: Authority of the Secretary of Commerce to change or modify parts of the Federal-Aid System, Feb. 23, 1960 (Bragdon Files, Eisenhower Papers, Eisenhower Library). The Assistant Attorney General "assumed" that in exercising this authority the Secretary would give "ample weight to the importance of stability in federal-state relationships" and to the state's reliance on the earlier designations.
\footnote{292} Bragdon made it clear that the massive urban cutback he favored would amount to a basic modification in the "concept" of the Interstate program. See Interim Report, supra note 89, at 11.
\footnote{293} See Memorandum for the Record, Apr. 8, 1960 (no author indicated), attached to Memorandum from J.S. Bragdon to General Goodpaster, Apr. 11, 1960 (Bragdon Files, Eisenhower Papers, Eisenhower Library).
\footnote{294} While over the last several years the Secretary of Transportation has deleted particular routes, his reason usually, if not always, has been their inconsistency with the social and environmental statutes enacted by Congress since 1956. See note 303 and accompanying text infra.

The Supervisors' quasi-veto power comes from \textit{Cal.} \textit{Sts.} \& \textit{H'WAYS CODE} § 100.2 (West 1969). \textit{But see} 23 U.S.C. § 107(a) (1970), as interpreted in City of Pleasant Ridge v. Romney, 382 Mich. 225, 169 N.W.2d 625 (1969) (if state law allows a city to block the state highway department from condemning land for an Interstate, the federal Secretary, at the state's request, may initiate the condemnation).
respond to this awkward circumstance. At the time, both federal and state officials were enthusiastic about the Century Freeway then planned for Los Angeles, and they were attracted to the idea of replacing the Embarcadero in the System with the Century; their mutual approval of this change could provide the "joint action" required by the 1944 Act. However, such a substitution scheme presented difficulties. First, there was room for doubt as to the legality of substitutions of this sort, since it could be plausibly argued that Congress in the 1956 Act had legally ratified the System as designated in 1947 and 1955 and presented it to Congress via the Yellow Book. Second, since the Century was of greater length than the Embarcadero, the need to stay within the System's (then) 41,000 mile limit militated against the substitution. Moreover, the substitution legally would have broken down into two discrete acts: the deletion from the System of one of its existing routes, and the addition to the System of a new route. With respect to that addition, the Century Freeway may have had many advantages, but so did the freeways which other states wished to propose; furthermore, under existing law the Secretary correctly believed himself legally obliged to consider all these additional proposals competitively. Congress reacted to the San Francisco experience by approving the Howard amendment in 1967. This amendment implicitly confirmed the general legality of mutually agreeable Interstate route substitutions: it provided the Interstate program with a 200 mile supplement for the purpose of making such substitutions; and it gave the state relinquishing an Interstate route a limited preference when the relinquished mileage came up for redesignation. Five years later, in the Federal-Aid Highway Act of 1973, Congress enlarged the mileage leeway to 500 miles (four substitutions had all but exhausted the original 200 miles), and also strengthened the preference.


298. Id. at 40-41.

299. Act of Jan. 2, 1963, Pub. L. No. 90-283, 81 Stat. 772. The amendment was coauthored by Representative Don Clausen of California. It was the San Francisco situation which was on his mind, and which was a focus of discussion in the committee hearings. See 1967 House Hearings, supra note 144, at 28, 40-41. In fact, California had by then already concurred in the deletion of the Embarcadero. Id. at 40. Relying on the general substitution principles recognized by the amendment the Secretary designated the Century Freeway as part of the System in March 1968. Work on this Interstate has now been halted by court order for reason of an inadequate public hearing. Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), cert. denied, 420 U.S. 908 (1975).


tions of the type contemplated by the amendment do ease the Interstate program out of difficult situations, but this is accomplished only by camouflaging the fact that the System is abandoning one of its original routes. Moreover, the substitution provisions, while giving the state a helpful incentive to concur in a System deletion, also detract from the original idea/ideal of a delimited System serving national rather than parochial state-by-state interests.

Of course, even to the extent that the 1944 and/or the 1956 Acts legally lock in the System, the authority has always resided in Congress to undo this lock. Again, however, the more that Congress exercises this authority, the more it disparages the original Interstate concept. In recent years Congress has at least tinkered with the lock. Responding to new public values, it has enacted various social and environmental statutes, clearly applicable to the Interstate program, which can be read as authorizing (if not requiring) the Secretary of Transportation to delete particular Interstate routes. Given liberalized rules on standing and on the reviewability of discretionary administrative judgments, these statutes also effectively authorize federal judges to halt work on particular Interstates; federal court injunctions of this sort, for better or worse, have turned into a major source of System delay. In another move, Congress, unhappy with the way in which the urban controversies were threatening to prevent the completion of the System, included provisions in the 1970 and 1973 Acts calling for the removal of certain freeways from the System if states do not have firm plans to proceed with them by an appropriate date. Even more significantly, in the 1973 Act, Congress also set up an important procedure pursuant to which the Secretary of Transportation and the state (the latter acting cooperatively with affected urban govern-

302. Recall the Bureau’s view that it lacked the legal power to delete a System route unilaterally. See 1967 House Hearings, supra note 144, at 35 (testimony of Federal Highway Administrator Bridwell); note 144 and accompanying text supra.

303. E.g., Department of Transportation Act of 1966, 49 U.S.C. § 1653(f)(170), pursuant to which Transportation Secretary Volpe cancelled part of I-40 in Memphis. See the Secretary’s decision, reproduced in O. Gray, CASES AND MATERIALS ON ENVIRONMENTAL LAW 1129-30 (2d ed.).


ments) can agree jointly, for federal funding purposes, to "trade" a
designated Interstate for an urban mass transit facility servicing the
particular traffic corridor. 308 The "intermodal" reasoning embodied in this
procedure manifests, at least in principle a repudiation of the Interstate
program's original highway premises. The 1976 Federal-Aid Highway Act
allows the "trade" of urban Interstate for ordinary city highways, as well as
for mass transit. 309 The idea lurking behind these "trading" provisions
offers interesting comment on the basic purposes of the urban
Interstates. 310

In all, for a program which supposedly had been comprehensively
dealt with in 1956, the changes made since that year, taken individually or
in combination, are of undeniable moment. The program's last bills were
due to be paid in 1972; by now, continuation into the 1990's is a virtual
certainty. 311 The overall cost of the program has already quadrupled and
may well go higher before the end is reached. There now are 1,500 more
miles of Interstate routes, and the rules for designating (and undesignat-
ing) routes have been amended several times. These various post-1956
modifications in the Interstate program suggest certain general lessons
about federal policymaking that will be elucidated at the end of the next
section, which is explicitly concerned with an evaluation of the program.

D. Evaluation

The preceding narrative has described and explained historically the
essential features of the Interstate program as they were decided on in
1944, 1956, and thereafter. This section of the Article will evaluate three of
the program's most important features: its reliance on highway users' taxes
as its means of financing; the Trust Fund and the problems associated therewith; and the conception of the System as an integrated
tility. This is a conception which, as will be shown, blunts many of the
criticisms which have been directed against the program, but at the same
time suggests the appropriateness of certain other criticisms not previ-
ously articulated.

1. Sources of Financing

Three alternatives were presented to the federal government for
financing the System: tolls, general revenues, and highway-user taxes. 312
From the perspective of the ordinary efficacy and equity principles of

309.  See text accompanying note 424 infra.
310.  Authorization will run until at least 1980 (see note 244 and accompanying text supra)
and the taxes will presumably continue for 3 years or so after the authorizations end. See text
accompanying note 229 supra.
311.  See notes 151-230 and accompanying text supra.
public finance, the choice among these three alternatives is genuinely difficult.

Fees imposed on the users of public facilities usually are celebrated insofar as they efficiently guide public decisions as to the level of facilities to be provided. The gas tax repeatedly has been praised as a "user tax." However, since the tax is compulsory, motorists in paying the tax cannot be read as signaling their demand for more highways, except in a rather indirect way. And since the tax applies to gas consumed on all the country's highways, it tells public officials next to nothing about the motorists' desire for a limited Interstate System.

Unlike the gas tax, an Interstate toll clearly would constitute a user's fee, plain and simple, and therefore could lay claim to those fees' efficiency advantages. Considerations exist, however, which suggest that a toll regime for the Interstates would actually have been productive of significant inefficiencies. Standard economic analysis advises that for a high fixed-cost public facility, inefficiency will result if that fixed cost is charged against the facility's users. Rather, the facility should be priced in such a way that its users pay its variable costs only, for a freeway, whose variable costs involve merely freeway maintenance and physical depreciation, the fee imposed on motorists should therefore be moder-

314. AMERICAN ASS'N OF STATE HIGHWAY OFFICIALS, THE FIRST FIFTY YEARS: 1914-64, at 176 (1965); Bruce-Briggs, MASS TRANSPORTATION AND MINORITY TRANSPORTATION, PUB. INTEREST, SUMMER 1975, at 43, 44. See also Ross, Basic Theory of State Highway Financing, in TAX INSTITUTE, INC., FINANCING HIGHWAYS 102, 113 (1957).

(a) The motorist who decides to drive on a congested street at peak hour may cause incremental congestion for all the other motorists, but he also suffers congestion which he would not incur were he to drive at a different time. There is, therefore, a substantial private cost to his decision which must be recognized as an offset against the external cost.

(b) The existing system does ration limited highway space—by expenditures of time rather than money. The income distribution effects of using time rather than money as the rationing device are attractive to me.
ately low. This standard analysis typically has been applied to the pricing of a facility which is assumed already to exist. But the idea at the core of the analysis\textsuperscript{319} suggests that it also has application to the decision to build the facility in the first place; toll revenue projections will significantly underestimate its potential societal value.\textsuperscript{320}

(c) In the long run, congestion pricing would have strong dispersing effects, as Professor Hilton recognizes. These long-run effects probably would hamper public transportation and seriously weaken downtown areas.

(d) If the urban Interstates were the only roads which were congestion priced, traffic would be diverted inefficiently to other city streets. Congestion pricing must be reasonably comprehensive if it is to be efficient.

(e) The administrative costs of a sensitive system of congestion pricing would be high—unless the highways already are being run as toll facilities. See Demsetz, \textit{Wealth Distribution and the Ownership of Rights}, 1 J. LEGAL STUDIES 223, 230 ('72).

(f) Assume that 100 cars can drive on a freeway without congestion, but that with 101 cars, each of them will suffer 1 minute of congestion; with 102 cars, 3 minutes; 103, 6 minutes; and so on. Now assume that 103 cars (or 110) wish to use the freeway. In the name of efficiency (and fairness), which cars should be assessed which fees?

(g) Without knowing how the revenues of the congestion tax will be spent, there is no reason to believe that imposing the tax will produce a net benefit for the affected urban motorists. See J. THOMSON, \textit{MODERN TRANSPORT ECONOMICS} 148-49 (1974). This helps explain why local officials have always regarded the congestion tax idea as "political suicide." See J. MEYER, J. KAIN & M. WOHL, \textit{THE URBAN TRANSPORTATION PROBLEM} 340 (1965).

(h) Centralized collection of comprehensive information on persons' travel behavior would threaten many persons' privacy values.

319. Assume the pure case of a facility with no variable costs, whose price, geared to its fixed cost, is set at \$X. Consider all persons who would derive a positive benefit from using the facility, but a benefit less than \$X. The \$X price effectively excludes those persons from the facility. This exclusion eliminates the cost-free benefit which their use of the facility would have entailed.

According to the Bureau's 1955 estimate, placing full tolls on the Interstates would have reduced their traffic by one-third. \textit{BUREAU OF PUBLIC ROADS, supra} note 172, at 26.

320. Assume again the pure case above, at the time when the facility is at the decision-to-build stage. Its cost estimate, let us say, is \$1 million, and the revenue accruing from the \$X price is estimated at \$700,000. From this last point it can be predicted that the facility, if operated on a price basis, will produce user benefits of \$700,000 (plus the consumer surpluses of all the price-payers). If, however, the facility is operated instead on a free basis, all of these benefits will be realized, as will, additionally, all the benefits tied to the new facility users described in note 319 supra.

If there is an intrinsic problem with this line of analysis, it lies in the ability of a government, set loose from the pricing constraint, to assess accurately and honestly what the diverse user benefits from the facility will be. Professor Demsetz, who makes explicit his distrust of public decision-making, sets forth a provocative scheme for avoiding the problem in Demsetz, \textit{The Private Production of Public Goods}, 3 J. LAW & Econ. 293 (1970). What he proposes is a differential pricing system for such facilities, the objective of which would be to charge each user a price just below the personal benefit he would derive from the facility. The trouble with this proposal is that sophisticated methods for determining individual benefits would be (as Demsetz concedes) prohibitively costly, while simpler, less expensive methods would probably produce determinations too crude to make the Demsetz system effective. Demsetz adequately demonstrates that his differential pricing proposal is not inconsistent with basic economic doctrine. Nevertheless, there are public instincts about equality which differential pricing of this sort
Additionally, it makes little economic sense to place a price on one facility if a substitute facility is provided for free.\textsuperscript{321} To the extent that a motorist confronted with an Interstate can return to an ordinary highway which is without any charge, imposing tolls on the Interstates would be certain to bring about substantial traffic misallocations. Finally, attention should be paid to the toll booth procedure at freeway entrances and exits. Such a procedure imposes both an administrative cost upon the highway authority, and a private cost, measured in terms of delay, upon the motorists. For a motorist taking a typical trip on an intercity Interstate, these costs will usually be quite small compared to the motorist's Interstate benefit. However, the costs remain the same regardless of the length of the particular trip. The average trip on an urban freeway is obviously much shorter than the average intercity trip; for urban trips of this sort, the toll both costs, public and private, become relatively substantial. For the urban Interstates, therefore, toll financing could be especially inefficient.\textsuperscript{322}

Efficiency apart, users' fees are typically commended on equity grounds: the person who benefits, pays.\textsuperscript{323} This benefit principle is one which clearly supports freeway tolls. The relevance of this equity principle to the gas tax as the means of Interstate financing is somewhat more complex. It is true, of course, that the motorists who pay the gas tax do benefit as a class from Interstate construction, and therefore the gas tax does have a strong appeal. However, it is also true that within the general class of motorists, the incidence of tax payments does not at all match the incidence of benefits from new highways.\textsuperscript{324} This suggests basic equity problems in the distribution of the Interstate System's costs and benefits. Under a gas tax revenue system, a subsidy runs from those motorists whose use of the System is less than average in favor of those whose use thereof is disproportionately high. Of all the reasons for believing that the Interstate System has inappropriately assisted the trucking industry,\textsuperscript{325}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{322} It was stated repeatedly in the years before 1956 that toll financing was unfeasible for urban freeways. See, e.g., Bureau of Public Roads, supra note 172, at 27-28; W. Owen & C. Dearing, Toll Roads 174-75 (1951); 1955 Senate Hearings, supra note 82, at 871-72 (testimony of Francis du Pont).
\item \textsuperscript{323} See O. Eckstein, Public Finance 54 (3d ed. 1973).
\item \textsuperscript{324} See Friedlaender, supra note 12, at 131-32.
\item \textsuperscript{325} Moynihan concludes that the Interstate System "provide[s] a great subsidy" to truckers because they share the cost of their roadbed with automobiles while the railroads pay the full cost of their own roadbed. New Roads, supra note 13, at 18. The "sharing" fact is of course an important one, but what it demonstrates is not a "subsidy" but rather an inherent economy of trucking which, for the sake of economic efficiency, ought to advance trucking in its competi-
\end{itemize}
\end{footnotesize}
this cross-subsidy is by far the most persuasive.\textsuperscript{326}

The gas tax can also be evaluated in progressivity terms. In the early years of the federal gas tax in the 1920's, the tax was frequently justified on the grounds that its burden fell most heavily on those with the greatest ability to pay\textsuperscript{327}—hardly an unpersuasive rationale in light of the then-prevailing patterns of automobile ownership. But given more contemporary patterns of car ownership, the rationale can only be regarded as erratic as it is applied to a highway program established in 1956. The gas tax is progressive at the bottom of the income scale, since those households which own no cars, and hence purchase no gasoline, generally have low incomes. Twenty-seven percent of all households were carless in 1956,\textsuperscript{328} that figure declining to 19 percent today.\textsuperscript{329} The tax is also progressive, in a way, at the top, since those households with two cars or more (12 percent in 1956,\textsuperscript{330} 34 percent today\textsuperscript{331}) are generally of a high income status. However, within the large category of one-car households (61 percent in 1956,\textsuperscript{332} 47 percent today\textsuperscript{333}), the tax seems wildly regressive; one would guess that for these households gas tax payments are only randomly related to household wealth or income.\textsuperscript{334}

Remaining for consideration is the alternative of financing out of general revenues. Except to the extent that society benefits from Interstate construction in ways not derivable from the immediate benefit received by the Interstate motorists,\textsuperscript{335} the use of general revenues is totally lacking in any benefit justification; a System financed out of general revenues would subsidize motoring in a rather unpalatable way. Viewed in progressivity terms, the general revenues alternative is more attractive at the federal

\textsuperscript{326} Strangely, while the American Railroad Association was represented during the 1954-56 period by a competent and articulate economist, he all but ignored this, his strongest argument. See, e.g., 1955 House Hearings, supra note 62, at 1042-55 (testimony of Burton H. Behling).

\textsuperscript{327} See Burch, supra note 25, at 71.

\textsuperscript{328} AUTOMOBILE MANUFACTURERS ASS'N, AUTOMOBILE FACTS AND FIGURES 36 (37th ed. 1957).


\textsuperscript{330} AUTOMOBILE MANUFACTURERS ASS'N, AUTOMOBILE FACTS AND FIGURES 36 (37th ed. 1957).

\textsuperscript{331} MOTOR VEHICLE MANUFACTURERS ASS'N OF THE U.S., INC., AUTOMOBILE FACTS AND FIGURES 1975, at 32 (1975).

\textsuperscript{332} AUTOMOBILE MANUFACTURERS ASS'N, AUTOMOBILE FACTS AND FIGURES 36 (37th ed. 1957).

\textsuperscript{333} MOTOR VEHICLE MANUFACTURERS ASS'N OF THE U.S., INC., AUTOMOBILE FACTS AND FIGURES 1975, at 32 (1975).

\textsuperscript{334} Likewise, within the class of all two-car families, the relationship between gas tax payments and family income is probably random.

\textsuperscript{335} H.R. Doc. No. 54, 87th Cong., 1st Sess. 4-6, 61-151 (1961).
level than at the state level, since for federal purposes general revenues consist of a quite progressive income tax, while for state purposes it refers to a less progressive compound of income and sales taxes.

All things considered, which of the three alternatives for Interstate financing was most in the public interest remains, in public finance terms, an open question. Tolling does not profess to be relevant to progressivity; it ranks high in benefit-equity; and its efficiency characteristics are generally complex, but on the whole rather negative, particularly for the System's urban routes. The gas tax earns mixed marks across the board. Federal general revenues is the most progressive method of the three, but it makes no contribution to either benefit-equity or efficiency. In these ambivalent circumstances, why did the Eisenhower Administration rule out tolls, despite the President's stated preference? The traditional, institutional, and political reasons for this have been indicated above.\(^{336}\) Having rejected tolls, why did the Administration insist on highway-user taxes rather than general revenues? The answer lies partly in the following syllogism: highway-user taxes made possible the Trust Fund; trust funds did not then appear in the official federal budget; and the President was committed to holding down the federal budget.\(^{337}\) This reasoning, of course, was concerned with images rather than reality; in any event, the exclusion of trust funds from the official budget was a fortuity which has since been corrected. Perhaps the lesson of the entire experience is that when basic principles of public finance do not clearly point to a particular financing alternative, the choice among alternatives is especially likely to turn on factors which public finance would ordinarily regard as extraneous.

The Ford Administration's 1975 proposal\(^{338}\) for modification of Interstate financing would alter the existing Interstate scheme by diverting up to 3 cents of the 4-cent gas tax away from the Trust Fund and into general revenues. Whether there is justification for a special tax on motorists, the revenues of which are not earmarked for highway expenditure, is a question closely tied to the present fuel crisis, with all its extraordinary foreign policy and cartel-economic circumstances; as such, that question is beyond the scope of this Article.

2. The Trust Fund

A common accusation against the Highway Trust Fund has been that it is a device insidiously masterminded by the highway lobby in order to provide a continuing bonanza to the automobile.\(^{339}\) It should be clear that

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336. See notes 178-79 supra.
338. See note 241 supra.
339. See, e.g., MOWBER, supra note 14, at 18-30 (chapter 2 is entitled "Magical Highway
this accusation misrepresents historical reality. A classical function of trust funds has been to render tax increases acceptable to those who will bear the tax burden by assuring these taxpayers that the tax revenues will be spent for their benefit.\textsuperscript{340} Highway-user taxes were drastically increased by the 1956 Act, and the Trust Fund, formalizing the linkage principle, helped make these tax increases politically feasible.\textsuperscript{341} Whether the Interstate System, as financed by the highway-user taxes channelled into the Trust Fund, would in truth be of benefit to the various highway interests, involved close questions as to the ratio between benefits and burdens. The calculations performed by most of the relevant interests came out negative in 1955, but positive in 1956. Even in 1956 the petroleum industry remained antagonistic to the basic idea of linking gas tax revenues to federal highway expenditure taxes. The industry regarded the repeal of the federal gas tax as its overriding legislative goal, and it reasoned that tying the gas tax to the highway program would politically eliminate the possibility of such a repeal.\textsuperscript{342}

Increased motoring since 1956 certainly has meant increased revenue available through the Trust Fund for highway purposes; the total federal highway program grew from $2.875 billion in fiscal year 1959 to $5.325 billion in fiscal year 1973, an increase of about 85 percent. During that interval, however, the total federal budget increased by 350 percent and the gross national product grew by almost 300 percent.\textsuperscript{346}


\textsuperscript{341} Opponents of the Ford Administration's 1975 legislative package legitimately can argue that its proposed 3-cent gas tax diversion dishonors 1956 commitments. See note 241 supra.

\textsuperscript{342} See 1956 House Ways and Means Comm. Hearings, supra note 189, at 537-38. Three years later the petroleum industry waged a vigorous battle against the 1-cent increase in the gas tax needed to prevent the Interstate program from sputtering to a halt. See 1959 House Hearings, supra note 233, at 206-14. Agreeing with the industry were Senators of the stature of Albert Gore, Russell Long, and Eugene McCarthy, who concluded that motorists should not be required to shoulder any further federal taxes; any new Interstate funds, they argued, should be drawn from general revenues. See S. Rep. No. 903, 85th Cong., 1st Sess. 25-26 (1959).

As for the industry's reasoning concerning the Trust Fund as affecting the chances for gas tax repeal, Congress' 1971 repeal of the auto excise tax (a tax never tied to the Trust Fund) supports the industry's political logic.

\textsuperscript{343} Federal-Aid Highway Act of 1956, ch. 462, §§§ 102(a), 108(b), 70 Stat. 374, 378 ($2 billion for the Interstate program and $875 million for A-E-C). Excluded from these calculations is federal assistance for forest highways, national park highways, and other relatively minor special items.


\textsuperscript{345} From $70 billion in 1956 to $268 billion in 1974. See U.S. OFFICE OF MANAGEMENT AND
Hence, one cannot automatically say that the Trust Fund has provided the highway program either with excessive funding or with more funding than it would have received from the congressional process absent the Trust Fund device. Finally, even if the 1956 Act has worked out in ways that have benefited many motorists and motoring interests, the Trust Fund cannot possibly be called a "subsidy to Detroit," at least if "subsidy" is used in its conventional sense. Motorists contribute every penny that the Trust Fund distributes. Moreover, at the time of the 1956 Act there was a 10 percent federal excise tax on automobiles. The Act declined to tie this tax in with the highway program and its Trust Fund; rather, all the proceeds of the tax were allowed to continue to flow into the general treasury. The same is true for the proceeds of the federal excise taxes on lubricating oil and auto parts and accessories, and half of what was then the 10 percent excise tax on new trucks and buses. In 1958, the first full year under the 1956 Act, the Trust Fund collected $2.082 billion in highway-user taxes, while $1.395 billion of such taxes went into general revenue. The auto excise tax was repealed (without much consideration of highway-finance issues) in 1971, but in fiscal year 1975, $200 million of Trust Fund revenues can be spent under the federal "urban system" program for public transporation, this sum increasing to $800 million in fiscal 1976.

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346. From $409 billion in 1956 to $1,224 billion in 1973. Id.
348. Some economists might say that Interstate motorists are "subsidized" in the sense that they are not required to bear the cost of the "externalities" of their motor, chiefly the externalities of pollution and congestion. As for the congestion "externality," the "subsidy" terminology should be deemed inappropriate, since congestion costs, while they may be caused by motorists, are also borne by motorists. See also note 318 supra. Even as for pollution, many economists reject the value-laden "subsidy" language and the question-begging "externality" phase; they would instead speak in terms of how to efficiently deal with the "costly interaction" of activities which are not fully compatible. See, e.g., Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Studies 13, 25 (1972). In any event, whatever the nature of the problem, it is a problem presently shared by all highway building programs in America and hence says nothing about the Interstate program in particular.
350. See 1959 House Hearings, supra note 233, at 107. Taking 1970, for example, as a typical, more recent year, the (then) 7% auto excise tax raised $1.694 billion, a sum equaling more than one-third of the $4.378 billion which was distributed from the Trust Fund during that year. Motor Vehicle Manufacturers Ass'n of the U.S., Inc., 1972 Automobile Facts and Figures 72, 78 (1972).
The realities may well be quite different at the local level, but at the federal level the Trust Fund did not end the traditional excess of motorists' taxes over highway expenditures.

Apart from the general subsidy argument, it has also been more selectively claimed that within the Interstate program a subsidy is received by the urban segments of the System. It is certainly true that the Interstate program, like any highway program fueled by highway-user taxes, harbors significant cross-subsidies. Whether, in particular, an urban cross-subsidy exists is an empirical question to be answered with the assistance of relevant data. On the expenditure side, the Clay Committee had estimated that of the $27 billion required for the entire System, $15 billion (or 55 percent) would be needed for its urban routes. This estimate has proven to be far off the mark in absolute terms, but accurate relatively. Forty-eight percent of all federal Interstate funds disbursed as of summer 1974 had been spent on urban routes; that figure was expected to rise to 53 percent (almost $38 billion) by the time of the System's completion at the end of the decade. On the revenue side our primary concern is with the gas taxes contributed to the Trust Fund. Government statistics show that in 1971, of all vehicle miles driven on the Interstate System, a fraction less than 50 percent were on the urban Interstates; of the vehicle miles driven on all the nation's roads, 52 percent were in urban areas. On the rural Interstates, 15 miles per gallon is the average gas consumption, while on the urban Interstates the estimated average is 13; the rural-urban gas mileage differential for non-Interstate driving is almost certainly greater. Taken together, these facts largely negate the idea of a substantial urban subsidy; if anything, they suggest that as measured against the standards of government

See also the Ford Administration's gas tax diversion proposal discussed in note 228 supra.

353. As of 1960, over $528 million of city general revenues were being spent annually for highways. COMMITTEE ON ECONOMIC DEVELOPMENT, DEVELOPING METROPOLITAN TRANSPORTATION POLICIES 47 (1964). BURRY, supra note 14, at 69, cites figures which suggest a higher total.


355. See CLAY COMMITTEE REPORT, supra note 149, at 18.


357. While the special large-vehicle taxes mostly can be assigned to rural driving, the rationale for these taxes is that large vehicles wear out the roadway more quickly. See note 202 supra. Hence, these taxes should be ignored in striking the urban-rural balance. Sixty-nine percent of Trust Fund revenues come from the gas tax, 11% from the tire taxes. MOTOR VEHICLE MANUFACTURERS ASS'N OF THE U.S., INC., 1972 AUTOMOBILE FACTS AND FIGURES 76 (1972).


359. Id. at 81.

programs generally, the apportionment of costs between urban and rural
is strikingly equitable.

3. The Interstate System as System

A fundamental fact about the Interstate program—and a fact which
sharply distinguishes it from the earlier A-B-C program, and from most
other federal grant-in-aid programs as well—is that it is concerned with a
closed system of facilities with predetermined locations. This is a fact
which one overlooks at his peril. Congress itself is capable of ignoring it,
and when this happens the result can be the frustration of congressional
attempts to improve the program. For example, when Congress stipulated
in the 1962 Act that all urban freeways approved for federal funding must
be "based on a continuing comprehensive transportation planning pro-
cess," it failed to express any clear intent that the urban Interstates
approved in 1955 be ignored so that the urban transportation planning
could proceed on a clean slate. The unfortunate consequence has been
that in most metropolitan areas the planning process has tended to regard
the 1955 Interstate freeways as "committed," i.e., to be accepted by the
planners as a given.

An insufficient regard for the closed system fact is conducive to the
lodging of inappropriate complaints against the program. The Governor of
California and the Task Force of the Governor of Massachusetts have
recently charged that Interstates are being built in those states not
because they are good investments, or even good highway investments,
but rather because the states cannot afford to turn down the 90 percent
federal share. But this assessment unduly ignores the fact that the 1944
and 1956 Acts together allow the construction of Interstates only along
those routes specifically endorsed as worthy by both the states and the

23 U.S.C. § 134(a) (1970) ("carried on cooperatively by state and local communities"). The
highway plan itself is to be "properly coordinated with plans for improvements in other forms of
transportation and . . . formulated with due consideration of [the] probable effect on the future
development of [the metropolitan area]." Id.

362. See Cafferty, Urban Goals and Priorities: The Increasing Role of Transportation
Interpretation, 35 J. AM. INSTITUTE OF PLANNERS 160 (1969). For an instance of this phenomenon in
Los Angeles, see Los Angeles Regional Transportation Study, 1980 Progress Report, 1967
(study prepared for the California Dep’t of Public Works and the Southern California Ass’n of
Governments).

363. See Governor’s Task Force on Transportation, Report to Governor Sargent on
Immediate Action Opportunities, Jan. 1970, at 5-6; Goft, U.S. Meddling in State Affairs Hit by
Brown, L.A. Times, Aug. 16, 1975, § 2, at 1, col. 1. See also R. GOODMAN, AFTER THE PLANNERS 74
(1971) (the "'90-10' formula makes for an irresistible inducement for states to build highways
almost anywhere just to get their hands on the subsidy").
Bureau in their 1947 and 1955 designations. A noted economist, discussing trust funds generally and the Highway Trust Fund in particular, has criticized them for supplying a program with increasing revenues even after the program’s benefits have passed the point of diminishing cost-benefit returns; it is frequently said of the Highway Trust Fund that it is mindlessly self-perpetuating. These criticisms founder on the fact that the Interstate System—the Trust Fund’s primary beneficiary—has been approved explicitly in its 40,000 (now 42,500) mile totality by Congress; indeed, under the Highway Revenue Act of 1956, the Trust Fund is itself designed to survive until—only until—the Interstate System is completed. As for the complaint about continuing funding, one might just as well object to the 1962 San Francisco bond issue for having provided continuing, unreviewed funding for the construction of BART.

At least, this BART analogy would obtain if it were true that Congress was on solid policy ground in conceiving of all the Interstate routes as a unitary, integrated system. Plainly, however, this conception was not at all inevitable, since it is clear that the Interstate System was easily capable of staging and segregation. From the analyses in *Toll Roads and Free*...

364. In the case of both Los Angeles and Boston, the 1955 designations were themselves based on metropolitan freeway plans earlier developed by state and local officials. See *Joint Board for the Metropolitan Master Highway Plan, The Master Highway Plan for the Boston Metropolitan Area* (1948); R. Zettel, *Federal Highway Legislation of 1956 and Its Impact on California* 7 (1957).

The state-federal Interstate cost breakdown is of course 10-90; in view of the state’s obligation to “maintain” System routes (see note 164 supra), the overall state-federal breakdown is more like 20-80. It is clear that the ratio of in-state benefits to out-of-state (or purely national) benefits accruing from the typical Interstate freeway is considerably higher than 20-80. See notes 409-36 and accompanying text infra. But see F. Michelsohn & T. Sandalow, *Government in Urban Areas* 1196 (1969). In light of this imbalance in ratios, the states have a clear incentive to seek Interstate routes that are not necessarily nationally cost-beneficial. Note, however, that the 1944 Congress, acting on the basis of the *Interregional Highways* map, approved a 40,000-mile system (which it later enlarged to 42,500 miles), and that the federal highway agency gave its approval, mainly in 1947 and 1955, to all of the interstate routes. These approvals carried the implicit federal judgments that the Interstate routes are in fact cost-beneficial from a national perspective. One can argue, of course, that the federal cost-benefit judgments should be rendered more nearly on a route-by-route basis, and at a time reasonably close to the beginning of a particular freeway’s construction. I agree with this argument, which is really one version of the more general point developed below regarding the preplanned structure of the Interstate program. See text accompanying notes 368-84 infra.


Roads and Interregional Highways, one can infer that a national system of considerably less than 40,000 miles could have made sense in ordinary transportation terms. The System’s urban Interstates could easily have been classified and ranked in terms of their contribution to the System’s general purposes. As emphasized above, in the 1944 and 1956 Acts, Congress imposed a 42,500 mile limitation on the System. What should be repeated here is that the 42,500-mile figure also functions, in some general way, as an obligation to undertake and complete the entire System.

This is the obligation which creates the problem, especially with the urban Interstates. The following section will discuss the extent to which the urban Interstates have been responsible for serious incidental consequences in urban areas. Objectively regarded, the 1956 Act, in establishing the Interstate program, was significantly deficient in its failure to take these side effects into account. As the next section will show, it certainly is not true that nobody knew anything about these consequences prior to 1956. Nevertheless, the relevant knowledge was quite scattered, and the public’s understanding of urban freeways was certainly limited. It was only the actual post-1956 undertaking of the Interstate program which provided the necessary stimulus for intense, specific thinking about urban freeways and their modern role. Notable early responses to this stimulus were: among urban professionals, a conference in Hartford, Connecticut, in 1958; among the lay public, the first of the urban controversies, which broke out in Reno in the same year; and within the executive branch, the Bragdon 1959-60 review. Experience is, of course, the great educator; as one study of the 1960’s Great Society observes, “[a]lmost by definition, a new social program is likely to be hobbled at first by the lack of knowledge and experience of those charged with its design and operation.”

The truth of this observation, as born out by the Interstate System, serves to counsel caution in the launching of major new social endeavors.

369. See note 121 supra.
370. See notes 113-26 and accompanying text supra. Back in 1960, Moynihan observed that the System was being built in “fragments strewn across the continent,” with virtually no effort to concentrate on the System’s most important routes. This, Moynihan thought, reflected the absence of even a “minimum of businesslike management.” New Roads, supra note 13, at 17.
371. See text accompanying notes 419-24 infra.
372. See text accompanying notes 223 and 289-99 supra.
373. See text accompanying notes 649-51 infra.
375. See notes 263-85 and accompanying text supra.
By the same token, once such endeavors have been launched, it is especially desirable to subject them to prompt, continuing, and thorough review, so as to take advantage of the newly “knowledge and experience” acquired in their early implementation. 377 Yet the Interstate program—its momentum established by the 1956 Act—has enjoyed a quasi-statutory immunity against reevaluations of this sort. By 1960, 4 years into a 35-year program, the President of the United States, deciding that he profoundly disliked the program’s urban component, nevertheless was forced to conclude that “his hands were virtually tied.” 378 By the mid-1960’s the consensus favoring the urban portion of the program had crumbled, yet the federal urban-freeway campaign continued. In 1976 urban freeways are still being built essentially because they seemed like a good idea back in 1955—and this is an arrangement one is hard pressed to justify. The Governors of California and Massachusetts379 do have a valid complaint: today they are substantially bound by the decisions rendered (or concurred in) by their predecessors of 20 years ago. Of course, the 1956 Act can be partly defended against complaints of this sort by pointing out that the Act contemplated that all the Interstates would be completed by 1972. But this is a defense the effect of which is to draw attention to the important fact that since 1956 the character of the Interstate program has drastically changed—from a 16-year $27 billion effort into a program covering upwards of 35 years and costing as much as $184 billion. Congress has never been given a real chance to pass judgment on whether a program of this expanded magnitude is really worthwhile, since from 1958 through 1973 the time and cost increases have been presented to Congress piece by piece, each time with at least the implicit assurance that no further increases would be necessary. 380

As a general matter, congressional efforts at overseeing the Interstate program have not proven especially successful. The urban Interstate controversies have been raging ever since the late 1950’s; Congress has responded to them not by reexamining basic freeway policy, but rather by enacting certain route substitution and route deletion rules which modify, if somewhat haphazardly, what could be thought to constitute the System’s original integrity. 381 New social and environmental values emerged during the 1960’s. In giving recognition to these values, Con-

378. See text accompanying note 282 supra.
379. See text accompanying note 363 supra.
380. Only in 1975 was Congress given any reasonable information concerning the effects of future inflation on the cost of the System.
gress abstained from challenging the Interstate program directly. Instead, it chose to superimpose upon that program a patchwork of strings and conditions; this has encumbered the program in ways which have made it extremely ineffective as a freeway-building effort. Currently loaded down by all these burdens, and with so many of its remaining urban routes buffeted by criticism, the entire program has been placed in a defensive and conservative posture which is ironically contrary to its initial ambitious, forward-looking orientation.

The glory of the Interstate program is that it involves a dramatic and explicit instance of the federal government attempting to plan ahead in a grand-scale, long-term way. There is an underside to this glory, however. Political scientists repeatedly advise us that for several reasons long-range planning is not feasible in a democratic society. Our cumulated Interstate experience can be read as indicating that when the circumstances do permit such planning, what it produces are extremely uneven results. The entire post-1956 Interstate program is one that could have been structured along very different lines, allowing it to proceed ahead deliberately by short-to-medium run increments. Political problems aside, this would have been the wiser course. The Ford Administration's 1975 proposal seeks to establish priorities for remaining Interstate construction in accordance with "the national significance" of a particular route and how "essential" it is to the "connectivity" of the System as a whole. While this is an intelligent step, the proposal comes 20 years too late.

III. THE URBAN INTERSTATES

A. THE RATIONALES

A glance at the experience in other motorized countries verifies what already should be clear—that a nationwide system of freeways need not include freeways within cities. The German autobahnen, planned and begun by the Third Reich, follows the practice of bypassing rather than


383. Where a particular state scheduled to receive no Interstates at all in the first stage, the votes from the state's congressional delegation would be hard to obtain.

384. See Dept't of Transportation 1975 Documents, supra note 72, Section by Section Analysis at 11. The highway bill passed by the Senate incorporated this proposal. See S. 2711, 94th Cong., 1st Sess. § 107(c) (1975). The House approved a weaker version. H.R. 8235, 94th Cong., 1st Sess. § 102(b) (1975). It was the House's version which was then accepted in conference and approved by the full Congress. Federal-Aid Highway Act of 1976, Pub. L. No. 94-290, § 102, 90 Stat. 425.

entering German cities. The English network of motorways, which has been developing in earnest since the early 1960’s, avoids intrusions into England’s metropolitan areas; sometimes, as with London, not even a circumferential bypass is provided. Given the technology of the automobile, it seems entirely feasible to separate intercity from intracity road building. The automobile—unlike, for example, the railroad car—is a vehicle which can quite conveniently transfer from one vehicle-carrying facility to another as it comes into the city. From a national perspective, intercity freeways would appear to foster “interstate commerce” in ways which intracity freeways do not, and the exclusion of the urban Interstates could have reduced the program’s anticipated costs by more than 55 percent. A figure of no less authority than President Eisenhower apparently believed that the program had adopted a bypass strategy. Why was that strategy rejected? What purposes were understood as being served by the inclusion of all the urban routes?

One of the rationales for the urban Interstates repeatedly mentioned during 1954-56 may surprise the reader. The 1956 Act added “Defense” to the title of the Interstate System. One feature of this “defense” element was that military equipment and personnel could be easily transported from one military location to another on the intercity freeways. Military usefulness of this sort had been one of the factors looked at in designating the Interstate System back in 1947, and it was later singled out by President Eisenhower in his memoirs. The urban freeways, it was said, would serve an additional defense purpose—civil defense—in the sense of the evacuation of the urban population in the event of a nuclear attack. The cause of urban evacuation was argued explicitly by the representatives of the big cities, but only after it had

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389. See text accompanying note 162 supra.
390. See text accompanying notes 264-66 supra.
391. All the rationales build on the freeway’s greater vehicle-carrying capacity. See note 515 infra.
394. “And motorists by the millions would read a primary purpose in the signs that would sprout up alongside the pavement: ‘In the event of an enemy attack, this road will be closed . . . ‘” D. EISENHOWER, MANDATE OF CHANGE 549 (1962). See also 1955 Senate Hearings, supra note 28, at 567-73 (testimony of Army Chief of Transportation Maj. Gen. Paul Yount); id. at 62-63 (testimony of Bureau Commissioner Curtis). The Department of Defense, however, rebuffed suggestions that part of the System’s cost be charged against the Department’s budget. Turner Interview. Representative Fallon, the author of the “National Defense” language in the System’s title, indicates that he regarded it as political window-dressing. Fallon Interview.
been ranked as a high priority by the Clay Committee\(^\text{396}\) and spotlighted by President Eisenhower in his message to Congress transmitting the Committee's report.\(^\text{397}\)

In the 1970's for a variety of reasons,\(^\text{398}\) this civil defense idea seems quite preposterous, and by 1972 it had been more-or-less officially abandoned even by the Federal Highway Administration.\(^\text{399}\) As early as 1958, Lewis Mumford was asserting that the entire national defense rationale for the 1956 Act had been nothing more than a "specious guise."\(^\text{400}\) However, if one examines the 1954-56 legislative history, taking it in the context of the civil defense assumptions prevailing during those years,\(^\text{401}\) one is led to two conclusions: first, that it is wrong to impugn the

\(^{396}\) Clay Committee Report, supra note 149, at 5.

\(^{397}\) Id. at iv.

\(^{398}\) For one thing, given the congestion on freeways when the work force descends on them at rush hour, one can't even begin to imagine the congestion if an entire urban population suddenly and simultaneously sought access to the freeways in an evacuation attempt. Also, much of the reason we now sense that rationale as silly is that, whether rightly or wrongly, we no longer seriously worry much about nuclear strikes against American cities. In the middle 1950's—shortly after Korea, not that long after the close of World War II, and long before the cathartically favorable resolution of the Cuban missile crisis—the possibility of a nuclear attack was on everyone's mind. See, e.g., the first paragraph in N. Mailer, The White Negro, in Advertisements for Myself 338 (1959). To regain perspective, we do well to recall that as late as 1961, in the midst of the Berlin crisis, President Kennedy seriously proposed in a nationally televised speech a massive program of building family and neighborhood bomb shelters. See Public Papers of the Presidents of the United States: John F. Kennedy, 1961, at 536-37 (U.S. Government Printing Office 1962). In the 1950's there was wide agreement that civil defense should be a major determinant of domestic policy; many urban planners were willing to call for a halt on all growth in our major metropolitan areas and even a partial relocation of their existing population in order to reduce our nuclear vulnerability. See, e.g., Augur, Decentralization Can't Wait, in Planning 1948, at 27 (Am. Soc'y of Planning Officials 1948), Kelly, The Necessity for Dispersion, 19 J. Am. Institute of Planners 20 (1953).

For an excellent discussion of the ambivalence in the federal government's current civil defense effort, see Wall Street Journal, June 23, 1975, at 1, col. 1.

\(^{399}\) See Federal Highway Administration, Resource Book on the Federal-Aid Highway Program, Sept. 1971. This is a public relations document which, in listing the benefits of the Interstate System, omits civil defense altogether.

As a general matter, the entire "defense" element of the Interstate System has been badly neglected. Because of "bureaucratic delay and inefficiency" within both the Bureau and the Department of Defense, "which might well serve as a textbook example of how a government should not be run," the Interstates were built between 1956 and 1960 with overpasses so low (14 feet) as to restrict their usefulness for missile and rocket transportation; moreover, the 1960 increase to 16 (rather than 17) feet "was controlled almost entirely by budgetary considerations rather than military requirements." H.R. Rep. No. 363, 87th Cong., 1st Sess. 37-38 (1961). As John Burby notes, "'Defense' provided military escort for the trust fund," but it has "since been dropped from common usage in describing the network." Burby, supra note 14, at 92.

\(^{400}\) Mumford, The Highway and the City, Architectural Record, Apr. 1958, at 179.

\(^{401}\) Most important was the assumption that there would be from 2 to 7 hours warning before any nuclear attack. See Owen, supra note 79, at 229; Peterson, Plans for Evacuating a Large City in Case of Atomic Attack, 10 Traffic Q. 38 (1956). It was not until later that
good faith of the civil defense rationale, and second, that despite this good faith, in the important quarters civil defense was regarded as a mere "bonus" benefit for an urban program whose basic benefits lay elsewhere.

The legislative record quite adequately sets forth these basic benefits. For almost everyone the essential point about the urban Interstate was that they would serve as "extensions" of the basic intercity routes on the Interstate System, collecting or distributing within cities traffic heading towards or coming from the nonurban Interstates. It would be unsatisfactory, the idea went, to connect Indianapolis and Cincinnati with Interstate 74, which can be driven in less than two hours, if the motorist must pick up I-74 on the outskirts of Indianapolis and get off it on the outskirts of Cincinnati, thereby subjecting himself to an additional two hours of intrametropolitan driving on the ordinarily congested streets of those two major cities. This "extension rationale," or at least a variation of it, had been pressed most vigorously in Interregional Highways back in 1943. The urban maps contained in the Yellow Book verify that the developments in guided missile technology made this assumption obsolete (although these developments were somewhat foreseeable as far back as 1956 (see Owen, supra note 79, at 229)).

402. When General Clay testified before the Senate subcommittee in 1955, he conceded that the urban Interstates would not be completely effective for civil defense, but he still asserted they would provide a "very excellent opportunity to do a considerable amount of evacuation," and that his concern was not merely for anticipatory evacuation, but also for an orderly evacuation and rehabilitation of the city subsequent to a nuclear attack. 1955 Senate Hearings, supra note 82, at 405. Clay was strongly supported on these issues by the testimony of the federal Administrator of Civil Defense, who introduced a consultant's study to help show that the civil defense "performance" of urban freeways would be "quite impressive." Id. at 591-93.

403. In 1955-56 it had been argued that the System's defense rationale warranted funding out of general revenues. See text accompanying notes 167-69 supra. Rejection of this financing scheme by Congress and the Administration indicates that they conceived of the Interstates as intended to fulfill ordinary highway transportation purposes. A discussion between Senator Gore and the Bureau Commissioner in 1955 narrowed down their differences—Gore stating that civil defense was merely "incidental," the Commissioner rejecting that adjective, but conceding that the urban routes still would be necessary parts of the System even if civil defense were of no concern. 1955 Senate Hearings, supra note 82, at 687. Compare id., at 405, 574-79 (Senator Estes Kefauver), with id. at 687 (Senator Strom Thurmond).

404. See 1944 House Hearings, supra note 31, at 74 (testimony of Massachusetts Public Works Commissioner Herman MacDonald); 1955 Senate Hearings, supra note 82, at 672. See also 1955 Bureau Memorandum, supra note 136, at 2, enumerating the Bureau's criteria for the reserved 2,200 urban miles: "All additions must be located to serve interstate routes effectively either as feeders thereto or distributors therefrom. Routes which are principally for local service without direct relation to the interstate system cannot be considered."

405. See INTERREGIONAL HIGHWAYS, supra note 121, at 56-59. This document reported that "on main highways at the approaches to any city," the traffic is especially heavy. A "common impression" is that urban bypass routes would effectively reduce the congestion at these approach points, but this is a "fallacy," since a very large part of [this] traffic originates in or is destined to the city itself. It cannot be bypassed. In general, the larger the city the larger is the proportion of the traffic on the main approach highways that is thus essentially concerned with the city.
rationale is, in some minimum map-sense, a nonwaivable requirement for every one of the urban Interstates. Each urban Interstate ties in with one of the System's intercity routes either directly or (occasionally) via another urban Interstate. The typical urban Interstate—unless it is a mere "spur" or unless there are topological barriers—connects up with an intercity Interstate at each of its ends; and the obvious function of such spurs is to afford the smaller cities access to the regular Interstate passing by a few miles away. The Miami map shows only one Interstate entering the city from the north and halting in midcity.\textsuperscript{407} Indianapolis, on the other hand, is rather thoroughly crisscrossed and encircled by Interstates.\textsuperscript{408} This is entirely sensible in basic extension terms. For obvious geographic reasons only one of the intercity Interstates reaches Miami, and reaches it only from the north; but Indianapolis, with its convenient midwestern location, is the origin of I-69 heading north towards Flint, and a midway-point for three other Interstates: I-65 from Chicago to Louisville, I-74 from Bloomington to Cincinnati, and I-70 from St. Louis to Columbus.

While the extension rationale was quite prominent in 1943-44 and 1954-56, in the discussions during those periods an additional benefit was also seen in the urban Interstates: these Interstates would help meet the internal transportation needs of the metropolitan areas themselves. It should be made clear that the cities never questioned or disputed the extension rationale; quite to the contrary, they cherished it insofar as it gave them a handle with which to argue for federal funding for one kind of expensive urban project long before Congress had become willing to invest in local facilities on a more general basis.\textsuperscript{409} However, especially during the 1955-56 period, the cities were insistent on advising Congress that the urban Interstates were also essential if the cities were to

Furthermore, of this city-concerned traffic, the largest single element originates in or is destined to the business center of the city. \textit{Id.} at 58-61. Therefore, to perform their extension function, the urban Interstates must at least approach that business center.

This reasoning is a "variation" of the purer extension reasoning in the sense that it is concerned with the traffic on a highway as that highway approaches a major city. This traffic certainly does include many vehicles which have departed from (or passed nearby) some other metropolitan area. However, it also includes large numbers of vehicles whose trips have originated not within the metropolis itself, but still within the larger "region" for which the metropolis serves as the center. See Friedmann & Miller, \textit{The Urban Field}, 31 J. AM. INSTITUTE OF PLANNERS, 312 (1965). If the Baltimore-Washington data in \textit{Interregional Highways} is representative, almost half of the traffic on highways approaching major cities is intraregional rather than interregional in character.


408. \textit{Id.} at 22.

409. Telephone interview with Randy Hamilton, July 24, 1973. Hamilton was the American Municipal Association (AMA) delegate to the Clay Committee staff during 1954-55.
cope with their own transportation problems. Section 116(b) of the 1956 Act ultimately read in part as follows:

Insofar as possible in consonance with this objective [the “prompt completion” of the System], existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

Within a year after the Act was signed the Bureau had worked out an interpretation of the “equal consideration” clause of section 116(b), one which held that in planning “the System as a whole and each segment thereof,” the needs of “so-called local traffic” and the needs of “so-called interstate commerce traffic” should be given “the same amount of consideration.” Section 116(b) was, however, capable of a reading quite different from that given it by the Bureau. That alternative reading, building on the syntax of the entire sentence in which the clause appears, would suggest that “local needs” should be given “equal consideration” only on the specific question of whether to include “existing highways” on the Interstate System, rather than building new highways in new locations. This narrower reading of section 116(b) was endorsed by both BOB and General Bragdon during the 1959-60 White House review. The section 116(b) issue, having been vigorously debated back and forth between Bragdon and the Bureau of Public Roads, eventually wended its way to the Department of Justice, where an Assistant Attorney General reached the conclusion that either of the section 116(b) interpretations could be defended as a law, and therefore that the choice between them should be determined by policy considerations—about which the Justice Depart-

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410. See notes 485-508 and accompanying text infra.
413. See id., Annex No. 5, at 3. As the BOB report correctly notes, the step-by-step legislative history of § 116(b) is ambiguous, as were later statements about § 116(b) by various Senators and by the Federal Highway Administrator. Id., Annex No. 5, at 1-4. Frank Turner indicates that Senator Robert Kerr had a hand in § 116(b), and that his concern was for existing highway incorporation. Turner Interview. The last sentence of § 116(b) called on the Bureau of Public Roads to prepare a report on its compliance with § 116(b); the Bureau’s report, submitted in 1958, dealt only with existing highway incorporation. H.R. Doc. No. 74, 86th Cong., 1st Sess. (1959). The Bureau’s basic conclusion was that 72% of the Interstate System should be in new locations. Id. at 12.
414. See text accompanying notes 263-85 supra.
ment would itself have nothing to say.\textsuperscript{415}

But why the intensity of this debate? Cannot urban Interstates handle extension and intrametropolitan traffic at one and the same time? If so, why should we not want them to? This in essence was the position taken by the Bureau during the 1959-60 period.\textsuperscript{416} In considering this position, we should take note of General Clay's present views.\textsuperscript{417} Clay now indicates that his Committee contemplated only extension-oriented freeways,\textsuperscript{418} that section 116(b) introduced the intrametropolitan idea, and that in so doing section 116(b) perverted his Committee's understanding and launched an urban program which Clay himself deprecates. With Clay's views in mind, it proves possible to identify several areas in which acceptance of the intrametropolitan rationale does make a difference in the formulation of Interstate policy.

The first of these policy areas involves, quite simply and importantly, the number of the urban Interstates. Clearly the freeway mileage needed for extension purposes alone is much less than the mileage required if those freeways are intended for both extension and intracity traffic. Any urban freeway obviously can handle some "extension" traffic, and as indicated, every urban Interstate has some extension tie-in.\textsuperscript{419} But despite this, and despite the stubborn claims in a 1970 position paper prepared by the Federal Highway Administration,\textsuperscript{420} it seems undeniably true that a significant number of the urban Interstates can be arguably worth their cost only if the accommodation of intrametropolitan traffic is considered to be one of their major intended benefits. In fact, traffic counts on particular urban Interstates indicate that 82 percent of all vehicles driving thereon carry in-state license plates.\textsuperscript{421} During the 1959-60 White House review, General Bragdon, in rejecting the intrametropolitan rationale which he thought attributable to section 116(b), was able to recommend the dele-

\textsuperscript{415} See H. Kaltenbach, Memorandum for the Record, Jan. 29, 1960 (Bragdon Files, Eisenhower Papers, Eisenhower Library).
\textsuperscript{417} Clay Interview.
\textsuperscript{418} See note 613 and accompanying text infra.
\textsuperscript{419} See text accompanying notes 407-08 supra.
\textsuperscript{420} See Federal Highway Administration, Stewardship Report on Administration of the Federal-Aid Highway Program 1956-1970, in Hearings on Report on the Status of the Federal-Aid Highway Program Before the Subcomm. on Roads of the Senate Comm. on Public Works, 91st Cong., 2d Sess. 98-114 (1970), arguing that each and every Interstate under controversy at the local level was "essential" to the "continuity" or the "integration" of the overall Interstate System.
\textsuperscript{421} Telephone interview with Bob Finch, Federal Highway Administration official, July 3, 1975. This figure is only suggestive, since almost all states contain more than one metropolitan area. Finch's figure for the rural Interstates is 76%.
tion from the System of 1,700 miles of urban routes. In 1967 Lowell Bridwell, then Federal Highway Administrator, stated in congressional testimony that not only the Embarcadero Freeway in San Francisco but every one of the urban Interstates then in controversy was not necessary for a "continuous or connected system;" each of them instead was due "to the statutory requirement of equal consideration to local traffic needs." The standards which Congress recently has employed in enacting its route substitution and public transit provisions reveal a congressional understanding that not all of the designated urban Interstates are "essential" to a "unified and connected Interstate System." Another policy area where full acceptance of an intrametropolitan rationale clearly makes a difference concerns the number of freeway lanes. While a four-lane freeway divided two and two might suffice in a

422. See text accompanying notes 274-75 supra Moynihan, who apparently had interviewed Bragdon (see Letter from Daniel Moynihan to General Bragdon, Dec. 21, 1959 (Bragdon Files, Eisenhower Papers, Eisenhower Library)), asserted in his 1960 article that § 116(b) was resulting in the "construction of [urban] arterial highways only by courtesy connected with interstate system." New Roads, supra note 13, at 19.

423. 1967 House Hearings, supra note 144, at 42.

While Bragdon and Bridwell are correct in their assessment of the influence of the intrametropolitan rationale on urban Interstate mileage, they are in error in attributing that mileage to § 116(b) (Moynihan makes the same error (see note 422 supra)). The fact is that almost all the freeways in question, including the Embarcadero itself, had been designated in 1955 and published in the Yellow Book. This apparently confirms that, General Clay's position notwithstanding, the intrametropolitan rationale had been a significant part of the Interstate program well prior to 1956 and § 116(b). One can find traces of this rationale as far back as Interregional Highways. The original state and federal emphasis on rural roads, that report noted, had led to a situation in which the greatest traffic deficiencies were those in cities; therefore, it reasoned, the federal priority should now be on roadbuilding in cities. INTERREGIONAL HIGHWAYS, supra note 121, at 3. The Bureau Commissioner, when asked in 1955 whether the urban Interstates to be designated later that year would serve extension or intrametropolitan traffic, twice answered "both." 1955 Senate Hearings, supra note 82, at 686, 877.

424. Substitutions and trades are allowed only if the original Interstate is not "essential" in this way. 23 U.S.C. §§ 103(e)(2), (4) (Supp. III, 1973). The substitutions and trades which have been approved by the Secretary of Transportation (see text accompanying notes 300 and 308 supra) indicate his agreement in specific cases with the general understanding of Congress that many routes are not so "essential."

The aspect of the Ford Administration's proposal relevant to this issue is mentioned in the text accompanying notes 436 infra.

425. The two rationales could also possibly differ on the location of a particular freeway within a city, since the city's internal traffic flow might be out of line with the flow of traffic into the city from without. See Burch, supra note 25, at 235. But it appears that locational mismatches of this sort seldom occur in the real world, and that extension-oriented freeways usually satisfy intracity needs rather well. In the entire record of the urban interstates, one can find barely a suggestion that extension reasoning has resulted in the placement of freeways which inadequately accommodate intrametropolitan traffic needs. (If one suggestion is in E. Hопwood & R. Boyce, STUDIES OF THE CENTRAL BUSINESS DISTRICT AND URBAN FREEWAY DEVELOPMENT 99 (1959)). The C program's 1955 change from an intrametropolitan to an extension rationale (see text accompanying notes 57-62 supra) is bewailed by Burch as an urban disaster. Burch, supra note 25, at 235. Yet in all the weeks of 1955 Congressional hearings, urban representatives mentioned this
particular case if only intercity traffic were considered, eight lanes might be a minimum if the freeway were to handle local urban traffic as well.\textsuperscript{426} This lane matter is of special interest because it reveals how pursuit of the intrametropolitan rationale can interfere—and in the real world twice daily does interfere—with the achievement of the extension purpose. Anyone leaving San Diego in midafternoon for Los Angeles along I-5 will find that the free flow of his intermetropolitan trip will be curtailed by the Los Angeles metropolitan rush-hour traffic that clogs the freeway from Long Beach on north.

The lane question also contains an interesting element of complexity which calls for examination. Even if the urban interstate is intended exclusively for extension travel and even if four lanes would suffice for extension travel, one must wonder whether there is any way to prevent local traffic from entering the freeway. If not, the extra lanes would need to be built anyway, if only to protect the interests of the extension traffic. In fact, there is a way to render the Interstate unattractive to local traffic: by limiting the number or frequency of entrance-exit interchanges. Intercity travel means long trips and hence will not be greatly influenced by interchange placement; but since local travel means short trips, the extent of local travel’s freeway utilization does become a function of interchange frequency.

On the issue of interchanges, and possibly lanes as well, the Bureau concluded, in considering the 1956 Act, that its interpretation of section 116(b) required it to revise its policies so as to render them more generous to the interests of local motorists. The resulting additions in urban and Interstate miles and urban interchanges (and possibly lanes) may have been in the vicinity of 63 percent.\textsuperscript{427} When the cost of the entire System, calculated at \$25 billion in 1956, was re-estimated by the Bureau at \$41 billion in 1958, \$4 billion of this \$14 billion increase stemmed from the various changes in the System, including (but not limited to) the additions of interchanges and lanes.\textsuperscript{428}

Multi-billion dollar expenditures\textsuperscript{429} are of course major matters in and

\textsuperscript{426} See Friedlaender, \textit{supra} note 12, at 84.

\textsuperscript{427} Bureau of Public Roads, 1958 Interstate Cost Estimate, H.R. Doc. No. 300, 85th Cong., 2d Sess. 8 (1958), states that the Bureau’s interpretation of § 116(b) led it to increase the number of interchanges, grade separations, and frontage roads. Frank Turner confirms that there were lane additions as well. Turner Interview. The general figure on increases which the Bureau’s report sets out is 63%.


\textsuperscript{429} Four billion dollars, plus the cost of the pre-§ 116(b) intrametropolitan-oriented urban Interstate routes. See note 421 and accompanying text \textit{supra}. 
of themselves. But cost, important as it may be, is not the only issue at stake in the decision whether to consider intrametropolitan in addition to intermetropolitan needs. At a very general level, the reason for building the entire Interstate System is the high-quality, high-volume transportation service which modern freeways provide. There is a world of difference, however, between the two rationales in their implications for federal urban policy. One rationale expresses a federal interest in city roads only insofar as they are adjuncts of a nationwide intercity highway system; the other rationale exalts the city as the entity whose needs the federal program is designed to fulfill. This analysis may initially suggest the appeal of the intrametropolitan rationale; however, the analysis must then be expanded in order to give recognition to the serious side effects which freeways produce in urban areas. Each urban Interstate will bring about some of these effects, and therefore the more Interstates built within a metropolitan area the more widespread these effects will be. Also, while these effects can be minimized if a freeway is designed to carry extension traffic only, they will be at their greatest if the freeway is deliberately designed to accommodate intrametropolitan traffic. It is the fully intrametropolitan freeway which will have the greatest impact, for example, on metropolitan development and on the plight of public transit. General Bragdon was gradually learning of these urban effects during 1959, and General Clay is certainly aware of them now. Both of these men also knew that the Interstate program organized during 1954-56 was poorly equipped to cope with these effects. Bragdon and Clay are only partly correct in believing that the intrametropolitan rationale entered the urban program via section 116(b); but they are entirely right in thinking that the full acceptance of that rationale was a major policy choice, and also a cause for significant concern.

Bragdon, of course, was in a position to challenge this rationale during the 1959-60 White House review, and in mounting his challenge he was led to question the Bureau's revised policies on lanes and interchanges. Long negotiating sessions between Bragdon and the Bureau ensued, and these negotiations eventuated in agreements on the lane and interchange issues. During the course of the negotiations Bragdon

430. See Burch, supra note 25, at 235.
431. On lanes, the agreement was the Bureau would promulgate a standard limiting the Interstates to not more than four lanes in cities of less than 400,000 population, not more than six lanes in cities of less than 1 million, and not more than eight in larger cities. On interchanges, the agreed-upon standard stipulated that interchanges in urban areas should be at least 2 miles apart, 4 miles apart in suburban areas, and 8 miles apart in rural areas. Both these standards were to be cast in the form of guidelines rather than fixed rules. Deviations from the lane guideline could be approved only by the Bureau's Washington office and only if several rigorous-appearing criteria were satisfied, including the inadequacy of public transportation and more conventional urban highways as ways of accommodating the projected travel needs. Departures
retreated from his strongest positions; moreover, the agreements themselves, whether Bragdon realized this or not, amounted to a basic victory for the Bureau in the general policy dispute which underlay the specific lane and interchange issues. That is, the lane and the interchange policies which the agreements embody seem eminently well-suited for freeways which quite effectively cater to intrametropolitan traffic. What appears true on paper is substantiated in reality; to my knowledge, every urban Interstate constructed since 1960 is regarded locally as an essential part of the local transportation system.

In another application of his general reasoning, during the 1959-60 review Bragdon also recommended the deletion from the System of 1,700 miles of urban routes, the routes which he thought could be justified only in intrametropolitan rather than extension terms. Here again Bragdon was unsuccessful, since he was unable to secure the President’s approval of this recommendation. The Bragdon effort thus essentially failed on every front. The urban Interstates accordingly survived the Eisenhower Administration with their intrametropolitan rationale fully intact, an equal partner in the urban program. It was not until 1975 that this rationale was again seriously questioned. The Ford Administration’s 1975 proposal, with respect to the urban Interstates yet to be constructed,

from the interchange standard would not need to be referred to Washington, but under no circumstances could interchanges be spaced closer together than 1 mile in urban or 3 miles in rural areas. See Interim Report, supra note 89, at 22-24.


432. On the lane matter he had at one time favored a rule of no more than four lanes on freeways in cities of less than 1 million, and no more than six in larger cities no matter what their size. See J.S. Bragdon, Fifth Draft of First Interim Report on Progress Review of the National System of Interstate and Defense Highways, Dec. 28, 1959, at 5 (Bragdon Files, Eisenhower Papers, Eisenhower Library). On interchanges he had evidently once argued for a minimum spacing of 4 (or perhaps even 8) miles. Turner interview. Additionally, Bragdon wanted fixed rules, not mere guidelines. Whether the 1960 agreements also embodied significant concessions by the Bureau is hard to say. The agreements did commit the Bureau to issue official standards on matters which until then had been dealt with informally. Frank Turner’s recollection, however, is that the agreed-upon standards were largely consistent with the practices which were occurring in the field anyway. In the late 1950’s highway officials believed that four lanes in one direction were the most with which ordinary drivers could safely cope; an eight-lane maximum thus was in accordance with accepted tenets of freeway engineering.

433. Partly this is because in their post-1960 administration these “guidelines” have turned out to be remarkably porous. Proposals for up to 10 lanes for urban Interstates have been routinely approved, so long as traffic counts are high enough. Telephone interview with William Chin, design official in the Federal Highway Administration Regional Office in San Francisco, Aug. 23, 1974. The absolute rule on 1-mile interchange spacing often has been honored in the breach, especially in California. Id. Back in 1960, the Bureau was in a much better position than Bragdon to estimate this porousness of implementation.

434. See text accompanying notes 274-75 supra.
435. See text accompanying note 282 supra.
seeks to give a strong priority to those urban routes needed for the "integrity of a connected Interstate network," and to postpone effectively into the indefinite future the funding of routes which basically "provide commuter service."

To assess the full meaning of Bragdon's failure to curtail the intrametropolitan rationale in 1960—a failure which allowed that rationale to flourish for the ensuing 15 years—requires some understanding of the collateral effects of the urban Interstates. These effects, and the claims concerning them, comprise the topic under discussion for the remainder of this Article.

B. THE INDICTMENT

1. An Overview and Preliminary Analysis

During the 2 years of activity preceding the 1956 Act, the American Association of State Highway Officials under the leadership of its president, Alf Johnson, urged inclusion of the urban routes in the System. By the time of his retirement from AASHO in 1972, however, Johnson had recanted, stating for publication that the inclusion of the urban Interstates had been a legislative mistake. General Clay has similarly disowned the urban Interstates, and President Eisenhower was distinctly unhappy when he belatedly learned what they were all about. In reaching their conclusion, these individuals were in one way or another responding to a set of criticisms of the urban Interstates which had begun to surface in the late 1950's, and which have been pressed with mounting vigor since the mid-1960's in a body of writings often nourished by freeway controversies at the community level. These are the criticisms which were collectively referred to in the Introduction as the "indictment" entered against the urban Interstates, an indictment which is of special importance because of the acceptance it has secured from a wide segment of public opinion.

The indictment's initial charge, a historical-political one, is that the urban portion of the Interstate program as established in the 1956 Act is attributable to the machinations of the highway lobby. The indictment then posits that the urban Interstates have failed to achieve their stated purpose of relieving urban traffic congestion. It next proceeds in several

436. See Dept' of Transportation 1975 Documen[s], supra note 72, Explanation at 2-4.
438. Cameron, How the Interstate Changed the Face of the Nation, FORTUNE, July 1971, at 78, 125.
439. See text accompanying notes 417-18 supra.
440. See text accompanying notes 265-66 supra.
441. See notes 13-15 and accompanying text supra.
counts to itemize a number of ways in which the effects of the urban Interstates have been unfortunate, if not perverse. The urban Interstates have polluted our air, ravaged the urban environment, and ruined its parks and open spaces. They have worked to destroy viable minority low-income neighborhoods and callously have evicted staggering numbers of residents and small businessmen. They are the cause of the disastrous decline of urban public transportation. They have brought about a dysfunctional suburbanization of the country’s metropolitan areas with no regard for proper principles of city planning. While many of these evils were the objects of congressional or administrative reforms instituted in the late 1960’s, these reforms arrived too late, have attempted no more than amelioration, and often have failed even in this modest endeavor.\(^{442}\)

A further question involved in the indictment concerns the extent to which the various adverse effects which the indictment identifies were appreciated back in 1956. This is a question on which the literature is divided—Moynihan in 1960 proclaiming that the effects in fact were appreciated, Moynihan in 1970 insisting that they were hidden from view.\(^{443}\) Some support for Moynihan’s 1970 position can be found in the posture in which the Interstate issue was presented to the federal government in the mid-1950’s. The Interstate System had, after all, been signed into law in 1944 and had been designated administratively in 1947 and 1955. By 1954 a more-than-trivial amount of construction work had been completed or at least commenced. The desirability of the Interstate System having been established both in Congress and in the executive branch, the immediate issue facing the federal government in 1955 and 1956 involved the financing and administration of the Interstate program.\(^{444}\) Had the sequence of events not narrowed the Interstate issue in this way, it can probably be assumed that federal consideration of the merits of the System would have been at least somewhat more extensive and ambitious.

The thin treatment of the Interstate System by the 84th Congress additionally can be explained in terms of the public understanding of urban freeways in the 1950’s. The short of the matter is that during that period, urban freeways were regarded widely as an obvious, uncomplicated “good.” In the nation’s newspapers, editorial support for the Inter-

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\(^{443}\) See text accompanying notes 17-18 supra.

\(^{444}\) In this vein, see General Clay’s statement, at the outset of his committee’s hearings, that the need for the System had already been authoritatively determined, and that therefore his committee’s chief concern would be for the financing and the governmental organization of an Interstate program. President’s Advisory Committee on a National Highway Program, Minutes of Public Hearings, 1955, at 1 (unpublished document in the Dep’t of Transportation library, Washington, D.C.).
state program was warm and virtually unanimous. The Hearst chain was especially enthusiastic. As for the "liberals," their "litany" during the 1950's was "Better Schools, Better Hospitals, Better Roads." The few conservatives who opposed the Interstate program (for the reason that it unduly federalized a highway-building function which the states were willing and able to perform) nevertheless volunteered their agreement with the urban portion of the program, on grounds of the overwhelming needs of urban traffic. The mid-1950's intellectual community can be represented by Wilfred Owen, the Brookings Institution's urban transportation specialist, whose 1956 book, The Metropolitan Transportation Problem, is still regarded as a "classic." While that book expresses both a concern for public transportation and a reservation about freeway traffic generation, one of its basic conclusions was that urban freeways constitute a vital "improvement" in urban transportation generally necessary if cities are to be successful in "adap[ting] to the automotive age." Other liberal intellectuals found the Interstate issue so entirely obvious as to be not even worthy of mention. During the entire 1954-56 period, New Republic ran only one four-paragraph article on the Interstate legislative effort, and this article's sole policy statement was that "everyone agrees that new highways are needed." In an influential 1958 essay evaluating the Eisenhower Presidency, William Shannon concluded, with no mention of the 1956 Act, that the Eisenhower era should be assessed as "the time of the great postponement" in which "no national problem [has been] advanced importantly toward solution nor its dimensions significantly altered."

If all the charges in the indictment were completely true, one might be inclined to agree that the 1956 Act was a disastrous exercise in blissful mid-fifties urban ignorance. However, a closer analysis of the 1956 Act, its

445. See LEAVITT, supra note 14, at 40.
449. Lupo, Colcord & Fowler, supra note 12, at 188.
451. Id. at 31, 40-54, 105-14.
legislative evolution, and its early implementation indicates the inade-
quacy of such an appraisal. In reporting below on what such an analysis had
yielded, this Article will first identify a compensating virtue found in the
1956 Act which its urban critics have ignored. The Article will then briefly
sketch the results of that analysis as applied to several of the indictment’s
counts. In Subsection (2), the remaining counts will be examined at
greater length and in greater detail.

a. Public hearings: When measured against contemporary urban
values, the 1956 Act deserves positive credit for at least one of its
provisions. It was section 116(c) of that Act which introduced into Title 23
the requirement that a local public hearing be held for all federal-aid urban
highways.454 A tracing of the somewhat flukish legislative history of this
provision,455 however, makes it difficult to discern what its inclusion in the


791, which had mandated a public hearing for every federal-aid highway "bypassing any city or
town." (It is said that this 1950 provision was due to Senator Dennis Chavez, chairman of the
Senate Public Works Committee, who had become annoyed when a federally aided realignment
of a state highway had taken business away from a bar owned by his brother-in-law (Turner
Interview).) After positing the public hearing requirement, § 13 went on to require that the state
highway department "certify" to the Bureau that it had considered the bypass’s "economic
effects": this made clear that "economic effects" was the issue which it was the purpose of
the hearings to explore. These post-1950 public hearings, although thus quite limited in both their
number and their scope, were regarded as a nuisance by state highway officials. The public
hearing issue was not raised in 1955-56 only because the Administration's 1955 bill, as well as
the 1955 Fallon bill reported out to the House, would have rendered § 13 inapplicable to Interstate
projects; the idea apparently was that the public hearings produced delay which was at odds
with the goal of achieving the prompt completion of the Interstate System. State highway officials
supported this amendment with public statements which exhibited an unabashed arrogance.
See, e.g., 1955 Senate Hearings, supra note 82, at 391-92. See also 1956 House Public Works
Comm. Hearings, supra note 155, at 76. On the Senate side, the Gore bill, approved by the
Senate in 1955, contained a section specifically reaffirming (and somewhat clarifying) the
existing § 13 public hearing requirement. The bill which finally passed the House in 1956 backed
away from the Fallon proposal by eliminating any mention of public hearings; it accordingly would
have preserved § 13 as it was. See H.R. Rep. No. 2436, 84th Cong., 2d Sess. 36 (1956). The
Senate's 1956 bill included basically the same reaffirming and clarifying section which the
Senate had approved the year before.

There thus were certain differences between the House and Senate bills, but these
differences were both minor and technical. Note, then, what happened in conference. The
conferees, while accepting the syntactic format of the Senate version, added new words to that
version so as to impose the public hearing requirement whenever a highway either "bypasses or
enters into" an urban area. What it was that occasioned in conference this sharp change of
direction—quite foreign to the conference’s supposed function of resolving or compromising
House-Senate differences—has not been disclosed, although one source indicates that the new
provision was authored in a mellow due process mood by Senator Francis Case. (Turner
Interview). That the change of direction was not given careful thought is suggested by the fact that
the conference bill (and hence the Act) did not expand the scope of the public hearing beyond
the issue of "economic effects"; this is a sensible limitation for hearings on bypass highways, but
an arbitrary limitation for hearings on urban highways generally. The congressional outcome
1956 Act truly revealed about the congressional understanding of the urban situation.

b. Air pollution: The urban Interstates have induced motoring, and to that extent can be held responsible for the air pollution which urban motoring produces. However, the steady flow of freeway driving results in the emission of less carbon monoxide and fewer hydrocarbons than the stop-and-go driving done on ordinary city streets. All one can confidently say about the net effect of the urban Interstates upon urban air quality is that it is uncertain. In the mid-fifties the general public was not particularly aroused about air pollution; moreover, the extent of the automobile's contribution to this pollution was just beginning to be publicly understood—and was not yet understood in Congress,keeps congressional hearings reveal. The theory of the photochemical nature of urban smog which suggested the significance of the automobile had been developed in 1949 by Dr. Haagen-Smit of the California Institute of Technology. In 1954 Haagen-Smit, mindful of the constant-speed

must have led many state highway officials to sue their preference to press the public hearing issue; and "outraged" Robert Moses "fulminated" against §116 in a 1957 report-the-citizenry in Harper's. Moses, The New Superhighways: Blessing or Blight, HARPER'S, Dec. 1956, at 27, 31, discussed in SCHNEIDER, supra note 14, at 95-96.


456. See text accompanying notes 515-31 infra.

457. See Federal Highway Administration, Resource Book on the Federal-Aid Highway Program, Sept. 1971, at 103 (finding a 2:1 ratio). But see Schneiderman, Cohn & Paulson, Air Pollution and Urban Freeways: Making a Record on Hazards to Health and Property, 20 CATH. U.L. REV. 5, 10 (1970), who claim that freeway driving fares badly in the emission of nitrogen oxide; I have been unable to document this.

458. An exception is Los Angeles, where by 1955 "smog" had already become a controversial political issue. See J. Flick, The CAR CULTURE 222-33 (1975).


460. Hearings on S. 690 and S. 928 Before a Subcomm. of the Senate Comm. on Public Works, 84th Cong., 1st Sess. (1955). For example, an industrial spokesman referred to the "popular view" that "industry" was the "sole [air pollution] offender," and spokesman conceded that there was a "certain logic" in this view, since industrial pollution was so conspicuous on a smokestack-by-smokestack basis. Id. at 248.

factor but apparently in the dark about traffic generation, published his conclusion that "[t]he construction of freeways . . . an excellent means towards the reduction of exhaust fumes." 462

c. Residential displacement. According to one estimate, the Interstate System is responsible for the displacement of 1 million persons. 463 Relocation assistance was first provided by the 1962 Act, and was then bolstered in 1968 and 1970. 464 By these years, however, much of the harm had already been done, for the 1956 Act itself contained no relocation provisions. 465 It has been asserted that the 84th Congress "never discussed" the relocation question. 466 This assertion is false. Prodded by the forceful testimony of New York City's Robert Moses, 467 the bills considered by the House in 1955 and then approved by the House in 1956 would have rendered family relocation expenses includable within highway "construction" costs for purposes of federal funding. 468 for the Interstate program, this would have entailed a 90 percent federal share of payments made to relocates. However, in the Senate in 1956, this provision was deleted by the Public Works Committee when it marked up the House's bill. 469 On the Senate floor, Senator Herbert H. Lehman's amendment to reinstate the House's provision was defeated by a voice vote. 470 and in conference the House acceded to this deletion. 471 The House conferees' willingness to accede on this one issue is typical of the kind of horse trading which characterizes conferences. 472 but the reasons for the Senate's hostility to the House's provision have never been adequately explained. 473 One factor which surely did not help was the

464. See note 246 supra.
465. Compare the 1956 Act's allowance of federal reimbursement for relocation payments made to public utilities. See text accompanying note 226 supra.
467. 1955 House Hearings, supra note 62, at 404-05. Moses' reasoning was quite practical. Displacements were a potential source of major opposition to the badly needed urban interstates. "Generous" relocation assistance—assistance which even goes "beyond being merely just and fair"—would be an effective way of buying off that opposition. See also CARO, supra note 14, at 847-49.
468. For the 1956 bill, see H.R. REP. No. 2022, 84th Cong., 2d Sess. 15-16, 24 (1956).
472. Fallon Interview.

Senator Gore opposed the Lehman amendment on the Senate floor on the grounds that his committee had not considered the relocation issue. 102 Cong. Rec. 9228 (1956). This is totally false: his committee had explicitly rejected the House's relocation proposal.
absence of any strong lobbying organization able to represent the interests of the potential displacees.474

d. The urban environment: It is true that parklands and shorelines have been disproportionate victims of the urban Interstates. This was a result which highway officials quite purposefully and openly strived for,475 and their purposes in this regard cannot be casually dismissed. Parklands are free of buildings, residences, businesses, and city streets. Constructing a freeway through a dense urban area results in enormous problems of human displacement and inconvenience. It also runs up an immense eminent domain bill, given the need to pay for the value of buildings and for the termination of access.476 By locating the freeway in a park, all of this expense is avoided. Parklands, of course, possess their own important urban value, which one would expect the appropriate park authority to seek to protect. Whether a state highway department has the power to condemn land already devoted to a public use by another agency is a question of state law. The priority which state law often attached to freeways in such a situation477 was plainly vulgar, but the blame for this cannot be placed on Congress.

e. Low-income communities: It is also true that in the 1955 designations a disproportionate number of Interstates were routed through low-income neighborhoods. This also was to a large extent purposefully done, and for reasons openly stated. The federal urban renewal legislation of 1954 had rested on the basic premise that slums were in essence a problem of deteriorated buildings, rather than a problem of the low-income of those buildings’ inhabitants. The solution, therefore, was to tear down these buildings and replace them with structures housing useful civil activities.478 Crude as this premise now seems, it was embraced in the mid-1950’s by city planners, whose “physical determinism” it vali-

474. By contrast, the public utilities lobbied quite effectively and over a period of several years. See Federal-Aid Highway Act of 1954, ch. 181, § 11, 68 Stat. 74; EISENHOWER DOCUMENTS, supra note 12, at 550; 1955 SENATE HEARINGS, supra note 82, at 895-943.

475. See INTERREGIONAL HIGHWAYS, supra note 121, at 69: “The valley of a small stream penetrating a city may offer excellent opportunity for the location” of a freeway. See also AMERICAN ASSEMBLY OF STATE HIGHWAY OFFICIALS, A POLICY ON ARTERIAL HIGHWAYS IN URBAN AREAS 89-90 (1957); INTERREGIONAL HIGHWAYS, supra note 121, at 62; 1955 BUREAU MEMORANDUM, supra note 136, at 9.


dated,\textsuperscript{479} and by all significant segments of public opinion.\textsuperscript{480} The urban renewal premise was in turn employed by highway officials, who concluded that locating a valuable freeway through a “blighted” or “decayed” slum area constituted a positive social good.\textsuperscript{481} There are additional considerations which explain the placement of freeways in low-income neighborhoods. In the mid-1950’s city planners believed that urban Interstates would have a beneficial effect on many inner-city neighborhoods: because through traffic would be diverted to the Interstates, ordinary city streets would become “quiet and safe” and more suitable for neighborhood use.\textsuperscript{482} Finally, some freeways scheduled in 1955 to run through upper- or middle-class neighborhoods were later rerouted through poverty neighborhoods after affected residents in the original locations exerted their political influence. As one commentator has noted, urban freeways “follow the geographical path of least political resistance.”\textsuperscript{483} There is perversity here, but it lies with our entire political system rather than any particular federal program.

2. Particular Counts

a. The political configuration: The indictment’s political claim is that the urban portion of the Interstate program was thrust upon American cities by the highway lobby.\textsuperscript{484} As history, however, this claim lacks accuracy. The truth is that it was the cities themselves which championed and indeed insisted on the urban Interstates. The cities’ spokesman in this regard was the American Municipal Association (AMA)—the organization which served as the principal representative of the city in federal matters

\textsuperscript{479} See H. Gans, People and Plans 25, 61 (1968).

\textsuperscript{480} Liberals wanted public housing, but they also definitely wanted urban renewal. Conservatives approved of urban renewal because of its favorable implications for central city property values and its opportunities for the urban renewal developers. For some, the point was that urban renewal would accomplish “Negro removal.” See generally L. Friedman, Government and Slum Housing (1968).

\textsuperscript{481} American Ass’n of State Highway Officials, A Policy on Arterial Highways in Urban Areas 89 (1957). See also P. Healey, Jr., The Cities’ Responsibility in the New Highway Program, Mar. 4, 1957, at 8 (paper delivered at the 18th annual Highway Conference) (copy on file with the author); Clarkeson, Urban Expressway Location, 7 Traffic Q. 252, 257 (1953); Lochner, The Integration of Expressways with Other Urban Elements, 7 Traffic Q. 346, 351 (1953).

Urban renewal’s ugly aspect was not without influence: according to Alf Johnson some city officials expressed the view in the mid-1950’s that the urban Interstates would give them a good opportunity to get rid of the local “niggertown.” Johnson interview.

\textsuperscript{482} See, e.g., Cleveland City Planning Comm’n, Cleveland Today . . . Tommorrow 31 (1950); McElhinney, Evaluating Freeway Performance in Los Angeles, 14 Traffic Q. 296, 306-11 (1960); Winter, Development of a Freeway System in Los Angeles Metropolitan Area, 3 Traffic Q. 105, 117 (1949).


\textsuperscript{484} E.g., Leavitt, supra note 14, at 80.
during the 1950’s. When the proposal to provide financing for the Interstate System was first presented in 1954, the AMA, in the words of its then Executive Director, "seized upon the idea." A resolution endorsing the urban Interstates carried by a 90 percent vote at the AMA’s Annual Congress in December 1954, and a similar but even more strongly worded resolution was approved unanimously in the late 1955 meeting after Congress had failed to act. Mayor Albert Cobo of Detroit, in 1955 testimony for the AMA, stated that urban freeways were "necessities," and that a good urban freeway was "a picture of beauty." President Eisenhower’s message to Congress had listed the relief of existing (and prospective) "traffic jams" as a major purpose of the Interstate System. Before the House and Senate committees the AMA’s representatives—mostly big-city mayors—pounded away with the argument that traffic jams are worst within cities, and therefore urban Interstates are entitled to the highest priority. Nashville Mayor Ben West told the Senate in 1955 that the increase of the federal share to 90 percent was indispensable to get the Interstate job done. In the 1956 hearings, Mayor West advised the House committee that "[w]e in the cities just cannot wait any longer. The situation is beyond being critical and is now approaching the point where ‘desperate’ would be a more adequate word to describe our needs." Congress was advised that in the view of Mayor Thomas D’Alesandro of Baltimore, "[t]raffic strangulation within cities is the major problem facing the country," a problem which further congressional delay would only exacerbate. Three years later when word leaked out that the President had ordered a review of the urban Interstates, the position of the AMA remained unchanged—if anything, it had become more adamant. Ben West, again representing the AMA, advised a congressional committee that the deletion of urban routes from the Interstate System

485. See S. Farkas, URBAN LOBBYING 63-65 (1971). While the AMA historically had given "insufficient weight" to the interests of the larger cities (see id. at 37), in its 1954-56 highway efforts big city mayors provided its leadership. The organization changed its name to the National League of Cities in 1964. Id.

486. See P. Healey, Jr., The Cities’ Responsibility in the New Highway Program, Mar. 4, 1956, at 3 (paper delivered at the 18th annual Highway Conference) (copy on file with the author).

487. 1955 Senate Hearings, supra note 82, at 15c.


490. Clay Committee Report, supra note 149, at iv.


492. 1955 Senate Hearings, supra note 82, at 15c.


494. Id. at 134.

495. See notes 263-85 and accompanying text supra.
would be "a terrible and tragic mistake," he went on to warn that "the Nation's cities will fight any such proposal to the bitter end."

If the big cities thus presented themselves publicly as true believers in the urban Interstates, there is little evidence that the prospect of these Interstates made either state highway officials or the highway construction industry especially happy. The inclusion of urban freeways within the Interstate System seems somewhat contrary to the construction industry's economic interests. Consider the Clay Committee's own figures—$12 billion for approximately 33,000 freeway miles in rural areas ($364,000 per mile), and $15 billion for about 7,000 miles in urban areas (over $2 million per mile). Part of the cost difference between urban freeways and rural freeways results from the greater number of lanes in cities, a factor which does redound to the benefit of the construction interests. The greatest part of the difference, however, is attributable to land acquisition costs, which are low in the countryside but astronomical within cities; land acquisition was known in 1956 to be often 50 percent and sometimes as high as 80 percent of the total freeway cost. To the extent that funds available to a highway program are allocated to land-intensive urban freeways rather than construction-intensive rural freeways, the highway construction industry clearly suffers.

The position of the state highway departments is likewise capable of refinement. As previously noted, until 1956 these departments were generally characterized by a significant anti-city (and especially anti-big city) bias or orientation. From their experience during the postwar years, state highway officials were probably more aware than anyone of the complexity of urban freeways—even if the complexities which they had encountered were primarily of a technical and engineering nature. From the standpoint of such officials, how much simpler and more satisfactory it was to build freeways in the open countryside. If anything, the real surprise may be that the state officials, speaking through AASHO and Alf Johnson, supported the urban Interstates at all. There are

496. 1959 House Hearings, supra note 233, at 376.
497. Id. See also id. at 374 (testimony of Glenn Richards, Chairman of the AMA's Highway Committee). The White House was bombard by letters from city mayors protesting the possibility of any such deletions. See, e.g., letter from Toledo Mayor John Yager to President Eisenhower, Aug. 17, 1959 (Pyle Files, Eisenhower Papers, Eisenhower Library).
498. See note 162 supra. The greater frequency of entrance-exit interchanges in urban areas adds enormously to cost. By 1973, the cost of an average rural interstate mile was $1.2 million, while the cost of an average metropolitan Interstate mile was $15-20 million. Gray, Section 4(f) of the Department of Transportation Act, 32 Mo. L. Rev. 327, 377 (1973).
499. See 1956 House Public Works Comm. Hearings, supra note 155, at 86. Not only does an urban right-of-way have a high fair market value, but the eminent domain liability for remainder damage and termination of access can be immense in cities.
500. See text accompanying notes 77-81 supra.
501. See text accompanying note 437 supra.
several possible explanations for this support,\textsuperscript{502} but of all these the political explanation is the most interesting. Alf Johnson’s basic goal was congressional approval of the Interstate program. He appreciated that to secure such approval it would be advantageous to establish the broadest possible coalition favoring the program and to hold down the number of the program’s enemies. Johnson was aware that cities fervently wanted the Interstates within urban areas. If urban freeways were included within the System, the cities could be enlisted in the coalition supporting the legislation; were urban freeways left out, the cities would have been politically furious. He also knew that opposition to the urban routes—either in Congress or in the public at large—was trivial.\textsuperscript{503} Johnson’s conclusion that the urban routes should be included in the System was thus grounded in considerations of political strategy.\textsuperscript{504}

Certain lessons can be drawn from this discussion. Recent commentary has been rife with allegations that almost every American city has been a “casualty” of the Interstate program,\textsuperscript{505} and that the 90-10 federal funding\textsuperscript{506} amounts to fiscal “blackmail” committed by the federal government against the cities.\textsuperscript{507} Whatever the actual consequences of the urban Interstates, these allegations are very misleading. If cities have been “casualties,” the injuries have been largely self-inflicted.\textsuperscript{508} If the financial arrangements constitute “blackmail,” it is a variation of blackmail in which the victim connived with the blackmailer. Whether the cities rightly understood the urban public interest is, of course, another question, to be considered separately. However, a basic initial point is that cities regarded the Interstate program as a way of rectifying what they saw as

\textsuperscript{502} Possible explanations include the states’ willingness to accept the cities’ claims as to the need for urban freeways.

\textsuperscript{503} See text accompanying notes 445-51 supra. During all the congressional hearings in 1955 and 1956, the urban portion of the Interstate program was objected to by only one organization—the Private Truck Council of America (see 1955 Senate Hearings, supra note 92, at 883-84)—an organization which did not wield significant political influence.

There was, as it happens, one official in the White House who preferred only a minimal urban component for the Interstate System—General Bragdon. However, during the 1954-56 period, Bragdon’s position on the urban Interstates was, at bottom, a corollary of his toll position. See J.S. Bragdon, OUTLINE OF A PLAN FOR A U.S. NATIONAL HIGHWAY SYSTEM TO BE FINANCED PRIMARILY BY REVENUE BONDS, EITHER U.S. OR STATE, UPON ELECTION BY EACH STATE, OR BY A STATE AS A FREEWAY, UNDER CERTAIN CONDITIONS, at 2 (uncited memorandum) (Bragdon Files, Eisenhower Papers, Eisenhower Library). Once Bragdon’s general toll recommendations had been rejected, his reservations about the urban Interstates could be conveniently ignored.

\textsuperscript{504} Johnson interview. Since the urban Interstates have developed into a clear political liability for the Interstate program, one can easily understand why Johnson now wishes they had been left out.

\textsuperscript{505} Dunhill, The Freeway Versus the City, ARCHITECTURAL F., Jan. 1968, at 73.

\textsuperscript{506} See note 363 and accompanying text supra.


\textsuperscript{508} Ms. Dunhill’s statement that cities “awakened only slowly to their own defense,” (Dunhill, Reconciling the Conflict of Highways and Cars, REPORTER, Feb. 8, 1968, at 22), is thus quite insufficient.
serious imbalances in traditional highway programs. At the time Congress came to consider the Interstate issue in the 1950's, urban motorists were expending far more in state gas tax payments than they were receiving back by way of urban highways provided by the existing state highway programs.\footnote{509} The 25 percent share allocated to the urban \textit{C} projects by the federal program had been thought unduly low even in 1944,\footnote{510} and population shifts subsequent to 1944 made the 25 percent figure seem increasingly unfair. To city officials these state and federal inequities were both substantial and galling.\footnote{511} An AMA study published in January 1955 asserted that "among inter-governmental fiscal relationships none are of greater perennial interest to municipal officials than those having to do with highways."\footnote{512} Cities were eager to secure their "rightful share" of highway program expenditures,\footnote{513} and the $15 billion budgeted for urban freeways by the Clay Committee was seen as a dramatic step in the right direction.\footnote{514}

b. \textbf{Traffic generation:} The general proposition at the heart of all the traffic justifications for the urban Interstates was that freeways allow a freer flow of traffic,\footnote{515} and hence are able to shorten driving times and reduce traffic congestion. The critics of the urban Interstates have sought to rebut this proposition, as it is applied to the urban Interstates, by contending that urban freeways "generate" traffic—traffic of such volume that the prefreeway congestion levels are quickly (or at least eventually) reestablished.\footnote{516}

In the early 1950's the American experience with urban freeways was relatively limited.\footnote{517} The traffic generation factor, however, had already been noted by the Bureau,\footnote{518} and was beginning to be frequently discus-
sed. Walter Blucher, a well-known urban planner, had by then made known his downcast views as to the complete futility of urban freeway building.\textsuperscript{519} In other writings it is possible to detect, especially retrospectively, an undercurrent of concern about generation.\textsuperscript{520} Nevertheless, most of the discussion remained upbeat.\textsuperscript{521} At that time, New York City was leading the nation in freeway building, and Robert Moses, its Public Works Commissioner, confidently predicted that "we can lick congestion," in the title of a 1956 article.\textsuperscript{522} The one empirical study made, published in July 1956, considered Chicago's Edens Expressway. Its conclusion was that there was "some evidence" of traffic generation, but that absent unusual circumstances such generation was not "highly marked."\textsuperscript{523}

There is a possible demurrer to the generation claim which is entitled to consideration here. Assume a freeway whose generated traffic does succeed in restoring prefreeway congestion. What the mechanistic language of "generation" obscures is that such a freeway does work to social advantage by satisfying citizen transportation preferences which would otherwise remain unfulfilled or "latent." As Professor Wohl points out, those who without the freeway would have declined to make a certain useful trip, or made it at a less convenient hour, are allowed to make the trip after all, or at a more convenient hour.\textsuperscript{524} Individuals also are afforded a greater latitude of residential and occupational choice; they can live further away from work and, with the help of freeways, keep the time of their commute within acceptable limits.\textsuperscript{525}

Professor Wohl's demurrer suffers, however, from two defects. The first concerns its policy. There may be good reasons for regretting the greater residential and occupational dispersion to which the demurrer refers. Also, some of the new freeway driving to which the challenge refers will involve trip-takers who previously had been patrons of public transportation; their withdrawal from the public transportation market may limit

\begin{footnotesize}
\begin{enumerate}
\item[519.] His views were published in a law review, of all places. \textit{Blucher, Moving People}, 36 \textit{Va. L. Rev.} 849, 849-50 (1950).
\item[520.] See the articles by Casey, Elder, and Smith, \textit{ibid} in \textit{Schneider, supra} note 14, at 198-99.
\item[522.] Moses, \textit{We Can Lick Congestion}, in \textit{Freedom of the American Road} 47 (Ford Motor Co. 1956).
\item[523.] Mortimer, \textit{The Influence of Expressways}, 10 \textit{Traffic Q.} 318, 328-29 (1956).
\item[524.] Wohl, \textit{Must Something Be Done About Congestion?} 25 \textit{Traffic Q.} 403, 405-06 (1971).
\item[525.] That the urban interstates have led to such dispersing consequences is acknowledged in the text accompanying notes 592-96 \textit{infra}.
\end{enumerate}
\end{footnotesize}
public transportation’s ability to avail itself of economies of scale. The demurrer’s second defect lies in its inadequacy as an historical explanation. It is clear that what Congress understood it was doing in approving the urban Interstates was reducing or preventing urban traffic congestion.526 Had Congress believed that these Interstates merely would permit more urban drivers to encounter the same congestion, it might well have been unwilling to approve the $15 billion (now $60 billion) urban portion of the Interstate program.

It is therefore appropriate to assess the factual correctness of the generation claim. On the merits the conventional wisdom is currently all on the side of the generationists. To pick an example almost at random, a recent *New Yorker* article states that “like most other cities, Atlanta discovered a few years ago that all the expressways it had been building were adding to the congestion rather than reducing it.”527 But is it really true that our experience since 1956 has completely vindicated Blucher’s 1950 expression of futility? Clearly, from a 1976 vantage point, the Moses title is ludicrous. Moreover, it seems certain that the urban Interstates have induced more traffic than highway planners had originally predicted—which does mean that travel-time gains have been less than expected. Nevertheless, today’s conventional wisdom significantly overstates its case. It is only at rush hour that the flow of traffic on an urban Interstate does not move reasonably freely; rush hour apart, the urban Interstates have been remarkably successful in increasing average vehicle speeds. The only real debate, therefore, concerns conditions at rush hour. On this issue, Federal Highway Administration figures indicate that the introduction of freeways in major metropolitan corridors generally has resulted—even at rush hour—in measurable decreases in average driving times.528 While the Administration’s arithmetic is frequently primitive,529 on this one factual issue there is no convincing counterdata, and my personal observations in several metropolitan areas are in harmony with the Administration’s findings.

No one could deny, of course, that complaints about today’s freeway congestion are both numerous and vociferous, and it might well be that today’s freeway motorists are as irritated by congestion as the ordinary city-street motorist of 20 years ago. Any such irritation parity, however, can be adequately explained in ways consistent with the analysis above.

526. *But cf. 1955 Senate Hearings, supra note 82, at 50-51.*
A freeway may inspire in the motorist an expectation of high speed which at rush hour it is unable to deliver; since the ordinary city street produces no such expectation, the motorist does not suffer any equivalent sense of aggravation when the street is filled with traffic.530 Also, in today's society, transportation is one urban problem out of which the affluent citizen cannot buy his way. By placing his residence in the suburbs he is able to escape neighborhood squalor, serious crime, inferior schools, undesirable neighbors, and air pollution at its inner-city worst. That very suburban choice, however, commits him to an arduous commuting cycle which, in light of the amenities to which he is otherwise accustomed, is bound to strike him as offensive.531

c. Public transportation: Another accusation leveled against the urban Interstate program is that it has hastened the decline of public transportation,532 and more generally that it ignored the entire question of urban public transporation in launching a major enterprise in urban private transportation.533 In Moynihan's 1960 judgment the 1956 Act was "lunatic" in this latter regard.534 On the merits it seems reasonable to assume that the urban Interstates have damaged the cause of public transit in at least two ways: first, by making the auto alternative for the trip to work more attractive;535 and second, by encouraging a decentralization of the metropolitan area which makes it harder for public transportation to provide adequate service.536 It is, however, quite difficult to measure the exact extent of that damage. Public transit passengership had been plummeting ever since the end of World War II—from 23.3 billion in 1945, to 17.2 billion in 1950, to a shocking 11.5 billion in 1955537—a passenger loss of 11.8 billion and over 50 percent. Between 1960 and 1970, with the urban Interstates opening up one after the other, patronage slipped from 9.4 billion to approximately 7.3 billion—a loss of more than 2 billion and more than 20 percent.538 Since the decline in patronage decelerated very

530. Compare the different and (in my view) less persuasive "expectation" argument advanced in Meyer, Urban Transportation, in THE METROPOLITAN ENIGMA 41, 48-49 (J. Wilson ed. 1968). See also Bruce-Briggs, Mass Transportation and Minority Transportation, PUB. INTEREST, Summer 1975, at 43, 48-49.
532. See, e.g., A New Federal Stab at Aiding Mass Transit, BUS. WEEK, Jan. 26, 1974, at 52, for a temperate recent statement of this claim.
537. See W. OWEN, THE ACCESSIBLE CITY 27 (1972). Corresponding with this public transit passenger loss was an increase over 75% in the number of registered automobiles between 1945 and 1953. See CLAY COMMITTEE REPORT, supra note 149.
significantly during 1960-70, absent additional evidence the urban Interstates cannot reliably be blamed for more than a fraction of this 1960-70 decline.

If the 1956 Act is faulted because it failed to provide funding for public transportation, the truth is that in both 1944 and 1956 a general federal subsidy for public transportation was not a politically available option.\textsuperscript{539} Many of the reasons for this are policy-neutral. The public transit industry earned high profits during World War II and nationwide was still in the black (although only slightly) in 1955-56.\textsuperscript{540} Public transit subsidies were controversial and unpopular at the local level,\textsuperscript{541} let alone at the federal. With the exception of a few large metropolitan areas, transit systems generally were privately owned,\textsuperscript{542} and federal grants to private companies would obviously be problematical. While Congress had approved both the C\textsuperscript{543} and the urban Interstate programs, these were far from decisive as precedents for any federal public transit subsidy. For one thing, the highway program, financed as it was after 1956 from special highway-user taxes, made no demands on general revenue. Moreover, until the breakthroughs of the mid-1960’s, Congress remained extremely wary of deeply involving the federal government in affairs which were “purely urban.”\textsuperscript{544} While a public transit program would definitely founder on this reluctance, the C and urban Interstate programs did not, since they were conceived of as mere elements of a more general, nationwide highway system.\textsuperscript{545}

Additionally, the 1955-56 period was, for somewhat fortuitous reasons, a singularly unfortunate time for Congress to be reaching decision (even implicitly) on the respective roles of automotive and public transportation. It happens that 1955 and 1956 were decisive years for the development of the American automobile and public attitudes. From the end of the war through 1954, Detroit had done little butinker with its basic

\textsuperscript{539} It should be made clear that a thriving federal program currently exists for the support of urban public transportation. See National Mass Transportation Assistance Act of 1974, 49 U.S.C. § 1602(a) (Supp. IV, 1974), amending 49 U.S.C. § 1602(a) (1970). This program did not involve major sums of money until the 1970’s.


\textsuperscript{541} See Smith, Maintaining the Health of Our Central Business Districts, 8 Traffic Q. 111, 119 (1954).

\textsuperscript{542} In 1956, only 42 of the 1,600 urban transit companies operating in the United States were publicly owned (although the public systems tended to be in the larger metropolitan areas). See 1956 House Ways and Means Comm. Hearings, supra note 189, at 420 (statement of George Anderson, Executive Vice President, American Transit Association).

\textsuperscript{543} See text accompanying notes 45-64 supra.

\textsuperscript{544} The phrase is drawn from Hanson, Congress Copes with Mass Transit, 1960-64, in CONGRESS AND URBAN PROBLEMS 347 (F. Cleveland ed. 1969).

\textsuperscript{545} See text accompanying notes 404-36 supra.
product, which was boxy and sedate. The 1955 models—introduced in late 1954—achieved a daring breakthrough both mechanically and stylistically. Their V-8 engines were endowed with far more horsepower than those of their predecessors, and their automatic transmissions were vastly improved. Their bodies were long, low, and “streamlined,” and came adorned with the kind of frillish innovations—wraparound windshields, new forms of two-toning—that succeeded, for better or worse, in exciting the American consumer’s imagination. Auto sales soared from 5.4 million in 1954 to a record-shattering 7.4 million in 1955, and one study fixes 1955 as the beginning of the “golden era” of the American automobile (an era which the fuel crisis has probably brought to a close). In his congressional testimony General Clay was inclined to extol the automobile, and a norma Congressman could easily assume the triumph of the automobile as the basic American mode of urban transportation.

A closer examination of the 1956 Act and its legislative evolution suggests, however, that Congress was not wholly insensitive to the situation of public transportation, and that the responsibility for any public transit deficiencies in the 1956 Act should probably be placed on the shoulders of other organizations. In the years between the conception of the Interstate program and the 1956 Act, the American Transit Association (ATA)—the major national representative of local transit operators—and the American Institute of Planners (AIP) had adopted, coordinated, and presented to the public an interesting and legitimate position: the interests of automotive and public transportation could be “accommodated” and “reconciled” by proceeding ahead with urban freeways while

546 See, e.g., the advertisements in LIFE, Nov. 22, 1954, at 19-30; id., Nov. 29, 1954, at 6-7, 34-35, 50-51, 80-81, 129, 158-59; and the news story, First Entirely New 1955 Cars, id., Nov. 1, 1954, at 49. Actually, Buick and Oldsmobile had changed their designs a year earlier, and the Oldsmobile had been the “hottest car” during 1954. Id.

547 Ward’s Automotive Yearbook 131 (1973).

548 J. Jerome, The Death of the Automobile 25 (1972). Jerome reminds us that:

Consumer interest in the new cars was positively frenzied: in those days the annual introduction of the new models had become, for most of America, an event ranking with the Homecoming Day of the local high school football team. Id.

The suburban narrator of a recent John Updike story reminisces about the 1950’s: “Guiltlessness. Our fat Fifties cars, how we loved them, revved them: no thought of pollution.” J. UPDIE, WHEN EVERYONE WAS PREGNANT (MUSEUMS AND WOMEN, 32 (1972).


550 1955 Senate Hearings, supra note 82, at 396; 1955 Senate Hearings, supra note 82, at 128, 143. See also 1955 Senate Hearings, supra note 82, at 160-61 (AASHO testimony).


552 This organization is now called the American Public Transportation Association.
at the same time incorporating into their design a variety of public transit facilities, including special turnouts and platforms for buses, exclusive bus lanes, and use of the freeway's median strip for rapid transit.\textsuperscript{553} 

During those early years, the ATA-AIP position won many adherents. In Los Angeles, for example, the original freeway plan devised in the 1940's contemplated "rapid transit" buses on all freeways and surface rail on "certain" freeways.\textsuperscript{554} In recent years the "accommodation" concept has been implemented in an interesting fashion. Because of the urban mass transportation capital grant program originally approved by Congress in 1964, rail rapid transit now runs in the median strip of Chicago's Dan Ryan Expressway.\textsuperscript{555} An exclusive bus lane, funded under a provision in the Federal-Aid Highway Act of 1970,\textsuperscript{556} now is part of the San Bernardino Freeway in Los Angeles.\textsuperscript{557} In these recent implementations the accommodation concept is proving sound. The Dan Ryan line is regarded as a success by the Chicago Transit Authority.\textsuperscript{558} Professor Hilton, a severe critic of the federal urban transportation program generally, singles out federally funded freeway bus lanes for commendation.\textsuperscript{559}


\textsuperscript{554} See Malley & Breigovel, Urban Freeways, J. AM. INSTITUTE OF PLANNERS, Fall 1948, at 23, 24-26; Winter, Development of a Freeway System in the Los Angeles Metropolitan Area, 3 TRAFFIC Q. 105, 107 (1949).

Since the building of a freeway itself requires the acquisition of a broad right-of-way and also the termination of access on surface streets, the extra cost of acquiring the land for a rail route is only a fraction of the cost which a rapid transit agency would be required to incur were it to condemn a right-of-way on its own.

In the late 1940's, Robert Moses successfully fought back an effort to build a rail route in a median strip of the Van Wyck Expressway in New York City. See CARO, supra note 14, at 904-08.


\textsuperscript{557} See L.A. Times, June 3, 1974, § 2, at 1, col. 5. On Mar. 15, 1976, an exclusive bus (and carpool) lane was opened on the Santa Monica Freeway in Los Angeles. Another is planned for the Hollywood Freeway (id., May 4, 1974, § 1, at 1, col. 4). In Paris, France, lanes are now reserved for buses along 43 miles of Parisian boulevards; the early returns on patronage increases are quite favorable. See id., May 30, 1974, § 1-A, at 6, col. 1.

The difficulties with the recent Diamond Lane on the Santa Monica Freeway in Los Angeles make clear the desirability of including such a lane in the freeway's original design, rather than imposing it on an already congested freeway.


\textsuperscript{559} id. at 18.
and Professor Kain suggests they are an excellent way "to improve urban transportation at practically no cost."\footnote{Kain, \textit{How to Improve Urban Transportation at Practically No Cost}, 20 \textit{Pub. Policy} 335, 349-57 (1972).}

An accommodation idea of considerable value thus was formulated as early as 1944 and was refined and widely discussed in the decade that followed. Yet this was an idea which went wholly unmentioned during the 1954-56 legislative deliberations. What accounts for this oversight? The basic explanation seems to be one which is concerned with the operation of interest group politics. Interest groups perform at least two important functions in a democracy. First, as wielders of effective political influence, they provide representation for interests which do not receive adequate representation through our system of electing Congressmen on a territorial basis. Additionally, they serve as sources of information, supplying Congressmen with useful data of which they would otherwise, for lack of access, remain ignorant.\footnote{See C. Lindblom, \textit{The Policy-Making Process} 66 (1968).} An adequate explanation for the omission of the special facilities idea from the 1954-56 debate and the eventual 1956 Act is that for one reason or another the idea was not presented to Congress by any of the interest groups which might have been expected to do so. Urban planners generally were committed to the idea, but their organization, the AIP, did not yet see itself in political terms; during the relevant years, it maintained neither a Washington office nor a Washington representative.\footnote{Howard Interview.} As for the American Municipal Association,\footnote{See note 485 and accompanying text supra.} in 1955, Mayor Dilsworth of Philadelphia, a city whose public transportation problems were prematurely acute, urged the AMA to adopt a resolution favoring the inclusion of "right-of-way for public transit" within every federally supported urban highway.\footnote{See M. Danielson, \textit{Federal-Metropolitan Transportation Politics and the Commuter Crisis}, 96 (1965).} The AMA rejected this proposal. According to its Executive Director, during 1955 the AMA's big concern was to persuade Congress to enact legislation to establish the Interstate Highway System, and every effort was made to present a united front by all interests favoring such a system. Anything that smacked of diversion of highway user taxes to other purposes, even such a related one as right-of-way for public transit, might break the ranks of that united front.\footnote{Letter from Patrick Healey (now a senior consultant at the NLC) to the author, July 20, 1973 (on file with the author). In 1957, with the 1956 Act already on the books, the AMA finally adopted a somewhat watered-down version of the Dilsworth proposal. See M. Danielson, \textit{Federal-Metropolitan Transportation Politics and the Commuter Crisis}, 97 (1965).}
nated the special facilities idea in its 1944 congressional testimony.\footnote{See 1944 House Hearings, supra note 31, pt. 2, at 687-94 (testimony of Charles Gordon).} Why did it let the idea lie dormant during 1954-56? A sufficient reason is that during this period the ATA was strongly supporting another legislative proposal, the logic of which effectively prevented it from also making the special facilities argument. This ATA proposal was that transit operators be exempted from the highway-user tax increases which the highway legislation anticipated.\footnote{See, e.g., the ATA’s statements and testimony in 1955 House Hearings, supra note 62, at 1283-89; 1956 House Ways and Means Comm. Hearings, supra note 189, at 420-28; 1956 Senate Hearings, supra note 212, at 151-53.} Given its keen interest in its tax exemption proposal, the ATA was obviously disabled from also arguing that the Interstate program should incur special expenses for the sake of public transit. Indeed, the strategy of the exemption issue further required the ATA to downplay the extent to which public transit vehicles, even absent special facilities, would find occasion to travel on federally aided urban highways in general and the urban Interstates in particular.\footnote{See, e.g., 1956 House Ways and Means Comm. Hearings, supra note 189, at 425.}

If the ATA thus chose to substitute the tax proposal for its earlier special facilities proposal, a related point is that the congressional response to the ATA tax proposal diminishes the charge that Congress slighted or disparaged public transportation during its 1955-56 deliberations. The initial Fallon bill in 1955 did not include a public transit tax exemption. However, after the ATA presented its position in the hearings on that bill, the Public Works Committee included such an exemption in the bill sent by the committee to the House floor.\footnote{H.R. 7474, 84th Cong., 1st Sess. § 4(h) (1955), explained in H.R. Rep. No. 1336, 84th Cong., 1st Sess. 22-23 (1955).} The 1956 House bill contained a similar exemption,\footnote{See H.R. 10660, 84th Cong., 2d Sess. §§ 206(a), 208(b)(1) (1956), explained in H.R. Rep. No. 1899, 84th Cong., 2d Sess. 26-28 (1956).} indeed, ATA representatives collaborated with the House Ways and Means Committee staff in working out its details and mechanics.\footnote{See 1956 Senate Hearings, supra note 212, at 150.} The exemption attracted little attention as the bill passed the House. However, in the Senate, Senator Byrd’s Finance Committee rejected the exemption, arguing that 55 percent of the Interstate funds would be spent in cities,\footnote{See note 126 and accompanying text supra.} that public transit vehicles could be expected to regularly utilize the urban Interstates, and that if this exemption were approved it would be necessary to include exemptions for other economically distressed concerns which would otherwise encounter the new taxes.\footnote{See S. Rep. No. 2054, 84th Cong., 2d Sess. 5 (1956). See also 102 Cong. Rec. 9233 (1956) (statement of Sen. Byrd).}
It is important to recognize that the Senate Finance Committee’s analysis was entirely sound as far as it went. If the analysis was to be regarded as other than dispositive, the reason would need to be in some special congressional concern for public transportation. On the floor of the Senate, such concern was in fact forthcoming. Senators Wayne Morse and George Smathers expressed solicitude for the “low income groups, who necessarily ride on public transportation systems,” and for the “housewives, clerks, stenographers, elevator operators, and others” who have no other means of transportation.\(^\text{574}\) Other Senators joined in with similar statements.\(^\text{575}\) An effort to amend the Byrd Committee’s bill on the Senate floor to conform it to the House bill was stymied for parliamentary reasons,\(^\text{576}\) but the tenor of the Senate’s discussion seemed sympathetic to the exemption idea. In conference it was the Senate which effectively receded; the conference bill provided that urban transit would pay neither the extra penny of the per gallon fuel tax nor the tax on over 26,000-pound vehicles.\(^\text{577}\) (These exemptions have remained in the law ever since, and have been expanded to cover the later increases in the fuel and vehicle taxes.)\(^\text{578}\) In short, the 1956 Congress gave the transit lobby everything it asked for, even though the reasoning which the lobby offered in support of its request was clearly underwhelming.

Whether the ATA behaved wisely at the time in pressing for the tax exemption rather than for special facilities is a question one cannot answer confidently. A tax exemption is for most purposes a functional equivalent of a subsidy (or some related form of public expenditures).\(^\text{579}\) However, this equivalence is better understood today than it was in the mid-1950’s, and it always has been better understood by tax lawyers and economists than by the general public.\(^\text{580}\) If the transit lobby wanted the most help it could get from the 1956 Act, there was considerable strategic value in choosing the exemption course. On the other hand, the exemption which it managed to secure did not help rail rapid transit operators, since they were not consumers of the highway-user items whose taxes Congress was considering increasing. The ATA’s exemption proposal also did not make a difference to publicly owned transit systems: by virtue of notions of intergovernmental tax immunities, federal statutes imposing

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\(^{574}\) 102 Cong. Rec. 9230-31 (1956).

\(^{575}\) See, e.g., id. at 9230 (remarks of Sen. Gordon Allott).

\(^{576}\) Id. at 9231.


\(^{578}\) See 26 U.S.C. §§ 4483(c), 6421(b) (1970).


\(^{580}\) The Supreme Court itself has opined that there is a constitutional difference between a subsidy and a tax exemption. See Walz v. Tax Comm’n, 397 U.S. 664, 674-75 (1970). The Court’s point may be that the public perceives an exemption as much different from a subsidy, and that such matters of public perception are relevant to establishment clause questions.
taxes on highway users had always exempted the public transit operators, and this exemption was conceded in every one of the 1955 and 1956 proposals, as well as in the ultimate 1956 Act.\textsuperscript{581} One should note that while only 42 of approximately 1,600 transit carriers were publicly owned in 1956, they tended to be located in the larger metropolitan areas.\textsuperscript{582} Moreover, in the years since 1956, public takeovers have been occurring frequently. According to a recent tabulation there are now 185 publicly owned systems nationwide, accounting for 91 percent of all urban transit trips.\textsuperscript{583} Since this public ownership trend was already in progress in 1956, the ATA's position does seem shortsighted; however, the ATA's institutional position in the mid-1950's may have inhibited it from basing its action on any public ownership assumptions.\textsuperscript{584}

d. \textit{Urban development and planning}: The urban development accusations against the Interstate System charge that it has purposefully fostered the suburbanization of our metropolitan areas and contributed to the decline of central cities, without any regard for principles of urban planning.\textsuperscript{585} These accusations build on what is now understood to be an important and undeniable truth: transportation exerts a powerful influence upon the patterns of urban development. The modes of transportation in American cities until the middle of the 19th century consisted only of walking, supplemented by private horse-drawn carriages. The result was a highly concentrated urban settlement. Since in the 1970's public transportation is frequently heralded as a device for increasing population density,\textsuperscript{586} there is irony in the fact that during the 19th century it was successive breakthroughs in public transportation technology which permitted and determined the initial stages of urban dispersal. By mid-century the omnibus (a 15-passenger vehicle drawn by two horses) and steam-driven commuter rail had become common, and they were followed by electric streetcars in the late 1880's. The consequence of these developments was a significant relocation of residences along the lines of the public transit service. Electrically driven elevateds and subways

\begin{itemize}
\item \textsuperscript{582} See \textit{1956 House Ways and Means Comm. Hearings}, supra note 189, at 420 (statement of ATA).
\item \textsuperscript{583} \textit{American Transit Ass'n, '73-'74 Transit Fact Book} 9 (1973).
\item \textsuperscript{584} The vast majority of transit operators during that period were private operators and desired to remain so. Public takeovers were generally regarded as a last resort justifiable only by economic necessity. Indeed, one of the ATA's arguments in 1956 was that, unless transit was exempted from the new highway-user taxes, those taxes, by discriminating against the private carrier, would lead to undesirable public takeovers of economically marginal transit operations. See 102 Cong. Rec. 9232 (1956).
\item \textsuperscript{585} See, e.g., \textit{Mowbray}, supra note 14, at 61-73; \textit{New Roads}, supra note 13, at 19.
\item \textsuperscript{586} See, e.g., \textit{Lisco, Mass Transportation: Cinderella in Our Cities}, PUB. INTEREST, Winter 1970, at 52, 56-57.
\end{itemize}
opened in four cities between 1892 and 1909.\textsuperscript{587} The extent to which public transportation controlled urban activity is revealed by the extraordinary fact that as late as 1925, only 1 percent of developed land within all of the New York metropolitan area was located more than 1 mile from a railway station.\textsuperscript{588}

The rapid rise of the automobile harbored dramatic implications, inasmuch as the automobile was conducive to a dispersion of residences both much "flatter"\textsuperscript{589} and more extended from the city center than previous types of public transportation could ever have achieved. In this way the automobile was responsible for the modern suburb. This fact was well understood by \textit{Interregional Highways}, which noted that "[s]uburban home developments have been made attractive largely by the possibilities of quick and individual daily transportation thus afforded,"\textsuperscript{590} and that "[s]uburban business centers have followed the clustering of suburban homes."\textsuperscript{591}

The fact that automobiles are privately and individually owned clearly has reduced government's power to regulate metropolitan growth. It by no means has eliminated that power, however, since even in the automobile age the pace and location of urban development still can be considerably controlled by the placement of public highways (which, in this setting, become the relevant publicly provided facility). Sensitive to this point, \textit{Interregional Highways} diagrammed how the outward growth of Baltimore, Washington, and Chicago in the 20th century had been governed by the location of highways.\textsuperscript{592}

Freeways, with their greater vehicle-carrying capacity, can be especially potent in their developmental consequences. While Los Angeles may be an extreme (or at least an unusual) case, the effect of freeways on Los Angeles urban patterns has been so salient as to require comment. The rapid population growth in the San Fernando Valley can be attributed largely to the opening of the San Diego, Golden State, and Hollywood Freeways; the San Diego and Santa Ana Freeways were the catalyst for the emergence of Orange County.\textsuperscript{593} All of these Los Angeles freeways,

\begin{footnotes}
\footnotetext{587}{See \textit{Tarr, From City to Suburb: The "Moral" Influence of Transportation Technology}, in \textit{American Urban History} 202-10 (A. Callow ed. 2d ed. 1973).}
\footnotetext{588}{Burch, supra note 25, at 17 n.16.}
\footnotetext{589}{The word is from Kain, \textit{The Distribution and Movement of Jobs and Industry}, in \textit{The Metropolitan Enigma} 28 (J. Wilson ed. 1968).}
\footnotetext{590}{\textit{Interregional Highways}, supra note 121, at 53-54.}
\footnotetext{591}{\textit{Id.} at 54. The report also took note of the central city's decay and the inefficient decentralization which the suburbanization process may entail. \textit{Id.} at 53-54.}
\footnotetext{592}{\textit{Id.} at 54-55.}
\footnotetext{593}{See generally Alexander, \textit{Too Little, Too Late, Too Bad}, in \textit{Cry California}, Spring 1968, at 7.}
\end{footnotes}
except the Hollywood, are included within the Interstate System.\footnote{594} If one considers the urban Interstates in American cities generally, two complementary points seem eminently clear. First, the urban Interstates encourage the dispersal of jobs and residences away from the central city\footnote{595} into suburban locations, inasmuch as they substantially minimize the access advantage which central city locations would otherwise enjoy. Second, they encourage job and residential locations in new outer suburbs rather than in established inner suburbs, since they help neutralize the access advantage that inner suburb locations would otherwise enjoy.\footnote{596}

Overall, the urban Interstates thus do produce very substantial suburbanizing effects. Substantial as these effects may be, however, they are still capable of overstatement, and overstatements of this sort have become common. Typical is a recent article in \textit{Fortune} which, while conceding that “many factors” have contributed to metropolitan suburbanization, nevertheless asserts that ultimately it is the Interstate System which “has made this transformation possible.”\footnote{597} In evaluating this assertion, one must keep in mind that it was not until 1956 that Congress undertook to finance the Interstate System, and that the ribbon on the first urban Interstate constructed with 1956 financing was apparently not cut until 1959.\footnote{598} Yet a year earlier, in 1958, it had been possible for the editors of \textit{Fortune} to publish a book called \textit{The Exploding Metropolis}—a title which purported to describe the suburbanizing phenomenon which had been in process ever since the close of World War II. All available data support the \textit{Fortune} editors’ observations.\footnote{599} The real suburban explosion was one which had already occurred by 1959. That explosion came about

\footnotesize{
594. The Santa Ana Freeway was completed before 1956, when the Interstate System was still part of the federal-aid primary program. See text accompanying note 146 supra.
595. By customary usage, “central city” refers to the entire municipality which forms the center of a metropolitan area. Thus the “central business district” or “downtown” typically comprises only a small portion of the central city.
596. In Los Angeles, “central city” occasionally is used in the sense of “central business district” (see, e.g., the sign on 6th Street near the Harbor Freeway).
598. Los Angeles may provide an exception of sorts to the text’s second point: the Santa Monica and San Diego Freeways have vitalized the City’s West Side, the area including the Westwood, Century City, and Brentwood neighborhoods.
596. \textit{Turner Interview}.
by virtue of the confluence of a number of factors other than freeways.\footnote{The following is drawn in part from J. MEYER, J. KAIN & M. WOHL, THE URBAN TRANSPORTATION PROBLEM 10-18 (1965).} One of these, to be sure, was a transportation factor—soaring auto sales. The other factors were somewhat distinct from transportation—including massive scale single-family home construction in the suburbs (as abetted by federal housing practices\footnote{ See F. WIRT, B. WALTER, F. RABINO\footnote{E.g., LUPO, COLC\footnote{See 1955 House Hear\footnote{See Memorandum from J.S. Bragdon to the Council [of Economic Advisors], Subject: Data Bearing on a National Highway System, Nov. 2, 1354 (Bragdon Files, Eisenhower Papers, Eisenhower Library) (listing suburban growth as a “collateral benefit” of the Interstate program).}}WIT & D. HENSLER, ON THE CITY’S RIM: POLITICS AND POLICY IN SUBURBIA, 178 (1972).} VIT & D. HENSLER, ON THE CITY’S RIM: POLITICS AND POLICY IN SUBURBIA, 178 (1972).}}\footnote{This is a point which I have previously suggested to Professor Rabinowitz. See id. at xvii, 179.} The surprising fact is that in the thousands of published pages of that history, there is not a single mention of the suburbanizing influence of the urban Interstates, and only two passages in which the entire suburban issue is even brushed.\footnote{For similar reasons—and this is an important point—it will not be possible to detect the full impact of the urban Interstates built during the 1960’s until perhaps 1990.} Nor does the Moynihan-Whyte view find significant support in the record of White House consideration of the Interstates; my study of the relevant White House papers reveals only one minor instance in which notice was taken of the Interstate’s suburbanizing tendencies.\footnote{See 1955 House Hearings, supra note 62, at 763-65 (statement of the American Manufacturing Ass’n), 102 CONG. REC. 9234 (1956) (statement by Sen. Byrd regarding the Highway Revenue Act of 1956).} In fact, Moynihan and Whyte themselves do not claim to find the requisite suburbanizing intent in Congress or the White House, but rather in the Report of the Clay
Committee, whose members they identify as the "sponsors" and "planners" of the Interstate program.\textsuperscript{609} In particular, what Moynihan and Whyte zero in on is one passage in the Report's Conclusion.\textsuperscript{610} This passage both applauds the suburbs and suggests an awareness of how highways and automobiles contribute to suburban growth. Nevertheless, it cannot reasonably bear the full interpretative weight which Moynihan and Whyte seek to place upon it. For one thing, their claims concerning the "sponsorship" role of the committee are quite inaccurate. The committee understood that its responsibility was to consider the Interstate program's financing and administration, not its general desirability;\textsuperscript{611} even on these financing and administration issues, the committee's key recommendations were entirely rejected by Congress.\textsuperscript{612} Additionally, in the main text of its report the committee explains and justifies the urban Interstates exclusively on grounds of their "extension" function;\textsuperscript{613} the intrametropolitan passage highlighted by Moynihan and Whyte appears only in the Conclusion—clearly a rhetorical add-on.\textsuperscript{614}

The conclusion therefore must be that the suburbanization potential of the urban Interstates was given very deficient consideration during the 1954-56 period. It does not follow from this conclusion, however, that the relevant policymakers gave no thought at all to the entire question of the effect of the urban Interstates on metropolitan structure. To the contrary, many of these officials were guided or influenced by one specific and

\textsuperscript{609} See Whyte, \textit{Urban Sprawl}, in \textit{The Exploding Metropolis} 133, 144 (1958); \textit{New Roads}, \textit{supra} note 13, at 19.

\textsuperscript{610} We are indeed a nation on wheels and we cannot permit these wheels to slow down. Our mass industries must have moving supply lines to feed raw materials into our factories and moving distribution lines to carry the finished product to store or home. Moreover, the hands which produce these goods and the services which make them useful must also move from home to factory to store to home.

Our highway system has helped to make this possible. We have been able to disperse our factories, our stores, our people; in short, to create a revolution in living habits. Our cities have spread into suburbs, dependent on the automobile for their existence. The automobile has restored a way of life in which the individual may live in a friendly neighborhood, it has brought city and country closer together, it has made us one country and a united people.

But, America continues to grow. Our highway plan must similarly grow if we are to maintain and increase our standard of living. There can be no serious question as to the need for a more adequate highway system. Only the cost and how it is to be met poses a problem.

\textsuperscript{611} Clay \textit{Committee Report}, \textit{supra} note 149, at 26.

\textsuperscript{612} See text accompanying notes 184-93 \textit{supra}.

\textsuperscript{613} The urban Interstates are to be "feeder and distribution" routes which will "render the interstate system more effective." \textit{Clay Committee Report}, \textit{supra} note 149, at 14-15.

\textsuperscript{614} The "Conclusion" section, however, was written personally by General Clay. Clay \textit{Interview}. 
interesting idea. Somewhat apart from the suburbs (whether outer or inner), there remains the issue of the welfare of the central business district (as distinguished from the entire central city). The current position is that the urban Interstates have contributed in the decline of downtown, and are in this regard blameworthy. As long ago as 1961, the Department of Commerce (in which the Bureau was then lodged) stated in an official document that the decline of downtown was an “intangible cost” of the Interstate System. This position is, as it happens, in direct conflict with an idea which was widely accepted in the mid-1950’s. That idea, as expressed by big-city mayors, urban-oriented Senators, downtown businessmen’s associations, and the 1957 Administrator of the Interstate Program, was that the urban Interstates were essential to the survival or the revitalization of the central business districts, which were then perceived as afflicted with dreadful traffic troubles—as suffering from “dry rot,” in Senator McNamara’s language.

Notwithstanding its inconsistency with the current position, this 1950’s idea may well be correct—and certainly is correct in particular metropolitan areas. Consider the metropolis which possesses an inner belt, an outer belt, and freeway radials—all the product of the Interstate program. Clearly such a freeway network renders downtown more accessible and hence more attractive (other things being equal). Even in those metropolitan areas (such as Los Angeles) where the freeway network resembles a grid, the grid tends to be “bent” in the direction of downtown, enhancing its accessibility. These metropolitan Interstate networks clearly were designed with improved downtown accessibility in mind. In the past several years, many downtown areas have witnessed major office-space building booms. Employment declined in many central cities between the end of the war and 1960, but in the years since 1965.

615. See note 595 supra.
616. See generally MOWBRAY, supra note 14, at 53-92; SCHNEIDER, supra note 14, at 51-58.
618. E.g., 1955 House Hearings, supra note 62, at 412 (testimony of Houston Mayor Roy Hofheinz). All Johnson indicates the city officials frequently spoke of the need to “ventilate” the central business district. Johnson Interview.
624. See id. at 43.
625. In some cities the boom achieved such momentum that builders overreacted, leading to an excess of office space today. See Empty Spaces, NEWSWEEK Mar. 18, 1974, at 104-06.
1960 almost every central city has registered slow but steady employment increases. Assuredly, employment levels throughout the metropolitan area have increased, and therefore downtown employment has declined as a percentage of metropolitan employment. But given both the population growth within the typical metropolitan area and the limited physical boundaries of the central business district, this could hardly be otherwise. Moreover, while the number of downtown jobs has held constant, the composition of the downtown work force has changed in important ways. The number of downtown factory workers and insurance company clerks has skidded downwards, while the number of executives, professionals, and others in “control” positions has risen sharply. Since white collar professionals have been substituted for workers and clerks, it is quite possible that the actual economic power concentrated in the central business district has resisted decline. What the fate of downtowns would have been had none of the urban Interstates been built is a question difficult to ponder. Certainly, however, one plausible hypothesis is that without the urban Interstates many downtowns would have fallen victim to serious atrophy.

The preceding discussion has been an attempt to determine the impact of urban freeways on urban development. This discussion draws attention to another objection to the 1956 Act: its lack of any requirement that the urban Interstates be consistent or coordinated with urban planning. Back in 1943, Interregional Highways had devoted several pages

626. See B. Harrison, Urban Economic Development: Suburbanization, Minority Opportunity, and the Conditions of the Central City ch. 2 (1974). Harrison’s data are for central cities generally, but their suggestion is that downtown job growth has been even more pronounced. Id. at 27-31.


628. Given the nature of “power” as a concept, one cannot make nice distinctions between “absolute” power and “relative” power.

629. As are all historical questions cast in the “what if” form.


631. See, e.g., M. Scott, American City Planning Since 1890, at 539 (1969) (“In the largest construction program in American history the planning profession and the planning function had been overlooked”), and Paul Ylvisaker’s 1959 statement that in light of the Interstate program city planners are a “beaten profession” (quoted in New Roads, supra note 13, at 20).

It was not until the 1960’s that urban planning conditions became boilerplate in federal grant-in-aid programs; still, there were certain pre-1956 federal law planning precedents, particularly in the urban redevelopment program. See Mandelker, The Comprehensive Planning Requirement in Urban Renewal, 116 U. Pa. L. Rev. 25 (1967).
to insisting that a city's freeway plan should be "so applied as to promote a
desirable urban development".\textsuperscript{632} it referred to the ongoing efforts of city
planning commissions and urged the establishment of special metropol-
tan authorities to plan the Interstates.\textsuperscript{633} This entire portion of the doc-
ument was watered down—indeed, just about watered away—by the
Bureau in its important 1955 memorandum.\textsuperscript{634} The route location work at
the state level had been carried out in 1955 by state highway de-
partments. Generally, these departments were narrowly engineering-minded.
Only 19 of them had even taken the modest first step of setting up a
separate urban division.\textsuperscript{635} Many of the state departments, in making their
route selections, did not even bother to confer with elected city officials, let
alone with the less politically influential city planners.\textsuperscript{636}

Eventually, in section 134 of the 1962 Highway Act, Congress estab-
lished a requirement that after July 1, 1965, all federally aided urban
highways be based on a "continuing comprehensive transportation plan-
ing process carried on cooperatively by States and local com-
unities."\textsuperscript{637} The urban planning objection focuses, therefore, on the
absence of planning during the 1955-65 decade. With the objection so
narrowed down, there are two reasons why it really is not very damaging.
First, the objection's assumptions concerning the efficacy of comprehen-
sive planning—so prevalent, especially at the federal level, during the
1960's—are almost certainly unwarranted. In 1968, a dozen years after
the 1956 Act, Professor Banfield could reasonably claim that there was not
a single city—let alone a metropolitan area—in which comprehensive
planning had even begun to live up to its billing as a governor of urban
development.\textsuperscript{638} Seven years later, with the possible exception of Bos-
ton,\textsuperscript{639} this generalization still holds true. Among academicians a clear
disillusionment concerning comprehensive planning theory has now set
in; comprehensive planning is "an idea whose time has come and

\textsuperscript{632} INTERREGIONAL HIGHWAYS, supra note 121.
\textsuperscript{633} Id. at 56, 70-71.
\textsuperscript{634} 1955 Bureau Memorandum, supra note 136, at 10.
\textsuperscript{635} OWEN, supra note 79, at 58. The AMA was well aware that this absence of urban
divisions magnified the likelihood of insensitive urban freeway building. But while in the 1956
hearings the AMA raised the issue of federally requiring the departments to establish such
divisions, it specifically asked Congress to defer consideration of this issue until a later time. 1956
House Public Works Comm. Hearings, supra note 155, at 127.
\textsuperscript{636} Healey Interview, Clay, Main Street 1969: Miracle Miles or a Big Mess?, 23 J. AM.
INSTITUTE OF PLANNERS 131, 132 (1957); see Kaufman, Book Review, J. AM. INSTITUTE OF PLANNERS,
Spring 1948, at 39.
134 (1970)).
\textsuperscript{638} Banfield, The Uses and Limitations of Metropolitan Planning in Massachusetts, in 2
gone.\textsuperscript{640} The planning undertaken pursuant to section 134 reinforces this disillusionment. That this planning has been lackluster and ineffective was the finding of a major Department of Transportation study,\textsuperscript{641} not a single urban Interstate has been withdrawn on grounds of its incompatibility with section 134 planning.\textsuperscript{642}

Second, even if planners had been professionally and effectively involved in the 1955 effort, there is little reason to believe that the 1955 Yellow Book maps would have come out significantly different. What is important to recognize is that the hostility to freeways which is now endemic among planners is most decidedly a post-1956 phenomenon. If anything, freeways were historically the planners' darling. The very term "freeway" was coined in 1930 by an urban planner, who predicted that the term's referent was such an essential facility that the term itself would quickly become a staple in the planner's vocabulary.\textsuperscript{643} A 1971 essay by a liberal political scientist opines that the Boston freeway system, which originally had been approved by state and local authorities in 1948, amounted to a triumph of the "logic of the technician" over the "logic of the planners."\textsuperscript{644} There may be a conflict of "logics" presently, but not in 1948; a metropolitan planner who reviewed the Boston plan in that year found it "sensible," "comprehensive," and "well reasoned."\textsuperscript{645} A reading of the planning literature published between 1944 and 1956\textsuperscript{646} reveals that planners were paying little attention to the metropolitan implications of urban freeway building;\textsuperscript{647} in many ways, Interregional Highways stands

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{640} Id. at 435.
\item \textsuperscript{641} See Cafferty, \textit{Urban Goals and Priorities: The Increasing Role of Transportation Planning}, 25 TRAFFIC Q. 309 (1971). My own research strongly supports this conclusion. During the summer of 1971 I spent 2 weeks closeted in a Federal Highway Administration office in Washington, D.C., reading planning reports prepared and submitted pursuant to § 134.
\item \textsuperscript{642} Telephone interview with Vincent Paparella, Federal Highway Administration official, Jan. 13, 1976. Part of the reason § 134 planning has been ineffective is that it has thought itself required to accept the designated urban Interstate as "committed" and hence not subject to real question. Given the momentum, legal and otherwise, which the Interstate program had acquired by the 1960's, it was simply too late to introduce any significant planning requirement.
\item \textsuperscript{643} Bassett, \textit{The Freeway—A New Kind of Thoroughfare} AM. Cty, Feb. 1930, at 95. Edward Bassett was then President of the National Conference on City Planning.
\item \textsuperscript{644} Lupo, Colcord & Fowler, supra note 12, at 216 (discussion by Prof. Colcord).
\item \textsuperscript{646} I have read through all the issues of the Journal of the American Institute of Planners for these years, as well as each annual volume of the American Society of Planning Officials. The only article extensively critical of the urban Interstates was written by, of all people, the editor of Better Roads magazine. Nelson, \textit{Expressways and the Planning of Tomorrow's Cities}, in Planning 1950, at 117 (Am. Soc'y of Planning Officials 1950).
\item \textsuperscript{647} The suburbanizing tendencies of the Interstates were noted only occasionally and never given extensive consideration. A favorable verdict on the urban Interstates was rendered by an urban planner. Van Tassel, \textit{Economic Aspects of Expressway Construction}, 20 J. AM.
\end{enumerate}
\end{footnotesize}
as a major breakthrough from which the latter planning literature quickly receded. In fact, during the period between the 1944 and 1956 Acts, far from raising doubts about the urban Interstates, urban planners had been "begging" Congress to provide Interstate financing.548

It was only subsequent to the 1956 Act that urban planners (and other urban experts) began to develop their reservations about urban freeways and their opposition to the urban interstates. A conference on the urban Interstates was convened in Hartford in late 1957 by the Connecticut Life Insurance Co., which was embarrassed by its recent shift of office headquarters from downtown Hartford to the suburbs.649 Much to the surprise of its organizer,650 this conference turned into a confrontation between urban planners and highway officials; the latter reacted with dismay when certain planners called for a moratorium on all urban freeway building until the needed urban planning was completed.651

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548. Typical of the superficiality is Malley & Breivogel, Urban Freeways, J. Am. INSTITUTE OF PLANNERS, Fall 1948, at 23, whose discussion consists of a virtual plagiarism of one sentence from Interregional Highways. There is a reasonably strong statement by Norton in The Expressway Dilemma, J. Am. INSTITUTE OF PLANNERS, Fall 1948, at 36, but it only takes the form of a one-page "abstract." The need for coordinating the urban Interstates with comprehensive urban planning was likewise occasionally mentioned, but only superficially. See, e.g., Forster, Book Review, J. Am. INSTITUTE OF PLANNERS, Spring 1947, at 38-39.

549. Coordination with land use planning was strongly recommended in Owen, supra note 79, at 218-25. But the primary purpose of such land use planning, according to Owen, was to control population so that highway officials could accurately predict and adequately handle future traffic demand. While Owen was sensitive to the neighborhood or "micro" issues which planning can deal with, he gave little attention to freeways as a general determinant of metropolitan development.

550. A three-part essay by Lewis Mumford, The Sky Line [of New York City], NEW YORKER, Mar. 19, 1955, at 85, Apr. 2, 1955, at 97, and Apr. 16, 1955, at 78, makes clear that Mumford, alone among the urban experts of the mid-1950's, appreciated the developmental potency of urban freeways. However, Mumford's view that the "high-density city is obsolete" (Apr. 16, 1955, at 79) has not worn well, and his call for an entirely "new metropolitan pattern" (id.) probably placed him beyond the pale of practical politics.

551. This, according to an address delivered by AIF ex-President John Howard, reprinted in PLANNING 1957, at 97 (Am. Soc'y of Planning Officials 1957). See also Forster, Book Review, 13 J. Am. INSTITUTE OF PLANNERS 38, 39 (1947) (approval of Interstate System "gratifying").

552. Howard's 1957 address went on insightfully to predict many of the adverse effects of the urban Interstates. However, during the late 1940's, Howard himself had supervised the preparation of a master plan for the City of Cleveland, which was eventually approved by the city's Planning Commission in 1950. CLEVELAND CITY PLANNING COMM'N, CLEVELAND TODAY . . . T O M M O R R O W (1950). That plan was entirely in harmony with the 1947 and 1955 Interstate designations for Cleveland (Bureau of Public Roads, General Location of National System of Interstate Highways 65 (1955)), and its accompanying text reflects few of the concerns voiced by Howard in 1957. See CLEVELAND CITY PLANNING COMM'N, CLEVELAND TODAY . . . T O M M O R R O W 30-33 (1950). The plan did emphasize, however, the importance of improved public transit. Id. at 34-37.

553. Owen interview.

554. Id.

555. See W. OWEN, CITIES IN THE MOTOR AGE 37-38 (1959). Highway officials countered with a conference of their own at Syracuse University in which urban issues could be recognized and discussed but in a less threatening atmosphere. This conference is briefly described in Holmes,

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Modern planning thinking on urban freeways essentially dates from that Hartford conference. An urban planning recommendation was urged unsuccessfully by General Bragdon as part of the 1959-60 White House review of the urban Interstates. The planning idea was then picked up by the Kennedy Administration, and after a gyration or two finally found itself in the 1962 Act.

**CONCLUSION**

What a review of the preceding sections verifies is that Interstate realities are considerably more complex than the indictment would suggest. Those realities are decidedly multifarious, and they certainly are resistant to the kinds of simplifications which characterize the indictment. As for air pollution, traffic generation, public transit, and urban development, the facts are distinctly subtle, and lend intermediate support—but no more than that—to the indictment's broad-brush claims. The assumption that in the 1956 Act Congress proceeded in a state of benign urban innocence is valid in some cases (again, air pollution), but at least partly invalid in others (e.g., public transit and relocation); the legislative history of the 1956 Act is not quite so bland as the 1970 Moynihan would have us suppose. For some of the other adverse consequences of the Interstate program (e.g., the damage done to the environment and to low-income neighborhoods), there are explanations which may not excuse, but which at least enable us to understand. If there was a moving-party "heavy" for the urban Interstates, it was the cities themselves rather than the highway lobby—a fact which makes one wonder whether that moving party should be regarded as a "heavy" after all. The sympathetic congressional response to the transit industry’s only request in 1956—a request of considerable economic importance to many transit operators—places an important caveat on the claim that Congress was insensitive to the public transit cause. Since urban freeways then carried the city planners’ seal of approval, there is little merit in the idea that the 1956 Act subverted the planners’ collective wisdom. It is often said that what our cities need is “balanced transportation systems”; a measure of balance is also needed in the appraisal of our existing transportation programs.

Even with the help of such balance, however, it remains unmistakably true that the Interstate program has been responsible for serious harms in

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652. See text accompanying note 276 supra.
urban areas. In the years since 1956, with the Interstate program rolling ahead, we have become more and more aware of the nature and full extent of those harmful consequences. What this in turn re-emphasizes is the point discussed at the end of Part II: Congress, in committing itself to a grand, long-term scheme, sacrificed the opportunities for thoroughgoing review of the program once it had begun and for the appropriate adjustment of the program on the basis of such review. Part II's conclusion was that in the Interstate case the benefits of advance planning have been outweighed by the cost of those sacrificed opportunities. This Part's analysis of the complexities of the urban Interstates, based on the 20 years of our post-1956 experience, fortifies that conclusion.
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Photographs
by
RONALD HUGO SCHRAMM
Antitrust and Motor Carriers: ICC Use of Clayton Act § 7 To Prevent An Involuntary Takeover

INTRODUCTION

In *Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freighlines, Inc.*, 122 M.C.C. 345 (1976), the Interstate Commerce Commission has, for the first time, used its Clayton Act power to prevent an involuntary takeover of one motor common carrier by another. The Commission’s eagerness to find a violation of § 7 of the Clayton Act in an attempted takeover situation represents a significant shift in the position of the ICC toward antitrust enforcement, and should put transportation lawyers on notice that, as one writer has put it, “[w]e are now at a regulatory watershed.”

The primary issue resolved by the decision is the determination of a proper “product market” and “geographic market” for the purposes of Clayton Act analysis. The Commission also has clarified the interrelationship between its Interstate Commerce Act § 5 authority and its Clayton Act § 7 powers, as well as providing a diagram for future § 7 proceedings.

I. BACKGROUND

Navajo Freight Lines is a motor common carrier of general commodities with authority over a regular-route network extending from Los Angeles and San Francisco to Fort Wayne, Indiana. It controls several

2. This and the following information is based on Navajo Inc.’s structure in 1970, the period pertinent to these proceedings. Navajo, Inc., has grown considerably since that time.
other motor common carriers through stock ownership, and is in turn controlled by United Transportation Investment Company (UTIC), which holds 90 percent of Navajo's outstanding capital stock.

Garrett is also a motor common carrier of general commodities with regular-route authority in a fourteen-state area, extending generally from Minneapolis/St. Paul, Denver and Albuquerque on the east to Los Angeles, San Francisco, Portland and Seattle on the west. A majority of Garrett's common stock is closely held. Although Navajo Freight Lines, Inc. is presently much larger than Garrett, during the period pertinent to these proceedings they were approximately equal in size, with gross annual revenues in the area of $50,000,000.

In 1965 Navajo began acquiring Garrett stock and by 1970 had acquired approximately a 26% interest in Garrett, representing a $5,000,000 investment. In addition, Navajo had, through its voting power, placed two representatives on the nine-member Garrett Board of Directors. Further participation by Navajo in Garrett's management was thwarted by Garrett's creation of a ten-year voting trust, controlling approximately 58% of its outstanding capital stock.

In 1970 the Department of Justice filed suit against Navajo and its two representatives on the Garrett Board, alleging violations of sections 7 and 8 of the Clayton Act. While this action was pending the Interstate Commerce Commission instituted its own investigation pursuant to § 5(8) of the Interstate Commerce Act and § 11 of the Clayton Act. The investigation sought to determine:

1) whether a violation of section [5(5)] had occurred through control or management of Navajo and Garrett in common interest without prior commission approval, 2) whether Navajo's acquisition of Garrett stock caused a violation of section 7 of the Clayton Act by substantially lessening competition, tending to create a monopoly or restraining commerce, and 3) if any violation were found what actions were necessary to eliminate and to prevent future violations.

Approximately fourteen weeks after the Commission initiated its investigation, Navajo applied to the Commission under § 5(2) of the Interstate

9. 122 M.C.C. at 350.
Commerce Act for authority to acquire control of Garrett. The Commission consolidated consideration of the § 5(2) application with its ongoing § 5(8) investigation.

After lengthy hearings and the compilation of thousands of pages of evidence, the Commission concluded: 1) that Navajo's § 5(2) application would be disapproved as not being in the public interest; 2) that Navajo had not violated § 5(5) of the Interstate Commerce Act because it had been unable to acquire control of Garrett; 3) that Navajo had violated § 7 of the Clayton Act because its holdings in Garrett would eventually lead the two carriers to seek a common ground, creating the potential for a substantial lessening of competition; and 4) that divestiture by Navajo of its Garrett stock was the only adequate remedy.

II. PRIMARY JURISDICTION ISSUE

Navajo's § 5(2) application presented a primary jurisdiction question at the district court level. As will be explained more fully later, Commission approval of the acquisition of control by one common carrier over another immunizes the carriers involved from the application of the antitrust laws insofar as is necessary to carry out the approved acquisition. The conduct at issue in the antitrust proceedings of both the Commission and the Department of Justice was the same conduct at issue in the Commission's § 5 proceeding. Thus, there was a possibility that the Commission would approve Navajo's § 5(2) application, which would render both antitrust proceedings moot. Faced with this possibility the court decided that primary jurisdiction should rest with the Commission, stating:

We think that granting the ICC primary jurisdiction of § 7 cases which involve stock acquisitions by one carrier in another would facilitate orderly administration and make the statutory scheme more workable.

It should be noted that the district court decision does not place exclusive jurisdiction with the Commission. Exclusive and prior jurisdiction are sometimes confused, yet they are clearly distinct. Exclusive jurisdiction is involved where a particular court or agency has the sole jurisdiction to proceed with an action and to issue an enforceable decree. Primary jurisdiction, on the other hand, arises where a claim is originally cognizable in the courts but enforcement of the claim requires

11. 122 M.C.C. at 388-89.
the resolution of issues which by statute have been placed within the special competence of an administrative body. The courts' jurisdiction is suspended as to these particular issues, but the court may retain jurisdiction over the cause of action, the remaining issues and the relief to be granted.

The doctrine is used to assure a workable allocation of business between the courts and administrative agencies. It may thus arise in a number of different circumstances. In the Navajo case the court employed what has been called the "immunization theory" of primary jurisdiction, stating:

"We think the ... doctrine is properly applied where there is a clear possibility that the agency may immunize precisely that conduct which is the basis of the antitrust complaint. ..."

It is evident from this statement that it is only where a Clayton Act violation has been alleged and its ultimate resolution could be affected by a § 5(2) or § 5(8) proceeding that primary jurisdiction would rest with the Commission. Where the outcome of a § 7 case was not contingent upon the outcome of a § 5(2) or § 5(8) proceeding the concurrent jurisdiction of the Commission and the Department would theoretically be unaffected.

III. The Agency's Decision

A. Statutory Scheme

A brief review of the dual statutory scheme involved in the Navajo decision is helpful to an understanding of the case.

Under § 5(12) of the Interstate Commerce Act the Commission has authority to immunize certain mergers, combinations and acquisitions of control from the operation of the antitrust laws. The exclusive means of obtaining approval, and thus immunization, is through application to the Commission under § 5(2) of the Act. Section 5(5) makes it unlawful for

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17. Id.
   ... [C]arriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws, insofar as may be necessary to enable them to carry into effect the transaction so approved ... .
21. 49 U.S.C.A. § 5(2) (1970). It provides in pertinent part: § 5, para. (2). Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
   (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and
any person to effectuate "the control or management in a common interest of any two or more carriers" without approval of the Commission. Section 5(8)\textsuperscript{22} authorizes the Commission, upon petition or its own initiative, to investigate and determine whether any person has effected control without authorization, in violation of § 5(5). If the Commission finds that § 5(5) has been violated it must "by order require such person to take such action as may be necessary . . . to prevent continuance of such violation."\textsuperscript{23}

Section 7 of the Clayton Act makes illegal the direct or indirect acquisition by one corporation of the stock or share capital of another where the effect is to substantially lessen competition.\textsuperscript{24} Concurrent jurisdiction to enforce § 7 is explicitly conferred upon the Department of

\begin{quote}
operation of the properties theretofore in separate ownership, or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . .

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission . . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . . .

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.


\textsuperscript{24} 15 U.S.C. § 18 (1970). It provides in pertinent part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . . .

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition . . . .

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce . . . . from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property or interest therein is so acquired. (emphasis added).

See, United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (D.C.N.Y. 1965) (§ 7 applies to mergers between actual competitors even though the firms have competed directly in only a fraction of the relevant product and geographic markets in which either has operated, and also bars any acquisition by one corporation of another, competitor or not, whenever reasonable likelihood appears that the acquisition may lessen competition substantially or tend to create a monopoly).
Justice and the ICC; § 5 authorizes the Attorney General to enforce the Clayton Act in the district courts, while § 11 authorizes the Commission to enforce § 7 against ICC regulated carriers. Although this § 11 authorization has been construed as placing an obligation upon the ICC to enforce the Clayton Act, the Commission has not been overzealous in this regard. The only previous proceedings by the Commission solely under § 7 of the Clayton Act which this author could find were in 1929-1933 and involved proceedings against two railroads who were acquiring large percentages of stock in competing roads in an attempt to forestall possible Commission action under a general plan of consolidation of United States railroads.

The anticompetitive aspects of an acquisition have been considered by the Commission in proceedings under § 5 of the Interstate Commerce Act, but the focus under § 5 is significantly different from the Commission's focus under § 7 of the Clayton Act. Under § 5 the antitrust laws are only one aspect of the Commission's considerations which must be weighed against the "public interest" of the proposed acquisition of control. Under § 7 the anticompetitive effect of a merger or control acquisition is the sole consideration for the finding of a violation. Moreover, the Commission may give, and has given, retroactive approval to past conduct which violated § 5(5) of the Act, thereby immunizing that conduct from antitrust prosecution. It was this willingness to grant retroactive approval of § 5(5) violations that lead many in the transportation field to believe that ICC regulated carriers were ipso facto "immune" from prosecution under the antitrust laws. The Navajo decision may lay to rest once and for all that mistaken belief. The Commission has made manifest what it has often said—common carriers do not have carte blanche in regard to antitrust immunity, and that the Commission has an obligation to enforce the Clayton Act against regulated carriers.

30. Note 21 supra.
31. Note 24 supra.
The fact that the Navajo case involves an attempted involuntary takeover makes it a novel antitrust situation and complicates a § 7 analysis. In the usual § 7 proceeding, as in a § 5 proceeding for that matter, there is evidence of a cooperative effort on the part of two corporations to merge or otherwise combine and thereby create the potential for a substantial lessening of competition. In this case, however, Garrett assumed a hostile stance toward all of Navajo's actions and succeeded in thwarting both majority stock ownership and substantial management participation by Navajo. The status quo, which prevented even the existence of a potential for anticompetitive cooperation, presented a hurdle which the Commission was not able to clear.

B. **SECTION 5(5) ISSUE**

The issue of "control" is at the heart of every § 5(5) proceeding. The courts have consistently held that control is a term of art, not a precise definition, and that the Commission has exclusive jurisdiction to determine whether control exists upon the basis of the particular facts of each case.\(^{34}\) In the Navajo case, the Commission determined that Garrett's hostility and Navajo's inability to acquire either a majority stock interest or a veto power on Garrett's Board prevented an acquisition of control by Navajo. Therefore no violation of § 5(5) was found.

C. **SECTION 7 ISSUE**

The failure to find a § 5(5) violation does not end a Clayton Act § 7 investigation but rather sets the stage for it. The Commission was in agreement with both the Department of Justice\(^ {35} \) and strong case law in holding that a violation of § 7 does not depend upon a finding of illegal control.\(^ {36} \) The Commission's § 5 and § 7 powers are clearly separable with the only overlap being the Commission's power under § 5 to immunize certain conduct from prosecution under § 7. The § 5 powers of the Commission come into play only when the initial determination of illegal control has been made.\(^ {37} \) Section 5 does not deal with the lessening of competition resulting from a stock acquisition which falls short of providing the acquiring corporation with control. This area is appropriately covered by § 7, the purpose of which is "to arrest restraints of trade in their


\(^{35}\) Under 15 U.S.C. § 21(b) the Attorney General may appear as a matter of right in § 7 proceedings by the Commission.


incipiency and before they develop into fullfledged restraints violative of the Sherman Act. As stated earlier, the sole question in a § 7 proceeding is whether the alleged conduct has the effect of "substantially lessening competition." Section 7, therefore, may be violated by a stock acquisition which does not amount to control. In fact, in a situation falling short of control, § 7 is the only legal tool available to the Department of Justice and the ICC to reach the anticompetitive conduct.

Utilizing Brown Shoe Co. v. United States as an analytical reference, the Commission discussed seriatum the requirements for a showing of a § 7 violation. Drawing from that case the Commission stated the four requirements for a § 7 violation as follows:

The threshold inquiry in an alleged section 7 violation requires the existence of two corporations engaged in commerce and the acquisition by one of the stock of the other. . . . The next inquiry is whether in any line of commerce (a product market) in any section of the country (a geographic market) the acquisition would have anticompetitive effects.

As the Commission correctly stated, it is not until you have delineated a product market and a geographic market that you reach the real test of a § 7 violation, whether the acquisition has a substantial anticompetitive effect.

1. Product Market

The determination of the proper product market was the primary point of dispute between Navajo and the Department of Justice. The difficulty of drawing the thin line necessary to isolate the proper market for antitrust analysis is evidenced by the fact that both sides cited the same decisions in support of their radically differing proposals. In a § 7 proceeding against a corporation marketing tangible products the determination of a product market is relatively simple. Even in a "tangible products" case, however, there can be disputes, since the product must be one for which there is substantial competition between the corporations concerned and for which there is not a readily available competitive substitute.

In the case of motor carriers, though, a service rather than a tangible product is sold. To deal with this service market, the Commission accepted the Department's proposal that a "cluster of services" be used to define the appropriate product market for § 7 analysis. Navajo argued for an industry-wide concept of a product market. They agreed that an area of effective competition must be determined but maintained that the

40. 122 M.C.C. at 368.
area should be "intercity transportation." In Navajo's product market all modes of transportation would have to be considered as providing substitutable competitive service. "Transportation in space" would be the product. The Commission did not accept this approach but instead delineated the following analytical basis:

While available transportation service is certainly a general product market, it is not a market sufficiently precise for section 7 purposes, where the analysis involves any line of commerce. It is an accepted principle that within a broad product market definable submarkets for antitrust purposes may exist.

In seeking the appropriate submarket in which companies compete, the goal is to define a certain 'cluster' or 'hard core' of products (or services) for which those companies have some comparative and competitive advantage over companies with different characteristics. The advantage need not cover all aspects of a particular product or service but must allow identification of certain core elements which distinguish it from other available products or services. Determination of the core elements of a particular submarket must be based on 'practical indicia' recognized by the public or within the industry.

This is a relatively new concept which arose primarily from three recent Supreme Court cases: United States v. Philadelphia National Bank, United States v. Phillipsburg National Bank, and United States v. Grinnell Corporation. United States v. Philadelphia National Bank was a civil action brought by the Attorney General to enjoin a proposed merger between two Philadelphia banks as violative of the Clayton Act. In defining the proper product market the court determined that the cluster of products and services denoted by the term "commercial banking," such as credit, checking accounts and trust administration, composed a distinct line of commerce. This approach was reaffirmed in the Phillipsburg National Bank case, also involving a proposed merger of two banks. In United States v. Grinnell Corporation, the Court held that the "accredited central station business," comprising burglar and fire alarm protection, is a relevant cluster of services product market for the purposes of the antitrust laws.

All of the above decisions, as well as the present one, have a firm grounding in the submarket criteria set forth in the Brown Shoe decision:

43. 122 M.C.C. at 368.
44. Id. (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).
The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E.I. duPont deNemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and use, [sic] unique production facilities.\(^{51}\)

It should be apparent that this approach gives great flexibility to the Bureau of Enforcement of the ICC and to the Department of Justice to delineate a “cluster of services” market tailored to create the best possible argument for a §7 violation. Even where there is some competition between all modes of transportation, on an industry-wide basis, the “cluster of services” concept can be used to isolate a core submarket in which there exists economically significant competition only between the parties charged with the §7 violation.\(^{52}\) In the *Navajo* case the Commission heard testimony from some twenty-two motor carrier witnesses, eleven shipper witnesses and four economists. Relying heavily on 1967 *Census of Transportation* data and on information from Trinc’s *Blue Book of the Trucking Industry* (1971 ed.) the Commission concluded that the proper cluster of services product market was:

transportation by regular route motor common carrier of general commodities, with the usual exceptions, in less-than-truckload (LTL) quantities weighing 10,000 pounds or less.\(^{53}\)

The Commission also gave the impression that this product market will remain relevant for regular-route motor common carriers of general commodities in future § 7 cases:

Certain motor carriers provide service with particular characteristics which are most suitable for LTL movements and which distinguish LTL movements from movements of all general freight . . . . These elements comprise a distinct cluster of services based upon commercial and economic realities, for which there is effective competition not only between Navajo and Garrett but between other common carriers with authority to transport general commodities over regular routes.\(^{54}\)

The particular service characteristics include “regular scheduled service, a distinct price, and the movement of a broad range of commodities.”\(^{55}\)


\(^{53}\) 122 M.C.C. at 368.

\(^{54}\) 122 M.C.C. at 371.

The Commission noted that according to the 1967 Census of Transportation, motor carriers account for eighty percent of all tonnage transported beyond two hundred miles in shipments of 10,000 pounds or under, and that there is a distinct lack of competition for LTL freight from contract carriers, special commodities carriers, irregular route carriers, private carriers, freight forwarders and shipper associations.56

Since the purpose of determining a product market is to focus the antitrust inquiry, the narrower the definition, the more likely a determination that the conduct at issue will substantially lessen competition. In effect, by making the area of competition smaller the antitrust target is made larger. It is this flexible approach which should be of greatest concern to transportation lawyers and which is likely to make the determination of a product market the most litigated issue in § 7 proceedings involving motor carriers.57 The product line, however, must be drawn somewhere or the effect of almost any anticompetitive conduct would be de minimus. The Commission has at least shown a willingness to disregard a market that is improperly "tailor made" to fit the exigencies of a particular case, as was one of the geographic markets discussed below.58

2. Geographic Markets

A geographic market may be drawn as narrowly as a product market for the purposes of § 7. Under the statute it is not necessary to show a substantial lessening of competition throughout the market served by the carriers, but only in "any section of the country." The market, however, "must, as nearly as possible, conform to competitive reality." (United States v. Continental Can Co., 378 U.S. 441, 457 (1967)). It need not be "where the parties to the merger do business, or even where they compete, but where, within the area of effective competition the effect of the merger will be direct and immediate." (United States v. Philadelphia Nat. Bank, 374 U.S. 321, 357 (1963)). In the Commission's words:

A geographic market for section 7 purposes must be defined with reference to commercial and competitive realities. Not only must the geographic market be an area where the parties do business and compete; a geographic market must also be economically significant.59

The Department of Justice proposed seven separate geographic markets. Four of the markets were composed of city pairs served by both Garrett and Navajo. The Commission considered the market shares held by each line in 1968, the market share which a combined Navajo and

56. 122 M.C.C. at 369-70.
57. This is currently being challenged on appeal. Navajo Terminals, Inc. v. United States, No. 76-1635 (7th Cir., filed July 1, 1976).
58. 122 M.C.C. at 373.
59. 122 M.C.C. at 372.
Garrett would obtain, and the increase in market concentration among the few largest carriers which would result from a Navajo/Garrett combination.

In the first city pair, Denver-Las Vegas, the record established that in 1968 Garrett ranked first among the serving carriers, moving 56.1% of the LTL Freight. Navajo ranked seventh with a 2.6% market share. A combined Navajo and Garrett would rank first with a 58.7% market share, and the market concentration among the top few carriers would increase from 88.8% to 91.4%. 60

In the second city pair, San Francisco Bay Area-Las Vegas, Garrett ranked third with 11% of the market and Navajo fourth with 7.3%. A combined Navajo/Garrett would rank second with an 18.3% market share, and the market concentration among the top four carriers would increase from 88% to 94.1%. 61 In the third city pair, Los Angeles-Denver, Garrett ranked fourth with 14.1% of the market and Navajo seventh with 5.6%. A combined Navajo/Garrett would rank second with a 19.7% market share, and market concentration among the top four carriers would increase from 71.1% to 76.7%. 62

In the fourth city pair, San Francisco Bay Area-Denver, Garrett ranked third with 18.3% of the market and Navajo first with 24.1%. A combined Navajo/Garrett would rank first with a 42.4% market share, and the market concentration among the four largest carriers would increase from 77% to 87.1%. 63

It can be seen that, although the market shares held by Garrett and Navajo varied considerably among the four city pairs, a Navajo/Garrett amalgamation would result in a significant increase in both the Navajo/Garrett market position and market concentration among the four largest carriers.

The fifth market was a transcontinental market between the Rocky Mountain Region and points east of the Mississippi River. The final two markets were gateway interchange markets at the cities of Denver and St. Paul. The administrative law judge combined the transcontinental and gateway markets into a single competitive geographic market. Garrett serves only the western half of the United States, however, and is thus involved in transcontinental service only through interline. Navajo does not serve the city of St. Paul. Therefore, the Commission rejected the transcontinental and gateway markets as not constituting an area of effective competition. The “combined” transcontinental and gateway

61. Id. at 718-719.
62. Id. at 722-723.
63. Id. at 724-725.
market was likewise rejected on the grounds that it "was improperly tailored to suit the facts of [the] proceedings." The Commission accepted only the city pairs as constituting the relevant geographic markets, since Garrett and Navajo were direct competitors for traffic between each city pair.

3. Substantial Lessening of Competition

The purpose of the Clayton Act is to arrest anticompetitive conduct in its incipiency. Thus, it is not necessary to show that past conduct violated the antitrust laws, nor that future conduct is certain to violate the antitrust laws; it is only necessary to show that present conduct creates the potential for substantially lessening competition. This potential must be considered in each geographic market, i.e., the four city pairs.

As previously stated, to assess the impact upon competition of Navajo's interest in Garrett, the Commission determined the present market shares and market concentration in each of the four city pairs and the effect a Navajo acquisition of Garrett would have upon market shares and concentration. In arriving at these ratios the Commission considered traffic that originated in one of the city pairs regardless of its ultimate destination, and traffic that was destined for one of the city pairs regardless of its origin. The Department alleged that a combined Navajo and Garrett would dominate between 12.5% and 55% of the traffic moving to, from, or between the city pairs. The Commission concluded that "any operation of Navajo and Garrett in a combined interest has the potential to increase competitive concentration in each of the involved markets."

In assessing the probable impact upon competition the Commission employed a two-level approach. The first level assumed that Navajo's holdings in Garrett would remain at 26% and the second presumed that Navajo would eventually achieve control of Garrett. In regard to the first, the Commission reiterated that a finding of control is not a prerequisite to a § 7 violation. However, the same evidence showing a lack of control over Garrett—the hostility of Garrett's management, Navajo's lack of veto power, and a thwarting of more than 26% Navajo stock ownership—also convinced the Commission that the 26% stock interest, standing alone, did not prove cooperation between Garrett and Navajo that would create the potential for a substantial lessening of competition. This is true even

64. 122 M.C.C. at 373.
67. 122 M.C.C. at 377 (emphasis added).
68. Id.
though Navajo’s 26% stock interest amounted to an investment exceeding $5,000,000. In regard to the second presumption, the Commission concluded that because Navajo had manifested an intent to acquire control of Garrett, and because it manifested no contrary intent for the future, it was probable that Navajo would gain control of Garrett at some future time. The Commission held:

It is not one single factor but the entire series of events and practices set forth in great detail in the record in these proceedings which leads us to conclude that it is likely, and in fact probable, that Navajo will in the future increase its percentage of Garrett stock, obtain a controlling interest in Garrett and if Navajo chooses, merge the two carriers, if remedial action is not taken. If a change in the status quo is not imposed upon Navajo and Garrett, these carriers have no reasonable choice but to seek common ground, as they are inextricably bound together.69

This conclusion was reached despite the fact that Navajo had proposed the creation of a ten-year voting trust for its stock and had agreed to accept a ten-year prohibition on purchases of Garrett stock, and despite the fact that its § 5(2) application had been denied. This portion of the decision needs to be analyzed in greater depth because there are steps in the Commission’s analysis which appear to make the finding of a § 7 violation impossible.

The Commission certainly appears to hold that the probability of the acquisition of additional shares by Navajo is the basis for its finding of a § 7 violation. It should be pointed out, however, that this presumption of probable future acquisition is not a sine qua non for the finding of a § 7 violation but was necessitated solely by the Commission’s reasoning in this case. Rather than supporting the finding of a § 7 violation, though, it is this presumption which actually makes such a finding impossible.

There is unequivocal case law standing for the proposition that a § 7 violation may occur where only a minority interest in a competitor is acquired.70 In fact, the Department’s arguments were founded upon just such a case, Hamilton Watch Co. v. Benrus Watch Co.71 The facts in that case were remarkably similar to the Navajo case. Benrus had acquired approximately 24% of the outstanding stock of Hamilton and was thereby

69. Id. at 378.
71. 114 F. Supp. 307 (D. Conn.), aff’d, 206 F.2d 738 (2d Cir. 1953). In his opening statement Mr. Steve Charno of the Department of Justice stated:

“Our primary application of section 7 of the Clayton Act, and the order of our proof, and the manner in which our evidence is organized, are all outlined in a single judicial opinion.... This is the opinion in Hamilton Watch versus Benrus”.

Record at 408-09, Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freightlines, Inc., 122 M.C.C. 345 (1976).
entitled to elect one member to Hamilton’s board of directors. The stock acquisition and impending takeover was shown to have considerably lessened Hamilton’s competitive position. The court found that Benrus’s minority interest in Hamilton violated § 7:

[The] acquisition if made only with intent to obtain minority representation constituted a violation of Section 7: having in mind the probable effect on the relevant ‘line of commerce’ of the competitive practices of these two competitors and the practical considerations that confront the board of directors of any corporation in a competitive enterprise, I think it fairly inferable that minority representation, because of the opportunity thereby afforded to persuade or to compel a relaxation of the full vigor of Hamilton’s competitive effort would come within the ban of Section 7.72

Unlike the court in Hamilton, however, the Commission declared that Navajo’s “intrusion alone [could] not be viewed in a vacuum”.73 Due to the hostility of Garrett and the effectiveness of the voting trust in preventing future Navajo acquisition of shares, the Commission concluded that Navajo’s intrusion was not sufficient standing alone, to compel a finding that Navajo could convince Garrett to relax the “full vigor” of its competitive efforts. In other words, if the status quo were maintained Navajo could not compel Garrett to cooperate in substantially lessening competition. By coming to this conclusion, the Commission foreclosed the possibility of applying the Hamilton rationale to hold that Navajo’s minority interest in Garrett, standing alone, constituted a violation of § 7. The Commission had to postulate a probable change in the status quo to support the finding of a § 7 violation. Therefore, they declared that it was “probable” that Navajo would, in the future, increase its interest in Garrett and by virtue of its increased interest compel Garrett to seek a “common ground.”

There are severe problems with this presumption. From the legal point of view, both case law and the statute itself support the contention that the present status of the parties must be the basis for a finding of probable future anticompetitive conduct. The Commission cites no authority supporting its assumption that there can be a contingent violation of § 7, i.e., that § 7 can be violated where the potential for anticompetitive conduct is itself dependent upon the happening of a future event. The Commission’s logical flaw is its dependence on a double set of probabilities, namely, its inference of potential anticompetitive conduct resulting from the probability of future control. Rather, if the present conduct of the parties does not present the potential for anticompetitive cooperation then no § 7 violation has occurred.74 This is the conclusion

72. 114 F. Supp. at 317 (emphasis added).
73. 122 M.C.C. at 381.
74. This is supported by the decision in United States v. E.I. duPont deNemours & Co., 353 U.S. 586, 598 (1957), where the court said: “[P]roof of a mere possibility of a prohibited restraint or tendency to monopoly will not establish the statutory requirement . . . .”
reached by Commissioner Brown, in partial dissent, where he states:

The overall tone of the majority report conveys more of a feeling that a violation of section 7 could occur at any time, than of a firm conviction that it has occurred.\textsuperscript{75}

Factually, there are even more problems with the Commission’s stance. The Commission does not explain how Navajo is to continue acquiring shares of Garrett with the aim of ultimately achieving control when its § 5(2) application has been disapproved. To achieve the control the Commission sees as inevitable would be a direct violation of the § 5(2) disapproval. Certainly the Commission was not suggesting that it might later be compelled to approve the very control it had disapproved in this proceeding.\textsuperscript{76}

In summary, the Commission could have relied upon case law for the principle that a minority stock acquisition can violate § 7 by creating the necessity for the two corporations involved to seek a common ground. Instead, they chose not to view the Navajo/Garrett situation in a vacuum but to consider the hostility between the two companies as making cooperation impossible. Had the Commission proceeded in the same vein, it would not have viewed the probability of Navajo control in a vacuum. Had the Commission been consistent it would have acknowledged that unless and until Navajo acquired a greater share of Garrett or otherwise caused Garrett to seek a common ground there was no violation of § 7.

One explanation for this seeming anomaly may be found in the statutory scheme under which the Commission was working. While it is true that the ICC has the power to order divestiture under § 5(8) of the Interstate Commerce Act,\textsuperscript{77} this power is not available until a finding of control has been made. When, as here, the Commission makes a determination that control has not been accomplished, its only divestiture powers are found in its Clayton Act authority. Theoretically, a § 5(2) disapproval will have no effect on this power. Thus, the Commission avoids giving the false impression that a § 5(2) disapproval may allow one to avoid a § 7 violation.

This need to find a § 7 violation in order to cause Navajo to divest itself of Garrett stock does not, however, justify the Commission’s non sequitur in its § 7 analysis. Nor does it explain why the Commission concludes:

\textsuperscript{75} 122 M.C.C. at 390-91.

\textsuperscript{76} Even in cases where there was no prior disapproval, the Commission has reversed the earlier trend of retroactively approving § 5(5) violations by virtue of § 5(2) approvals. Alleghany Corp.—Control and Purchase—Jones Motor Co., Inc., and Control—Erie Trucking Co., 109 M.C.C. 333 (1970).

\textsuperscript{77} 122 M.C.C. at 391 (Commissioner Brown, dissenting in part, citing Gilbertville Trucking Co. v. United States, 317 U.S. 115, 129-30 (1962)).
Our analysis of the evidence of record supports the ... finding ... that
substantial adverse competitive effects in the four city pair markets will
result from Navajo's purchase and continued ownership of 26 percent of
Garrett's stock, and that a violation of section 7 exists which must be
remedied.\textsuperscript{78}

This conclusion meets the technical requirements for a § 7 violation but is
contradicted by earlier language in the decision.

One other aspect of the Commission's approach, which can be
viewed apart from the Commission's probability rationale, should be
noted. This is its method for computing the degree of anticompetitive
impact arising from Navajo/Garrett cooperation should it in fact occur. The
Commission concluded that such cooperation would have the effect of
decreasing competition and increasing market concentration. The
Department of Justice argued that this fact alone established a violation of
§ 7 by virtue of the "presumption of illegality" doctrine developed in earlier
cases.\textsuperscript{79} Under this doctrine a merger or acquisition

which produces a firm controlling an undue percentage share of the
relevant market, and results in a significant increase in the concentration of
firms in that market, is so inherently likely to lessen competition substantially
that it must be enjoined in the absence of evidence clearly showing that the
merger is not likely to have such anticompetitive effects.\textsuperscript{80}

Navajo, on the other hand, argued that recent Supreme Court decisions\textsuperscript{81}
have foreclosed the "mechanical application" of § 7 based upon market
share data and also that the highly regulated nature of the motor carrier
industry made unlikely a substantial lessening of competition.

The Commission took a position between the two proposals. It stated
that market shares and market concentration alone are not conclusive of
substantial anticompetitive consequences, but that the effects of regulation
upon competition must be considered as one relevant factor in the
economics of the particular situation.\textsuperscript{82} This is in keeping with the frame of
reference announced in the \textit{Brown Shoe} decision:

Congress indicated plainly that a merger had to be functionally viewed, in
the context if its particular industry . . .

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Statistics reflecting the shares of the market controlled by the industry
leaders and the parties to the merger are, of course, the primary index of
market power; but only a further examination of the particular market—its

\textsuperscript{78} 122 M.C.C. at 380.
\textsuperscript{79} Citing, United States v. General Dynamics Corp., 415 U.S. 486 (1974).
\textsuperscript{81} Principally, United States v. General Dynamics Corp., 415 U.S. 486 (1974).
\textsuperscript{82} 122 M.C.C. at 379.
structure, history and probably future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.\textsuperscript{83}

4. Exemptions and Remedy

The Commission found that Navajo did not qualify for either of the exemptions under § 7.\textsuperscript{84} First, it was decided that Navajo did not hold Garrett stock solely for investment because Navajo utilized its voting power to seat two members on Garrett’s Board of Directors. Second, in light of the Commission’s finding that Navajo and Garrett were competitors in the four city pairs, the Commission found that Navajo failed to qualify for the “no substantial competition” exemption.

Finally, having determined that Navajo’s interest in Garrett would in the future create the potential for a substantial lessening of competition, the Commission determined that divestiture was the only appropriate remedy. This finding is in keeping with the case law development of § 7 enforcement.\textsuperscript{85}

CONCLUSION

There is a wind of increased antitrust enforcement blowing through the regulated industries. Motor carriers would be well advised to take note of the changing climate. The ICC has always had the power to enforce § 7 of the Clayton Act against regulated carriers. Due at least in part to its statutory directive to “foster sound economic conditions in transportation and among the several carriers” while developing a national transportation system,\textsuperscript{86} however, the Commission has focused more on its licensing and consolidation authority than on its antitrust powers. Many were led to believe that because of the highly regulated nature of the transportation industry, common carriers were exempt from the application of the antitrust laws. The Commission itself has fostered this belief in the past by retroactively approving acquisitions of control by one carrier of another effected in violation of § 5(5) of the Interstate Commerce Act. This policy of retroactive approval has been reversed in recent cases. A change in the Commission’s view of anticompetitive conduct can be seen as underlying this shift in policy. Thus, enforcement of the Clayton Act, initiated with or without the prompting of the Department of Justice, may well be the policy of the future. The Navajo decision is currently on appeal to the Seventh Circuit.

\textsuperscript{84} See note 17 supra.
\textsuperscript{86} Act of Sept. 18, 1940 § 1, 54 Stat. 899 (1940) (uncodified Preamble to Interstate Commerce Act).
Even if the Commission is reversed because of its analytical method, however, its new attitude will not likely change. We certainly will hear again these words of the Commission:

As § 7 of the Clayton Act forms a part of the Commission's regulatory umbrella, we are required to use its provisions, as well as our licensing and consolidation authority, to deter anticompetitive activities.\footnote{122 M.C.C. at 380.}

Teryl R. Gorrell
Delta Air Lines, Inc. v. CAB: Air Line Control of Radioactive Cargo?

The use of radioactive materials has increased dramatically in recent years. Whether one views this development favorably or unfavorably, there is no dispute that the transportation of these materials necessitates recognition of numerous problems. Since no single federal agency has exclusive jurisdiction in this area, the regulations which have evolved are complicated, sometimes overlapping, and confusing to the persons affected by them. In far too many cases, the regulations have not been followed or have been ignored.

The transportation of radioactive materials by air poses special problems, for two reasons. First, a possibility exists that significant radiation will be released if a plane carrying radionuclides crashes.\(^1\) Second, with air travel there is necessarily a time lag between the discovery of an emergency and corrective action. Thus, a package emitting high levels of radiation can create a more serious threat in air transport than in other transportation modes.

Sensitivity to these problems, especially the latter one, has led private groups to press for stricter control of air shipments of radioactive materials. For example, since February 1975 the Air Line Pilots Association (ALPA) has refused to fly airplanes carrying radioactive materials unless air carriage is essential for reasons of human health, as may be the case with shipments of radiopharmaceuticals. More recently, several air lines have proposed tariff revisions\(^2\) generally following the guidelines of the ALPA embargo. Because the shipping policies advocated by ALPA and the air lines are more restrictive than existing federal regulations, ques-

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1. In response to this problem, Congress has recently prohibited the Nuclear Regulatory Commission from licensing air shipments of plutonium (except plutonium intended for human medical use) until a container has been developed which can withstand crash impact. 42 U.S.C.A. § 5841 note (Supp. 1976). Similar restrictions have been placed on plutonium shipments by the Energy Research and Development Administration. Pub. L. No. 94-187, §§ 501-02 (Dec. 31, 1975). Plutonium is an extremely toxic radionuclide which is present in the nuclear energy fuel cycle.

2. Tariffs are filed by the air lines with the Civil Aeronautics Board (CAB) and show "all classifications, rules, regulations, practices, and services" related to the transportation provided by the air lines. 14 C.F.R. § 221.3(a) (1976). An air line revision of a tariff goes into effect after thirty days' notice unless the CAB suspends the revision in order to investigate its lawfulness. 49 U.S.C. §§ 1373(c), 1482(g) (1970).
tions are raised as to the legitimate role held by private groups such as ALPA and the air lines in affecting regulatory policy and also as to ultimate federal agency responsibility for safe air transport of radioactive materials.

It is the purpose of this note to address these questions by examining Delta Air Lines, Inc. v. CAB, a recent case involving the air line tariff revisions mentioned above. Here, the Civil Aeronautics Board (CAB) summarily rejected tariff revisions on the grounds that they were inconsistent with a CAB regulation requiring tariff conformity with federal safety regulations. In vacating the rejection orders of the CAB and remanding the case to the agency, the court held that the CAB had ignored its statutory duty when it rejected the tariffs without first affording the air lines a hearing.4

The impact of the Delta decision, however, extends beyond this narrow procedural holding to a four-step process specified by the court for the mandated CAB hearing. Accordingly, this note will consider the mechanics and substance of this hearing procedure by developing two discussion sections. First, statutes and regulations pertaining to air shipments of radioactive materials are reviewed, with particular attention given to the regulatory interplay among federal agencies. The second section analyzes the four-step hearing outlined by the Delta court, reviews several cases which preceded Delta and laid a foundation therefor, and describes possible rationales for CAB approval of the tariff revisions.

I. FEDERAL REGULATION OF AIR SHIPMENTS
   OF RADIOACTIVE MATERIALS

To one degree or another, the safe carriage of radioactive materials by air is the responsibility of several different federal agencies, including the CAB, the Federal Aviation Administration (FAA), the Materials Transportation Bureau (MTB), and the Nuclear Regulatory Commission (NRC).5 Since NRC regulations do not apply to air carriers,6 only the other

4. In the court's view, the CAB could reject the tariff revisions without a hearing only if they were technically deficient or if they were "substantive nullities." Delta at 8, 32. Since the tariffs were filed in proper form and were not on their face in violation of federal law or regulation, a CAB hearing was required.
5. The CAB and the NRC are independent regulatory bodies, while the FAA and the MTB are within the Department of Transportation.
6. The NRC's regulations apply only to its licensees. 10 C.F.R. § 71.2 (1976). The NRC requires a licensee to comply with safety regulations of the Department of Transportation (DOT), even if the licensee is not subject to DOT jurisdiction. Id. § 71.5. For a discussion of the relationship of the regulatory roles of the NRC and the DOT, see 40 Fed. Reg. 23768 (1975).
agencies’ responsibilities will be discussed here.\footnote{An air line’s common carrier duty to provide safe transportation is discussed in the next section of the note. See p. 301 infra.}

The Federal Aviation Act of 1958\footnote{49 U.S.C. § 1301 (1970).} established overlapping roles for the FAA and the CAB regarding the safe shipment of hazardous materials. The FAA was empowered to "promote safety of flight of civil aircraft in air commerce,"\footnote{Id. § 1421(a).} while the CAB, charged with the economic regulation of aviation, was directed to consider safety, among other things, "as being in the public interest, and in accordance with the public convenience and necessity."\footnote{Id. § 1302. Besides assurance of the “highest degree of safety” in air transportation and the "promotion of safety in air commerce," other factors to be considered by the CAB as being in the public interest include the "encouragement and development of an air-transportation system properly adapted to the present and future needs of . . . foreign and domestic commerce . . . of the Postal Service, and of the national defense," the "competition . . . necessary to assure the sound development of [such] an air transportation system," the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges," and the "regulation of air transportation in such manner as to recognize and preserve the inherent advantages of . . . and foster sound economic conditions in, such transportation." Id.} Thus, the roles of the FAA and the CAB were interrelated—the FAA had authority to establish air safety regulations, and the CAB had authority to regulate aviation in accordance with safety and other considerations.

The Transportation Safety Act of 1974\footnote{49 U.S.C. § 1801 (Supp. IV, 1974).} is a recent expression of congressional intent in the area of hazardous materials transportation and therefore is particularly relevant to the air line tariff controversy. Congress’ declared policy in the Act was "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.\footnote{Id.} To this end, the Secretary of Transportation was granted broad authority to issue safety regulations governing this commerce.\footnote{Id. § 1084.} Moreover, to insure that an adequate level of transportation safety would be maintained, the Act provided that any state or local hazardous materials requirement which is "inconsistent with" federal regulations is preempted unless it "(1) affords an equal or greater level of protection to the public than is afforded by [federal regulations] and (2) does not unreasonably burden commerce.\footnote{Id. § 1811(a)-(b).} Considered together, the Act’s declaration of policy and its preemption provisions convey a two-barreled congressional purpose: the transportation of hazardous materials should be regulated enough "to protect the Nation adequately," but not regulated to the point of imposing an unreasonable burden on commerce.
In addition to establishing a general regulatory framework for transportation safety, the Act dealt specifically with air transport of radioactive materials. In section 108 Congress mandated regulations which:

prohibit any transportation of radioactive materials on any [passenger-carrying] aircraft unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety.\(^\text{15}\)

The regulations implementing this section defined "research" in a manner which encompassed both medical and non-medical research.\(^\text{16}\) In contrast, the air line tariffs at issue in \textit{Delta} propose to ban radioactive materials intended for non-medical research use,\(^\text{17}\) and, as a result, are more restrictive than federal regulations.

The implementation of the 1974 Act has narrowed the FAA's safety role by transferring a large part of its duties to the Materials Transportation Bureau (MTB), a new division within the Department of Transportation. In 1975, the MTB was established and delegated authority to issue safety regulations for all modes of hazardous materials transport.\(^\text{18}\) Although the FAA is no longer responsible for promulgating regulations for air shipments of hazardous materials, it retains the duty to enforce these regulations.\(^\text{19}\) Significantly, the Act in no way altered or elucidated the scope of the CAB's safety authority, nor were air carriers required to accept all packages shipped in accordance with MTB regulations.

Neither the Federal Aviation Act nor the Transportation Safety Act specifies the precise relationship between the CAB and the MTB as to air transport safety, but the implementation of the former act has established this relationship to a certain extent. The 1958 Act requires air line tariff adherence to regulations prescribed by the CAB,\(^\text{20}\) which in turn requires that tariffs be "in conformity with" MTB safety requirements.\(^\text{21}\) In the \textit{Delta}

\(^{15}\) \textit{Id.} § 1807(a).

\(^{16}\) 40 Fed. Reg. 17141 (1975). These regulations were codified in 14 C.F.R. Part 103 and, with the exception of the research definition, have since been transferred to Title 49 of C.F.R. See note 18 \textit{infra}. Although the research definition has not been reissued under Title 49, presumably "research" continues to include non-medical as well as medical research.

\(^{17}\) \textit{Delta} at 13-14.


\(^{19}\) 49 C.F.R. § 1.47(i) (1975). In addition, the FAA is responsible for establishing procedures to monitor and enforce MTB regulations pertaining to shipments of radioactive materials by passenger aircraft. \textit{Id.} § 1.47(j).


II. **The Four Step Hearing**

As mentioned earlier, rather than holding only that a CAB hearing was required, the appellate court chose to pursue the mechanics of that hearing. Judge Wilkey defined specific perimeters of and mandatory considerations for a four-step CAB hearing:

*First*, the CAB should obtain in writing the FAA's [MTB's] authoritative position on the safe transportation of each category of hazardous materials excluded by the air line's tariffs. . . .

*Second*, since the [MTB] is not concerned with economic questions, it remains for the CAB to strike a balance between what the air lines possibly *could carry* without jeopardizing the safety of their passengers and crew, and what it would cost the carriers to undertake the transportation of all such cargo, in comparison with alternate means of transportation.

*Third*, the Board will have to determine whether the air lines are under a common carrier obligation (statutory or common law) to carry some or all of the dangerous articles which comply with [MTB] safety criteria.

*Finally*, if the Board finds such a duty to carry, it will also have to determine to what extent it has the authority to enforce this obligation by compelling air lines to carry specific materials.25

As this procedure indicates, the ultimate decision to approve or reject the tariffs will depend on several specific CAB determinations, including a finding as to whether the proposed tariffs conflict with MTB (previously FAA) safety standards,26 an accounting of economic costs incurred in

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23. Delta at 27. In fact, the CAB's own regulations contemplate hazardous materials tariffs more restrictive than MTB regulations. For example, the CAB requires tariffs to list the hazardous materials "which are not acceptable for transportation as well as those articles which are acceptable for transportation only when specified packing, marking, and labeling requirements have been met." 14 C.F.R. § 221.36(a)(5) (1976). This implies that some MTB-approved cargo can be banned by air line tariffs. Elsewhere, the CAB authorizes an air line to file a separate governing tariff which "may contain restrictions on the extent to which . . . carriers will accept [hazardous materials] for transportation." Id. § 221.104. Arguably, if the CAB did not contemplate tariffs stricter than MTB regulations, it could have simply required the separate governing tariff to incorporate MTB regulations in full.
24. Delta at 27 (footnote omitted).
26. The FAA's authority to issue safety regulations has been transferred to the MTB. See p.
shipping hazardous cargo by air and by other transport modes, an evaluation of common carrier responsibilities, and an estimation of the CAB’s enforcement powers.

The Delta tariff revisions, somewhat more restrictive than MTB regulations, would presumably satisfy existing MTB safety criteria. Excepting the more straightforward questions of enforcement and formal MTB input, the focus of the hearing is on the basic economic costs and common carrier duties. Relative importance of these considerations justifies discussion of the second and third steps of the mandated hearing before discussion of the first and fourth steps.

A. Economic Considerations

The second hearing step requires the CAB to compare the economic costs which the air lines would incur in shipping all MTB-approved cargo to the costs of shipping this cargo by other transportation modes. On the basis of this cost comparison, the CAB is to "strike a balance" which would determine whether it is economically justified for the air lines to ban certain cargo. Apparently, if the CAB finds that air line costs in the safe shipment of tariff-banned materials exceed the comparable costs in other transportation modes, the economic soundness of the tariff is demonstrated.

An important underpinning of this judicial position is that the air lines at some stage in the administrative process must be given the opportunity to present economic data in support of their ban on air transport of certain classes of hazardous materials. The court saw that the CAB’s ruling had effectively prevented any representation of economic concerns before an administrative agency, since the rulemaking proceedings which produced the safety regulations had precluded the opportunity to raise specific economic factors. The dialectics of regulation and economy

296 supra. Consequently, the remainder of this note will refer to the MTB as the agency which establishes air safety standards.

27. Economic costs cited by the court include "the cost of training special personnel to handle and inspect dangerous articles, the cost of creating special segregated areas at airports and on airplanes to accommodate such cargo, and the cost of inspecting all cargo to make sure that it complies with [MTB] safety standards." Delta at 21.

28. Id. at 20. Ironically, economic costs were not put forward by the air lines as grounds for approval of the tariffs; the air lines sought to justify the tariffs solely on the basis of their duty to provide safe transportation. Id. at 43, n. 98. On petition for rehearing, the CAB argued that the air lines’ failure to raise economic justifications for the tariffs precluded the need for a hearing. The court held that even though a hearing on economic matters might not be required in this instance, a hearing was still necessary to decide whether the CAB has jurisdiction to permit the tariffs on safety grounds alone. Furthermore, if future tariff filings were to raise economic questions, the CAB would be bound to entertain them at a hearing. Id. The practical effect of this ruling is that at some point—either at the mandated hearing or at a future hearing—the CAB will be required to address the issue of economic costs outlined in the second step of the Delta hearing procedure.
must be present—the denial of such a crucial factor in industry regulation lacks social utility.

There is interesting analogy between the cost/benefit analysis necessary for a tariff revision and the burden-of-commerce test involved in scrutinizing a state or local regulation.\textsuperscript{29} The court noted that the tariffs would not ban all nuclear material transport, but rather would include carriage of materials when speed was so essential as to overcome the dangers concomitant with that carriage.\textsuperscript{30} While it must be kept in mind that the Delta decision is directed to a private action, the economic balancing is strikingly similar to the traditional constitutional test for upholding or voiding state laws affecting commerce.

This test, asserted in Southern Pacific Co. v. Arizona,\textsuperscript{31} declares that the nature and extent of the burden of the state law should be balanced against the merits and purposes to be derived therefrom.\textsuperscript{32} When concerning only one mode of interstate carriage (i.e., air transport), a ban of some cargoes, even if universal among the participating carriers, does not necessarily burden commerce if other modes can effectively assume transportation of the banned items. Commerce concerns the national economy;\textsuperscript{33} it can be asserted that the national economy properly includes various alternative transport modes. Since it is the economic cost which now determines the degree of carriage by each mode, cost is also determinative of the burden on commerce whether it is a private carrier who proposes a single modal regulation or whether it is a state or local requirement affecting a single mode of carriage. If the goods cannot be shipped economically by alternate modes, then a burden on commerce occurs; if the shift of transportation modes does not materially decrease the number of shipments or impede the flow of nuclear materials as goods, then there is little burden.

To justify a burden on commerce, even if slight, a substantial interest must be demonstrated by the state. This interest can be in safety, health or other areas, but in the end reduces to the measure of benefit which results from the suspect regulation. Regardless of the terminology, a substantial state interest is comprised of benefits such as the safety and economic benefits found in step two of the prescribed administrative hearing in Delta.

Preemption questions have been raised in attempts by state and

\textsuperscript{29} See p. 295 supra.

\textsuperscript{30} Delta at 24.

\textsuperscript{31} 325 U.S. 761 (1945).

\textsuperscript{32} Id. at 768-69.

\textsuperscript{33} See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942), where the Supreme Court held that commerce could be reached by Congress "if it exerts a substantial economic effect on interstate commerce . . . ." Id. at 125.
local governments to augment federal regulations in the field of air transport of nuclear materials.\footnote{For example, the commission of the Minneapolis-St. Paul airport passed an ordinance which established a system to monitor radioactive materials packages at the airport. The ordinance, which took effect before passage of the Transportation Safety Act of 1974, has successfully withstood a preemption challenge. Braniff Airways, Inc. v. Minneapolis-St. Paul Metropolitan Airport Comm’n, 377 F. Supp. 1190 (D. Minn. 1974).} Perhaps the best example is that of a Louisiana regulation requiring notification to passengers of the presence of nuclear cargo on an airplane. This regulation, not allowed to pass under the preemption provisions of the Transportation Safety Act,\footnote{49 U.S.C. § 1111 (Supp. IV. 1974).} was invalidated by the MTB as "inconsistent" and therefore "preempted."\footnote{Determination by the MTB, Letter from Herbert H. Kaiser, Jr., to Charles W. Tapp, September 22, 1975. In the MTB's view, preemption was automatic because the Louisiana regulation was inconsistent with federal regulations. One court has disagreed with this interpretation, stating that the regulation would be preempted only if it compromises MTB safety standards or unreasonably burdens commerce. Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165, 173, n. 24 (D.C. Cir. 1976).} The problem which inheres in this preemption provision is the measure used to evaluate consistency. No clear rule emerged from MTB's finding that the ordinance was inconsistent with and so preempted by federal regulation,\footnote{The MTB did, however, offer its logic, stating that "[t]he warning required by your rule would be misleading in that it would foster an unwarranted apprehension for personal safety without imparting any information of value to the passengers." Determination by the MTB, \textit{supra} note 34. The MTB found additional support from the fact that "a closely related provision [requiring passenger notification] was considered and rejected in the issuing of radiation monitoring regulations." \textit{Id.}, \textit{citing} 39 Fed. Reg. 14612 (1974).} but rather the MTB decided that "not in conformity with" was the meaning of "inconsistent."

The \textit{Delta} court interpreted statutory and regulatory language of conformity and consistency differently than the CAB, holding that "carrier tariffs, when filed, can \textit{not} provide for the carriage of materials which [the MTB] has \textit{banned} from air transportation."\footnote{Delta at 26.} The difference of interpreting this language as a boundary over which air lines may not cross and a precise regulation which the air lines must mirror invites the economic evaluation in the hearing, yet potentially allows air line flexibility. The long-range effect of this approach is to provide a cost/demand availability of service with a maximum limit set by federal regulations.\footnote{It is doubtful, however, that banning certain cargo would be an efficient and economically sound means of compensating for air line shipping costs. Instead, the CAB would better allow air lines to recoup these costs through higher shipping prices to the public. The outright ban of certain cargo would appear to be justifiable only as a safety measure, not as an economic measure. Perhaps it was for this reason that the air lines did not raise the issue of economic costs in the \textit{Delta} proceedings. See note 28 \textit{supra}.} Carriage of certain nuclear materials such as radiopharmaceuticals would not be undermined since the CAB could likely rule that the benefits of carriage for...
medicinal purposes outweigh other considerations presented at a formal tariff hearing. Hence, a built-in safeguard exists.

A final observation remains in contrasting the MTB ruling on the Louisiana regulation with the Delta decision. After invalidating the Louisiana regulation, the MTB suggested that the State submit the regulation for allowance as: (1) stricter than federal regulations and (2) not an unreasonable burden on commerce. Since both Louisiana's regulation and the Delta tariffs are clearly more restrictive than federal regulations, the respective burden on commerce and cost/benefit analyses become the basis of evaluation. Apparently, equivalent data underlie each analysis, reducing state, local and even private attempts at strengthening control of air transport of nuclear materials to a common denominator.

B. COMMON CARRIER DUTIES

The third step of the hearing concerns an air line's common carrier duty to carry some or all of the articles which comply with federal agency safety criteria, notwithstanding the economic validity of the tariff revision. Congress outlined the scope of an air carrier's duty to provide carriage of persons and property in section 404(a) of the Federal Aviation Act:

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor . . .; to provide safe and adequate service, equipment, and facilities in connection with such transportation; [and] to establish, observe, and enforce . . . just and reasonable classifications, rules, regulations, and practices relating to such air transportation. . . .

The common carrier duty which derives from this statute consists first of that which inheres in an air line's certificate of public convenience and necessity, and second of that which is necessary for providing safe and adequate service concomitant with such transportation. Consequently, it is necessary for the agency hearing to consider both the duty to carry cargo as specified by an air line's certificate, and an air line's common law duty of safety owed to passengers.41

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41. Actually, it is not entirely clear that the terms of the third step contemplate CAB approval of the tariffs on the basis of the air lines' duty to refuse unreasonably dangerous cargo in the interest of safe transportation. Steps three and four speak of a common carrier duty to carry some or all MTB-approved cargo, but do not specifically mention a duty to refuse this cargo when its carriage would be unsafe. In step two, moreover, the phrase "what the air lines possibly could carry without jeopardizing the safety of their passengers and crew" is reasonably interpreted to mean simply all MTB-approved cargo, in which case there would be no room for a carrier determination of what constitutes "safe cargo." As a practical matter, however, it is not important whether the four-step hearing procedure itself allows for CAB consideration of carrier duty to provide safe transportation, for this consideration is mandated elsewhere by the Delta court. See p. 303 infra.
There is no question that the CAB can order an air line to perform certificated services. In some instances, such as the shipment of radiopharmaceuticals, air transport is in the public interest even though a tariff banning these materials might be "economically sound." The unanswered question is, however, the CAB's propriety in emasculating the common carrier duties of safety—duties that section 404(a) acknowledges. Evidently, though, the CAB takes a strict compliance approach to a carrier's certificate, even when the totality of a particular service is acceptable. Since, by statute, the CAB can force an air line to provide, to the letter, those services for which its certificate was issued, only the counterbalancing duty of safety, found in the same statute, can affect this broad agency authority.

It may be asserted that the proper limit on the CAB's power to compel certain activities is the common law duties owed passengers by a common carrier. In Williams v. Trans World Airlines, the right of refusal by an air line to transport a passenger who was believed to be a threat was upheld based on the carrier's responsibility to protect its passengers from danger and inconvenience. In Delta, the CAB took the position that the air lines must accept anything defined by the MTB as safe for transport, no matter how offensive to basic common law duties owed passengers. This is evidently predicated on the dictum that rejection is proper only on a case-by-case determination and not on a broad categorical basis. However, this still fails to abolish common law obligations.

Ironically, it is the passengers who merit protection by the regulatory framework. Thus, even if the chance of injury from nuclear transport is small, unless that risk is necessary (as is perhaps true with radiopharmaceuticals), there should be no removal of common law duties to these passengers. If, of course, an air line chose not to ban certain materials which then resulted in injury to a passenger, the air line would be under common law liability for that injury; to provide otherwise is to lessen the protection afforded those whom the law has sought to serve.

43. Capital Airlines, Inc. v. CAB, 281 F.2d 48 (D.C. Cir. 1960). In this case, an air line had failed to provide certificated flights. The court (and the CAB) rejected the argument that the totality of flights was adequate, stating "that where a carrier is authorized to provide competitive service . . . the fact that other carriers provide . . . minimally adequate service does not discharge the offending carrier's obligations under its certificate." Id. at 51.
44. 509 F.2d 942 (2d Cir. 1975).
45. Brief for Respondent at 18.
46. Air Line Pilots Ass'n v. CAB, 516 F.2d 1269, 1276 (2d Cir. 1975).
47. There is a great difficulty in determining common law liability resulting from radiation injuries. First, it may be a long time before symptoms occur, and perhaps damage will only appear genetically. Second, the measure of damage, i.e., extent of injury from radiation, becomes very difficult to prove. Extensive discussions of the several concerns in common law liability can be found in Keyes & Howarth, Approaches to Liability for Remote Causes: The Low
An air line's duty to provide safe transportation is also raised when the court instructs the CAB, in addition to the mandated four-step process, to determine whether the agency has authority under section 102 of the Federal Aviation Act to approve the tariffs for safety reasons alone. This instruction came in response to the argument of the air lines and intervenor Air Line Pilots Association (ALPA) that the tariffs were necessary to ensure safe transportation. Responding to this argument, the court recognized that "perhaps under section 102 the [CAB] retains a small residue of authority over safety issues whereby it could impose hazardous cargo standards stricter . . . than those of [the MTB]." In an important footnote, the court elaborated:

[If it turns out, as ALPA contends, that current safety regulations are not being adequately enforced by [the FAA], possibly the CAB has jurisdiction to permit the carriers, in the fulfillment of their common carrier obligation to exercise the highest degree of care toward their passengers (see Federal Aviation Act § 404 (a) . . . ), to force additional safety measures on the shippers through the medium of more restrictive tariffs. This is another question which the CAB will have to face, in the first instance, at a hearing on [the air lines'] tariffs.]

This passage indicates that the CAB's safety jurisdiction, whatever its scope may be, is triggered by the existence of a situation which warrants an air line's restricting its carriage of hazardous cargo in recognition of its duty to provide safe transportation. In a sense, then, the CAB's section 102 duty to promote aviation safety merges with the air lines' section 404(a) duty to provide safe transportation.

In a previous case, Kappelmann v. Delta Air Lines, Inc., a specific common law duty to warn passengers of danger was sought to be enforced. Here, the federal appellate court once again held that administrative remedy should be pursued where one desires to vary a regulatory policy.

Kappelmann, who had been a passenger on a flight during which a release of radioactivity had occurred, not only sued for damages, but also sought an injunction which would require Delta to warn passengers of

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50. Reply Brief for Petitioner at 4-5; Brief for Intervenor at 15.
51. Id., n. 56.
52. 539 F.2d 165 (D.C. Cir. 1976).
53. This incident was investigated by Congress and made the subject of a special report. SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON AIR SAFETY: SELECTED REVIEW OF FAA PERFORMANCE, 93d Cong., 2d Sess. 179-80 (1974).
the carriage of nuclear materials. The lower court had dismissed the injunctive aspects of the case since the plaintiffs had not petitioned for a federal regulation requiring the warning. The court determined that "it should be the agency charged with carrying out that policy that makes the initial decision whether the dangers and risks involved require that special warnings be posted." The court refused to decide whether a common law right of warning still existed, but held that first resolution of this issue would still be with the administrative agency.

The appellate court affirmed this ruling, commenting that such relief would amount to legislation by injunction. The court referred to the opinion by the MTB determining the inconsistency and preemption of the Louisiana regulation discussed earlier. The court did not consider the MTB decision to contain a sufficient record for review and stated:

[W]e are unwilling to permit appellants to substitute a MTB decision on a particular state regulation for the record that would be developed during a rulemaking proceeding on this subject. To do so would be to "short circuit" the path mandated by Congress and leave the court without the full record of the agency's reasons for refusing to adopt such a regulation, a record which is necessary to the proper resolution of the questions appellants raise.

Faced with a challenge to an agency's safety procedures, the court demanded development of a thorough agency review concerning the challenge before ruling on the merits. It is this kind of thorough review which the Delta court mandated with regard to the air line tariffs.

To summarize the substance of the second and third steps of the mandated hearing, there are two rationales for CAB approval of the air line tariffs. The first rationale requires that the CAB find that the tariff is economically sound and there there exists no common carrier duty to transport materials which are banned by the tariff. The second rationale allows the CAB to approve the tariffs if they are necessary to ensure transportation safety. Interestingly, approval of a tariff for safety reasons would be based upon a CAB conclusion that MTB/FAA regulation is not effective and that therefore the air lines have a common carrier duty to

56. Id. at 17921. The court indicated that any state common law requirements inconsistent with the Transportation Safety Act were probably preempted. Id. at 17921, n. 1.
57. 539 F.2d at 169.
58. Id. at 173.
restrict their handling of MTB-approved cargo. In contrast, the first rationale for tariff approval presumes that MTB/FAA regulation is effective, but posits that economic considerations and an absence of common carrier duty to transport tariff-banned materials could justify the tariff.

C. MTB'S AUTHORITATIVE POSITION AND CAB'S ABILITY TO ENFORCE

Finally, the first and fourth steps of the administrative hearing procedure can be analyzed together. The first step, formal input of the MTB's position on safe transport of those materials excluded by the tariff revisions, and the fourth step, the CAB's ability to enforce carriage based on its ruling, while clearly separated by the court in Delta, nevertheless have underlying unification. It is the MTB's position, tempered by economic and common carrier duties, which the CAB must follow thereby ensuring air line compliance with the precepts of the MTB's safety regulations.

The formal input of the MTB's position becomes the touchstone indicating the intent of safety regulations which, along with the exact language of the regulations, acts as the CAB's guide in allowing deviation from the letter of a regulation. Since the CAB's final ruling is dependent on the MTB's regulations, the CAB must modify its position to satisfy its statutory duty within the scope of the MTB's position. The court's interpretation was that "the [MTB] . . . decides what the air lines may carry under safety regulations, [while] [t]he CAB decides what the air lines must carry under their certificates of convenience and necessity and their obligations as common carriers."59 Only by receiving the formal position of the MTB does the intent of the safety regulations manifest to enable evaluation of the dichotomy between the upper limit of "may" and the absolute of "must."60

In the final step of the hearing process, the CAB must determine whether it has the ability to enforce a decision that the air lines are under a duty to carry some or all of the cargo banned by the tariffs. Section 204(a) of the Federal Aviation Act empowers the CAB "to perform such acts . . . as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this [Act]."61 Inasmuch as the Delta court felt that it was the CAB's duty under the Act to consider economic and safety considerations, it follows that so long as a CAB decision to reject the tariff revisions is made in accordance with these considerations, the CAB has the power to enforce this decision. As the Delta court concluded, "once the [CAB] holds a hearing and makes a determination, its directive must be obeyed unless and until it is set aside

59. Delta at 5.
60. Id. at 23.
as unreasonable by a court of competent jurisdiction."\textsuperscript{62}

Where a CAB order had properly issued, the Second Circuit Court of Appeals, in \textit{Air Line Pilots Association, International v. CAB},\textsuperscript{63} implied a capability of enforcement, stating that "[t]he premise that the airlines have the right to disregard the entire regulatory scheme is not only violative of [statute] but of common sense as well."\textsuperscript{64} Were it not for the court’s tacit recognition of enforcement ability, the air lines could ignore administrative orders.

Even if the air lines were to comply with a CAB order rejecting the tariffs (thereby eliminating any challenge to CAB enforcement powers), a problem remains that ALPA might continue its restrictive policy with regard to piloting aircraft carrying radioactive materials.\textsuperscript{65} This problem could be resolved, however, by court injunction compelling pilots to undertake such flights. Precedent for an injunction is found in \textit{American Airlines, Inc. v. Air Line Pilots Association, International},\textsuperscript{66} where the court held that "[refusal to land or take off] unless enjoined, will interfere with [the air lines'] duties to render service under their certificates of public necessity."\textsuperscript{67} This logic permits enjoining an ALPA refusal to fly when certain MTB-approved materials are to be carried, but only after a CAB ruling that the transport of those materials is required under the air lines’ certificates of public necessity.

\textbf{Conclusion}

\textit{Delta Air Lines, Inc. v. CAB} was strictly a procedural controversy, but in resolving the procedural issues, the court recognized inherent problems in air transport of radioactive materials. By mandating a specific, four-step hearing, the court integrated the difficult problem of safe, reasonable transport of passengers with federal regulatory policy regarding passenger transport and hazardous materials carriage. The CAB must now, for the first time, balance: (1) the costs and benefits of radioactive material transport and (2) the statutory and common law duties owed by air lines, as participants in a regulated industry, to both passengers and those who ship radioactive materials by air. Moreover, this balancing by the CAB, the economic regulator of air lines, must be made in accordance with MTB safety policy.

\begin{itemize}
\item \textsuperscript{62} Delta at 25.
\item \textsuperscript{63} 516 F.2d 1269 (2d Cir. 1975).
\item \textsuperscript{64} Id. at 1276.
\item \textsuperscript{65} See p. 293 supra.
\item \textsuperscript{66} 187 F. Supp. 643 (N.D. Ill. 1960). Here, ALPA planned to picket airports at which a particular air line was certificated by the CAB. Participating pilots were to inform employer air lines that they would neither land nor take off from such airports.
\item \textsuperscript{67} Id. at 645.
\end{itemize}
While the *Delta* decision has immediate impact on the proposed tariff revisions, there is a potential for long-range influence of the mandated hearing as a model for determining the compatibility of carrier tariffs with federal regulations. The *Delta* decision could not, on the issues raised, have considered more fundamental problems resulting from society's increasing dependence on radioactive materials. These problems will be determined as the imperatives of nuclear policy become more clearly defined by the cost/benefit considerations of technology and social needs. On the basis of its ruling, the *Delta* court should be applauded for the steps taken toward resolution of an issue in a continuing legal and social problem.

*James K. Leonard*

*Timothy J. Martin*

[It is established Commission policy to withhold issuance of new authority to any applicant while said carrier’s fitness is under investigation in a formal proceeding; that, in such instances, it is not determinative that the application is unopposed or that the applicant has been previously found fit; and that once an investigation proceeding is instituted, all new authorities that have not been issued are withheld pending the final determination of the investigation proceeding.—Interstate Commerce Commission's description of its fitness flagging practice in a June 17, 1975, order (quoted in North American Van Lines, Inc. v. United States, 412 F. Supp. 782, 796 (N.D. Ind. 1976))

I. INTRODUCTION

On August 9, 1976, the Interstate Commerce Commission (hereinafter the Commission) published a notice in the Federal Register proposing the institution of rules governing its so-called “fitness flagging” procedures. Although the Commission had long practiced fitness flagging with respect to new applications for motor carrier operating authority, no notice had ever been published in the Federal Register and, furthermore, fitness flagging had never been the subject of a rule-making proceeding with notice or opportunity for comment afforded to parties affected by the practice.

The Commission, in issuing the rules, stated that North American Van Lines, Inc. v. ICC, North American Van Lines, Inc. v. United States, and the July 1975 findings of the Commission’s “Blue Ribbon Staff Report” were the decisive factors leading to the promulgation of the rules.

The purpose of this comment is to analyze the prospective effectiveness of the proposed rules by examining the fitness flagging practice as it has evolved in various administrative proceedings and by determining whether or not the rules will afford the measure of procedural protections deemed necessary by the North American courts.

* This note was prepared while the author was the 1976 Motor Carriers Lawyers Association summer research fellow at the University of Denver College of Law.

II. THE PROCEDURE ITSELF

In any application for additional motor carrier operating authority, the Commission is mandated, under § 207(a) of the Interstate Commerce Act, to make an affirmative finding that the applicant is "fit, willing, and able properly to perform the service proposed." The Commission must also find that the carrier is able "to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder." The primary aim of § 207(a), as elaborated in Jones Common Carrier Application, is to protect members of the public from carriers whose conduct evinces an unwillingness to operate in conformity with the statutory requirements.

It is a well-settled rule that a determination of the fitness of a motor carrier applicant is wholly within the discretion of the Commission. Although there is no absolute rule by which an applicant's fitness is determined, the Commission does take several common factors into account. Among the most frequently cited are: 1) the nature of the proven violation of the act, 2) extenuating circumstances surrounding the infraction, 3) evidence of self-compliance on the part of a carrier, 4) effort on the part of a carrier to correct past violations, and 5) patterns of persistent disregard of the relevant law. The fitness flagging practice has taken four forms, the most common being where the Commission finds that "present or future public convenience and necessity" require that a particular applicant's request for new authority be granted. But then, upon advisement by its Bureau of Enforcement of the pendency of a matter affecting the fitness of that applicant, the Commission decides that it is inappropriate at the present time to make the required fitness finding, and will order the application proceeding held open until a final determination in the investigatory matter.

A second manner of applying the practice is embodied in an agree-

7. Id. The Interstate Commerce Commission is also required to find that "the proposed service . . . is or will be required by the present or future public convenience and necessity." Id.
8. 96 M.C.C. 100, 103 (1964).
12. Aero-Trucking, Inc., Extension, 121 M.C.C. 742 (1975); Cherokee Hauling & Rigging, Inc., Extension, 121 M.C.C. 756 (1975); Curtis, Inc., Extension, 113 M.C.C. 340 (1971); Frigidways, Inc., Investigation & Revocation of Certificate, 76 M.C.C. 77 (1958); Houff Transfer, Inc., Extension, 78 M.C.C. 145 (1958); Penn-Dixie Lines, Inc., Extension, 73 M.C.C. 145 (1957). It should be noted that in none of the above administrative decisions was the fitness flagging practice challenged.
ment\textsuperscript{13} by which the Commission empowers the Department of Transportation to intervene in an application proceeding if, in the Department’s belief, the applicant has engaged in a systematic violation of safety regulations. In \textit{Eagle Motor Lines, Inc.},\textsuperscript{14} the Federal Highway Administration of the Department of Transportation requested that the Commission take no action with respect to the release of certificates of operating authority until Eagle’s fitness was determined relative to safety regulation violations alleged in a pending investigatory proceeding.

The third form of fitness flagging was illustrated in \textit{North American Van Lines, Inc. v. ICC.}\textsuperscript{15} The Commission had already made the findings necessary to the granting of a certificate of public convenience and necessity to North American and had entered a written order directing the issuance of such certificates as soon as North American complied with the usual statutory formalities.\textsuperscript{16} North American did not receive the certificates, however, and upon inquiry was informed that it was “the Commission’s ‘practice’ to ‘withhold the release’ of any permanent operating authority when an applicant’s fitness came under Commission scrutiny.”\textsuperscript{17}

The fourth variation on the flagging procedure employed by the Commission is also found in the \textit{North American} case. This is where the Commission reopened application proceedings that had previously been closed but in which the Commission had not yet entered an order for the issuance of certificates.

In all variations of the fitness flagging practice, the decision to hold the certificate application in abeyance was made \textit{ex parte}. No hearings were held to permit the applicants to present views and evidence as to whether or not the fitness flagging procedure should apply to a particular application. Moreover, the Commission orders imposing the fitness “flags” generally contained no findings of fact as to the need for staying the applications.

Upon being criticized for withholding information as to the nature of the practice and its procedural applications, the Commission explained the basis upon which “fitness flagging” rests:

\begin{quote}
The concept of fitness is a continuing one. An applicant carrier must establish its fitness in every proceeding, and thereafter it must maintain its operations at all times in conformity with all applicable statutes and regulations. Having previously found a carrier fit, this Commission is not foreclosed from reopening the proceeding to consider the matter further. It is
\end{quote}

\textsuperscript{13} 32 Fed. Reg. 5744 (1967).
\textsuperscript{14} Eagle Motor Lines, Inc., Investigation & Revocation of Certificates, 117 M.C.C. 30 (1972).
\textsuperscript{15} 386 F. Supp. 665 (N.D. Ind. 1974).
\textsuperscript{16} These formalities consist of: 1) filing a tariff amendment, 2) filing proof of insurance, and 3) appointing an agent for the service of process.
\textsuperscript{17} 386 F. Supp. at 672.
absurd to contend that we should put on blinders, and not take another look
at a carrier's fitness if our attention is called to a possible lapse. To follow
such a course would be an abnegation of our statutory responsibilities. 18

III. EARLY ATTACKS ON THE FITNESS FLAGGING PRACTICE

The delay occasioned by the fitness flagging practice was first
attacked in 1958, in a decision before a specially-constituted court in
Illinois-California Express, Inc. v. United States. 19 Defendant Watson
Brothers Transportation Company filed with the Commission an applica-
tion for transporting general commodities in late 1949. In April 1951, a
Joint Board, to whom the application had been referred for a hearing,
recommended that Watson Brothers be issued a certificate of public
convenience and necessity. 20 In November 1952, the Commission voted
to postpone action on the application pending the outcome of a fitness
proceeding. 21 Although the record did not disclose when the investigatory
proceeding ended, the date of issuance of the certificate to Watson
Brothers was stipulated as November 12, 1956. More than six years, then,
had intervened between the time the application was filed and the
issuance of the certificate.

Plaintiff protestants brought action for injunctive relief and attacked
the Commission's order issuing the certificate on grounds that the public
necessity which had been found six years earlier no longer existed in view
of the radical economic changes in the freight transportation business.

Although the court recognized that the delay was "unusual, extraordi-
nary, and inordinate," it dismissed the action and held that such a delay
does not constitute a ground for attack if it is due to the pendency of a
proceeding before the Commission in which the fitness of the applicant
is in question. The court hinted, however, that if the record were to show an
abnormal delay in the completion of the investigatory proceeding (which
the present record did not), or that a certain amount of time had elapsed
between termination of the investigation and final determination of the
status of the application, it might reach the opposite result and open the
order to attack. 22 However, the three-judge panel offered no guidelines
from which a carrier could reasonably ascertain what the court would
consider as an unconscionable delay.

Fourteen years later, the fitness flagging procedure itself, rather than
the attendant delay, was the subject of attack in Eagle Motor Lines, Inc. 23

18. Eagle Motor Lines, Inc., Investigation & Revocation of Certificates, 117 M.C.C. 72, 75
(1972).
20. Id. at 916.
21. Id. at 917.
22. Id.
23. 117 M.C.C. 72 (1972).
in a petition for reconsideration of an order issued 41 days earlier.\textsuperscript{24} The Bureau of Carrier Safety of the Federal Highway Administration had conducted a survey of Eagle’s operations.\textsuperscript{25} From the survey, which revealed several violations, the Commission concluded that a grant of additional operating authority to Eagle would not be in accordance with the Interstate Commerce Act, public safety, or the terms of the national transportation policy.\textsuperscript{26}

Eagle claimed that since the Commission had made all the necessary findings of public convenience, necessity, and fitness with respect to its five applications, its due process rights would be violated by an ex parte reopening of these administratively final applications.\textsuperscript{27} The Commission relied on Eazor Express, Inc.\textsuperscript{28} to hold that the agency has the authority, at any time prior to the actual issuance of a certificate, to reopen on its own motion any proceeding whatsoever.\textsuperscript{29}

The Commission reasoned that fitness is a continuing concept; therefore, the carrier must establish its fitness in each proceeding for additional operating authority and must further show that it is in conformity at all times with the rules and regulations of the Interstate Commerce Act.\textsuperscript{30}

IV. THE PROBLEM OF THE INTERNAL COMMISSION MEMORANDUM

[Laymen and lawyers alike are baffled by a lack of published information to which they can turn when confronted with an administrative problem.

\textit{Hearings on S. 674, 675, & 918 Before the Senate Subcomm. on the Judiciary, 77th Cong., 1st Sess., pt. 2, at 807 (1941).}

Eagle Motor Lines had also requested information with respect to the fitness flagging practice, asserting that the Commission’s General Counsel had earlier urged in a memorandum that the procedures be changed. The Commission deemed this memorandum an internal Commission communication on in-house procedures and therefore not for public dissemination.\textsuperscript{31} It also denied that the document represented the opinion of the Commission and attributed it solely to the Office of the General Counsel.

With respect to fitness flagging, however, the Commission stated:

\begin{footnotes}
\item[25] \textit{Id.} at 33.
\item[26] \textit{Id.} at 36.
\item[27] Sub-Nos. 228, 289, 294, 296, & 299.
\item[28] 101 M.C.C. 719 (1967).
\item[29] \textit{Id.} at 720-21.
\item[30] 117 M.C.C. at 75.
\item[31] \textit{Id.} at 79.
\end{footnotes}
Our procedures are designed to promote efficient administration and to reduce the expense, in time and monies, of both the Commission and the parties. Rather than . . . trying the fitness issue in each and every pending application involving that carrier, we have . . . reopened those of Eagle's pending applications . . . which now await only an affirmative finding of that carrier's fitness. . . . 32

It is interesting to note that nowhere in the Commission's statement were considerations of procedural due process mentioned. Moreover, the Commission's reference to a blanket reopening of the pending applications seems contrary to the principle in North American Van Lines, Inc. v. ICC, 33 where the court stated that "'fitness' in respect to new certificate applications is a case-by-case determination (so long as there is no consolidation of cases), and must ultimately be individually litigated in each application proceeding". 34 This the Commission seemed to recognize four years later, however, in its joint brief with the United States filed with respect to North American Van Lines, Inc. v. United States. 35 Here the Commission stated that it "cannot and ought not to defer internally or informally a finding on fitness in a given application proceeding without issuing a judicially reviewable order to that effect." 36

The question as to the whereabouts of the memorandum surfaced again in 1976, in a May 20 letter 37 to the Commission's Freedom of Information Officer from W.J. Digby, Inc. in reference to the case of W.J. Digby, Inc. 38 The Commission's return letter stated: "We have examined the entire docket in that proceeding, and have been unsuccessful in locating a copy of the subject memorandum. Accordingly, we can only presume that the respondent, Eagle Motor, merely cited its existence and did not introduce a copy for the record." 39 The Commission Secretary then stated that the memorandum, not having been published, was an internal Commission communication and that, even if the memorandum did exist, it did not reflect the opinion of the Commission. Furthermore, said the agency, Digby's request was denied pursuant to 5 U.S.C. § 552(b)(5), which excepts intra-agency memoranda from public inspection. 40

32. Id. at 77.
34. Id. at 677.
40. Administrative Procedure Act, 5 U.S.C. § 552(b)(5) (1970). Exempt from disclosure are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
On July 8, 1976, Digby, pursuant to 49 C.F.R. 1001.4, appealed from the Commission’s decision and filed a motion to compel the production of the memorandum.\textsuperscript{41} Digby argued that since a Traffic World article had indicated that the Commission would soon be promulgating new fitness flagging rules, production of the memorandum would not inure to the Commission’s detriment.\textsuperscript{42} The Chairman’s answer on July 14 indicated that the Commission was in complete agreement with the decision of the Secretary denying Digby’s request\textsuperscript{43} and cited NLRB v. Sears, Roebuck & Co.\textsuperscript{44} as standing for the proposition that Exemption (5) calls for the withholding of all papers which represent the group-thinking of an agency in the process of formulating its policy and working out what its law will be.

After the Eagle decision, supra, Commissioner W. Donald Brewer felt compelled to defend the fitness flagging procedures in a 1972 address before the Transportation Law Institute.\textsuperscript{45} He described the practice as being “neither secret nor prejudicial to individual carriers such as Eagle, but rather is in accordance with procedures established in a memorandum of agreement between the Commission and the Department of Transportation and published at 32 Fed. Reg. 5744 (1967).” However, a reading of 32 Fed. Reg. 5744 is not illuminating as to the nature of the fitness flagging practice. In addition to describing the procedure by which the Department of Transportation is empowered to intervene in an application proceeding, 32 Fed. Reg. 5744 simply states that the statutory duty of the Commission under the Interstate Commerce Act to find a carrier “fit” includes a finding that the applicant is fit from the point of view of safety of operations—a proposition not seriously disputed. Brewer went on to say that this memorandum should clear up the “misinformation circulating among the transportation bar.”

V. THE NORTH AMERICAN CASES

A. NORTH AMERICAN I

The licensing provisions of the Administrative Procedure Act which require "agencies to determine promptly all applications. . . . are necessary because of the very severe consequences of the conferring of licensing

\textsuperscript{41} Motion of W.J. Digby, Inc. to Compel Production of Documents Pursuant to the Freedom of Information Act, No. MC-115826, (Sub.-No. 21, 136 et al.) (July 8, 1976).

\textsuperscript{42} TRAFFIC WORLD, JUNE 28, 1976, at 59.

\textsuperscript{43} Letter from George M. Stafford, Commission Chairman, to Leonard A. Jaskiewicz, July 14, 1976.


authority upon administrative agencies. If agencies are dilatory... parties are subjected to irreparable injuries." S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946).

North American Van Lines, Inc. v. ICC,\textsuperscript{46} can be described as the turning point in the history of the fitness flagging practice, for—more than any other occurrence—it led to the promulgation of the new rules. Although couching the import of that decision in terms as innocuous as possible, the Commission in its 1975 Annual Report to Congress stated that the court "expressed reservations about the lack of formal Commission procedure when determining whether to defer fitness findings."\textsuperscript{47}

The factual background is quite lengthy and complicated. However, it is necessary to set it forth in some detail in order to compare the significance of the actions of the Commission with the grandiloquent testimony five years earlier of Ms. Virginia Mae Brown, then Chairman of the Commission. Ms. Brown, in hearings before the Senate Committee on Commerce, proclaimed the Commission's adherence to openness and to conformity with the procedural protections of the Administrative Procedure Act:

Because of... the Commission's long history of conducting its operations in the environment of open scrutiny... important regulatory decisions are preceded by... hearings or investigation... Our regulatory concepts, policies and procedures are evolved through the medium of formal proceedings conducted in accordance with the Interstate Commerce Act and the Administrative Procedure Act.\textsuperscript{48}

In 1972 the Commission had audited North American's (hereinafter NAVL) activities in its household goods operations pursuant to the 1970 revised regulations governing the transportation of these goods.\textsuperscript{49} But the new rules contained no meaningful standard by which performance could be measured and NAVL asserted that 100% compliance was physically impossible.\textsuperscript{50}

Prior to the institution of the household goods investigation proceeding against NAVL in September 1972, the Commission offered NAVL an opportunity to settle the proceeding by signing a cease and desist order promising 100% compliance as had Aero-Mayflower Transit Co. and Allied Van Lines.\textsuperscript{51} NAVL refused, again arguing that the nature of the business was such that 100% compliance was physically impossible.

\textsuperscript{46} 386 F. Supp. 665 (N.D. Ind. 1974).
\textsuperscript{47} 89 ICC ANN. REP. 76 (1975).
\textsuperscript{50} 412 F. Supp. at 785.
\textsuperscript{51} 386 F. Supp. at 671.
At the time of the commencement of the investigation proceeding, NA VL had pending before the Commission several applications for operating authority in its new products division. In six of these proceedings, the Commission had entered a written order issuing the certificates to NA VL, but NA VL did not receive the certificates even though it had fully complied with the formalities of issuance. In another five application proceedings, the Commission had made all the required findings for the granting of the certificates but, prior to actual issuance, reopened the proceedings and deferred any further action until a final determination of NA VL's fitness in the household goods investigation proceeding. In still another eleven application proceedings, the Commission found that the operations proposed by NA VL were required by public convenience and necessity, but again declined to make the necessary fitness finding pending the outcome of the same investigation.

In June 1974, an administrative law judge's initial decision in the household goods investigation "rejected the ICC's contention that 100% compliance with the household goods regulations was required" and dismissed three of the charges. However, he found that, with respect to three other charges, the evidence warranted cease and desist orders as to NA VL's activities. The judge then ordered a further hearing concerning NA VL's compliance with the household goods regulations and accepted NA VL's suggestion that it conduct a study on feasibility levels. Despite the initial decision of the administrative law judge rejecting the 100% compliance standard and finding that the charges did not justify a revocation of NA VL's certificates, the Commission took no further action with respect to NA VL's pending applications for operating authority and,

52. The Interstate Commerce Commission established classifications of motor carriers of property based upon the type of goods the carrier transports. North American, Inc. operates under both classifications. When it engages in the carriage of household goods, it is classified as a "carrier of household goods as a commodity" and when engaged in the transportation of new products, it is classified as a "carrier of specific commodities not subgrouped." 49 C.F.R. pt. 1040 (1975).

A reading of the regulations governing the transportation of household goods and those governing the carriage of new products discloses many differences, and one is apt to question the relationship between the two divisions. However, as the Commission pointed out at 27 in its joint brief with the United States in North American Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D. Ind. 1976), section 207(a) of the Interstate Commerce Act authorizes the issuance of a certificate to the carrier as a whole and not to each of its separate divisions. Moreover, section 207(a) requires that a carrier conform to the "requirements, rules and regulations of the Commission" and not just to a part of the rules. The difference between the two divisions was not materially at issue in either of the two North American cases.

53. 386 F. Supp. at 672, (Sub-Nos. 137, 139, 140, 142, 146, and 147).
54. Id., (Sub.-Nos. 126, 133, 135, 145, and 152).
55. Id., (Sub.-Nos. 141, 143, 148, 149, 150, 154, 155, 158, 160, 163, and 178).
56. Id. at 674.
in August of 1974, stayed indefinitely the judge's decision.\textsuperscript{58}

Coincidentally, the very day after the administrative law judge issued his initial verdict, the ICC commenced a new products investigation proceeding against NAVL.\textsuperscript{59} This "investigation" was essentially a declaratory proceeding and revolved around a difference of opinion between NAVL and the Commission as to the meaning of the terms "new furniture" and "household appliances."\textsuperscript{60} Typical of the issues presented in this declaratory proceeding was whether North American could transport pool and ping-pong tables under its "new furniture" authority. Such an issue impliedly does not relate to a carrier's fitness to operate its proposed services. In fact, at the hearing in \textit{North American I}, this point was conceded by the Commission's attorney.\textsuperscript{61}

In none of the above application proceedings was the Commission's fitness flagging prefaced by a hearing or an opportunity for NAVL to be heard, nor was there any evidence in the pending applications with respect to the household goods fitness investigation. Thus, in \textit{North American I}, NAVL requested mandamus relief and asked that the Commission's orders postponing fitness determinations on its applications be enjoined, set aside, annulled, or suspended.

The court began by noting the statutory authority of the Commission to affirmatively find in each application proceeding that the applying carrier is "fit, willing, and able properly to perform the service proposed" and the discretion given to the Commission in determining whether a carrier is fit.\textsuperscript{62} Judge Eschbach felt that it would be unreasonable for the Commission to ignore current investigatory proceedings which could possibly involve factors very relevant to the Commission's consideration of a carrier's fitness to operate.\textsuperscript{63}

Nevertheless, said the judge, although the Commission's power is discretionary and the Commission \textit{may} determine that a given application for additional operating authority should be deferred until the outcome of a current fitness investigation,

\begin{quote}
this court cannot hold that the statute delegates to the ICC the power to institute a rule withholding \textit{all} certificate applications any time and every time there is a carrier investigation pending, regardless of facts concerning the individual application and the nature of the complaint at issue in the investigation.\textsuperscript{64}
\end{quote}

\begin{footnotes}
\item[58] \textit{Id.} at 787.
\item[59] \textit{Id.} (No. MC-C-8372).
\item[60] \textit{Id.}
\item[61] \textit{Id.}
\item[62] Interstate Commerce Act \textsection 207(a), 49 U.S.C. \textsection 307(a) (1970).
\item[63] 386 F. Supp. at 676.
\item[64] \textit{Id.}
\end{footnotes}
Moreover, said the court, "[t]he results of the fitness investigation, even if there were a substantial factual link between it and the pending application proceedings, could only be evidence and not conclusive in the subsequent application proceedings."\(^{65}\)

The court went on to say that the discretion possessed by the Commission must comply with the procedural protections afforded by the Administrative Procedure Act and cannot be exercised by the Commission in an *ex parte* manner. The court also faulted the agency for not having disclosed how it concluded that NAVL's applications for additional authority should be suspended pending a determination of current investigation proceedings. The court quoted the words of the United States Supreme Court in *Burlington Truck Lines, Inc. v. United States*:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. . . . The Commission must exercise its discretion . . . within the bounds expressed by the standard of "public convenience and necessity." . . . And for the courts to determine whether the agency has done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress had empowered it."\(^{66}\)

The court then mandated the Commission to proceed with the certification process with respect to those six application proceedings wherein the only outstanding Commission order was the actual granting of the certificates. With respect to the five application proceedings which were reopened and deferred pending the final determination of the household goods investigation and the eleven proceedings in which the Commission delayed a fitness finding, the court granted the motion to dismiss of the Commission and intervening defendants, holding that the applications were not sufficiently final for judicial review.\(^{67}\)

**B. NORTH AMERICAN II**

A prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject matter and issues involved. Notice, in short, must be given; and it must fairly indicate what the respondent is to meet. . . . Room remains for considerable improvement in the notice practices of many agencies. Agencies not infrequently set out their allegations in general form, perhaps in statutory terms thus failing fully to apprise the respondents and to permit them adequately to prepare their defenses. S. Doc. No. 8, 77th Cong., 1st Sess. 62-63 (1941) (*Report of the Attorney General's Committee on Administrative Procedure*).

After *North American I* was issued on October 31, 1974, NAVL notified the Commission that it had complied with the statutory formalities

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65. *Id.* at 677.
required for issuance of the certificates in the six administratively final application proceedings. But on December 20, the Commission issued an order reopening the six completed dockets, ostensibly for the limited purpose of permitting NAVL and other interested parties to present evidence and views as to whether or not these proceedings should be further deferred pending the final outcome of the household goods investigation. No party, with the exception of NAVL, filed a response. But on June 2, 1975, the Commission ordered these proceedings reopened pending not only the final outcome of the household goods investigation but also the investigation into NAVL's new products business, the declaratory proceeding.

Meanwhile, in November of 1974, NAVL had filed a petition for reconsideration with respect to the application proceedings in which NAVL had not, according to the 1974 North American court, exhausted its administrative remedies. On January 2, 1975, the Commission, in a single consolidated order applicable to all the proceedings, issued an order denying NAVL's petitions for reconsideration. The Commission found that each petition was identically worded and "did not present any relevant evidence, views, or arguments which might indicate that the determination to withhold a fitness finding is incorrect. . . ." This order, contrary to the mandate of Judge Eschbach that the flagging decisions accord with the requirements of the Administrative Procedure Act, was entered without notice or opportunity to be heard.

On May 5, 1975, the Commission set aside its order of January 2 and reopened each of the proceedings for reconsideration. By an order of June 17, again entered without notice or hearing, the Commission turned down NAVL's petition for reconsideration because no reasons had been given, said the Commission, for granting the relief NAVL sought. The Commission went on to note that since its initial decision to suspend consideration of NAVL's fitness in its application proceedings, two additional developments relating to the question of NAVL's fitness had taken place: the second "investigation" in the new products business and North American Van Lines, Inc., Extension—New Furniture (Sub.-No. 170).

In a May 2, 1975, order with respect to Sub.-No. 170, Division 1 of the Commission affirmed the findings of the administrative law judge that

69. Id.
70. Id. at 789.
71. Brief for Plaintiff at 5, North American II.
72. Joint Brief for Defendants at 5, North American II.
73. 412 F. Supp. at 796.
74. No. MC-107012.
NAVL had violated the Act in part and denied the certificate application. However, the June 17 order mentioned above disclosed that the deferrals were *not* imposed pending the outcome of Sub.-No. 170, and the order expressly noted the dissimilarity between the subject of that proceeding and the matters involved in the household goods investigation. North American agreed with Division 1 that this particular application proceeding (Sub.-No. 170) should be denied and did not petition the Commission for a reconsideration of its application.75

The Commission followed its June 17 order with a July 1, 1975, order of Division 1 acting as an Appellate Division. Division 1 once again denied NAVL's petition for reconsideration and provided that each of the proceedings would remain open not only for the final outcome of the household goods investigation but also for the new products "investigation."

In the interim, the Commission had on March 5 issued an order lifting its August 1974 stay of the administrative law judge's decision in the household goods investigation. The Commission affirmed the judge's decision and provided that the study of feasibility levels that had been suggested in the previous proceeding would now be jointly conducted by the Commission and NAVL, rather than by the NAVL alone. On April 9, NAVL filed a petition for clarification and questioned whether, in light of the March 5 order, the fitness flagging practice would continue to apply. Ten days later, the Commission denied NAVL's petition and declared that it would continue to hold any application proceedings in abeyance pending a final determination of NAVL's fitness.76 On May 1, NAVL again filed a petition for further clarification and requested a determination that the March 5 order not be a bar to the issuance of limited term certificates.77 The Commission, on May 13, denied NAVL's petition and noted that the certificates could not issue even if there were a final determination in the household goods proceeding because of the pendency of the new products "investigation."

On May 21, NAVL filed a petition in the nature of a compliance statement and requested that the Commission consider the issuance of limited term certificates based upon a 90% compliance standard.78 Shortly thereafter, on July 8, the Commission instituted an investigation in order to verify the compliance statements, auditing 2,250 household goods contracts and NAVL's new products business.79 Although the audit ended in August, NAVL was not apprised of the results despite several requests.80

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75. *412 F. Supp.* at 789, n.32.
76. *Id.* at 781.
77. *Id.* at 789.
78. *Id.* at 790.
79. Reply Brief for Plaintiff at 17, North American II.
Shortly after filing its joint brief with the United States in *North American II*, the Commission, in a single consolidated order without notice or hearing, raised a third flag applicable to 31 different application proceedings. Now NAVL's applications for additional operating authority would not be considered until a final determination of NAVL's fitness in not only the household goods and new products investigations, but also pending the final outcome of Sub.-No. 170, which the Commission reopened by this order and which NAVL believed had been concluded.\textsuperscript{81}

NAVL immediately petitioned for a reconsideration of this order on the grounds that, *inter alia*, the September 23 stay had been imposed without notice or hearing and that the Commission failed to take into account the August 1975 audit of NAVL's operations by the Commission. NAVL also requested the issuance of limited term certificates and again proposed that it be permitted to sign a 90% compliance order.\textsuperscript{82}

The Commission denied NAVL's petition on December 22, 1975, and affirmed its earlier decision that no new applications be issued pending a determination of all three "flags". The Commission also ruled that as far as "notice" was concerned, since NAVL by this time must surely have been aware that the Commission was likely to impose stays on any further application proceedings, it therefore had actual notice of the flagging procedure. In addition, the Commission, without mentioning the results of the 1975 audit (which NAVL estimated would demonstrate in excess of 95% compliance), found it "unappropriate" to extend to NAVL a 90% compliance settlement offer. The Commission then reopened the household goods investigation, consolidated it with Sub.-No. 170, and rescinded its earlier decision to participate in a feasibility level study with NAVL.\textsuperscript{83}

Since September 28, 1972, three years had passed since North American had been issued any new operating authority. Expert witnesses testified that NAVL was losing over $15,000 per day because of the awareness on the part of shippers that it could not, or would not, obtain new operating authority.\textsuperscript{84}

By this date the time had expired for the Commission to enter an appeal of Judge Eschbach's decision, leading most observers to speculate that the Commission would shortly be promulgating new rules with respect to its fitness flagging procedures. In fact, on January 7, Commission Chairman George M. Stafford had appointed a Blue Ribbon Panel of staff members to institute a regulatory reform study, and one of the issues to be treated was that of fitness flagging. As stated by the Chairman in

\textsuperscript{81} *Id.*
\textsuperscript{82} *Id.*
\textsuperscript{83} *Id.* at 791.
\textsuperscript{84} Brief for Plaintiff at 21, *North American II.*
testimony on regulatory reform pursuant to a Senate Resolution authorizing a study of the purpose and effectiveness of certain federal agencies, "[t]heir charter called for a 'no holds barred' review of the heart of our operations—the processing of cases." 85

However, in testimony at the same time the Commission was issuing its December 22 order without notice or hearing imposing three flags with respect to each of NAVL's applications, the Chairman, in addressing the problem of regulatory lag, reported "[t]here is not a great deal that can be done about the opportunity of parties to be heard because the sense of fair play that pervades the judicial process cannot be compromised." 86 Yet, from the time of the 1974 decision, NAVL had not received a hearing as to the propriety of the suspensions on its new operating applications, despite Judge Eschbach's holding that a determination to apply the practice must be in compliance with the notice, hearing, and record requirements of 5 U.S.C. §§ 554, 556-57, and despite the fact that the record in the household goods investigation had closed on October 26, 1973.87 (The record in the new products "investigation" had closed on April 15, 1975.) Most surprising, however, was the fact that the Commission sometime in 1974 had allowed another motor carrier involved in the transportation of household goods to sign a decree promising 90% compliance,88 the very level of compliance that the Commission had earlier rejected and which had triggered the Commission's investigation into NAVL's household goods business. ICC v. Global Van Lines.89

The stage was set for North American Van Lines v. United States.90 This time the case went before a three-judge federal court, with Judge Eschbach again participating and writing the court's opinion. The Judge began by stating that the facts and issues presented in the previous North American case were applicable to the present proceeding as well.

The court noted that 5 U.S.C. § 558(c) requires: "[w]hen application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceed-

86. Id. at 303. In fairness to the ICC, however, it must be mentioned that despite an increasing workload, the Commission personnel decreased by 20 to 25 percent during the period 1965-70. Cramton, Causes & Cures of Administrative Delay, 58 A.B.A.J. 940 (1972).
87. 386 F. Supp. at 674.
ings . . . ." (emphasis added). In addition, the court observed that this provision for timely processing of operating authority is complemented by 5 U.S.C. § 706(1) to "compel agency action unlawfully withheld or unreasonably delayed." 

Also, said the court, 49 U.S.C. § 307(a) directs that a certificate "shall be issued" if the applicant is determined to be fit and that "otherwise such application shall be denied." In light of the foregoing, the court held that the statutes by their very terms do not clothe the Commission with discretion as to whether or not it will act upon an application. Rather, the Commission is charged with the duty of either granting or denying the applications. Therefore, the delays of the Commission in processing NAVL's applications were not a matter "committed to agency discretion by law," 5 U.S.C. § 701(a), and were therefore reviewable under the Administrative Procedure Act.

According to § 553(b)(A) of the Administrative Procedure Act, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are exempt from the notice and hearing requirements." However, unless a party is deemed to have actual notice of it, a rule of procedure must be published in the Federal Register. The court discounted the Commission's contention that NAVL had actual notice of the fitness flagging practice by observing that the only descriptions extant of the procedure were to be found in the Commission orders under review. Therefore, said the court, NAVL's knowledge of the scope of the flagging practice was no better than its own.

The court reiterated the findings of the 1974 North American decision that although the Commission may place a carrier application in abeyance in an appropriate case, provided the action satisfies the procedural safeguards of the Administrative Procedure Act, the Commission cannot apply fitness flagging as an automatic rule. The court found that the record did not support this prohibition of the 1974 court. In each order holding NAVL's applications in suspension, the sole "findings" were as follows:

It appearing, that matters concerning the fitness of applicant are in issue in a pending proceeding in No. MC-C-7901, makes it inappropriate here to determine applicant's fitness properly to perform the proposed service in conformity with the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder.

92. 412 F. Supp. at 792.
94. 412 F. Supp. at 796. The court found that in over 15 stay orders, the findings were identically worded.
Therefore, said the court, because of the lack of evidence in each order supporting the nexus between the individual application proceedings and the outstanding fitness investigations, the stays "were issued solely on the basis of an automatic rule requiring the withholding of action whenever an investigation involving the carrier was technically unresolved."\(^{95}\)

The court then went on to compare the fitness flagging rule with the NLRB's "blocking charge" rule in which the NLRB delays consideration of a petition for the decertification of a bargaining representative pending the determination of an unfair labor practice charge. In *Surratt v. NLRB*,\(^{96}\) the court decided that the Board could not apply its "blocking charge practice" as a per se rule without "exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the election petition ought to be delayed or dismissed."\(^{97}\) Continuing the analogy, the court noted that, like the blocking charge rule held illegal above, the flagging practice was automatically applied in each of NAVL's applications regardless of whether the charges in the current investigations were proven, unfounded, or disproven. As a result, the court held that the

ICC's statutory duty ... to determine a carrier's fitness in an application proceeding may not be fulfilled by the expedient of promulgating an informal rule automatically withholding a fitness determination whenever an investigation involving the carrier is filed by the ICC's Bureau of Enforcement.\(^{98}\)

The court concluded, then, that the rule was arbitrary under 5 U.S.C. § 706(2)(A), in excess of statutory authority under 5 U.S.C. § 706(2)(C), unreasonable under 5 U.S.C. § 558(c), and unlawful under 5 U.S.C. § 706(1).\(^{99}\)

Because the court was unable to find any evidence of NAVL's unwillingness to conform to statutory requirements after the March 5, 1975 order of the Commission affirming the administrative law judge's decision in the household goods investigation, it determined that no further question of fitness was involved.\(^{100}\) The Commission itself had repudiated the 100% compliance level standard and, as it had not yet promulgated a new standard, NAVL could not be found remiss in failing to conform to a requirement that did not exist. Insofar as the declaratory proceeding was concerned, since the very purpose of such a proceeding is to determine

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\(^{95}\) *Id.* at 797.

\(^{96}\) 463 F.2d 378 (5th Cir. 1972); Annot., 18 A.L.R. Fed. 420 (1974).

\(^{97}\) 463 F.2d at 381.

\(^{98}\) 412 F. Supp. at 785.

\(^{99}\) *Id.* at 799.

\(^{100}\) *Id.* at 800.
just what a particular rule will be, NAVL could not be held to be in violation of a rule not yet announced.\textsuperscript{101} Therefore, the continued refusal of the Commission to consider the applications was "arbitrary, capricious, an abuse of discretion, and in excess of statutory authority."\textsuperscript{102}

The court also noted the Commission's refusal to permit NAVL to sign the 90% compliance agreement which it had allowed Global Van Lines to sign and held that the continued suspension of NAVL's applications based on this factor, in addition to being without reason, was "beyond the limits of justifiable discretion, and tinged at times with bad faith."\textsuperscript{103}

Finally, the 1976 \textit{North American} court quoted the 1974 court and indicated that by the terms of the Administrative Procedure Act:

\textit{[a]}djudications otherwise required by statute to be decided on the record after opportunity for an agency hearing must comply with the notice, hearing, and record requirements of the Act, 5 U.S.C. §§ 554, 556-7. It has long been held that an application of a motor carrier for a certificate of public convenience is such an adjudication and therefore covered by those requirements.\textsuperscript{104}

NAVL had not received notice of the actions of the Commission in deferring its applications, had been denied the opportunity to be heard, and had not been informed of the standards to be applied. Therefore, every stay order was entered without observance of the procedures required by the Administrative Procedure Act and was consequently unlawful.

The court gave the Commission 60 days within which to render an order in each application proceeding stayed before the March 5, 1975 order.\textsuperscript{105} As far as any subsequent applications were concerned, the court ordered the Commission to hold the required hearings promptly or to make a decision consistent with the opinion. The court also permanently enjoined the Commission from applying the fitness flagging rule in a per se manner.\textsuperscript{106}

On May 10, 1976, in \textit{North American Van Lines v. United States},\textsuperscript{107} a different case, the very same court, although denying the Commission's motion for clarification of judgment filed May 3 and its motion for amendment of findings filed the same day, extended the time within which the Commission was expected to either grant or deny the pre-March 1975 applications.

\textsuperscript{101} Id. at 801.
\textsuperscript{102} Id. at 800.
\textsuperscript{103} Id. at 802.
\textsuperscript{104} 386 F. Supp. at 678-79.
\textsuperscript{105} 412 F. Supp. at 808.
\textsuperscript{106} Id.
\textsuperscript{107} 1976 FED. CARR. REP. ¶ 82,615 (N.D. Ind. 1976).
The court rejected the Commission's contention that the March 5 order did not negative the 100% compliance requirement. In fact, stated the court, the Commission's very own wording in its order belied that argument:

Such a study should demonstrate whether existing standards are realistic and, if they are not, it should aid us in formulating realistic standards of service which carriers are capable of meeting.\(^{108}\)

Pursuant to the decision in *North American II*, the Commission on July 13 served an order in which Commissioners Murphy and Gresham did not participate and in which Commissioner O'Neal strongly dissented. The order approved the issuance of 29 certificates to NAVL as soon as it had complied with the statutory formalities.\(^{109}\)

VI. CURRENT APPLICATIONS OF THE PRACTICE

The most recent case to call the Commission's fitness flagging practice into question was *W.J. Digby, Inc. v. ICC*.\(^{110}\) The factual background preparatory to this decision, which was affirmed without opinion, is as follows.

The Commission had originally found that all 41 of Digby's proposed services were required by the public convenience and necessity but declined to make fitness findings pending the outcome of No. MC-115826 (Sub.-No. 21). The decision in Sub.-No. 21, served March 29, 1972, determined that Digby had violated, *inter alia*, the terms of a civil injunction. This order deemed Digby to be "unfit" and recommended that the Sub.-No. 21 application proceeding be denied.

The Commission's Division 1 affirmed the March 1972 order on January 17, 1973. In March 1973, Digby filed a petition for rehearing, which triggered an investigation of Digby's field operations. After the survey had ended in February 1975, Digby presented a supplemental petition for rehearing, but by a March 21, 1975 order of Division 1 acting as an Appellate Division, both petitions were denied. Division 1 noted that the January 17 findings were in accordance with the evidence and stated that even if the order were to be reopened after a three year time lag, a different result would not be reached.

In May of 1975, Digby instituted court action and, on June 6, 1975, the court stayed the Commission's January 17, 1973 order, only to subsequently affirm it on February 4, 1976.\(^{111}\) By an order served on April 16, 1976, the Commission's Division 1 found that the 41 applications should be denied because Digby had failed to establish its fitness. On June 30, the

\(^{108}\) 121 M.C.C. 136 (1975).

\(^{109}\) No. MC-107012 (Sub.-No. 26 et al.) at 3 (July 8, 1976).

\(^{110}\) 530 F.2d 1095 (D.C. Cir. 1976).

\(^{111}\) *W.J. Digby, Inc. v. ICC*, 530 F.2d 1095 (D.C. Cir. 1976).
same Division 1—acting as an Appellate Division—affirmed the earlier order.

Division 1 distinguished the 1976 decision in *North American II* (and the proposed rules reflect this distinction) in that it dealt with:

the flagging of proceedings pending the outcome of another application or investigation proceeding on the fitness where no final fitness determination has as yet been made, whereas here the various application proceedings herein had been held open on the fitness issue between January 17, 1973 and April 2, 1976 on the basis of an actual adverse fitness finding.\(^{112}\)

Be that as it may, however, as Commissioner Christian observed in lone dissent, Digby was never afforded an opportunity for a hearing as to whether the issues presented in Sub.-No. 21 were so closely related to Digby’s pending applications as to deny every single one.

Digby again petitioned for reconsideration on May 14, 1976 on the grounds that the Court of Appeals, in affirming the Commission’s Sub.-No. 21 decision, observed:

> Our affirmance in this case does not intimate any views on the fitness of the petitioner with respect to any other certificates or applications therefor.\(^{113}\)

Digby argued that the court did not specifically intend its decision to affect the other application proceedings. However, by order of June 30, 1976, Appellate Division 1 denied Digby’s petition.

On July 16, Digby filed a motion for stay of the Commission’s June 30 order pending judicial review and, on July 20, filed a stay motion with the United States Court of Appeals (D.C. Cir.). The Commission by order denied Digby’s petition, but the court granted Digby a stay. But, just seven days before the new fitness flagging rules appeared in the August 9 issue of the *Federal Register*, the court vacated the stay and ordered Digby’s temporary authorities terminated. As of October 13, 1976, Civil No. 76-1657 had not yet been scheduled for oral argument.

## VII. THE PROPOSED RULES

If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power must be fixed and determined. The rights of the citizen against them must be made plain.

Elihu Root\(^{114}\)

The Commission indicated in the explanatory material preceding the

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114. Quoted by Congressman Francis E. Walter, S. Doc. 248, 79th Cong., 2d Sess. 350 (1946) (*Administrative Procedure Act Legislative History*).
rules that the new flagging procedures were to be applied on an interim basis to carriers who are currently the subject of a fitness investigation.115 This would, in effect, preclude the 41 application proceedings under dispute in W.J. Digby, Inc.116 from receiving the benefits of the expanded notice, record, and hearing provisions since the investigation concerning Digby is closed.

The Commission sets forth a flagging standard which provides that the procedure may be initiated if there is probable cause to believe that the applicant for motor carrier operating authority will ultimately be unable "to meet statutory requirements for favorable Commission action."117 This standard meets the middle ground of leaving within the discretion of the Commission the determination that a motor carrier is fit while at the same time forestalling any Commission action on the basis of mere suspicion or desire to vindicate prior administrative action.

The flagging standard section goes on to describe several situations from which a reasonable belief might issue that an applicant will not be able to conform to the statutory requirements: flagrant and continuous disregard of the rules and regulations of the Interstate Commerce Act, "uncorrected or other significant violations denoting an indifference by the applicant towards lawful standards of behavior, or a pattern of neglect of its duties towards the public that betokens a refusal voluntarily to meet its duties."118 The rules hasten to add, however, that bona fide differences of opinion or interpretations regarding a carrier's operating rights would not give rise to a probable cause belief. This caveat would seem to eliminate situations such as the declaratory proceeding in North American wherein the main issue presented was whether or not a pool table could be transported under an already existing "new furniture" authority. It would also exclude those instances wherein the carrier lawfully challenges a rule which it believes in good faith to be incapable of execution, such as the 100% compliance standard set forth by the Commission with respect to its household goods regulations.

The Commission's Bureau of Enforcement, under the proposed rules, will no longer be able to intervene in application proceedings on its own motion but must request that it be allowed to participate. This request must contain a summary of the evidence that the Bureau intends to put forward. The procedures with respect to the Department of Transportation's participation are essentially the same: the Department must petition to intervene in an application proceeding bearing on the issue of carrier fitness but may still, on its own motion, pursuant to 32 Fed. Reg. 5744

118. Id.
(1967) file a formal complaint with the Commission with respect to the safety practices of a particular carrier.119 If the Department files a petition for leave to intervene, it must at the same time notify the applicant. This petition must also be published in the Federal Register and set forth the evidence to be presented. The rules then state that:

Show-cause flagging procedures, if any, will be undertaken only in the application proceedings in which the Bureau of Enforcement or the Department of Transportation is participating on fitness.120

This section, §1067.5, leaves open the query whether, if the Commission initiates an investigation on its own motion, and alone participates in an application proceeding, the procedural safeguards inherent in the "show-cause flagging procedures" will be applicable. In explaining the fitness flagging practice as it evolved prior to the issuance of the rules, the Commission stated in its preface to the proposed rules that a flagging motion could be raised by one of three parties: the Commission itself (or by the Vice-Chairman), the Bureau of Enforcement, or the Department of Transportation. Yet in two sections of the proposed rules—§§1067.5 and 1067.11—the plain import would be to preclude the procedures specified from coming into existence where the Commission begins an investigation on its own motion, and is the sole participant in the application proceeding.

Under the "show-cause flagging procedures," the order authorizing either the Bureau or the Department to participate must contain the statutes, rules, or regulations allegedly violated and the nature of the allegations. In addition, the pending application proceedings being considered for a flag must be set forth. The order would also require that the Bureau or the Department inform the applicant in writing within ten days of "all matters of fact and law to be asserted with sufficient particularity to make clear the violations alleged and the nexus alleged to exist between those violations and the application proceeding in which fitness flagging is being considered."121 The applicant will then have 20 days within which to respond by submitting verified "written representations including facts and arguments tending to show cause why all or any of its applications should not be flagged for fitness."122 The Bureau or the Department is then allotted a fifteen-day period within which to reply.

Proposed 49 C.F.R. § 1067.13 provides that when the applicant, under the show-cause procedures, has filed its representations purportedly demonstrating why its applications should not be flagged, the Commission will promptly review the representations. This section also, in the

119. Id. at 33309-310 (proposed 49 C.F.R. 1067.3, 1067.4).
120. Id. at 33310 (proposed 49 C.F.R. 1067.5).
121. Id. at 33310 (proposed 49 C.F.R. 1067.6).
122. Id.
interest of administrative efficiency, requires the applicant to file, along with its representations, a petition for reconsideration, as the Commission will not consider a separately filed petition.

Although, under the proposed rules, the issuance of a show-cause order does not constitute flagging, the Commission cautions that the invocation of the procedure acts as a temporary restraint on the issuance of operating certificates until such time as the Commission has decided whether or not a flag should be raised. The 70-day time limit posted is well within the 90-day requirement for disposing of applications in the proposed 1975 Motor Carrier Reform Act.\textsuperscript{123}

A carrier failing to respond to the show-cause procedures within the time limits specified will have its applications flagged. Such flagging, however, is to be accompanied by notice to the parties. Should the Commission determine that a flag must be raised, such order is subject to a petition for reconsideration. If the petition is denied, the matter is considered sufficiently final for judicial review. This would provide a measure of protection for those application proceedings that were not, under the previous application of the flagging practice, considered administratively final.\textsuperscript{124}

All orders raising "flags" must designate "at least in general terms" the findings of the Commission in relation to the standard previously described and must list those application proceedings to which the findings apply. This order, however, cautions the Commission, does not constitute a decision per se as to the carrier's fitness.\textsuperscript{125}

If an application is flagged, the Commission will not hold it completely in abeyance until a final determination of the applicant's overall fitness. Rather, the Commission will continue to move forward towards the disposition of the "public convenience and necessity" and the "fitness to perform the service proposed" issues. At the point when these statutory findings have been made, further consideration of the application will be suspended until the Commission has determined that "flagging is not warranted, the fitness issue is resolved, or the fitness flag is removed."

In a proceeding where there is fitness participation by the Bureau of Enforcement or the Department of Transportation, if a flag has been raised on a particular application and the carrier files a new request for operating authority, this application will, by notice, be added to the list of proceedings set forth in the original order unless the carrier files a petition. Such a petition will be acted on by the Commission 30 days after the notice of the application is published in the \textit{Federal Register}. Moreover, the Commis-

\textsuperscript{125} \textit{Id}. at 33310 (proposed 49 C.F.R. 1067.9).
sion will promulgate any order with respect to the petition only on the basis of the announced standards.\textsuperscript{126}

Here again, this section applies to the application proceedings in which either the Bureau or the Department participates. Does the Commission make the assumption that, since it is within the Commission's discretion to determine whether or not an applicant is fit, the show-cause safeguards do not apply in instances where the Commission is the sole participant in an application proceeding? Or is it the Commission's intent to ensure the Bureau of Enforcement and the Department of Transportation do not abuse their privileges in being allowed to participate in application proceedings? Why, then, does the Commission say that "show-cause procedures...will be undertaken only in the application proceeding in which the Bureau...or the Department is participating on fitness?"\textsuperscript{127}

The Commission reiterated its authority to reopen at any time any application proceeding for reconsideration of the fitness issue. Only those applications which resulted in the issuance of operating rights are excepted. This latter provision would seem to exempt from fitness flagging the six proceedings in \textit{North American I}, where the Commission had entered a written order for the issuance of the certificates but had nevertheless subjected those administratively final proceedings to the flagging practice.\textsuperscript{128}

The Commission then addresses itself to the \textit{Digby} controversy. Proposed 49 C.F.R. § 1067.16 provides:

\begin{quote}
[w]here the fitness flag has been raised, an administratively final determination that applicant has failed to show that it is fit will provide a sufficient basis for disposition of all designated pending applications. Following an administratively final ultimate finding unfavorable to applicant, all flagged proceedings will be denied by appropriate order.\textsuperscript{129}
\end{quote}

Most likely, the United States Court of Appeals will consider the June 30 order, \textit{supra}, at 345, an administratively final determination that Digby is unfit and affirm the Commission's decision denying the 41 applications.

If the carrier files applications subsequent to an adverse fitness finding, the last section, §1067.17, provides that the applications will be considered in the normal manner and that the applicant will have to prove that he is "fit". However, the Commission may take official notice of the prior finding.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{126} Id. (proposed 49 C.F.R. 1067.11).
\item \textsuperscript{127} 41 Fed. Reg. 33310 (1976) (emphasis added).
\item \textsuperscript{128} Id. (proposed 49 C.F.R. 1067.10).
\item \textsuperscript{129} Id. at 33311.
\item \textsuperscript{130} Id.
\end{itemize}
It is evident that the procedures comport with the notice, hearing, and record requirements of the Administrative Procedure Act when either the Bureau of Enforcement or the Department of Transportation take part in application proceedings. To what extent are the rules addressed to the multifaceted test suggested by Judge Eschbach in the 1974 North American case? He believed that the Commission should take into account several factors in deciding whether or not to "flag" an application for new operating authority: 1) the seriousness of the violations, 2) the degree of relevance between the violation and the carrier's proposed services, 3) the expected length of delay should the application be flagged, and 4) the immediacy of the public's need for the service proposed in the application.\footnote{131}

The Commission's concern with the seriousness of the violation is reflected in the flagging standard which makes only such breaches actionable as are past and uncorrected, and/or which denote an indifferent attitude on the part of the carrier "towards lawful standards of behavior." The rules clearly specify that differences of opinion and the like do not constitute grounds for flagging.\footnote{132}

As to the degree of relevance between the violation and the proposed application, the rules stress that the applicant must be informed of the nexus that the Bureau of Enforcement or Department of Transportation believes to exist between the infraction and the application. The applicant is then permitted to answer the contentions and to petition for reconsideration if its written representations are denied. Also, in any order raising a flag, the Commission must make findings on the record which at least in general terms show the alleged nexus.

Pervasive throughout the rules is the Commission's concern for mitigating delay and expediting the procedures. An entirely separate section provides that the "application proceeding. . . .will be processed on an expedited basis to the extent consistent with the Commission's other responsibilities,"\footnote{133} and another section provides that the flagging "order . . . will be disposed of as promptly as possible."\footnote{134} This concern for handling the procedures with dispatch parallels the published Commission policy favoring the speedy processing of applications.

Although the rules do not mention any consideration of the public interest factor or the immediacy of need for a proposed service, the Commission is empowered under the Interstate Commerce Act to issue temporary operating certificates and has done so in the past.

\footnote{133} Id. at 33310 (proposed 49 C.F.R. 1067.14).
\footnote{134} Id.
VIII. POSSIBLE REACTION OF THE COURTS
TO THE NEW PROCEDURES

In view of the Supreme Court's recent reaffirmation of the limited
scope of judicial review of Commission decisions in Bowman Transporta-
tion Inc. v. Arkansas-Best Freight System, Inc.,\(^\text{135}\) it would seem likely that,
under the new rules promulgated by the Commission, the courts will
accord a presumption of validity to flagging orders and will be reluctant to
overturn them unless the orders are arbitrary or capricious on their face.

In *Bowman*, the Supreme Court unanimously reversed the district
court's opinion in *Arkansas-Best Freight System, Inc. v. United States*,\(^\text{136}\)
which had set aside Commission orders authorizing the granting of
certificates of public convenience and necessity. In so doing, the Court
held that the arbitrary and capricious standard of the Administrative
Procedure Act is a narrow one whereby the reviewing court need only
consider whether the decision was based upon a consideration of the
relevant factors and whether it reflects a clear error of judgment.\(^\text{137}\)

Under the new flagging rules, the statutory requirement that the
Commission orders set forth findings with respect to the Commission's
publicly announced standard would make it unlikely that the courts will
ever subject an order to the intense scrutiny involved in the *North
American* cases.\(^\text{138}\) Thus, the requirement that the Commission decisions
be supported by adequate findings will be satisfied "if the report of the
Commission, read as a whole, discloses the essential basis of the
decision."\(^\text{139}\)

IX. CONCLUSION

The promulgation of the new fitness flagging procedures represents
an increased recognition that regulatory agencies should attempt to act
on the basis of articulated policies and standards. This belief is reflected
in Recommendation No. 71-3 of the Administrative Conference of the
United States, which provides that:

Agency policies which affect the public should be articulated and made
known to the public to the greatest extent feasible. To this end, each agency
which takes actions affecting substantial public or private
interests... should, as far as feasible in the circumstances, state the

\(^{137}\) See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Independent
\(^{138}\) But see, White, Allocating Power Between Agencies & Courts: The Legacy of Justice
\(^{139}\) National Freight, Inc. v. United States, 359 F. Supp. 1153, 1156 (D. N.J. 1973); Soo
standards that will guide its determinations in various types of agency action.\textsuperscript{140}

The procedural safeguards of the new rules, with their increased notice, opportunity to be heard, and record requirements, place the fitness flagging procedures more in line with the Interstate Commerce Act and the Administrative Procedure Act. As such, the rules represent a positive step in the right direction.

\textit{Kathleen MacDevitt}

\textsuperscript{140} 2 Administrative Conference of the United States 24 (1970-1972). This increased recognition that agencies should establish standards to guide discretion is a trend also discussed by Professor Davis in the 1976 Supplement to his \textit{Administrative Law Text}. 
United States v. Morgan Drive Away: Perfunctory Criminal Antitrust Prosecution and Novel Civil Relief

There are some who think that the existence of regulation ipso facto eliminates antitrust as a practical concern for regulated firms in the surface transportation industries. This view, however, is a dangerous distortion of reality.¹

Despite governmental industry regulation, the United States Department of Justice, Antitrust Division prosecutes antitrust violations with vigor, ease, and ingenuity. This note focuses on the recent Morgan Drive Away antitrust litigation, which involved both criminal proceedings² and a civil action.³ Of significance is the ease with which the Antitrust Division disposed of the defenses raised by joint motion of the defendants in the criminal case, and also the unique relief which resolved the civil litigation.

The Morgan Drive Away criminal case was initiated first, August 2, 1973.⁴ Defendants filed a joint motion to dismiss the indictment, or in the alternative to strike specific charges therein, or to stay the proceedings pending referral of specific issues to state or federal agencies.⁵ The court denied summarily each issue raised, whereupon the defendants entered pleas of nolo contendere which were accepted.⁶ An aggregate fine of one hundred seventy-five thousand dollars was imposed, five thousand of which was suspended.⁷ In this note, a brief background of the legal principles raised by the joint motion and an analysis of the court’s opinion is presented. Of particular note is the similarity of the opinion to the arguments presented by the Antitrust Division, and, consequently, the apparent amenability of the Court to those arguments.

The civil action was initiated December 5, 1974.⁸ Before trial the

4. Indictment, United States v. Morgan Drive Away, 1974 Trade Cas. 95,997 (D.D.C., August 2, 1973) [hereinafter cited as Indictment].
7. Id.
parties negotiated a consent judgment or decree\(^9\) which was approved by the court on June 30, 1976.\(^{10}\) The consent judgment imposed an aggregate fine of $209,388 and afforded unique affirmative and negative injunctive relief.\(^{11}\) The duration of the judgment was made perpetual except for punitive injunctions which prohibited what normally would be legal activities, and for affirmative obligations which placed the defendants in a less competitive position than others in the industry.\(^{12}\) The significant facet of the consent judgment was the imposition of a moratorium on protests before the Interstate Commerce Commission. The protest moratorium replaced the normal method of restoring competition to a monopolized industry which had been the revocation of an antitrust violator's certificates of public convenience and necessity.

The transportation industry should be aware of the current trend of antitrust decisions. Although convictions in the past are not unknown,\(^{13}\) regulated firms frequently display a complacent attitude toward conduct which could be construed as violative of the antitrust laws. The status "regulated" does not affect the interval decision to prosecute or to seek severe criminal sanctions according to a Department of Justice official in 1974.\(^{14}\) "[E]ven the presence of some limited antitrust immunity embodied in the regulatory statute will not foreclose criminal prosecution and liability. . . ."\(^{15}\) The ease and ingenuity with which these guidelines can be pursued should be recognized.

The note is organized and proceeds as follows:

II. Violations Alleged and the Factual Context

III. Resolution and Civil Relief

A. A Moratorium on Protests

B. Enumerated Illegalities, Litigation

Conduct, and Public Comments

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11. Id.


15. Id.
II. VIOLATIONS ALLEGED AND THE FACTUAL CONTEXT

On August 2, 1973 a federal grand jury indicted the three largest motor carriers engaged in for-hire transportation of mobile homes within the United States: Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc. Six agents of these companies also were charged on three separate counts of violating sections 1 and 2 of the Sherman Act. On December 5, 1974 the United States Department of Justice, Antitrust Division filed a complaint against the three corporations alone which alleged violations of the Sherman Act since the early 1950's on the same three counts: a combination and conspiracy in an unreasonable restraint of trade in violation of section 1 of the Sherman Act; conspiracy to monopolize trade in violation of section 2; and monopolization of trade in violation of section 2.

For-hire transporters of mobile homes had gross 1971 revenues in excess of seventy-one million dollars. Service involves “initial moves” from the factory to the retailer, and “secondary moves” from the retailer to the individual purchaser. Secondary moves also include subsequent transportation requested by the private owner. Motor carriers engaged in for-hire transportation of mobile homes generally rely on operator-owners who lease the specially designed trucks.

Mobile home transporters such as the defendants operate both across state lines and wholly within individual states. A certificate of public convenience and necessity must be obtained from the Interstate Commerce Commission for all interstate operations according to 49 U.S.C. § 306. Most states require similar operating licenses or specified authority for intrastate service. The holder of mobile home authority may file protests with the Commission, and with most state agencies, against any applications for a certificate which conflicts with its existing operating authority. In addition, rates charged for interstate operations are subject to Commission regulation under 49 U.S.C. § 316(e). Motor carriers of the same class may obtain Commission approval of rate agreements and rate-making conferences under 49 U.S.C. § 5(b)(2).

Since 1965 Morgan Drive Away, National and Transit have earned more than eighty-five per cent of the total gross revenue received in the industry. The defendants have sufficient mobile home authority for one or

17. Complaint at 3-4, 10-15.
more of them to protest virtually any application certificates. Since 1962, the defendants, among others, have participated as members of the Mobile Housing Carriers Conference, Inc. (MHCC).

The alleged illegal activity of the Morgan Drive Away defendants is essentially the same for all three counts and identical for both suits. The indictment and the complaint state that the substantial terms of the conspiracy have been a continuing agreement, understanding, and concert of action to exclude other persons from the industry; to limit and restrict the growth of competitors; to coerce competitors to both raise rates and join the MHCC; and to coerce other members of the MHCC to relinquish their right of independent action on rate charges. The suits also charged that defendants conspired to coerce competitors to charge rates identical to their own and to fix rates within individual states without authorization of state law. The companies were charged with conspiring to eliminate competition among themselves for the services of drivers and field organization personnel. The indictment and complaint further charged that the defendants deprived persons applying for mobile home operating authority of meaningful access to, and fair hearings before, federal and state agencies and courts. Finally, the defendants allegedly interfered with the lawful business pursuits of competitors by threats of substantial rate reductions.

III. RESOLUTION AND CIVIL RELIEF

Current attitudes and the Department of Justice's ability to prosecute make the benefits of early resolution desirable for defendants in antitrust litigation. Neither a consent judgment nor a plea of nolo contendere imply an admission of guilt by the defendant. If no testimony has been taken, both forms of resolution avoid the effect of § 5(a) of the Clayton Act. This provision directs that an adverse decision in a government antitrust action shall constitute prima facie evidence of liability in any subsequent suit brought by a private individual.

The Department's objectives in the negotiations for a consent judgment in the Morgan Drive Away civil case were threefold. First, they sought to prevent a continuation of the defendant's unlawful conduct and conspiracy, and to insure independent conduct. Second, the Department wanted to insure that the defendants would refrain from abuses of the regulatory process. Third, a restoration of competition to the industry was intended. Although "negotiations" did ensue, the Department was not,

18. Indictment at 9-14; Complaint at 10-15.
and typically has not been, inhibited from effecting its goals in a consent judgment. In 1968, the Assistant Attorney General in charge of the Antitrust Division stated that “the Government should depart from a standard of reasonably complete relief only in a few carefully defined situations.”

In addition, final judicial approval of a consent decree is subject to a determination by the court that such judgment is in the public interest.

A. A Moratorium on Protests

The most remarkable component of the consent judgment was the protest moratorium, “the first such relief ever obtained by the Antitrust Division in a case involving defendants in a heavily regulated industry.” The purpose of the protest moratorium was “to redress the injury to competition . . . caused by defendant’s monopolization of that industry.”

The protest moratorium replaced the “revocation of authority certificates” remedy which traditionally has been used to restore competition to an industry. The moratorium was to enable a protection of “the interests of the ICC in the continuation and expansion of adequate transportation service.” The method was to diminish defendant’s market power, to restructure the industry and to allow opportunity for new entry by existing and potential competitors.

“Section X provides, in effect, that each defendant is permanently enjoined from protesting any application for mobile home authority which meets the criteria set forth in paragraphs (a) or (b), even if the application is still pending after the expiration of the time period provided therein for filing.” Paragraphs (a) and (b) impose separate time and geographic limits for initial and secondary mobile home authority.

27. The Department of Justice’s original complaint requested certificate revocation, not a protest moratorium. Complaint at 16.
29. Id. at 3764.
30. Id. at 3763.
31. Twelve months in twelve states for secondary authority; thirty months in twenty-eight states for initial authority. Final Judgment at 3759.
The advantages of a protest moratorium compared to certificate revocation are enumerated in the Morgan Drive Away competitive impact statement.\textsuperscript{32} Certificate revocation was deemed too cumbersome and its impact too uncertain.\textsuperscript{33} The protest moratorium was self-executing and thus avoided expense and delay. The market of for-hire mobile home transport was subject to rapid geographical shifts so flexibility was important. The small number and weakness of existing carriers available to handle the relinquished authority was also determinative.\textsuperscript{34} Future use of the protest moratorium will depend upon long run effectiveness, ease of administration, and the existence of industries in like circumstances.

B. \textit{Enumerated Illegalities, Litigation Conduct, and Public Comments}

The remainder of the consent judgment includes more typical negative and affirmative injunctive relief. Part of the permanent injunction delineated the alleged activity and conspiracy which violated sections 1 and 2 of the Sherman Act.\textsuperscript{V.V.}\textsuperscript{35} Threats and agreements or communications about threats were enjoined.\textsuperscript{VIII.} The defendant's discussion of rates and employment was limited by the judgment to during an approved conference or when in compliance with state action requirements.\textsuperscript{IX.} No across-the-board or secret non-protest agreements were allowed, nor was action to fix the compensation or inhibit the mobility of personnel within the industry.\textsuperscript{VII.}

Many obligations were placed upon litigation conduct to enjoin the coordination or inducement of opposition.\textsuperscript{VI.} The decision to protest an application for mobile home authority was required to be independent. Not even notification of another competitor about a third party's pending application was allowed. Five year injunctions were ordered on sharing the major costs of initial adjudications. Meritless protests were disallowed and, for five years from the date of the final judgment, the defendants were required to make, and reduce to writing, an investigation of the merit of any rate or authority application to be protested.

Comments suggesting modifications or alternatives were received\textsuperscript{36} pursuant to 75 U.S.C. § 16(d) and were rejected. An "asphalt clause" was suggested which estops defendants from denying any of the allegations of the complaint in any subsequent private action involving the same issues. The Antitrust Division decided that this proposal would delay

\begin{itemize}
  \item \textsuperscript{32} Competitive Impact Statement, \textit{supra} note 12.
  \item \textsuperscript{33} Competitive Impact Statement at 3764.
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} Roman numerals in this and the subsequent paragraph refer to sections of the Final Judgment, \textit{supra} note 9.
\end{itemize}
restoration of competition in the industry and therefore was contrary to the public interest.\textsuperscript{37} Also rejected was a limited admission provision for subsequent use in agency adjudication of certificate applications and protests.\textsuperscript{38} The requirements for a reduction to writing of investigations on the merit of any protest and the protest moratorium were deemed adequate. \textsuperscript{39} Cost sharing at the appellate stage was not enjoined, nor were mergers or acquisitions.\textsuperscript{40}

The long term effectiveness of the Morgan Drive Away consent judgment, and especially the protest moratorium facet, can not now be readily evaluated. Attempts to obtain similar relief will depend on like circumstances in future cases. Noteworthy is the Antitrust Division's initiative for obtaining, in any particular situation, relief which is effective.

IV. REGULATION BASED IMMUNITY

The court's decision in the Morgan Drive Away criminal case exemplifies the strong body of precedent which is contrary to the general belief that regulated industry is immune from the antitrust laws. The Supreme Court has never held "that a federal regulatory act by implication completely displaced the antitrust laws."\textsuperscript{41} The express exemptions from operation of the antitrust laws are to be construed "strictly."\textsuperscript{42} In addition, the use of exempted procedures for predatory practices can destroy immunity.\textsuperscript{43}

Antitrust prosecution of regulated industries has become so well established that the Morgan Drive Away court was able to dismiss each immunity issue summarily, with little reference to judicial precedent. The defendants contended that their activities to coerce members and non-members of the MHCC were immune under the Interstate Commerce Act's antitrust exemption for approved agreements.\textsuperscript{44} It was obvious to the court that parties to an agreement approved by the ICC are relieved from operation of the antitrust laws by section 5 a(9) "only with respect to the

\textsuperscript{37} Competitive Impact Statement at 3764; see also Written Comments Upon Consent Judgment and Department of Justice Response Thereto, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., May 4, 1976); reprinted in 41 Fed. Reg. 18,437 (1976).
\textsuperscript{38} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Marnell v. United Parcel Serv. of America, 260 F. Supp. 391, 400 (N.D. Cal. 1971).
\textsuperscript{44} 49 U.S.C. 5b(9) (1970).
making and carrying out of the agreement in conformity with its provisions and the terms prescribed by the ICC." \(^{45}\) Contacts with non-members of a conference are not exempted. Coercion of members destroys any available immunity because "the free and unrestrained right to take independent action" must be preserved to each party. \(^{46}\) The defendants also contended that their threats of rate-reductions could not be coercive since all rates must ultimately be approved by the Commission. \(^{47}\) To this contention the court held:

Aside from the factual inaccuracy of this assertion, the Court is not persuaded that the power of the ICC to approve rates precludes as a matter of law the possibility that coercive rate reduction proposals can violate the anti-trust laws. \(^{48}\)

In the alternative, defendants argued that charges based on the alleged activities should have been stricken on due process grounds because they lacked fair warning that such conduct could constitute antitrust violations where an industry is pervasively regulated. Defendant's alternative argument is contrary to established precedent, and representative of the misunderstanding of the antitrust laws evidenced by many regulated industries. A pervasive regulatory scheme has implied repeal of the antitrust laws only where a clear and positive repugnancy exists between the acts. \(^{49}\) The Morgan Drive Away court dismisses the contention with the simple statement, "criminal prosecutions under the Sherman Act against defendants in regulated industries are not unknown." \(^{50}\)

Immunity of regulated industries from antitrust prosecution has been construed narrowly and implied rarely. \(^{51}\) Coercion was never intended to be immunized by ICC regulation: rules incorporated with Certificate No. 44, \(^{52}\) the original exemption for carrier rate conferences, and the author of section 5a(9) \(^{53}\) of the Interstate Commerce Act, both expressed strong

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48. Id.
52. 8 Fed. Reg. 3804, 3805 (1943).
views against the immunization of coercive activity. The *Morgan Drive Away* opinion illustrates that successful antitrust prosecution is imminent. The Justice Department’s brief reveals the Government’s attitude toward bringing suit: “absent express antitrust immunity for the totality of conduct alleged to violate the statute, there is no business which operates in a zone safe from criminal prosecution.”54 That type of activity which violates the antitrust laws is discernable and regulated industry should begin monitoring the new and dynamic trends.

V. MEANINGFUL ACCESS TO COURTS AND AGENCIES

Concerted actions to deter applications for certificates of public convenience and necessity—as opposed to attempts to defeat applications on the merits—are not immune from operation of the Sherman Act. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The *Morgan Drive Away* defendants objected that prior to *Trucking Unlimited* they lacked fair warning of the criminality of their actions which were alleged to have obstructed access to application hearings. Consequently, the defendants contended, due process was not being accorded because, at the time the activity occurred, there was lacking a reasonable degree of certainty that the activity violated a criminal statute. The *Morgan Drive Away* court overruled the objection, relying on *United States v. Trenton Potteries Co.* and *Nash v. United States*55 for the proposition that the criminal provisions of the Sherman Act “have been consistently held not to violate a defendant’s due process rights . . . .”56

More importantly the court found that the result in *Trucking Unlimited* had been signaled previously by *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*57 *Noerr* established the principle that attempts to influence representative government personnel were not violative of the antitrust laws regardless of motive or result.58 The “signal” in *Noerr*, however, was the “sham” exception to the above principle which would arise where a publicity campaign was a mere sham to cover a primary purpose “to interfere directly with the business relations of a competitor.”59

The activity of the *Morgan Drive Away* defendants alleged to have

54. Brief for Plaintiffs at 38, United States v. Morgan Drive Away, 1974 Trade Cas. 95,997 (D.D.C. 1974) [hereinafter cited as Brief for Plaintiffs].
55. See United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Nash v. United States, 229 U.S. 373 (1913) (there is sufficient certainty regarding the economic harm which the statute proscribes).
57. 365 U.S. 127 (1961) [hereinafter cited as Noerr].
58. Id. at 139-140.
59. Id. at 144; see also Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C.C. 1971), cert. denied, 404 U.S. 1047 (1972).
deprived other persons applying for mobile home authority of meaningful access to, and of fair hearings before, federal and state agencies and courts was:

(1) protesting virtually all such applications, without regard to the merits; (2) inducing others to protest such applications, without regard to the merits; (3) jointly financing such protests, and jointly providing personnel including employees to aid in the conduct of such protests; (4) using tactics whose purpose and effect were to deter, delay and increase the costs of applications of other persons for mobile home authority; (5) refraining from protesting one another’s applications for mobile home authority, for the purpose of qualifying each to protest applications of other persons for mobile home authority; (6) providing, procuring, and relying upon testimony which they knew to be false and misleading in agency proceedings concerning such applications.\(^{60}\)

The activity in \textit{Noerr} alleged to be an antitrust violation involved a publicity campaign to stimulate the enactment of laws helpful to the defendant railroad’s competitive position. Desired was a restriction on permissible load limits for trucks and an increase in motor carrier taxes. \textit{Noerr}’s primary holding was to exempt from antitrust prosecution attempts to influence the representative branches of government.\(^{61}\) A similar case, \textit{United Mine Workers v. Pennington},\(^ {62}\) reinforced the principal that this activity was immune whether “standing alone or as part of a broader scheme itself violative of the Sherman Act.”\(^ {63}\) The premise for this doctrine was the belief that neither the functioning of representative government\(^ {64}\) nor the first amendment right to petition\(^ {65}\) should be impaired.

The result in \textit{Trucking Unlimited} served to define “interference with the business relations of a competitor,” as well as to expand both the immunity rule and the exception.\(^ {66}\) The defendants of \textit{Trucking Unlimited} were accused and convicted of activity identical to that of the \textit{Morgan Drive Away} defendants: an agreement to oppose license applications regardless of the merits of any applications, pooling resources to do so, and publicizing this intent. The result in \textit{Trucking Unlimited} answered affirmatively the question raised in \textit{Pennington} of whether immunity would attach for attempts to influence adjudications.\(^ {67}\) The “sham” exception

\(^{60}\) Indictment, supra note 4 at 10-11.
\(^{62}\) 381 U.S. 657 (1965).
\(^{63}\) Id. at 670.
\(^{64}\) Noerr, 365 U.S. 127, 137 (1961).
\(^{65}\) Id. at 138.
\(^{66}\) See Oppenheim, \textit{Antitrust Immunity for Joint Efforts to Influence Adjudication before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited}, 29 Wash. & Lee L. Rev. 209 (1972); Note, \textit{Antitrust—Supreme Court Extends Noerr Immunity from Sherman Act to Attempts to Influence Adjudication}, 76 Dick. L. Rev. 593 (1972).
was expanded to include "[m]isrepresentations . . . used in the
adjudicatory process." 68 Trucking Unlimited's expansion of Noerr's
"sham" exception to cover falsified facts does not conflict with the
statement in Morgan Drive Away that "Trucking Unlimited neither estab-
lished nor brought previously exempt conduct within the prescription of the
Sherman Act." 69 The Morgan Drive Away court cites other cases 70 for
the proposition that "perjury and subordination of perjury . . . has never
been contended or protected in agency proceedings." 71

According to the Morgan Drive Away opinion, then, a reasonable
degree of certainty did exist prior to Trucking Unlimited that some activity,
oftentimes attempting to influence governmental bodies, could violate the
antitrust laws. With respect to the Morgan Drive Away case Trucking
Unlimited only expanded Noerr by specifying certain activity to be within
the exemption. It was Noerr which established the potential for criminal
prosecution. Therefore the defendants' due process rights could not be
violated.

Applications for certificates of public convenience and necessity and
protests against such applications are integral to ICC regulation. The
merit of such protests should be considered with an eye toward Trucking
Unlimited, especially if protests are made in concert with other estab-
lished holders of carrier authority. Repeated protests of baseless merit
which directly injure other parties to the adjudication, and thereby attempt
to influence government action only incidentally, are subject to antitrust
prosecution. It is highly possible that some courts will presume that
frequent, baseless protests do directly injure other parties. The question
of what constitutes "baseless merit" can be resolved by reference to the
regulations and viable precedent of a particular agency. The adjudica-
tions of an application for carrier operating authority centers on the
adequacy of existing service. Morgan Drive Away illustrates the impor-
tance of a thorough knowledge of existing law. A due process argument
based on ignorance is decidedly weak.

VI. PRIMARY JURISDICTION

The doctrine of primary jurisdiction is dependent predominately on a
court's assessment of the danger of unnecessary conflict with agency
regulation, plus the usefulness to the antitrust proceeding of prior resort to
an agency. 72 A court's decision on these two overworked principles,
desire for uniform regulation\textsuperscript{73} and need of expertise,\textsuperscript{74} necessarily reflects a court's predispositions in any given case. The defendants in \textit{Morgan Drive Away} moved for dismissal on the grounds that the antitrust case interfered with ICC regulation. The defendants requested, at minimum, a stay for an ICC determination of the facts.\textsuperscript{75} The court found no conflict because the alleged conduct of defendants in violation of antitrust law was not "within the jurisdiction of the ICC to approve or immunize."\textsuperscript{76} The court concluded that prior ICC adjudication would not have been of "material aid . . . in deciding whether and to what extent the Interstate Commerce Act forecloses this action or in resolving any conflicts between regulatory and anti-trust statutory policies."\textsuperscript{77}

The Department of Justice disagrees with the general principle that primary jurisdiction automatically rests with an administrative agency when the regulatory statute covers the dominant facts at issue in the antitrust case. The Department construed from \textit{Ricci v. Chicago Mercantile Exchange},\textsuperscript{78} a civil case, that referral "need not be made unless the sole or dominant issue presented by the antitrust case is within agency jurisdiction and a determination of the antitrust case depends upon or would be materially assisted by prior agency action."\textsuperscript{79} More specifically, \textit{Ricci} is interpreted as stating that when the only subject of the antitrust complaint is a violation of agency rules, referral is necessary where the violation determines "both the scope of immunity and the fact of antitrust liability."\textsuperscript{80}

Apparently, the court approved of the Department's interpretation of \textit{Ricci} since the case was cited heavily in the \textit{Morgan Drive Away} opinion. The ability of the Department to convince the court may suggest a judicial attitude toward antitrust prosecution of this nature. At minimum, regulated industry should beware that for unapproved or unapprovable past conduct in a criminal case, there is little chance of successfully alleging interference with agency jurisdiction.\textsuperscript{81}

\textsuperscript{74} See Far East Conference v. United States, 342 U.S. 570 (1952).
\textsuperscript{75} United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,999 (D.D.C. 1974).
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} 409 U.S. 289 (1973).
\textsuperscript{79} Brief for Plaintiffs at 9.
\textsuperscript{80} Id. at 79.
VII. IMMUNITY UNDER PARKER v. BROWN

In the interests of expeditious antitrust prosecution, the court denied defendant's request of referral to state agencies to determine whether their alleged intrastate rate agreement was protected under the doctrine of Parker v. Brown. To avoid delay by making referral unnecessary, the court decided that evidence of conduct immunized by Parker could be excluded at trial.

Although the Morgan Drive Away court decided to avoid the issue, antitrust immunity under Parker is not always readily available. In the words of the Morgan Drive Away opinion, Parker conferred immunity upon "conduct which is directed, commanded or imposed by the state legislature acting as sovereign." Under Parker "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." A fine distinction was drawn by Parker between official state action taken by state officials and private action taken pursuant to a state statute. This distinction has been re-stressed in recent months by Cantor v. Detroit Edison Co. On the facts, Cantor held that Parker does not immunize conduct which has been approved by a state and which must be continued while the state approval remains effective.

Delay tactics, however much potential for legitimacy exists, are not being tolerated in antitrust proceedings in Federal District Court of the District of Columbia. Tangential violations will be ignored in order to effectuate the policies against antitrust. Exclusion of evidence "is preferable to the delay that would accompany deferral to state agencies."

VIII. THE NEXUS WITH INTERSTATE COMMERCE

The Sherman Act proscribed "restraint of trade or commerce among the several States" and monopolization or attempts to monopolize "any part of the trade or commerce among the several States." Defendants contended that their alleged intrastate activity was not shown to have sufficient nexus with interstate commerce to satisfy the requirements of the Sherman Act. The Department of Justice charged that the defendants' local conduct was "a method of furthering a conspiracy to control a national market which itself is comprised of businesses depending on

82. 317 U.S. 341 (1943).
both interstate and intrastate operations. The court dismissed this issue with no more than the conclusory statement that "when read as a whole the indictment sufficiently alleges an effect on interstate commerce." As precedent for the above statement dismissing the defendants' argument, the court relied on Moore v. Meads Fine Bread Co. which involved an interstate bakery's effectuation of local price cuts to destroy the business of a purely intrastate bakery. The Supreme Court held that "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." The Morgan Drive Away court also mentioned United States v. Employing Plasterers Ass'n which was concerned with the issue of whether an antitrust complaint stated a cause of action: when "a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified." The final case cited, Las Vegas Merchant Plumbers Ass'n v. United States, stands for the proposition, at least in the Department's brief, that the merit of the alleged effect on interstate commerce is for jury determination, not pretrial motion.

The failure of the court's opinion to recognize and thoroughly consider the defendant's contentions illustrates the inadequacy of canned defenses. Also suggested might be the fact that defendants' delay tactics again were dismissed summarily. At minimum, we know the nexus of anticompetitive activity with interstate commerce is not difficult to prove. Employing Plasterers interprets Mandeville Island Farms Inc. v. American Crystal Sugar Co. as standing for the proposition that "[w]here interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases."

CONCLUSION

Scrutiny of anticompetitive conduct is becoming more acute and prosecution more prevalent. The Morgan Drive Away litigation evidences the ability of the Department of Justice to fulfill its constant mandate: "vigorous enforcement of the antitrust laws."

90. Brief for Plaintiffs at 119.
93. Id. at 120.
Under both the current state of the law and foreseeable trends, the Department has an advantage in the prosecution of antitrust cases. The Federal District Court of the District of Columbia appears sympathetic to and receptive of the Antitrust Division’s analysis of applicable legal concepts. The implied immunity of regulated business is virtually a baseless argument. Express immunity will be narrowly construed. Despite the Noerr-Pennington immunity case series a strong doctrine has developed against predatory activities which are directed at parties to an adjudication before courts and agencies. In fact, the use of coercion destroys express statutory immunity. As antitrust immunity afforded by regulatory agencies diminishes, carriers may become more susceptible to antitrust prosecution in criminal courts. The principle of Parker v. Brown also is being narrowly construed. The definition of interstate commerce continually is proved to be malleable to the court’s sense of values.

The Department’s propensity for success in the antitrust arena is illustrated further by its novel efforts for civil relief in Morgan Drive Away. The future use of the protest moratorium is dependent, of course, on the long run effectiveness and ease of administration it may prove to provide. What the relief in Morgan Drive Away truly shows is the attitude of the Department of Justice toward unprecedented circumstances and toward actuating more effective sanctions.

Regulated industry can remain complacent toward its anticompetitive conduct, or it can become aware of cases such as Morgan Drive Away and make conscious efforts toward compliance with the antitrust laws. Compliance may be elusive, however, due to the attitudinal fluctuation of both carriers and the government. Whether the regulatory agencies recognize their role in antitrust enforcement, it seems that the Department of Justice, Antitrust Division will be scrutinizing potential anticompetitive conduct. And it is the Department of Justice which will be setting standards of conduct and applying the severe sanctions suggested in the Morgan Drive Away litigation. The only possible escape from criminal liability may be more effective use of agency antitrust review.

Daniel Buchanan Matter

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1976 Congressional Action on the Clean Air Act: Automobile and Truck Emission Standards

I. INTRODUCTION

A determination of standards for the control of automobile emissions requires the consideration of a complex network of factors. The following analysis examines the relative benefits and disadvantages created by different legislative proposals. The focus is on economic and health effects and technological feasibility. In addition, special considerations associated with the control of heavy-duty trucks and buses will be discussed.

Vehicle emission standards are only one component of a system of regulations limiting air pollution from various sources. It should be noted that controls of emissions as discussed herein are only one alternative for reducing vehicular pollutants. Other strategies available include attracting mass transit ridership, reducing peak hour transit volumes, and encouraging land use patterns that would decrease average travel distances.\(^1\) Alternatives more closely related to vehicles include increasing costs of automobile use to reduce vehicle miles traveled, eliminating unnecessary pollutants from fuels, controlling evaporation of gasoline from service stations and vehicle gas tanks, and creating differential urban/rural controls whereby strict emission controls would be required only in heavily polluted areas.\(^2\)

Two bills were considered in Congress in 1976 to amend the Clean Air Act by weakening the standards for passenger automobiles and establishing statutory standards for heavy-duty vehicles (over 6000 pounds gross vehicle weight).\(^3\) Both S.3219 and H.R. 10498\(^4\) limit vehicular output of three different pollutants: hydrocarbons, carbon monoxide


\(^2\) Id. at 5-3.

\(^3\) "Heavy duty vehicle means any motor vehicle either designed primarily for transportation of property and rated at more than 6,000 pounds GVW [gross vehicle weight] or designed primarily for transportation of persons and having a capacity of more than 12 persons." 40 C.F.R. § 86.077-2 (1976).

and oxides of nitrogen. In addition, smoke (particulate) output is controlled for heavy-duty diesel engines. Other pollutants may be controlled at the discretion of the Environmental Protection Agency (EPA) Administrator, who has statutory authority to supervise emission control programs.

II. LEGISLATIVE HISTORY

It has been more than twenty years since the United States Congress first gave priority to the control of air pollution, and a decade has passed since passage of the first federal automobile emission standards. During this period, automotive pollution control tactics have displayed a pendulum effect. The first legislative action consisted of a weak bill that merely authorized a study of the problem. The second generation of legislation allowed the Department of Health, Education and Welfare to promulgate regulations limiting automobile pollutants, but these standards were set at the level of existing technological feasibility. The primary result of these standards was a codification of existing practices with implementation of a few minor controls.

The third generation legislation brought pollution controls to its apogee in the form of the Clean Air Act of 1970. This bill enacted stringent standards (termed "drastic medicine" by some observers) for cutback of automobile emissions and other sources of pollutants.

5. Oxides of nitrogen include the sum of nitric oxide (NO) and nitrogen dioxide (NO₂) and is abbreviated as NOₓ. 40 C.F.R. § 86.077-2 (1976). Hereinafter, carbon monoxide will be abbreviated as CO and hydrocarbons as HC. It is conventional in automobile emissions literature to express emissions in the shorthand form HC/CO/NOₓ (in that order). Automobile emissions are measured in grams per mile. Thus, an automobile emission standard of 41/3/4/2.0 would be .41 grams per mile of hydrocarbon emissions, .3 grams per mile of carbon monoxide and 2.0 grams per mile of oxides of nitrogen.

6. Heavy-duty vehicle pollutants are expressed in the same shorthand form, except as otherwise noted, but are measured in grams per brake horsepower hour (BHP-hr).


12. The Secretary shall encourage the continued efforts on the part of the automotive and fuel industries to develop devices and fuels to prevent pollutants from being discharged from the exhaust of automotive vehicles, and to this end shall maintain liaison with automotive vehicle, exhaust control device, and fuel manufacturers. Id.


In recent years, the progress of the crisis-oriented 1970 Act has been reversed with repeated delays of deadlines for meeting emission standards. This slowdown stage in pollution control appears to have been occasioned by such factors as the fuel shortage, an economic slump, and continuing American attachment to large, powerful automobiles.

The automobile emission standards originally set for full implementation in model year 1975 (and 1976 for oxides of nitrogen) have been suspended three times thus far. Each suspension has been for a period of one year, moving the present compliance date to September 30, 1978. Despite Congress' belief in 1970 that technology to meet strict emission standards would be available by 1975, it is now clear that this session of Congress will again postpone these standards until the 1980's.

Preparation for passage of the Clean Air Act Amendments of 1976 began early in 1975. President Ford stated his position in an energy message to Congress in January, 1975, and reaffirmed it in later messages and letters to Congressmen.

I . . . urge the Congress to act quickly on amending the Clean Air Act auto emissions standards that I proposed last June to achieve a balance between objectives for improving air quality, increasing gasoline mileage, and avoiding unnecessary increases in costs to consumers.

The President joined automobile manufacturers in calling for a delay until 1982 on stiffening emission standards. His recommendation for a five-year moratorium on emission standards was embodied in the Dingell-Broyhill (Train) proposal, which will be discussed infra.

coordination to impede development of pollution control technology, ending with consent decree admitting no liability); In re Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir. 1973), remanded 367 F. Supp. 1298 (C.D. Cal. 1973); aff'd 536 F.2d 231 (1976) (action by states and cities based on same antitrust claim as above, holding that no remedy existed in this situation under the Clayton Act §§ 4 and 6, 15 U.S.C. §§ 15 and 26 (1970).


Work on the House and Senate bills included extensive hearings\textsuperscript{19} and mark-up sessions by the Senate Public Works Committee Subcommittee on Environmental Pollution (chaired by Senator Edmund S. Muskie of Maine) and the House Interstate and Foreign Commerce Committee Subcommittee on Health and Environment (chaired by Paul G. Rogers, Florida).\textsuperscript{20} House committee members did not report their bill until May 15, 1976, the last day for reporting bills containing appropriations for fiscal year 1977.\textsuperscript{21} At the time of this writing, the House had not yet voted on the Clean Air Act Amendments.

S. 3219's chief sponsor, Senator Muskie, threatened to substitute another bill if the committee proposal was significantly weakened on the Senate floor. The substitute would contain provisions only for appropriations and for an interim loosening of automobile standards. Action on other portions of the clean air program—e.g., nondegradation, stationary source controls, and transportation controls—would be postponed until the next session of Congress.\textsuperscript{22} However, this action proved unnecessary when the Senate passed S. 3219 on August 5, 1976, with no changes in the Public Works Committee stance on vehicle emissions.\textsuperscript{23}

Although the party affiliation of Congressmen proved to be an important indicator of their positions on the Clean Air Act, it was not dispositive. President Ford's request for a five-year delay in tightening emission criteria was disregarded by many Republicans.\textsuperscript{24} All of the Republicans on the Senate Public Works Committee voted to report S.3219 despite its relatively strong antipollution viewpoint.\textsuperscript{25}

Senate roll call votes defeating two amendments offered by Senator Gary Hart of Colorado to shorten deadlines for stringent emission standard compliance showed that 45 percent of Democrats supported them, compared to 18 percent of Republicans. The Senate version of the entire Clean Air Act Amendments was approved by 72 percent of Republicans and 96 percent of Democrats.\textsuperscript{26}

\textsuperscript{19} Hearings on Implementation of the Clean Air Act Before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works, 94th Cong., 1st Sess., ser. 94-H10, pts. 3 and 4 (1975) [hereinafter cited as Senate Hearings].


\textsuperscript{22} 122 CONG. REC. 57452 (daily ed. May 19, 1976) (remarks of Sen. Muskie).

\textsuperscript{23} Creidson, Senate Passes Clean Air Amendments, 34 CONG. Q. WEEKLY REP. 2107 (1976).


\textsuperscript{25} SENATE REPORT, supra note 20, at 93.

\textsuperscript{26} 122 CONG. Q. WEEKLY REP. 2172 (1976).
At the time of this writing, figures were not yet available for House action on the Clean Air Act Amendments with the exception of the committee vote to report H.R. 10498. This action received both support and opposition from members of each party.

Due to the Administration's dissatisfaction with the automobile emission cleanup timetable, it has been suggested that a veto might be possible. This appears unlikely because of election-year repercussions and the high percentage of Congress supporting the Clean Air Act Amendments. Additionally, the automobile industry requires almost two years lead time to "tool up" for a particular model year, so 1978 planning is nearly completed with emission levels that would not meet statutory requirements.

The more probable snag for action on the Clean Air Act is adjournment prior to completion of action since substantial conference committee work will be required to synthesize the two versions. In this event, it is likely that legislation resembling Senator Muskie's substitute bill will be passed relaxing automobile emission standards for an interim period until the 1977 Congress can finalize the full Clean Air Amendments.

A. PROPOSED STANDARDS FOR LIGHT-DUTY VEHICLE EMISSIONS

The automobile emission control controversy has raged in committees and on the floor as several contrasting amendments (ranging from strong controls to the industry/administration-supported freeze) have been proposed, supported, discussed, analyzed and rejected. Comparison of the relative strengths and weaknesses of these proposals is greatly complicated by the barrage of technical data supporting each one. Amendments at both extremes claimed fuel savings over opposing proposals. Environmentalists claimed marked declines in public health would be brought about by Detroit's proposals, but at the same time the automobile industry's studies found that air quality would improve almost as much under their standards as under the environmentalists. New technology to meet more stringent emission standards, including various types of less-polluting, more economical vehicle engines, was within easy grasp according to environmentalists, but completely unfeasible in the automobile industry's estimation. These proposals facing Congress differed not so much by the reduction in emissions they imposed as by their timetables for implementation. All the proposals contained the same final

goal for hydrocarbons and carbon monoxide as that in the 1970 Clean Air Act (a 90 percent reduction in these pollutants) but the date for reaching this level varied from 1978 to 1985. The only final standard on which proposals differed was that for nitrogen oxides.

1. Dingell-Broyhill (Train) Amendment

Representatives John D. Dingell of Michigan and James T. Broyhill of North Carolina sponsored this amendment to H.R. 10498. It was supported by both Environmental Protection Agency (EPA) Administrator Russell Train and the automobile industry. Under the provisions of this amendment standards would remain fixed until 1979, with slightly more stringent interim standards in effect until implementation of the final standards in 1982. The NO\textsubscript{x} level would be set administratively by EPA for the 1982 model year and thereafter. According to its main proponent, Representative Dingell, the advantages of the proposal are that it permits manufacture of fuel efficient automobiles, phases in stricter air pollution control standards, provides better job security for auto and related industry workers, and reduces air pollution. A major economic impact of my amendment is that it will produce consumer purchase cost savings and maintenance savings far greater than standards contained in H. R. 10498, or other proposals publicly announced to date.

2. Waxman Amendment

This amendment, sponsored by Representative Henry A. Waxman of California, contains the standards approved by the Health and Environment Subcommittee and later weakened by the Interstate and Foreign Commerce Committee. The final emission standard under this amendment would be implemented in 1980, with a waiver available for NO\textsubscript{x}.

The technical feasibility of this proposal was supported by reference to the California experience:

It requires no more than an extension of the current California standards to all new cars in 1978 and 1979. . . . The fact that the California standards are now being met by 10% of the domestic auto market means that requiring these standards nationwide will not, in our opinion, pose a burden for Detroit.

31. HOUSE REPORT, supra note 20, at 47.
33. Letter from Representative John D. Dingell to members of Congress, re Dingell—Train Auto Emission Standards Amendment to the Clean Air Act Amendments (May 3, 1976).
34. HOUSE REPORT, supra note 20, at 475.
35. Id.
36. Id. at 476.
3. **Brodhead Amendment—H. R. 10498**

Representative William M. Brodhead of Michigan presented the amendment that was adopted by the House Committee on Interstate and Foreign Commerce.\(^{37}\) As a compromise between the Waxman and Dingell proposals, this proposal would freeze current standards for two years (until 1980), at which time the final HC and CO standards would become effective.\(^{38}\) With the exception of \(\text{NO}_x\), the final standard would not be prefaced by interim standards, thus allowing manufacturers time to experiment with alternate technologies.\(^{39}\)

4. **Hart Amendments**

The most stringent proposal offered to Congress was formulated by Senator Gary Hart of Colorado. His amendments to S. 3219 would have required achievement of statutory HC and CO standards in 1978.\(^{40}\) Implementation of the 0.4 statutory \(\text{NO}_x\) standard would be required in 1982.\(^{41}\) In other words, this timetable would allow no delays for the automobile industry beyond the latest EPA-granted suspension (with the exception of a three-year delay for \(\text{NO}_x\)).

Senator Hart rejected arguments that stiff standards would be economically injurious:

> Relaxing clean aid [sic] standards is at best an ineffective weapon against inflation and unemployment. Relaxing air quality standards to the detriment of public health and safety misplaces our national priorities. Certainly Congress has at its command more effective tools to deal with national economic problems.\(^{42}\)

This amendment was defeated by a wide margin on the Senate floor.\(^{43}\)

5. **S. 3219**

The Senate Act, as reported from the Public Works Committee and passed by the Senate, is similar to the Brodhead proposal in eliminating interim standards, but it imposes the statutory guidelines one year earlier than H.R. 10498. It requires that a 1.0 gram per mile \(\text{NO}_x\) emission standard be met for 10 percent of a manufacturer's output of new cars for

\(^{37}\) Id. at 479.

\(^{38}\) Id.

\(^{39}\) Crisdon, supra note 23, at 2108.

\(^{40}\) Id.

\(^{41}\) Senate Report, supra note 20, at 58.

\(^{42}\) In his minority view of the committee report, Senator Hart expressed his opposition to S. 3219 as reported from the Public Works Committee: "If the Committee's proposed amendments are adopted, we should remove the word 'clean' from the Clean Air Act. Or at the very least, we should rename the law the Fairly Clean Air Act or Sort-of Clean Air Act." Minority Views of Senator Hart, Senate Report, supra note 20, at 136.

1979.44 The method selected for meeting this requirement is apparently at the option of the manufacturer, and could be fulfilled by meeting the requirement for all cars sold in California, or for certain models of cars.

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<th></th>
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(1) E.P.A. Administrator may waive NOx to 2.0
(2) E.P.A. Administrator may waive NOx to 1.5
(3) Administratively determined
(4) Administrator may waive NOx to 1.0
(5) For 90% of manufacturer's new car fleet
(6) For 10% of manufacturer's new car fleet

44. Senate Report, supra note 20, at 55.
III. **HEAVY-DUTY VEHICLE STANDARDS**

Control measures have progressed more slowly on heavy-duty vehicles than light-duty ones. "It has been estimated that under the currently promulgated standards, the Nation's fleet of 23 million trucks would emit as much pollution as 500 million passenger cars." 46

This reticence might be attributed to the importance of heavy-duty commercial vehicles to the American economy, which causes a hesitancy to interfere with their operation; to the smaller contribution of heavy-duty vehicles to air pollution problems compared with passenger cars; 47 or to the fact that light-duty vehicle standards were imposed by statute while heavy-duty standards were set administratively. Whatever the reason, 1977 federal standards require only a 15 percent reduction in HC plus NOx emissions and a 57 percent reduction in CO from uncontrolled levels. This contrasts sharply with the over 80 percent reductions required of light-duty vehicles. 48

[A] heavy duty truck will emit as much nitrogen oxides as nine automobiles, as much HC as 18 automobiles, and as much CO as 45 automobiles. These ratios indicate that each year, after 1976, trucks and buses will be the source of a larger and larger percentage of total vehicular emissions. At some time between 1980 and 1985, the emissions from heavy-duty vehicles will be more than half of all transportation emissions, unless control regulations are revised. 49

Since the form of the Clean Air Act Amendments relating to heavy-duty vehicle emissions has not yet been finalized, it was necessary to compile a hypothetical act to illustrate the issues involved and facilitate analysis. This hypothetical bill, set out below is an attempt to compromise the most recent versions of the bill in each house (S.3219 as passed by the Senate, August 8, 1976, and H.R. 10498 as reported from the Interstate and Foreign Commerce Committee May 15, 1976) in light of technological, environmental, economic, and public policy factors discussed in the voluminous literature on automobile emissions.

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47. Eighty-four percent of all vehicles miles traveled in the United States can be attributed to light-duty vehicles, compared to ten percent for light-duty trucks and six percent for heavy-duty vehicles. Emission Control Technology Div., Office of Mobile Source Air Pollution Control, EPA, An Examination of Interim Emission Control Strategies for Heavy Duty Vehicles 58 (October, 1975) [hereinafter cited as EPA Interim Strategies].
49. Id.
Emission Standards For Heavy-Duty Vehicles or Engines and Certain Other Vehicles or Engines
(Hypothetical portion of the Clean Air Act Amendments of 1976)

SEC. 1(a) Section 202(a) of the Clean Air Act (42 U.S.C. § 1857f-1) is amended by adding the following new paragraph (3):

"(3)(A) The regulations under paragraph (1) of this subsection applicable to emissions of carbon monoxide, hydrocarbons and oxides of nitrogen from classes or categories of heavy-duty vehicles and engines manufactured in model years—

"(i) 1978 through 1980 shall contain standards which require a reduction of emissions of such pollutants established by application of the best available control technology, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers, and to noise, energy, and safety factors associated with the application of such technology.

"(ii) 1981 and thereafter shall contain standards which require reductions of at least 65 percent in the case of oxides of nitrogen compared to the baseline model year 1971, and 90 percent in the case of carbon monoxide and hydrocarbons compared to the baseline model year 1970. These reductions shall be based on the average of the actually measured emissions from heavy-duty gasoline-fueled vehicles or engines, or any class or category thereof, manufactured during the appropriate baseline model year.

"(iii) The Administrator may, where appropriate, classify vehicles and engines regulated under this paragraph by size, gross vehicle weight, horsepower, or use patterns.

"(B) At any time after January 1, 1979, the Administrator may, after notice and opportunity for public hearing, promulgate regulations revising any standard prescribed as provided in subparagraph (A)(ii) for any class or category of heavy-duty vehicles or engines. In revising any standard under this subparagraph, the Administrator shall determine the maximum degree of emission reduction which can be achieved by means reasonably expected to be available for production for such period and shall prescribe a revised emission standard in accordance with this determination.

"(C) Action revising any standard for any period may be taken by the Administrator under subparagraph (B) only if—

"(i) he finds that compliance with the emission standards otherwise applicable for such model year cannot be achieved by the technology,
processes, operating methods or other alternatives reasonably expected to be available for production for such model year without increasing cost or decreasing fuel economy to an excessive and unreasonable degree; and

"(iii) the National Academy of Sciences has not, pursuant to its study and investigation under subsection (c) of this section, issued a report substantially contrary to the findings of the Administrator under clause (i).

"(D) A report shall be made to the Congress with respect to any standard revised under subparagraph (B). The report shall contain—

"(i) a summary of the health effects found, or believed to be associated with, the pollutant covered by such standard,

"(ii) an analysis of the cost-effectiveness of other strategies for attaining and maintaining national ambient air quality standards in relation to the cost-effectiveness of the unrevised standard,

"(iii) a summary of the research and development efforts and progress being made by each manufacturer for purposes of meeting the standards promulgated as provided in subparagraph (A)(ii), and

"(iv) specific findings as to the relative costs of compliance, and relative fuel economy, which may be expected to result from the application of such revised standard, in comparison with the unrevised standard."

(b) Section 202(b)(3) of the Clean Air Act is amended by adding the following new subparagraph at the end thereof:

"(C) The term 'heavy-duty vehicle' means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as determined under regulations promulgated by the Administrator) in excess of six thousand pounds."

(c) Section 206 of such Act (relating to compliance testing and certification) is amended by adding the following new subsection at the end thereof:

"(f)(1) In the case of any class or category of heavy-duty vehicles or engines or motorcycles to which a standard promulgated under section 202(a) of this Act applies, a certificate of conformity shall be issued to the manufacturer under subsection (a) (except as provided in paragraph (2)) and shall not be suspended or revoked under subsection (b) notwithstanding the failure of such vehicles or engines to meet such standard if such manufacturer pays a nonconformance penalty as provided under regulations promulgated by the Administrator after notice and opportunity for public hearing.

"(2) No certificate of conformity may be issued under paragraph (1) if the degree by which the manufacturer fails to meet any standard promulgated under section 202(a) exceeds the percentage determined by
regulations promulgated by the Administrator to be practicable. Such regulations shall require such testing of vehicles or engines being produced as is necessary to determine the percentage of the classes or categories of vehicles or engines which are not in compliance with the regulations with respect to which a certificate of conformity was issued, and shall be promulgated not later than December 31, 1977.

"(3) The regulations referred to in paragraph (1) shall be promulgated by the Administrator not later than December 31, 1977, and shall provide for nonconformance penalties in amounts determined by a formula established by the Administrator. Such penalties under this formula—

"(A) may vary from pollutant to pollutant;

"(B) may vary by class, category, vehicle, or engine;

"(C) shall be based on the extent to which actual emissions of any air pollutant exceed allowable emissions under the standards promulgated under section 202;

"(D) shall create incentives for the development of vehicles or engines which achieve the required degree of emission reduction; and

"(E) shall remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction."

A. **Analysis of the Hypothetical Conference Bill**

The basic framework of the vehicle emission standards set forth in the Clean Air Act is supplemented by Environmental Protection Agency regulations in 40 C.F.R. Part 86 (1976). The EPA now has power to modify standards in several ways: by suspending the standards (subject to certain restrictions) if the administrator finds that reaching the standards would be unfeasible for a particular model year, by developing and modifying testing procedures, and by setting standards for uncontrolled pollutants. If the proposed amendments are passed, the EPA will gain the additional ability to divide the category of heavy duty vehicles into

50. 42 U.S.C. § 1857f-1(b)(5)(C) (Supp. 1974) provides:

The Administrator shall grant such suspension only if he determines that (i) such suspension is essential to the public interest or the public health and welfare of the United States, (ii) all good faith efforts have been made to meet the standards established by this subsection, (iii) the applicant has established that effective control technology, processes, operating methods, or other alternatives are not available or have not been available for a sufficient period of time to achieve compliance prior to the effective date of such standards, and (iv) the study and investigation of the National Academy of Sciences conducted pursuant to subsection (c) of this section and other information available to him has not indicated that technology, processes, or other alternatives are available to meet such standards.


further subcategories based on gross vehicle weight, size, horsepower or use patterns. 53

Section (3)(A)(i) of the hypothetical bill (dealing with 1978-1980 standards) reflects similar provisions found in both houses. It states that interim emission guidelines will be set administratively at the level of "best available control technology" while taking into account other factors that tend to slow emission clean-up. 54 In May of 1976 the EPA proposed standards for 1979 and later model years for heavy-duty vehicles. It is not clear to what degree the final form of these standards will need to be altered to agree with the current amendments. The standards contemplated by EPA are significantly less stringent than those proposed in either congressional bill, particularly for carbon monoxide. The congressional carbon monoxide standard for model years following 1981 is approximately 9.5 gms/BHP-hr, contrasted with the EPA standard for 1979 of 25 gms/BHP-hr. 55 Some revisions in the EPA regulation thus appear necessary.

The goals for emission reduction for the 1980's are expressed in §(3)(A)(ii) of the hypothetical bill. The foremost difference between the Senate and House versions regarding desirable standards was the timetable for compliance. The Senate called for compliance by 1981 with standards that were slightly stricter than those imposed by the House, but the House would have allowed an additional four years for compliance. 56 Determining a compliance deadline is the most controversial issue of the air pollution debate.

Determination of heavy-duty vehicle emission standards is, in simplified form, a three-step process. First, ambient air quality standards 57 must be set based on health effects of various pollutants, cost, impact on the economy as a whole, energy consumption, regional differences in air quality, and a variety of other factors. Measures to achieve the ambient air quality standards must then be allocated between stationary and mobile source controls by weighing cost-effectiveness, available technology and impact on various industries. Finally, further allocations of emission cutbacks must be made among categories of mobile sources—light-duty vehicles, heavy-duty vehicles, motorcycles, railroad engines, and aircraft.

55. 41 Fed. Reg. 21,292 (1976). Uncontrolled CO emission levels from heavy-duty gasoline trucks were measured at 95 grams per BHP-hr. EPA Interim Strategies, supra note 51, at 38.
57. Ambient air standards refer to overall air quality as opposed to emission levels from particular sources.
and subcategories within these main categories. The basis of this allocation is again found in cost-effectiveness and available technology, along with the particular requirements of users of different classes of vehicles and the possibility of reducing vehicle miles traveled.

Of course, this entire process is colored by an overlay of political activity, ranging from response to an environmental crisis to protection of entrenched economic interests. The process must be repeated for each controlled pollutant, with the further complicating factor of synergistic effects of various pollutants.  

1. Standards for Individual Pollutants

The particular percentages of reductions of heavy-duty vehicle emissions in S. 3219 and H.R. 10498 appear to have been selected by Congress primarily to equalize the burden between light and heavy-duty vehicles, since the reductions are almost identical to those established for light-duty vehicles. The emphasis in past years has been on reducing emission levels of passenger cars and other light-duty vehicles; emissions from Diesel heavy-duty vehicles have been allowed to increase. It should be noted, however, that light and heavy-duty vehicle standards are not directly comparable since light-duty vehicle emissions are measured in grams per mile, while heavy-duty vehicle emissions are expressed in grams per brake horsepower hour (BHP-hr).

In past years, standards for heavy-duty vehicle emissions have allowed a combined total for HC and NOx so that manufacturers could exercise more flexibility in their pollution control technology by severely cutting back on one pollutant while allowing greater outputs of the other pollutant. This practice has been questioned by the EPA in its most recent proposal for heavy-duty vehicle standards, which sets forth both a combined standard (10 gms/BHP-hr NOx + HC) and a separate standard for hydrocarbons (1.5 gms/BHP-hr).

An EPA report on interim controls discussed the advisability of combining HC and NOx standards and noted research indicating that controlling HC is the most effective means of limiting oxidant formation. The EPA’s proposal (using both HC and combined standards) has been described as emphasizing control of hydrocarbons but penalizing those

59. H.R. 10498, 94th Cong., 2d Sess. § 204, (1976) specifies that reductions shall be 90% for HC and CO and 65% for NOx, while S.3219, 94th Cong., 2d Sess. § 17, (1976) merely states that heavy-duty vehicle standards will be "equivalent" to those for light-duty vehicles.
60. Senate Report, supra note 20, at 53.
manufacturers who have chosen to restrict NO\textsubscript{x} emission at the expense of HC formation.\textsuperscript{63}

Two other options were also considered in promulgating regulations: adopting separate standards for HC and NO\textsubscript{x}, and using separate standards plus a combined standard. Both were rejected as being overly severe on all manufacturers who have reached the previous combined standard by cutting back on only one of the pollutants, whereas the EPA proposed standard would adversely affect only the manufacturers who had allowed high levels of HC.\textsuperscript{64}

The long-term goal is reduction in both HC and NO\textsubscript{x} standards, so the final standards (as delineated in the hypothetical act) should contain separate requirements. However, for the interim time period (1979-1980), the EPA felt that continuation of the combined standard would create less of an economic hardship for manufacturers who had chosen to comply with previous standards primarily by reducing only one of the constituent pollutants.\textsuperscript{65}

Applying the 90 percent/90percent/65 percent reductions to figures previously available, it appears that heavy-duty vehicles will be expected to reach standards of approximately 8/9.4/4.0 grams per brake horsepower hour by 1981.\textsuperscript{66} An even stricter reduction requirement, 90 percent for all three pollutants, was proposed in the 1975 House Clean Air bill, but was later discarded.\textsuperscript{67} As noted supra, the carbon monoxide standard will be particularly difficult to attain since it represents such a severe cutback from previous standards for gasoline-powered engines. However, the carbon monoxide standard is still not as low as measured pollutants from an uncontrolled Diesel engine. From the air quality viewpoint, the Diesel engine appears to present distinct advantages over the gasoline engine. Uncontrolled Diesel emissions for each of the three major pollutants are significantly lower than for comparable uncontrolled gasoline engines.\textsuperscript{68}

In the past, separate standards have been promulgated for gasoline and Diesel engines. This practice has now been abandoned in order to give extra incentive to a conversion from gasoline engines to Diesel, which would act to cut actual overall heavy-duty vehicle pollutants.\textsuperscript{69}

\textsuperscript{63} EPA Interim Strategies, supra note 47, at 21.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 23.
\textsuperscript{66} Based on figures id. at 40.
\textsuperscript{68} EPA Interim Strategies, supra note 47, at 40.
\textsuperscript{69} Senate Report, supra note 20 at 54. House Report, supra note 20, at 224 n. 15.
2. Noncompliance Penalty

Section (c) of the hypothetical bill follows H.R. 10498 in allowing manufacturers an opportunity to avoid complying with stringent emission standards by payment of a nonconformance penalty. This is a unique treatment of the problem of noncompliance—considerably more realistic than delegating to the Administrator only the illusory options of granting a total waiver or enjoining production of noncomplying vehicles. This provision is interesting in that it highlights a point of controversy among environmentalists: do controls operate more effectively through imposition of legal sanctions or through economic incentives? The hypothetical bill attempts to synthesize these two alternatives.

Of course, a vital factor in the effectiveness of this technique is the setting of penalties. The guidelines enumerated in §1(b)(C)(3) of the hypothetical bill require that the manufacturer's penalty at least exceed the costs expended by competitors in complying and not foreclose the possibility that a voluntary discontinuance of production of noncomplying vehicles would be a less costly alternative.

Another motivation for setting heavy-duty vehicle emission standards at the point specified by Congress is to “force technology.” The prevalent theory is that manufacturers will be motivated to strive for advances in emission control technology only if the standards are set beyond the level achievable with existing technology. This technology-forcing motivation was readily admitted by Congress. The House Committee on Interstate and Foreign Commerce made a statement often expressed in the congressional discussion of emission levels:

In providing for these levels, the Committee did not conclude that they were certainly technologically feasible. Rather, the Committee determined that these were reasonable target levels for manufacturers at which to aim research and development efforts for 1985 production.

The concept of technology-forcing as a legitimate tool of environmental legislation has been affirmed recently by the United States Supreme Court. The obvious problem, of course, is attempting to predict the rate at which technology will become available. As an “escape hatch,” the hypothetical bill incorporates a provision allowing the EPA Administrator to revise standards if compliance is not feasible or would be too costly in terms of cost or fuel economy. As an additional deterrent to manufacturers seeking to relax standards, the bill provides that the National Academy

71. HOUSE REPORT, supra note 20, at 224.
of Sciences must not be in opposition to a loosening of standards. Thus the bill attempts to force manufacturers into a good-faith effort to comply.

IV. AIR QUALITY AND HEALTH EFFECTS

Although emission standards for new vehicles have been reduced by over eighty percent, this has not been reflected in a concomitant improvement in either air quality or emissions from vehicles in operation. Automotive emissions were reduced by approximately twenty-five percent in 1975 over baseline year 1972, and will be reduced an expected forty-five percent in 1977.

Air quality improvements from vehicular emission reductions consistently lag behind new car standards because of two factors:

(1) Failure to reduce vehicle miles traveled.

The cutback in emissions per vehicle is partially offset by the growing number of automobiles on the road each year. Despite slowdowns in new car sales, the total number of passenger cars registered in 1975 was 2.4 million more than in 1974, and the number of trucks increased by 1.3 million. It has been predicted that “the historical growth of the vehicle population and the increasing trend in annual mileage per vehicle lead to a projected increase in automotive emissions sometime after 1985.”

(2) Vehicle age mix.

Even if the vehicle emission standards were permanently frozen at their present levels, air quality would continue to improve for several years as new vehicles replaced older pre-controlled vehicles. This replacement process has two major ramifications. First, economic conditions causing automobile sales to decline have negative effects on the environment if it is assumed that the total number of vehicles in use will remain relatively constant. Second, and more importantly, adding overly expensive emission-control equipment to automobiles may have the contraposition effect of degrading ambient air quality. If consumers are dissuaded from purchasing new automobiles because of higher prices, higher fuel
consumption, or diminished performance, older cars will remain on the road for a longer time, creating an adverse environmental effect.\textsuperscript{80}

As will be described in the economic impact section, \textit{infra}, price increases due to emission control technology are relatively small when compared with increases for optional accessories or inflation, but the replacement process effects of emission control alternatives should be the subject of further investigation.

The ultimate effect on the public health of a given pollution control technology can be difficult to predict, due to the varying mix of advantages and disadvantages of the different methods. For example, catalysts are especially effective in meeting strict emission reduction standards for some pollutants, but they also produce an unusually large amount of sulfates, the danger of which has not yet been fully assessed.\textsuperscript{81}

For the most part, health effects are dependent upon ambient emission levels. It is difficult to separate health problems caused by mobile sources from those created by stationary sources. A few basic differences are apparent, though; for example, carbon monoxide from vehicles in urban areas is more directly harmful to human health than identical pollutants from factories and power plants because vehicle pollutants are emitted at street level where they are not easily dispersed.

Significant health effects of air pollution have been confirmed by numerous studies. The results of a few of these studies will suffice to illustrate the seriousness of the health hazard posed by automotive pollutants:

1. Four thousand deaths per year and four million illness-restricted days per year may result from automobile emissions, according to the Coordinating Committee on Air Quality Studies report to the Senate Public Works Committee. This is approximately .25% of the total U.S. health hazard.\textsuperscript{83}

2. Specifically, pollutants have been linked to heart problems, respiratory disease, hypertension, and cancer. "[T]here is growing evidence that nitrogen oxides may combine with other substances in urban air to form deadly, cancer-causing nitrosamines."\textsuperscript{84}

\textsuperscript{80} International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 634 (D.C. Cir. 1973).

An analogous occurrence has been described by the Motor Vehicle Manufacturers Association, which attributed a 43% decline in sales of Diesel vehicles over 33,000 pounds (1974 to 1975) to the recession and "buyer resistance to Federal Motor Vehicle Safety Standard 121 (Air Brakes) which dramatically increased prices." \textit{MOTOR VEHICLE MANUFACTURERS ASSOCIATION, supra} note 83, at 17.

\textsuperscript{81} \textit{House Hearings}, \textit{supra} note 16, pt. 1 at 48 (Testimony of EPA Administrator Train).

\textsuperscript{82} J. Horowitz & S. Kurtz, \textit{supra} note 75, at 9.

\textsuperscript{83} \textit{COORDINATING COMMITTEE ON AIR QUALITY STUDIES, supra} note 58, at 12.

\textsuperscript{84} \textit{HOUSE REPORT, supra} note 22, at 197.
(3) "[T]he Department of Health, Education and Welfare estimated in 1970 that automotive air pollution cost the Federal Government $1.9 billion in lost income taxes due to premature death, $0.2 billion in disability payments and $0.1 billion in lost production."\(^{85}\)

(4) A study of New York metropolitan policemen on patrol car duty found that they exhibited abnormally high levels of carbon monoxide and lead in their blood and a high incidence of high blood pressure, breathing problems, and abnormal heart action.\(^{86}\)

(5) Health effects become more pronounced when the effect on particularly susceptible groups, including children, the elderly, and those with respiratory and cardiac problems, is studied separately.\(^{87}\) For example, it has been estimated that a standard of 3.1 grams per mile of NO\(_x\) will cause 200 to 245% more days of illness in children than the statutory standard.\(^{88}\)

In general, studies of health effects of air pollution have concluded that there is no "threshold" level of pollutants above which public health is harmed and below which air quality is "safe".\(^{89}\) Ideally, standards should be set by determining a level at which no serious health effects have been observed, and then allowing a safety margin to overcome presently unknown effects and synergistic reactions. The actual process of setting air quality standards involves other considerations—unquantifiable health and environmental benefits must be balanced against more readily quantifiable fuel consumption and technological costs.

V. FUEL CONSUMPTION

The correlation between fuel consumption and pollution control is one of the strongest arguments that has been used against enactment of strict emission standards. Although demonstrably strong in the past, that correlation has recently been questioned.

Anti-pollution measures were the major cause of a 13 to 20 percent fuel economy loss between 1967 and 1974, but 1975 and 1976 witnessed a return to better gas mileage. EPA tests showed that 1975 models increased gas mileage by an average of 13.5 percent over 1974 cars.\(^{90}\)

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\(^{85}\) Id. at 208.


\(^{87}\) COORDINATING COMM. ON AIR QUALITY STUDIES, supra note 58, at 41.


\(^{89}\) COORDINATING COMM. ON AIR QUALITY STUDIES, supra note 58, at 17.

\(^{90}\) Id. R. Krzyckowski, supra note 1, at 5-3.
increasing to 26.6 percent for 1976 models.\textsuperscript{91}

The true energy impact of pollution control is a question that \textit{should} be answered through scientific investigation, rather than through legal or political determinations. The contradictions presented in existing scientific analyses, however, return the question to the political arena. Therefore, to describe the political controversy fully it is necessary to summarize the divergent scientific findings.

It should be noted that presentations supporting the fuel consumption/emission control correlation are usually stated in terms of fuel penalties caused by adjustments and devices altering the classic Otto internal combustion engine.\textsuperscript{92}

Representative Dingell, in comparing his proposed standards to stricter ones, commented:

Brothead, or the Committee bill, results in a 5 percent reduction in fuel economy for model year 1980 cars relative to Dingell-Train. A 5 percent reduction corresponds to 2.46 billion gallons of added gasoline consumption over the ten-year lifetime of the model year 1980 auto fleet; this amounts to 16,000 barrels per day.\textsuperscript{93}

A study conducted by DuPont found that meeting the statutory emission standards\textsuperscript{94} would cause a 20 per cent fuel economy loss compared to 1975 models, while maintaining existing standards\textsuperscript{95} would allow manufacturers more freedom for technological innovation.\textsuperscript{96}

Presentations attempting to prove that fuel economy need not be harmed by air quality controls tend to rely on the utilization of new technology rather than on modifications of the Otto engine. An interesting point is that "1976 cars are the most fuel efficient since 1957 and the uncontrolled emission days. In some cases, methods used to reduce emissions has [sic] also improved fuel economy."\textsuperscript{97}

Relative fuel consumption depends upon several factors: vehicle weight, type of engine, and perfection of that type of technology. Emission controls are not directly related to fuel consumption:

\begin{itemize}
  \item \textsuperscript{91} HOUSE REPORT, supra note 20, at 201.
  \item \textsuperscript{92} Reitze and Reitze, Law—Engines for the Future, ENVIRONMENT (1976), reprinted in 122 CONG. REC. H4915 (daily ed. May 25, 1976).
  \item \textsuperscript{93} 122 CONG. REC. H4270 (daily ed. May 11, 1976) (remarks of Rep. Dingell). The source of Representative Dingell's information was the Department of Transportation study, supra note 88. It should be noted that this study found no fuel consumption differences between the Dingell-Brothill (Train) and Brothead standards for model years 1976-1979 and 1982-1984.
  \item \textsuperscript{94} .4/.3/.4/4 grams per mile.
  \item \textsuperscript{95} 1.5/15.0/3.1 grams per mile.
  \item \textsuperscript{96} E.I. du Pont de Nemours & Co., Inc., Vehicle Design Options for Reducing Gasoline Consumption, in House Hearings, pt. 2, 1132, 1133.
  \item \textsuperscript{97} Vol. 83 No. 12 Dec. 1975, Austin, Michael & Service, Fuel Economy Trends, AUTOMOTIVE ENGINEERING 12, 29 (1975), quoted in HOUSE REPORT at 201.
\end{itemize}
There is no inherent relationship between exhaust emission standards and fuel economy. Delaying or relaxing standards cannot guarantee that gains in fuel economy will be made. 98

The EPA and Federal Energy Administration (FEA) joined in a technical analysis which concluded that fuel economy improvements mandated by 1985 99 will be achieved "almost totally by non-emission control related changes such as weight reduction, model mix shifts, driveline improvements and the use of diesel engines." 100 This study found that there would be no fuel penalty for meeting the statutory emission standard, provided enough time were allowed for development. Implementation in 1980 would cause a fuel economy loss of 10 to 15 percent, and reaching statutory standards by 1978 would cause a 15 to 20 percent fuel economy loss compared to 1976 cars. 101 On the other hand, another FEA study concluded that gas mileage improvements could be made while meeting these standards. 102 Thus it appears that it is not the standard per se that harms gas mileage, but rather the technology utilized in achieving that standard.

The United States consumes about 6.3 million barrels of gasoline per day. Approximately 25 percent of this amount is used by commercial vehicles. 103 Thus it is appropriate to illustrate the differences in fuel consumption that can be caused by various technologies with the example of heavy-duty vehicles. Diesel engines currently attain 25 percent better mileage than gasoline-powered engines, yet emit fewer pollutants. 104 It is anticipated that the difference in fuel costs and other maintenance costs may militate toward usage of Diesel engines. Since Diesels are already within proposed emission standards, no fuel penalties for Diesels will result by implementation of these standards.

For heavy-duty gasoline engines, EPA expects no fuel penalty for implementation of their proposed 1979 standards. 105

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104. EPA Interim Strategies, supra note 47, at 23 and 63.
105. Proposed 1979 standards are 1.5/2S/10(HC, NOx) grams per BHP-hr. 41 Fed. Reg. 21292 (1976); EPA Interim Strategies supra note 47, at 39-41.
In fact, based on recent light duty vehicle performance, it is expected that a recovery of any existing fuel penalty will be possible if catalyst technology is applied to gasoline engines.\textsuperscript{106}

FEA has projected that average fuel economy for heavy-duty vehicles may improve 18 percent by 1980.\textsuperscript{107} These administrative estimates differ sharply from estimates presented by some vehicle manufacturers to the California Air Resources Board in 1973, which stated that fuel penalties for a standard similar to the 1979 Federal standard\textsuperscript{108} could reach 40 percent.\textsuperscript{109}

To date no studies have been made assessing the fuel economy impacts of the heavy-duty vehicle standards contemplated in Congress for 1981 and beyond. This area is one that should be investigated immediately because these standards are significantly more stringent than their predecessors.

VI. ECONOMIC IMPACT OF VEHICULAR EMISSION LIMITATIONS

Economic impact of vehicular emission controls may be manifested in three ways:

First, the cost to purchasers may be raised by devices (such as catalysts) added to vehicles to limit pollution and by increased fuel consumption.

Secondly, a slowdown in the purchase of new vehicles could occur because of the increased price, resulting in economic injury to the automobile industry, and reverberating through the economy as a whole.

Thirdly, the increased cost of transporting goods by truck because of higher capital costs of heavy-duty vehicles and higher fuel consumption could have consequential effects on the trucking industry.

On balance, the evidence discussed infra shows that the economic impacts of vehicular controls are minimal, and that the net economic impact of pollution control, including both stationary and mobile sources, is positive.

\textsuperscript{106} EPA Interim Strategies, supra note 47, at 41.


\textsuperscript{108} 5 grams per BHP-hr. (HC,NOx)/25 grams per BHP-hr. CO.

\textsuperscript{109} EPA Interim Strategies, supra note 47, at 31. The EPA concluded that these figures were suspect:

The gross overestimations of fuel penalty by Chrysler, Ford, IH [International Harvester] . . . clearly represent a lack of development effort by these manufacturers. Furthermore, the panel concludes that the large fuel consumption 'penalties' quoted by some manufacturers are more the result of questionable data chosen to try to influence CARB's [California Air Resources Board's] decision on their standards than they are estimates representative of good faith efforts to achieve the emission levels required with minimum or no BSFC [brake specific fuel consumption] penalty.
A. INCREASED VEHICULAR COST

For the majority of private passenger automobiles, emission controls will be achieved by modification of presently utilized engine designs rather than by widespread conversion to advanced designs. Thus it should be comparatively easy to compute the extra cost that will be added to the price of each new car to compensate for emission controls. Despite this seeming ease of computation, estimates by proponents of various viewpoints have differed considerably.

Senator Muskie stated that the S.3219 standard would add $175 to $218 to the price of a new 1982 car, while the less stringent Dingell-Train standard would add an almost identical $175 to $216. He estimated that the lifetime cost difference between the two sets of standards would be approximately $100.\textsuperscript{110}

On the other hand, EPA determined that the lifetime cost of S.3219 would be $217 to $369 higher than the Dingell-Train standards.\textsuperscript{111} Henry Ford II stated that emission reductions for models beyond 1978 would cost $750 per car.\textsuperscript{112} Another estimate places pollution control cost for 1980 cars at $350 in equipment costs plus $50 to $75 additional fuel and maintenance costs per year.\textsuperscript{113}

The year-to-year change in the base price of new automobiles has increased from .57 percent to 10.19 percent during the last decade, but additional safety and anti-pollution equipment is not the primary reason for these increases. Instead, the blame can be placed on inflation and the greater use of convenience and power options.\textsuperscript{114}

The wholesale price index for passenger cars rose to 134 in April of 1976, compared to a 1967 base of 100, but this rise was not as great as that of most goods. The overall consumer price index rose to 168 during this period.\textsuperscript{115}

Maintenance and fuel costs of pollution control equipment, as well as initial equipment costs, are affected by the type of technology utilized, and not merely by the emission standards selected. This phenomenon is best illustrated by a National Academy of Sciences study which compared sticker price, fuel, and maintenance costs for vehicles achieving S.3219

\textsuperscript{110} 122 CONG. REC. S8552 (daily ed. June 4, 1976).
\textsuperscript{111} Dept. of Transportation, et al., supra note 88, at H3484.
\textsuperscript{112} R. Krzczkowski, supra note 1, at 5-3.
\textsuperscript{115} National Academy of Sciences, Comm. on Motor Vehicle Emissions Report (November, 1974) summarized at SENATE REPORT, supra note 20, at 59.
standards for 1980 utilizing different control techniques. The most expensive would add a lifetime total cost of $575 to the 1970 base price, while a Diesel engine was forecast to be more economical than the 1970 gasoline-powered model by $234.\textsuperscript{116} The Diesel engine would yield a vastly different cost configuration than alterations in present engines: the initial equipment cost would be higher, but would be counteracted by significant savings on fuel and maintenance.\textsuperscript{117}

Accessories add significantly to the price of new cars. The average consumer adds $800 to the price of his automobile by purchasing optional accessories.\textsuperscript{118}

Thus, any decrease in sales of new cars due to higher prices would not be attributable solely to emission control devices, although their effect might be larger than that discernible from their percentage as a component of cost increase. For example, present emission control devices have caused decreases in engine power that might dissuade buyers from purchasing new cars.

Disagreement as to the fuel economy implications of different standards and the technologies used to achieve them also influences the outcome of lifetime vehicle cost computations. Regarding these costs, the Senate Public Works Committee concluded, "The costs of emission control are real, but they are reasonable in relation to the public benefits achieved."\textsuperscript{119}

\textbf{B. Effects on the Automobile Industry and the National Economy}

Imposition of strict automobile pollution control has been predicted to lead to serious economic consequences. Projected consumer cost increases and shifting target emission levels would, according to some observers, lead to "[h]igher inflation rates, [r]educed purchasing power, [r]educed consumption of new cars, [g]reater unemployment in the auto industry, [g]reater unemployment in related supplier industries (steel, rubber, glass, etc.), [and a] [r]eturn to the recessionary spiral."\textsuperscript{120}

It is not contested that the automobile industry suffered from a severe decline in sales during the early 1970's, brought on by the recessionary conditions prevalent throughout the economy and by oil shortages. The

\textsuperscript{116} \emph{Id.}

\textsuperscript{117} Dept. of Transportation, et al., \emph{supra} note 88, at H3486.

\textsuperscript{118} \textit{Most GM Prices Top $4,000}, Los Angeles Times, Aug. 28, 1974, § III, at 11, quoted in Biniek, \emph{supra} note 114, at E3084.

\textsuperscript{119} \textit{Senate Report supra} note 20 at 60.

issue in dispute is the stability of the present recovery of the industry. Statements by congressmen from opposite sides of the automobile emission controversy illustrate these divergent viewpoints. Senator Muskie commented:

Dark projections of permanent industry depression were vastly overstated. Suggestions that the domestic auto industry would suffer permanent retrenchment have been replaced by new statistics indicating that an upturn has occurred. . . . Industry sales as of December, 1975 were up 30 percent over those of a year earlier. . . .

The dire statistics presented by industry spokesmen as a basis for relaxing emission requirements have also undergone a metamorphosis. Long-term layoffs of auto workers were down to about 65,000 industrywide in January, 1976, compared to 275,000 in February, 1975. . . .

On the other hand, the viewpoint of those who oppose emission standards as harmful to the economy was stated by Representative Dingell:

Only recently has there been evidence of a trend toward reducing the rate of unemployment, but this could be reversed if energy penalties and high consumer costs produce further inflation, with consequent reduction in purchasing power. The [House Interstate and Foreign Commerce] Committee bill and Waxman amendment are capable of providing just such a disruptive influence.

Another way of approaching this controversy is to examine the air pollution control effort as a whole. When stationary source control is included in the economic analysis, the economic impact of pollution control appears more positive, although mobile source controls may be more cost-effective for certain pollutants. A study by the Council on Environmental Quality revealed that 1.1 million workers are employed in the pollution control industry. According to Council on Environmental Quality Chairman Russel W. Peterson, the report “provides a forceful rebuttal to the thesis that we must choose either a healthy economy or a healthy environment. On the contrary, it suggests economic health and environmental health are interrelated.”

122. Dissenting Views of Dingell, supra note 120 at 418.

The United Automobile Workers expressed a similar view:

There is a trade-off between short-range increases in fuel efficiency and decreases in emission standard requirements for new cars. Unless that trade-off is allowed for in setting the standards, we will have severe disruption in production and marketing activities of the domestic auto industry, and that will hamper the nation's ability to reduce the current high level of unemployment and the human suffering which it causes. United Automobile Workers, Position Paper on Federal Standards for Auto Emissions and Fuel Efficiency (March 6, 1976), in Senate Hearings, pt. 3, at 300.

124. Id.
The scales weighing the costs of automobile emission clean-up may be tipped by another means, namely, including the externalities of vehicular pollutants in the analysis. The National Academy of Sciences estimated the health and other benefits from automobile emission controls at 2.5 to 10 billion dollars per year.\textsuperscript{125}

C. Effects On The Trucking Industry

The reaction of motor carriers to emission control has quite often been negative. The Highway Users Federation stated, "Greatly increased truck costs would constitute an added burden on an industry which already feels itself threatened by proposed economic deregulation."\textsuperscript{126}

However, EPA studied the costs that would arise from control of heavy-duty vehicles and found that they were insignificant. To implement standards as stringent as 1.5/15/9 grams per BHP-hr., gasoline-powered trucks would probably need to be equipped with a catalyst. The initial cost would be $165 amortized over a 160,000 mile useful life of the vehicle (a cost of .1¢ per mile), but in addition there would be a fuel savings of eighty-seven dollars per year.\textsuperscript{127}

For a Diesel engine, the initial cost would be approximately $300 to meet these standards. This would amortize to .07¢ per mile over an average 436,000 mile useful life.\textsuperscript{128} There is not expected to be a fuel penalty for this level of control.

These figures must be evaluated in light of the average cost of operating a heavy-duty vehicle—usually over one dollar per mile.\textsuperscript{129} It should be noted that the controls evaluated by EPA are considerably weaker than those that would be required under the current congressional proposals. This is another area that merits some investigation prior to final enactment of statutory standards.

\begin{center}
COST PER HEAVY-DUTY ENGINE OVER 1974 BASE TO MEET POSSIBLE EMISSION STANDARDS\textsuperscript{130}
\begin{tabular}{lcc}

| HC/CO/NO\textsubscript{x} | Diesel Engine & Gasoline Engine |
|--------------------------|-----------------|--------------------|
| 3/30/9                   | $100            | $ 75               |
| 1.5/25/9                 | $300            | $110               |
| 1.5/15/9                 | $300            | $165               |

* Grams per brake horsepower hour.
\end{tabular}
\end{center}

\textsuperscript{125} House Report at 208.
\textsuperscript{126} From Issues to Answers, Highway Users Quarterly 2, 11. (Spring, 1976).
\textsuperscript{127} EPA Interim Strategies, supra note 47, at 64. The fuel savings of $57 assumes a gasoline cost of 50¢ per gallon. The savings would be $130 if the price of gasoline was 75¢ per gallon.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 41.
VII. TECHNOLOGICAL FEASIBILITY

Do manufacturers presently possess the capability to meet automobile and heavy-duty vehicle emission standards? If so, how soon will utilization of this technology become feasible?

The first question can be answered affirmatively, based on the fact that vehicles meeting Clean Air Act standards are already being produced and sold on a large scale. A vehicle that is accomplishing so-called impossibilities is the 1977 Volvo equipped with a three-way catalyst system. The 1977 Volvo received considerable attention from Congress when it was certified by the California Air Resources Board at .2/2.8/.17, well below the statutory standard of .41/3.4/.4.131 Particularly controversial was the fact that it accomplished this feat while improving gas mileage by ten percent over the preceding year.132 It should also be noted that this car displays an exceptionally low NO\textsubscript{x} level: “Most dramatically, the Volvos certified to date have halved the statutory 0.4 NO\textsubscript{x} standard—a standard which the industry said could not be met for several years and which, under the Dingell amendment, is effectively repealed altogether.”133

Projected timetables for feasible implementation of new technology differ widely. Automobile manufacturers contend it will be several years before large-scale production can take place, particularly if more radical changes from the traditional engine are contemplated. However, other estimates have placed the technology for meeting emission standards within production range by 1977-78.

EPA’s March 5, 1975, decision to suspend the 1977 standards was based on the need to study sulfate emissions from catalytic converters prior to implementation of standards which would almost certainly require their use.134 EPA Administrator Train stated that the suspension application would have been denied except for the sulfate problem,135 and further commented: “I thus find that the catalyst technology exists and could be applied to meet the statutory HC and CO emission levels on a very large proportion of automobiles by 1977.”136

132. 122 CONG. REC. E3193 (June 9, 1976) (remarks of Rep. Waxman). The measured gasoline mileage for these cars was 21.6 miles per gallon. Id. at E3195.
133. Id. at E3193.
134. EPA Administrator Train commented, “The decision on my part was driven . . . by the sulfate issue.” House Hearings, supra note 18, at 42.
136. The House Interstate and Foreign Commerce Committee concluded, “The potential threat of sulfuric acid mist from catalytic converters was grossly overestimated. Since this potential risk was the sole basis for Administrator Train’s proposed five-year moratorium on new car emission standards, there is no longer any basis for Congress to adopt Administrator Train’s proposed delay.” House Report, supra note 20, at 215.
Another assessment of technological feasibility was made by the National Academy of Sciences, and again the conclusion was that emissions could be reduced feasibly to statutory levels in the 1970's.

Emission standards for HC and CO (.41 and 3.4 gm/mi) for the 1978 and subsequent model year light-duty vehicles should be maintained at the current statutory levels. Attaining these levels by 1978 is both feasible and worthwhile.\textsuperscript{137}

Furthermore, the National Academy of Sciences concluded that these standards could be met in 1977 with gas mileage equal to or better than 1970 cars.\textsuperscript{138}

Although both of these conclusions were framed in terms of meeting the standards with the use of catalysts, a variety of alternative technologies are available. These include types of engines that might, in the long run, be preferable for fuel economy and emissions reduction, but involve significantly higher costs and extensive re-tooling for manufacturers, such as the Diesel, Stirling, and stratified-charge engines.\textsuperscript{139}

In the case of heavy-duty vehicles, the technological feasibility of the standards proposed by Congress has not yet been determined. In assessing available technology for meeting interim standards for hydrocarbons, the EPA found that fuel injection and crankcase emission controls would be the most feasible alternatives for reducing Diesel emissions. For gasoline, the preferred alternatives were oxidation catalysts, air injection, and improved air/fuel management.\textsuperscript{140}

For carbon monoxide, no controls are necessary for Diesels to meet interim standards since uncontrolled Diesel CO levels are so low. CO controls for gasoline engines are substantially the same as for HC control.\textsuperscript{141}

The devices available for cutting NO\textsubscript{x} emissions from Diesels include modifications in the shape of the combustion chamber with such colorful names as the "swirl chamber," "poker head," and "squish lip." However, changes in combustion chamber shape would entail more industry opposition, a longer lead time, and higher fuel consumption than other types of control technologies, so the EPA instead recommended improved injection systems and exhaust gas recirculation.\textsuperscript{142} The latter is also preferred for gasoline-powered heavy-duty vehicles.\textsuperscript{143}

\begin{footnotes}
\item 139. \textit{Reitz & Reitz}, supra note 92.
\item 140. EPA Interim Strategies, supra note 51, at 25-26.
\item 141. \textit{Id.} at 26.
\item 142. \textit{Id.} at 27.
\item 143. \textit{Id.} at 28.
\end{footnotes}
Smoke limitations on Diesel trucks, as set by the proposed interim regulations, were considered not to require any additional control devices, since standards were set at the current level of control to prevent sacrifice of smoke control for control of other pollutants.\textsuperscript{144}

CONCLUSION

A. LIGHT-DUTY VEHICLES

If one considers the evidence on the environmental, technological, economic, and fuel consumption factors, substantial extension of the deadline for achieving the final statutory standards does not appear to be justified. An appropriate compromise between the opposing viewpoints would be to set the final compliance deadlines for HC and CO standards for the 1980 model year, and with NO\textsubscript{x} deadlines set for 1982.

As discussed above, studies have found that technology is presently available for meeting the standards mandated in the 1970 Clean Air Act, and these standards are in fact being achieved by some vehicles today. Despite the automobile industry's contentions that suitable technology will not be available for mass production before 1982, EPA originally found that technology was available for the 1975 model year. If the best available pollution control devices are utilized, fuel and cost penalties for achievement of these standards by 1980 need not be excessive. There may in fact be some positive fuel consumption results from antipollution technology, depending on the methods utilized.

In the long run, the most beneficial and efficient means of achieving pollution control will probably be the development of alternative engines. Funding should be made available to encourage a bold step in this direction.

The foremost argument against delaying implementation of the final standards is that it negates the technology-forcing aspects of the Clean Air Act. Standards should remain stringent to serve as ideal goals. For those manufacturers who cannot achieve these performance levels, a noncompliance penalty like that found in the hypothetical heavy-duty emissions bill supra would be appropriate. Thus manufacturers who succeed in cutting emissions would be rewarded. The situation now yields a reverse effect; a manufacturer who achieves the standards is penalized when the deadlines are postponed because other manufacturers can offer larger and more powerful vehicles at lower cost.

The Clean Air Act § 202(b)(5)(C)\textsuperscript{145} sets forth the criteria that must be met for the EPA Administrator to grant an extension of the deadline for

\begin{footnotesize}
\begin{enumerate}
\item[144.] ld.
\end{enumerate}
\end{footnotesize}
vehicle manufacturers to meet pollutant standards. Among these criteria is a requirement that manufacturers have made “good faith efforts” to comply with the standards. In 1975, EPA studied the automobile industry’s compliance efforts and found, “[t]he efforts of some auto manufacturers directed toward the 1978 statutory emission standards have dramatically decreased during the past year [1974].” EPA analyzed its observations as suggesting that “a maximum effort was not made by the automobile industry to meet the 1978 emission standards. . . .”

It does not appear that the automobile industry has increased its research and development efforts in the last year. Even though manufacturers may not have shown good-faith efforts sufficient to qualify them for a one-year administrative delay, Congress is on the verge of granting them a considerably longer delay while simultaneously relaxing the goals to be met. This action is inconsistent with the original character of the Clean Air Act. It transforms a progressive, technology-forcing act into a weak endorsement of current industry practices.

B. HEAVY-DUTY VEHICLES

Adoption of heavy-duty vehicle standards similar to those set forth in the hypothetical bill supra would constitute significant progress in reducing the amount of pollutants from heavy-duty vehicles. The primary effect of heavy-duty emission standards in conjunction with rising costs of fuel will probably be a shift toward Diesel-powered engines. The environmental benefits of this type of shift would be substantial. The non-compliance penalty clause may allow many manufacturers to delay compliance, but it gives continuing economic incentives for progress. These standards represent a step forward in environmental preservation, in contrast to the delays manifest in light-duty vehicle standards.

Gale Norton Reed

146. Id. § 1857f-1(b)(5)(c)(ii). See note 50 supra
148. Id. at 1-3, Senate Hearings, supra note 16, pt. 3, at 690.
Enforcement Controversy Under the
Clean Air Act: State Sovereignty and
the Commerce Clause

On June 1, 1976, the United States Supreme Court granted certiorari on five cases which may well produce a decisional milestone in shaping our system of federalism. At issue is the power of the Administrator of the Environmental Protection Agency [hereinafter "the Administrator" and "the EPA"] granted to him by the Clean Air Act [hereinafter "the Act"]. The Administrator interpreted the Act to empower him to promulgate regulations requiring the states to pass laws, institute programs, and use their police power to enforce antipollution measures in order to meet air quality standards created under the Act by the Administrator. The states which petitioned for review of the above regulations claimed that the Clean Air Act did not support the Administrator's actions and, to the extent that it did, it would be unconstitutional. The five cases mentioned supra, plus Pennsylvania v. EPA, which involved the same issues but is not up for review before the Supreme Court, will be referred hereinafter as the Clean Air Act cases.

Section 110(a)(1) of the Clean Air Act provides: "[E]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of [primary and secondary air quality standards promulgated by the Administrator]." Upon receiving the plan of a state, the Administrator must approve or disapprove it on the basis of eight listed criteria. The Administrator has the

1. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); Virginia ex rel. State Air Pollution Control Bd. v. Train, 521 F.2d 971 (D.C. Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975).
3. 500 F.2d 246 (3d Cir. 1974).
5. 42 U.S.C. § 1857c-2 gives the Administrator authority to designate air quality control regions, § 1857c-3 requires the Administrator to publish a list of air pollutants, and § 1857c-4 orders him to prescribe national primary and secondary air quality standards for those pollutants. 42 U.S.C. § 1857c-4(b)(1) and (2) define primary standards as representing a level of pollution reduction necessary to protect the public health, and secondary standards as representing a level of reduction necessary to protect the public welfare.
nondiscretionary duty to disapprove a plan which does not conform to the
criteria set forth in the statute, but the Act also allows a state to revise its
plan in order to satisfy the requirements.

If the Administrator disapproves the state's proposed plan, he is
required to promulgate whatever regulations are necessary to create a
satisfactory plan. The final plan, whether an approved state plan or a plan
consisting in whole or in part of regulations promulgated by the Adminis-
trator, is called "an applicable implementation plan" for achieving national
primary and secondary air quality standards and can be enforced by
both the state and federal governments.

The Administrator has partially disapproved many proposed state
plans for their failure to provide for the necessary legal authority and funds
to implement them. He then promulgated regulations which were
designed to control the use of the governmental powers of the affected
state. The purpose of this was to avoid inefficiency; rather than undertak-
ing to police its antipollution measures directly against private parties at
the cost of duplicating previously existing state policing machinery, the
EPA sought to command the states to use their police powers to achieve
the national air quality standards. The result of this tactic was to make
states vulnerable to the enforcement and penalty provisions of section
113 of the Clean Air Act not only for operating a pollution source, but also
for failing to use their governmental powers as directed by the Adminis-
trator's regulations to control the pollution activities of parties subject to
their jurisdiction.

The controversy which developed between the EPA and the states in
this regard centered on state- and area-wide transportation control plans.
Although the Clean Air Act specifically required an implementation plan to
provide, "to the extent necessary and practicable, for periodic inspection
and testing of motor vehicles to enforce compliance with applicable
emission standards," transportation controls were required only if
necessary "to insure attainment and maintenance of . . . primary or
secondary standard[s]." Since several air pollutants for which the
Administrator had promulgated air quality standards were produced in
large part by motor vehicles, extensive transportation controls were clearly
necessary to meet the national standards.

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I. PENNSYLVANIA v. EPA

The Third Circuit’s decision in Pennsylvania v. EPA initially addressed the question of the Administrator’s power under the Clean Air Act to regulate the state in its capacity as a government. The transportation control plan at issue was typical of those at issue in the other Clean Air Act cases. The Pennsylvania plan required the Commonwealth to establish an air bleed retrofit program, establish an inspection system for certain motor vehicles, set up bikeways, establish a computer carpool matching system, create exclusive bus and carpool lanes, limit public parking, and monitor carbon monoxide and hydrocarbon emissions to determine the effectiveness of the EPA measures. In its petition for review, Pennsylvania challenged the regulation requiring a retrofit program and the Administrator’s action making the Commonwealth subject to enforcement penalties for violation of the implementation plan if it failed to enforce and administer the regulations.

Before deciding the question of the constitutionality of the Administrator’s claimed power, the court proceeded to determine the extent of power authorized by the Act itself. Section 113 of the Clean Air Act provides for enforcement against “any person,” which is defined to include “any State, municipality, and political subdivision of a State.” Further, federal enforcement actions may be taken under section 113 “when there has been a violation of ’any requirement’ of an applicable implementation plan.”

The court gave “great deference” to the Administrator’s determination of appropriate means to achieve the statute’s purposes, “particularly since it represents the judgment of one charged with carrying out the statutory provisions ‘while they are yet untried and new.’”

Unlike the decisions in the other Clean Air Act cases, which found the legislative history to be ambiguous in this area, in the Pennsylvania decision the legislative history was held to show that “Congress clearly contemplated that states could be required to implement a transportation control plan . . . .” In summary, the decision on the question of statutory intent was based mostly on the “great deference” given to the determination of the Administrator, with some reliance placed also on the presumed intent of Congress as seen through the legislative history.

In regard to the constitutional question, the court observed that, since

15. 500 F.2d 246 (3d Cir. 1974).
16. Id. at 249.
17. Id. at 248.
20. Id. (citing Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933)).
21. Id. at 259.
it is well settled that air pollution is a form of interstate commerce and also affects interstate commerce. Congress necessarily has the authority to regulate it. This left only the question of whether the means used were unconstitutional.

At the beginning of its analysis of this question the court indicated its opinion on the doubtful relevance of the tenth amendment, quoting the following language from *Case v. Bowles*:

> Since the decision in *McCulloch v. Maryland*, 4 Wheat. 316, 420, 4 L.Ed. 579, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use the all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government (footnote omitted)."

According to the *Pennsylvania* decision, the point the precedents really established was "only that the resolution of this constitutional issue should *not* depend on whether the party to be regulated is a private person or state." The only limitation on Congress was the reach of the commerce power itself, and the sole limiting factor in that connection was whether the activity to be regulated significantly affected interstate commerce.

The regulations at issue in the *Pennsylvania* case easily met the test of constitutionality formulated by the court. The Commonwealth's roads, licensing procedures, and system of traffic laws were activities which affected air pollution, and therefore, interstate commerce. The court found an apt analogy to its decision in *United States v. California*, where the Supreme Court upheld federal safety laws as applied to a state-owned and -operated railroad. The Third Circuit likened Pennsylvania's transportation system, including the legal and policy structure behind it, to the state-owned railroad in *California*, and reasoned that the same necessity of state compliance with federal regulations existed here.

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23. *Id.*

24. *Id.* n. 20 (citing *Case v. Bowles*, 327 U.S. 92, 102 (1976)).

25. *Id.* at 260.


The court rejected Pennsylvania's claim that *New York v. United States*\(^\text{30}\) should provide the basis for review of the Administrator's action. It declared that there had been a long-recognized distinction between the taxing and commerce powers of the federal government, and the modern trend toward diminishing this distinction increased the reach of the former without shortening the reach of the latter.\(^\text{31}\)

The Court of Appeals did not appear uneasy over the practical effects of its decision, which it predicted would be beneficial:

It is also true that compliance with the plan will require the Commonwealth to exercise its legislative and administrative powers, for that is the means by which a state regulates its transportation system . . . . In enacting the Clean Air Amendments of 1970, Congress created an interlocking governmental structure in which the Federal Government and the states would cooperate to reach the primary goal of the Act—the attainment of national ambient air quality standards . . . . We believe that this approach represents a valid adaptation of federalist principles to the need for increased federal involvement.\(^\text{32}\)

II. **Brown v. EPA**

The decision in *Brown v. EPA*\(^\text{33}\) was in complete opposition to that in *Pennsylvania*, as the Ninth Circuit Court of Appeals discovered grave constitutional difficulties with the Administrator's position and decided that the Clean Air Act had not clearly given such an extensive power. Examining the Act, the court saw two indications in section 113 (the enforcement section) that enforcement actions could not be brought against a state for failing to regulate private parties. First, this section makes a distinction between "person" and "state" in the notice proce-

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30. 326 U.S. 572 (1946). In this case a badly divided Court held in a 5-4 decision that Congress could tax the sale of mineral waters even if they were sold by a state. Only one Member of the Court joined in the Court's opinion, written by Justice Frankfurter. Justice Rutledge wrote a concurring opinion, and dissented insisting that full protection of the states from federal taxation was required by the tenth amendment.
32. Id.
33. 521 F.2d 827 (9th Cir. 1975). California was the petitioning state in this case. The disputed regulations required, among other things, a reduction of the amount of gasoline sold in certain regions, the administration of an inspection and maintenance program by California, the imposition by California of limitations on the use of motorcycles, the creation by California of an oxidizing catalyst retrofit program, the establishment by the State of a computer-aided carpool matching system, and the creation of preferential bus and carpool lanes. Failure to submit a compliance schedule in regard to these requirements or to create the required regulatory programs would put the State in violation of the implementation plan and subject it to federal enforcement actions. *Id.* at 830.

*Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975), was decided on the same day as *Brown*. Although it was a separate case, it raised the same issues, so the court disposed of them in its opinion in *Brown*. *Id.* at 826.
dures. Before the Administrator can issue an order or bring a civil action against a "person in violation of a plan," he must give notice both to that "person" and to the "State in which the plan being violated applies."34

Secondly, subsection 113(a)(2) contains a provision for direct federal enforcement of an implementation plan against "any person" until the state satisfies the Administrator that it will enforce the plan. This section applies to situations where violations of the plan are so widespread that the state appears to be delinquent in its enforcement efforts.35 This portion of the Act treats the "person in violation" and the "State failing to enforce" as two different entities, which seems to refute the view that the state's very failure to enforce the regulations would cause it to become the "person in violation."36 Congress had left a gap between the concept of the state as a governing power and the state as an operator of a pollution source, and the court declined to supply a connection through statutory interpretation.37

The court found further support for its statutory analysis in the broad legislative design of the Clean Air Act. Congress had created a complicated structure of regulation, using such techniques as total and partial preemption, delegation of federal authority to states, and offering opportunities to states to participate in the task of controlling air pollution.38 This complex structure was described as "incompatible with the view that buried within section 113 is the Congressional intent to make the states departments of the Environmental Protection Agency no less obligated to obey its Administrator's command than are its subordinate officials."39

The court found the legislative history too ambiguous to be of significant help, but it concluded that the more natural reading of the legislative history was that "the Administrator [has] ample power to enforce an implementation plan when a state has failed to do so."40

Turning to the constitutional question, the Brown decision held that a state's governing functions had a unique constitutional status, and were protected by the tenth amendment. The court insisted upon maintaining a strong distinction between ordinary activities affecting interstate commerce and a state's regulation of the activities of other parties which affect interstate commerce.41

Since two Supreme Court cases occupied a central position in the

34. Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975).
36. Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975).
37. Id.
38. Id. at 835.
39. Id.
40. Id. at 836.
41. Id. at 838-839.
constitutional analysis of the Administrator's action, it is worthwhile to describe them more fully. Maryland v. Wirtz\textsuperscript{42} involved an action by Maryland and other states attacking amendments to the Fair Labor Standards Act which extended federal minimum wage and maximum hour laws to cover state schools and hospitals.\textsuperscript{43} The Supreme Court upheld the amendments to the Fair Labor Standards Act, and in doing so held that the commerce power includes the authority of Congress to regulate employment conditions of state employees engaged in activities which affect interstate commerce.

One of the difficulties in determining the meaning of this case lay in the Court's observation that the Fair Labor Standards Act as amended expressly avoided application to school employees in executive, administrative, or professional positions, and the Court assumed that medical personnel in analogous positions were also exempted. The only effect of the law was on the wage-hour structure, and it did not otherwise affect the way school and hospital duties were performed.\textsuperscript{44}

Thus, on the one hand the Court appeared to emphasize the minimal nature of the federal intrusion into state affairs involved in this case. On this point the Court stated, "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."\textsuperscript{45}

On the other hand, the case contained language denying any limitation on a granted federal power based on states' quasi-sovereignty:

[!] It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character. As long ago as Sanitary District v. United States, 266 U.S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce.\textsuperscript{46}

Fry v. United States,\textsuperscript{47} involved a challenge to the attempt of the United States to apply the Stabilization Act\textsuperscript{48} wage-price controls to prevent payment of part of a wage increase to Ohio state employees deemed by the United States to be excessive. The Supreme Court

\begin{itemize}
\item \textsuperscript{42} 392 U.S. 183 (1968).
\item \textsuperscript{43} 29 U.S.C. §§ 206(a), 207, 203(s) (1970).
\item \textsuperscript{44} Maryland v. Wirtz, 392 U.S. 183, 193 (1968).
\item \textsuperscript{45} Id. at 193-194.
\item \textsuperscript{46} Id. at 195-196.
\item \textsuperscript{47} 421 U.S. 542 (1975).
\end{itemize}
affirmed the Court of Appeals ruling that the Stabilization Act as applied to state employees was constitutional.

The petitioners in this case were two Ohio employees who had sought and obtained a writ of mandamus from the Ohio Supreme Court ordering payment of the full wages agreed upon. They admitted that the payment of the state wages had an effect on interstate commerce but contended that there were limitations placed on the exercise of the federal commerce power by state sovereignty and the tenth amendment. The Court bluntly rejected this contention, declaring:

_Wirtz_ reiterated the principle that States are not immune from all federal regulations under the Commerce Clause merely because of their sovereign status. 392 U.S., at 196-197. We noted, moreover, that the statute at issue in _Wirtz_ was quite limited in application. The federal regulation in this case is even less intrusive.49

Thus, in one paragraph the Court asserted that the states' sovereign status could not make them immune from federal regulation under the commerce power and yet emphasized the unintrusiveness of the statute at issue. If this latter fact was important to the decision, one could reasonably argue that a statute which interferes extensively with state sovereignty is unconstitutional. This argument is strengthened by a footnote in which the Court stated:

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," _United States v. Darby_, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.50

The _Wirtz_ and _Fry_ cases did not set a clear direction in federal-state relations. They continued a long-standing tradition of expanding federal power under the Commerce Clause and yet contained language acknowledging the constitutional importance of state sovereignty as attested by the tenth amendment. It is not surprising that these cases could be read to support contradictory holdings. Thus the Third Circuit in _Pennsylvania_ relied heavily on _Wirtz_ (_Fry_ had not been decided yet), and concluded that the commerce power was in no way limited by state sovereignty and the tenth amendment, while the other courts in the Clean Air Act cases cited dicta in _Wirtz_ and _Fry_ as indicating that state sovereignty does impose some limitations on federal power.

In _Brown v. EPA_, the Ninth Circuit held that a state's governmental powers are not subject to the commerce power, except where state laws must yield to federal regulation to give effect to the Supremacy Clause.51

50. _Id._ at 547 n. 7.
51. _Brown v. EPA_, 521 F.2d 827, 839 (9th Cir. 1975).
The court decided that the holdings in *Maryland v. Wirtz* and *Fry v. United States* were inapposite, and that the court in *Pennsylvania v. EPA* had erred by failing to recognize the special character of a state's regulation of the economic activity of those subject to its jurisdiction. On this, the *Brown* court said:

> To make governance indistinguishable from commerce for the purposes of the Commerce Power cannot be equated to the "intrusive" regulation of economic activities of the states upheld by the Supreme Court in *Maryland v. Wirtz* and *Fry v. United States*. A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress.

The court foresaw consequences so severe as to constitute a possible violation of the constitutional guarantee to the states of a republican form of government. If Congress had the power to compel the use of a state's governmental machinery for its own constitutional purposes, it could control an ever increasing portion of the states' budgets. This would create a gap between the taxing and spending powers as far as state funds were concerned: control over a state's functions and moneys would be determined, to a large extent, by national representatives and their constituents, while the obligation to tax would remain local, focused on the taxpayers of each state. The taxpayers of each state would be encouraged to demand increased federal aid to their states, while attempting to earmark their own state's funds for activities still subject to state control. These effects are not consistent with either a "healthy federalism or sound public finance."

Separation of the power to tax from the power to spend would divest the states of a sovereign function so important that they would no longer possess a republican form of government as that term was understood by Montesquieu and the authors of the *Federalist Papers*. This conclusion would not be altered even if both the powers of spending and taxation were exercised by the federal government. Although the court did not base its rejection of the Administrator's position squarely on the Guarantee Clause, it did view that Clause being relevant to its decision.

The heart of this decision was the necessity, as the court perceived it, of protecting the essentials of state sovereignty as a part of the constituu-

52. id. at 838 & n. 45.
53. id. at 839.
54. id. at 840.
55. id.
56. id.
57. id.
58. id.
59. id.
60. id.
61. id.
tional structure of federalism. The court quoted Fry v. United States as authority on relevance of the tenth amendment in establishing and protecting this structure.\textsuperscript{62} It also quoted a statement from Maryland v. Wirtz that "'[t]he Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.'"\textsuperscript{63} These statements gave support to the concept of a reserved state sovereignty which was threatened by the Administrator's regulations.

III. MARYLAND V. EPA

The decision in Brown was followed by the Fourth Circuit in Maryland v. EPA,\textsuperscript{64} especially in regard to the constitutional analysis. The Maryland case, like Brown, was decided by a statutory interpretation which was strongly influenced by the alternative of striking down part of the Act on constitutional grounds. Two rules of construction mandated this approach. The first requires that courts should, when possible, construe the statute as valid, and the second requires a court to decide a case through statutory construction or general law rather than on constitutional grounds if either method is available.\textsuperscript{65}

Although the statute specifically authorized the Administrator to promulgate necessary regulations when a state had not done so, the Maryland decision held that this provision was very different from one which would authorize the Administrator to direct a state to enact statutes and regulations. The court could find nothing in the terms of the Act which clearly gave the Administrator the power to do the latter.\textsuperscript{66} "In our opinion," the court held, "the preparation of regulations for a state means regulations to be applied within the boundaries of a state if it does not act in a manner approved by the EPA."\textsuperscript{67}

The Court of Appeals began its examination of the constitutional question by quoting from Maryland v. Wirtz,\textsuperscript{68} New York v. United States,\textsuperscript{69} and Gibbons v. Ogden\textsuperscript{70} to show that the commerce power is limited and

\textsuperscript{62} Id. at 842 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).
\textsuperscript{63} Id. (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).
\textsuperscript{64} 530 F.2d 215 (4th Cir. 1975). Maryland challenged the right of the EPA to require that it enact programs calling for retrofit of pollution control devices on certain classes of vehicles and the establishment of bikeways. Id. at 218. The EPA also promulgated regulations providing that the "State of Maryland shall" establish automobile inspection and maintenance programs. Id. at 219.
\textsuperscript{65} Id. at 226-227.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} 392 U.S. 183, 196 (1968).
\textsuperscript{69} 326 U.S. 572, 580 (1946).
\textsuperscript{70} 22 U.S. (9 Wheat.) 1, 198-199 (1824). Chief Justice Marshall's opinion in this case is usually cited for authority on the broad sweep of the commerce power, but in Maryland the Fourth Circuit quoted the following statement in support of a reserved state sovereignty:
that state sovereignty is an essential part of our constitutional system. 71
The court then stated:

[While it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause [sic], it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in In re Duncan . . .: “By the constitution [sic], a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . ..” 72

The court pointed out that the First Circuit had been troubled by the direction the Clean Air Act requirements were taking when it reviewed different issues in Natural Resources Defense Counsel v. EPA. 73 In that case the petitioner, the Natural Resources Defense Counsel, wanted assurances from the governor or legislature of Rhode Island that the implementation plan’s regulations would be followed. The court replied that it was difficult to imagine what sort of guarantee the current Rhode Island executive or legislature could give the E.P.A. to insure that adequate resources would be devoted to the Plan . . . Such assurances might have a symbolic effect; however, they would have little more, since a governor or even a present session of the legislature cannot make binding commitments on behalf of their successors, nor would such representations seem to be enforceable. 74

The Fourth Circuit concluded that the serious constitutional questions raised by the Administrator’s interpretation of the Clean Air Act required an alternative interpretation.

IV. VIRGINIA AND DISTRICT OF COLUMBIA

In Virginia ex rel. State Air Pollution Control Board v. Train and District of Columbia v. Train 75 (hereinafter District of Columbia), the D.C. Circuit held that the Clean Air Act did not support the Administrator’s regulations

72. Id. (quoting In re Duncan, 139 U.S. 449, 461 (1891) (citation omitted)).
73. 478 F.2d 875 (1st Cir. 1973).
74. Id. at 883-884, quoted in Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975).
75. 521 F.2d 971 (D.C. Cir. 1975). The District of Columbia and the State Air Pollution Control Board (of Virginia) were joint petitioners before the court, which decided the issues in one proceeding. The claims of the two parties were considered as separate cases only in the Supreme Court memorandum granting certiorari. 96 S.Ct. 2224 (1976).
insofar as they required the state and local governments to enact statutes, but it declared that the question of requiring the states to enforce existing EPA regulations was a different matter. The court proceeded to examine the constitutionality of the regulations requiring state enforcement, and held that the tenth amendment prevented such an exercise of federal power.

There were two points in the statutory design which supported its decision. The first point concerned the distinction subsection 113(a)(1) makes between a "person in violation of the plan" and the "State in which the plan applies" in its notice requirements. This point was discussed in the Brown case, supra.

The second point arose from a comparison of subsection 113(a)(1) with subsection 113(a)(2). The former authorizes the Administrator to take enforcement action directly against a person in violation of the implementation plan if, after notice to both the violator and the responsible state and a thirty-day waiting period, the state has not taken action. The latter gives the Administrator general enforcement responsibility for the plan as a whole if there are such widespread violations that he finds a lack of proper enforcement effort by the state. After making that finding, he must notify the defaulting state of his finding, wait thirty days for the state to improve its enforcement efforts, and then, if the state’s efforts are still unsatisfactory, give public notice of the assumption of direct federal enforcement. Direct federal enforcement continues until the state satisfies the Administrator that it will enforce the plan properly. The court reasoned that, if the Administrator were correct in his determination that he could penalize a state under subsection 113(a)(1) for violating regulations directing it to enact statutes and enforce the plan, subsection 113(a)(2) would be nearly superfluous.

The District of Columbia case also noted that subsection 113(a)(2) treats "violations of an applicable implementation plan" and "a failure of the State in which the plan applies to enforce the plan effectively" as separate concepts, thus distinguishing between nonenforcement by the state and violation of the plan. Finally, the notice requirements to be given both to the state failing to enforce the plan effectively and to the general public thirty days later emphasized the difference between the failure of a state to enforce the plan and the violation of the plan by polluting activities of any "person." If a state’s failure to enforce were itself a violation of the plan, only one notice, to the state, would be required. The second notice must have been aimed at polluters who were thereby warned that the federal government was assuming responsibility for

79a. Id.
enforcement.\textsuperscript{80} The court held that this provision treated state enforcement as voluntary and not as coerced by the threat of federal penalties.\textsuperscript{81} All the above considerations caused the court to conclude that the language in section 110(a)(1), that states “shall” submit implementation plans, was directory and not mandatory.\textsuperscript{82} It also concluded that the Administrator could not use his power to promulgate regulations to throw the responsibility back on the states if they failed to accept it voluntarily.\textsuperscript{83}

It is surprising that after making this analysis of the statute the court decided that the Administrator’s action requiring the states to legislate should be treated differently from that requiring the states to enforce the implementation plan. Nevertheless, the District of Columbia case stated that such a distinction could be argued to exist, and the latter power, though not supported by the Clean Air Act any more than the former, was not expressly denied.\textsuperscript{84} Furthermore, the legislative history, combined with section 110(a)(2)(G),\textsuperscript{85} appeared to evidence the congressional intent to require state inspection and testing of motor vehicles.\textsuperscript{86}

The court turned to the constitutional question regarding the Administrator’s power to require state enforcement. It had been established that air pollution affects interstate commerce.\textsuperscript{87} The federal government, therefore, had the power under the Commerce Clause to regulate all sources of air pollution, including state-owned sources, whether those sources stem from activities described as “proprietary” or “governmental.”\textsuperscript{88} This power also extended to sources such as highways which cause air pollution indirectly by promoting polluting activities of others.\textsuperscript{89}

On this basis the court upheld portions of the implementation plan at issue which required the District of Columbia and the petitioning states to create exclusive bus lanes and purchase additional buses.\textsuperscript{90} Both buses and highways could be used to decrease the generation of pollution by others, so the court labeled them indirect pollution sources.\textsuperscript{91} The court referred to the states’ buses and highways as a “state-owned transportation system,” and stated that federal control over it could be justified on the

\textsuperscript{80} Id. at 985.
\textsuperscript{81} Id.
\textsuperscript{82} Id. (construing 42 U.S.C. § 1857c-5(a)(1) (1970)).
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 988.
\textsuperscript{86} District of Columbia v. Train, 521 F.2d 971, 987 (D.C. Cir. 1975).
\textsuperscript{87} Id. at 988.
\textsuperscript{88} Id. (citing Maryland v. Wirtz, 392 U.S. 183 (1968)).
\textsuperscript{89} District of Columbia v. Train, 521 F.2d 971, 989 (D.C. Cir. 1975).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
basis of *United States v. California*, which required a state-owned railroad to conform to federal safety regulations.\(^{92}\)

However, the logic of labeling buses as sources of indirect pollution and thus giving the bus-purchase requirement equal justification with the requirement for creating exclusive bus lanes does not hold up under examination. Since a state-owned highway causes other parties to drive motor vehicles and pollute the air, it can easily be defined as a source of indirect pollution, justifying the federal requirement that the state conform to EPA regulations in controlling its use.

This analysis cannot apply to the bus-purchase requirement. A bus, unlike the highway it runs on, does not cause pollution by others; its effect is to produce pollution directly. By classifying buses with highways as indirect pollution sources, the court allowed the EPA to require state legislatures to appropriate money. This part of the decision is inconsistent with the rest of the decision, which held that either the Clean Air Act or the Constitution prevented federal control over state legislative activities.

The regulations requiring the states to establish and administer programs for motor vehicle inspection and maintenance and for retrofit of certain classes of vehicles with antipollution devices were struck down. The court held that, while the exclusive bus lane and bus-purchase requirements were regulations of state activites, the retrofit and inspection regulations were aimed at controlling individuals who operated motor vehicles.\(^{93}\) The effect of the inspection and retrofit regulations was to use the commerce power to force the states to regulate interstate commerce.\(^{94}\)

This was an "impermissible encroachment on state sovereignty and went beyond ‘regulation’ by the Congress."\(^{95}\) The court quoted *Fry v. United States* as support for the proposition that the tenth amendment "does have some substantive meaning." Federally compelled state enforcement of the retrofit and inspection programs would run afoul of the principle in this footnote that "Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system."\(^{96}\)

The court distinguished the holdings of *Fry v. United States* and *Maryland v. Wirtz* from the instant case on the ground that a lesser degree of federal interference in state functions was involved in the former two cases. The Supreme Court had observed in *Wirtz* that the disputed statute

\(^{92}\) Id. (analagizing from United States v. California, 297 U.S. 175 (1936)). The term "state" will also be used to refer to the District of Columbia, since it was treated the same as the states.

\(^{93}\) Id. at 990.

\(^{94}\) Id. at 992.

\(^{95}\) Id.

\(^{96}\) Id. at 993 (quoting Fry v. United States, 421 U.S. 542, 547 n. 7 (1975)).
was not significantly intrusive, and in *Fry* the Court had declared that the statute at issue in that case was even less intrusive. The *District of Columbia* decision concluded that "[h]owever the Supreme Court ultimately determines to reconcile the formulation of the Tenth Amendment in *Fry* with the federal commerce power, we have no doubt that the inspection and retrofit regulations involve 'drastic' intrusions on state sovereignty."

The court’s position on the meaning of the tenth amendment was that it restricted the fashion in which the federal government could exercise the commerce power, possibly preventing the use of a method involving a drastic invasion of state sovereignty where a less intrusive one was available, even though less efficient. Although the Administrator had chosen an efficient method of regulating pollution sources, this nation’s constitutional system requires that state participation be voluntary.

If necessary, Congress could devise a system of rewards and forfeitures in federal aid programs to induce the states to cooperate. Also, negative controls, such as the requirement that a state refrain from registering vehicles that do not conform to federal regulations and refuse to allow them on its roads, are constitutionally valid. Beyond the permissible techniques listed here the EPA would be forced to assume direct responsibility for enforcing regulations if the states did not want to participate. Both the *Brown* and *Maryland* cases also noted that the federal government could still choose from numerous options to solve an interstate problem which involved difficult federal-state relations.

The present attitude of the Supreme Court toward questions on federalism has been revealed most recently in *National League of Cities v. Usery*. That case involved the attempt of Congress to press its luck to the limit in extending the application of the Fair Labor Standards Act to state employees. Amendments to this Act in 1974 applied its minimum wage and maximum hour standards to almost all employees of states and their political subdivisions. This application was struck down on constitutional grounds in a 5-4 decision.

The majority opinion in this case continued a line of argument found in

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97. 392 U.S. at 193-194.
98. 421 U.S. at 548 n. 7.
100. Id.
101. Id.
102. Id. at 993 n. 26.
103. Id. at 991-992.
104. Id. at 994-995.
105. 96 S.Ct. 2465 (1976).
the dissents of *Maryland v. Wirtz* and *Fry v. United States*. In *Maryland*, Justice Douglas dissented in an opinion joined by Justice Stewart. Justice Douglas asserted that the decision should have turned on the threat of the federal law to overwhelm state fiscal policy by imposing federal controls on wage structures.\(^{107}\) He rejected the previous commerce power cases as precedents for *Wirtz* on the ground that they did not pose the same threat to the states' fiscal policy and autonomy in regulating health and education.\(^{108}\)

Justice Douglas noted the wide reach of the commerce power based on such cases as *Wickard v. Filburn*\(^{109}\) and *Katzenbach v. McClung*,\(^{110}\) and then issued a warning:

> Yet state government itself is an “enterprise” with a very substantial effect on interstate commerce . . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build super highways criss-crossing their territory in order to accommodate interstate vehicles . . . ? Could the Congress virtually draw up each State’s budget to avoid “disruptive effect[s] . . . on commercial intercourse?”\(^{111}\)

Justice Douglas advocated using *New York v. United States*,\(^ {112}\) as a guide to decision.\(^ {113}\) He quoted the opinion of Chief Justice Stone in that case that “the National Government may not ‘interfere unduly with the State’s performance of its sovereign functions of government,’ ” and Justice Frankfurter’s statement that a constitutional line should be drawn between the state as a government and the state as trader.\(^ {114}\)

Justice Rehnquist, dissenting in *Fry v. United States*, continued and expanded the arguments of Justice Douglas in *Wirtz*. Although his was a lone dissent in that case, a year later he wrote much the same opinion for the majority in *National League of Cities v. Usery*.\(^ {115}\)

In *National League of Cities*, the Supreme Court held that the plenary power of Congress to regulate activities affecting interstate commerce cannot be exercised “in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system . . . .”\(^ {116}\) This is so


\(^{108}\) Id. at 203-204.

\(^{109}\) 317 U.S. 111 (1942).


\(^{112}\) 326 U.S. 572 (1946).

\(^{113}\) *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (dissenting opinion).

\(^{114}\) Id.

\(^{115}\) 96 S.Ct. 2465 (1976).

because state governments have aspects of sovereignty reserved to them which Congress may not impair even when it acts from an affirmative grant of authority.\textsuperscript{117} Whether any given state choices are thus protected from congressional infringement depends upon their status as "functions essential to separate and independent existence."\textsuperscript{118}

In the instant case, the Court concluded that the federal law had thrust itself unconstitutionally into sovereign state decisions. The statute would likely impose additional costs on states which then might have to cut back on important programs.\textsuperscript{119} Furthermore, a state might want to hire part-time or summer employees without the normal training requirement at wages below the federal minimum.\textsuperscript{120} Although the precise effects of the Fair Labor Standards Amendments formed a matter of controversy, "particularized assessments of actual impact" were not necessary to the decision. It was enough that employer-employee relationships in activities traditionally pursued by state governments would be altered significantly by the federal law.\textsuperscript{121}

The Court overruled Maryland v. Wirtz.\textsuperscript{122} United States v. Fry was not overruled but was viewed separately from Wirtz primarily on the ground that an economic emergency existed at the time that the law in controversy was passed and national action was required to deal with it.\textsuperscript{123} The Court also favored the general wage freeze in Fry over the minimum wage and maximum hour law in Wirtz. The former, the Court held, "displaced no state choices as to how governmental operations should be structured nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency."\textsuperscript{124}

The Court refused to overrule a number of other cases that had supported an extensive reach for the commerce power, and it even reaffirmed its adherence to the holding of United States v. California.\textsuperscript{125} However, the Court described as "simply wrong" a phrase in the California opinion that "[t]he state can no more deny [the plenary power to regulate commerce] if its exercise has been authorized by Congress than can an individual."\textsuperscript{126}

\begin{tabular}{l}
117. \textit{Id.} at 2471. \\
118. \textit{Id.} \\
119. \textit{Id.} at 2471-72. \\
120. \textit{Id.} at 2472. \\
121. \textit{Id.} at 2474. \\
122. \textit{Id.} at 2475. \\
123. \textit{Id.} at 2474. \\
124. \textit{Id.} at 2474-2475. \\
125. \textit{Id.} at 2475 n. 18 (discussing United States v. California, 297 U.S. 175 (1936)). \\
126. \textit{Id.} at 2475 (quoting United States v. California, 297 U.S. 175, 183-185 (1936)). 
\end{tabular}
Justice Blackmun cast the swing vote in this 5-4 decision. In his short concurring opinion, he stated,

I may misinterpret the Court’s opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in such areas as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. . . . With this understanding on my part of the Court’s opinion, I join it.127 (Emphasis added.)

The dissenters in this case made crystal clear their opinion that there could be no state interest asserted to limit the exercise of the commerce power,128 so Justice Blackmun’s position on this question will probably be decisive. Although he mentions environmental protection as a specific example of an area of dominant federal interest, the italicized phrase may be an important clue to his intent as to the permissible use of federal power here. It is logical to read Justice Blackmun’s comment to mean that, unlike the situation in the Usery case, where Congress’s attempt to regulate state activities affecting interstate commerce was struck down on the ground that state sovereignty overbalanced the federal interest, in the environmental protection area the federal government would have sufficient interest to regulate pollution even where state facilities were involved.

The question remains whether Justice Blackmun would weight the federal interest in environmental protection so heavily as to include state legislative and administrative machinery among the “state facilities” whose compliance with federal regulations could be enforced. It is the conclusion of this paper that he would vote to strike down the regulations of the EPA which were at issue in the Clean Air Act cases. Such a decision would not prevent the EPA from exercising the full power needed to regulate all sources of pollution; it would simply preclude sacrificing essential aspects of state sovereignty to efficiency in controlling polluters.

If a majority of the Court is now prepared to require an exercise of federal power under the Commerce Clause to yield to certain essential aspects of state sovereignty, it seems likely that the Supreme Court will either affirm the statutory constructions of the Fourth and Ninth Circuits, or establish a new constitutional landmark in state-federal relations.

Arlan Gerald Wine

127. Id. at 2476 (emphasis added).
HAROLD S. SHERTZ ESSAY AWARD CONTEST

The Film, Air and Package Carriers Conference of the American Trucking Association in conjunction with the Motor Carrier Lawyers Association in an endeavor to encourage interest within the legal education community in the field of transportation, annually hold the Harold S. Shertz Essay Award Contest. The contest title was selected to honor Harold S. Shertz, Esq. of the Philadelphia, Pennsylvania Bar for his long service to the transportation industry and to the legal profession.

Submission of manuscripts must be in conformance with the competition’s rules as follows:

1. **Eligibility:**
   The contest is open to any law student of a school in the United States or Canada other than student members of the staff of the *Transportation Law Journal*. An essay may be written in collaboration only with another student provided there is full disclosure.

2. **Subject Matter:**
   A contestant may write on any area of transportation law.

3. **Determination of Award:**
   Essays will be judged on timeliness of the subject, practicality, originality, quality of research, and clarity of style. The Editor-in-Chief and Board of Governors of the *Transportation Law Journal* shall act as judges. In the discretion of the judges, no prize may be awarded. The decision of the judges shall be final.

4. **Prizes:**
   A prize of $250.00 will be paid and the winning essay will be published in the *Transportation Law Journal*.

5. **Right of Publication:**
   Each contestant is required to assign to the *Transportation Law Journal* all right, title, and interest in the essay submitted, and shall certify that the essay is an original work and has not had prior publication. Papers written as part of a contestant’s law studies are eligible provided first publication rights are assigned to the *Transportation Law Journal*.

6. **Formal Requirements:**
   Essays must be submitted in English and be typewritten (double space) on 8 1/2" x 11" paper with 1" margins. Footnotes shall be typed separately and all citations must conform to the Harvard Law Review citation booklet (12th Edition) or other uniform law journal style. The essay shall be limited to 40 pages including text and footnotes.

7. **Submission Requirements:**
   Three copies of essay entries should be enclosed in a plain envelope and sealed. Contestant’s name should not appear on either the envelope or the essay. The envelope containing the essay should be placed in another envelope with a letter giving the name and address of the contestant and stating that the article is submitted for the contestant and that the author has read and agrees to be bound by the Rules of the contest. Enclosed with this letter must be the certification set forth in Rule 5 above and a brief biographical sketch of the contestant.

8. **Closing Date:**
   Papers must be received by March 15, 1977. The winner will be announced by June 1, 1977.
   
   All correspondence, including the submittal of entries, and questions should be directed to the Editor-in-Chief, *The Transportation Law Journal*, University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204.
Airport Noise Regulation: Burbank, Aaron, and Air Transport*

MARY LEE WARREN**

"The aircraft and its noise are indivisible . . . ."¹

Noise has been an unfortunate by-product of air transportation since its earliest days. One can humorously imagine an assistant on the sands at Kitty Hawk in 1903 with fingers poked in his ears screeching to be heard above the racket of a flimsy propeller. The growth of the air-transport industry and the development of subsonic and supersonic jetcraft have deaveningly increased and compounded aircraft noise. Large urban airports have so concentrated that noise as to threaten public health and environmental balance within a wide radius of the airport.

Attempts to abate the noise at airports have been halting and generally ineffective. One reason for this failure has been the legal uncertainty concerning whether the federal, as opposed to state and local, government has the power to control airport noise. This article will review three court challenges of California airport noise regulation and fiscal responsibility, as well as the lack of federal agency initiative, in an attempt to ascertain where that control now rests.

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¹ 1975 winner of the Harold S. Shertz Essay Award Contest, subsequently published in 5 ENVIRONMENTAL AFFAIRS 97. Reprinted with permission of ENVIRONMENTAL AFFAIRS.

** Third year student, Boston College Law School; Editor-in-Chief, ENVIRONMENTAL AFFAIRS; A.B., Mount Holyoke College, 1964.

The first of these cases is City of Burbank v. Lockheed Air Terminal, Inc., in which the United States Supreme Court struck down a municipal ordinance enacted to abate local airport noise and declared that the Federal Aviation Act of 1958, the Noise Abatement Amendments of 1968, and the Noise Control Act of 1972 together established an instance of federal preemption over "airspace management." Burbank, however, was not a definitive resolution of the allocation of the power to control noise. The rationale was founded on ambiguous legislative history and the holding provided a massive exemption for possible local control where framed as proprietary, rather than police power, restrictions.

Next, Aaron v. City of Los Angeles struck a financial blow to municipal proprietors of airports which had not been foreseen after Burbank. The shift of control of noise from traditionally local to federal government regulation should logically be accompanied by a parallel shift to the federal government of fiscal liability for damages caused by noise pollution. Aaron, however, held that the fiscal liability continued with the local government and consequently further defined the Burbank proprietary exception.

Considering the proprietary control exception of Burbank and the consequent fiscal liability of Aaron, as well as the continuing lack of federal regulation or enforcement of airport noise control, a three-judge federal district court recently held in Air Transport Association of America v. Crotti that certain state suggestions for local airport owner-operator regulation of noise were not per se invalid. The opinion expressly withheld final decision on the yet to be applied regulations, but it marked the first positive affirmation of local control of airport noise after Burbank.

I. FEDERAL PREEMPTION OF AIRSPACE MANAGEMENT: CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.

In 1970 the Burbank City Council enacted a curfew ordinance which made unlawful jet take-offs from Hollywood-Burbank Airport between 11

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2. 411 U.S. 624 (1973) [hereinafter cited as Burbank.]
9. 399 F. Supp. 58 (N.D. Cal. 1975) [hereinafter cited as Air Transport].
p.m. and 7 a.m.\textsuperscript{10} Airport noise had been widely recognized as most annoying during these nighttime hours,\textsuperscript{11} and the curfew was expressed as an exercise of the city's police power to protect and preserve the public health. In fact, only one flight per week—an intrastate flight Sunday nights at 11:30 p.m.—was affected. Although the municipal restriction was framed cautiously in terms of airport and not air flight control, both airport and aircraft operators could be held responsible for violations.

The airport owner and the affected airline challenged the constitutional validity of the city's curfew in federal district court.\textsuperscript{12} The court found the ordinance unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.\textsuperscript{13} On appeal the Ninth Circuit Court of Appeals affirmed under the Supremacy Clause on grounds of federal preemption and conflict.\textsuperscript{14} On final appeal, the United States Supreme Court affirmed on grounds of preemption alone.\textsuperscript{15} The Federal Aviation Act of 1958,\textsuperscript{16} the Noise Abatement Amendments of 1968,\textsuperscript{17} and the Noise Control Act of 1972\textsuperscript{18} were cited as evidencing “complete and exclusive” federal sovereignty “airspace management.”\textsuperscript{19}

The Supreme Court holding had been foreshadowed by a series of federal and state court cases. In \textit{Allegheny Airlines, Inc. v. Village of Cedarhurst},\textsuperscript{20} a local ordinance setting minimum altitude overflights for aircraft using nearby John F. Kennedy Airport in New York was held invalid by the Second Circuit Court of Appeals, which found that the area of navigable airspace had been federally preempted to the exclusion of other regulation. In \textit{Loma Portal Civic Club v. American Airlines, Inc.},\textsuperscript{21} an injunction sought by a group of property owners to eliminate certain flights at a neighboring airport was denied. The California Supreme Court relied

\begin{itemize}
  \item \textsuperscript{10} Burbank, Cal., Municipal Code \$ 20-32.1 (1970). The ordinance allowed an exception from the curfew restriction for emergency flights authorized by the Burbank police.
  \item \textsuperscript{11} For a survey of noise pollution health studies see Comment, \textit{Toward the Comprehensive Abatement of Noise Pollution: Recent Federal and New York City Noise Control Legislation}, 4 Ecol. L.Q. 109, 110-14 (1974).
  \item \textsuperscript{12} The Air Transport Association, whose membership includes all nationally certified carriers, intervened as a plaintiff. The Federal Aviation Administration filed an amicus brief in support of the plaintiff and the State of California filed an amicus brief in support of the defendant municipality.
  \item \textsuperscript{13} 318 F. Supp. 914 (C.D. Cal. 1970). U.S. Const. art. I, \$ 8, cl. 3 (Supremacy Clause). U.S. Const. art. VI, cl. 2 (Commerce Clause).
  \item \textsuperscript{14} 457 F.2d 667 (9th Cir. 1972).
  \item \textsuperscript{15} 411 U.S. 624 (1973). (Douglas, J., writing for a 5 member majority).
  \item \textsuperscript{16} 49 U.S.C. \$ 1301 et seq. (1970).
  \item \textsuperscript{17} 49 U.S.C. \$ 1431 (1970), as amended, (Supp. III, 1973).
  \item \textsuperscript{19} City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 626-27 (1973).
  \item \textsuperscript{20} 238 F.2d 812 (2d Cir. 1956).
  \item \textsuperscript{21} 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).
\end{itemize}
on *Cedarhurst* but narrowed its theory of invalidity from preemption to specific conflict with federal regulation of aviation. In *American Airlines, Inc. v. Town of Hempstead*, a town's "unnecessary noise" ordinance was held invalid, again by the Second Circuit, as a thinly veiled attempt to impermissibly regulate aircraft flight in conflict with Federal Aviation Agency landing and take-off regulations for Kennedy Airport. The court relied on *Loma* for the theory of specific conflict, although it indicated broader preemption might have also been found. More recently, in an advisory opinion, the Massachusetts Supreme Judicial Court cautioned the state legislature that a proposed enactment banning supersonic transports from landing in the Commonwealth would be an unconstitutional encroachment in the federally preempted area of aircraft flight. The court added parenthetically that some limited regulations might be permissible when the state or local agency was acting as airport proprietor.

Not all local ordinances regulating airport or air flight management to control noise, however, had been invalidated. In some cases, a federal preemption was not found. In such cases, if the local regulation was reasonable and it did not conflict with any existing federal law, rule, or regulation, it was allowed to stand. For example, in *Stagg v. Municipal Court*, the enactment of a night curfew at the Santa Monica Municipal Airport was held by the California Court of Appeals to be a valid exercise of the city's police power which was not in conflict with any state or federal legislation. And in *Port of New York Authority v. Eastern Air Lines, Inc.*, the federal district court held that the metropolitan authority's scheme of preferential runway use to abate jet aircraft noise at La Guardia Airport was reasonable and did not infringe upon a federally preempted area of regulation.

Given this background, *Burbank* appeared to settle the uncertainties of local jurisdiction to control airport noise pollution. The Supreme Court

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23. The District Court below had declared:
The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decibel limit. . . . In a word, the Ordinance does not forbid noise except by forbidding flight and it is, therefore, the legal equivalent of the invalid Cedarhurst Ordinance.
found a federal preemption of "airspace management." The Federal Aviation Act of 1958 was held to have established "complete and exclusive national sovereignty" of the airspace of the United States. This federal primacy, the Court believed, was emphatically ratified by the Noise Control Act of 1972, which had been passed since the lower court rulings in Burbank: "That Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempts state and local control."30

A. THE PREEMPTION FINDING

The Court initially recognized that no express language of preemption could be found in the Noise Control Act and that a strong presumption existed that the control of noise, which had traditionally been exercised within the powers of states, would remain with the states.31 The Supreme Court, in Rice v. Santa Fe Elevator Corp.,32 however, had stated that when Congressional intent was manifest and clear, evidenced by the pervasiveness of federal regulation in the area, this presumption could be overcome and preemption could be found.33 The Burbank Court illustrated the pervasiveness of federal regulation of air traffic by quoting from Justice Jackson's concurrence in Northwest Airlines, Inc. v. Minnesota:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.34

The Court recounted a legislative history of the 1968 Noise Abatement Amendments to the Federal Aviation Act and the Noise Control Act of

31. Id. This presumption against preemption of a power traditionally held by the states was declared by the Court in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959) to be basic to a form of government founded on a concept of Federalism.
32. 311 U.S. 218 (1947).
33. Id. at 230. The "clear and manifest purpose of Congress" could be shown by: 1) the pervasiveness of the federal regulatory scheme, 2) the dominance of federal interest in the area. 3) the objectives of the federal law which imply a uniform system of regulation, and 4) the objectives of the federal law which preclude state or local inconsistencies. These four instances broadened the traditional preemption rule which had been declared in Cooley v. Board of Wardens, 53 U.S. (12 How.) 143, 152 (1851). The Cooley rule states that the "nature" of the area of regulation is determinative. If the area admits to only one source of control, preemption may be inferred, but if similar controls can be exercised by various levels of government, preemption may not be found unless explicitly stated in the regulatory legislation.
1972 to evidence pervasiveness and resultant Congressional intent to preempt state and local government police power controls. Included were portions of a written opinion of the Secretary of Transportation about the 1968 Amendments, the unenacted Senate version of the 1972 Act, arguments from the floor of Congress urging enactment, and a statement of the President at the signing of the bill.

Despite the recital of legislative history, the Supreme Court in fact appeared to rely on actual agency behavior and practical functioning to evince the "clear and manifest" purpose of Congress to preempt the area. The Court announced that the procedures under the 1972 Act were already well under way, noting certain regulations which had already been promulgated and Federal Aviation Agency (FAA) notices that others were soon to be issued. Practical functioning of aircraft control under the Federal Aviation Act further explained the preemption requirement:

The Federal Aviation Act requires a delicate balance between safety and efficiency 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

The Supreme Court chose to rely on the broad constitutional ground of federal preemption and not the narrower or more explicit grounds of direct conflict with federal law or undue burden on interstate commerce. Even though Commerce Clause implications were introduced in

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36. *S. REP. NO. 1353, 90th Cong., 2d Sess. 6 (1968)*.

37. *118 CONG. REC. 37083 (1972) (remarks of Representative Staggers) and 118 CONG. REC. 37317 (1972) (remarks of Senator Tunney)*.

38. *8 WEEKLY COMP. PRES. Docs. 1583 (1972)*.


42. *E.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (which invalidated a state statute requiring a peculiar type of mudguard on trucks using state highways as unduly burdensome on interstate commerce); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (which struck down a state law limiting train length as obstructive to the free flow of interstate commerce); and *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177.
a suggestion that the Burbank ordinance and similar ordinances of other municipalities would "fractionalize" any regulatory scheme and thus "severely limit the flexibility of the FAA in controlling air traffic flow. . .".43 The Court's ground for invalidation was solely the existence of a federal preemption.

The finding of preemption continued a trend of Supreme Court decisions and represented a particular kind of judicial lawmaking.44 When the Court determines Congress intended by its legislation complete and exclusive federal regulation of a particular field, preemption, based on the Supremacy Clause, is declared.45 The Court's review is limited to flat determinations of intent evidenced in legislative language, history, or administrative behavior. There is no delicate balancing of burdens and interests as in Commerce Clause cases.46 There is no factual finding of "direct and positive" inconsistency of state law with federal law as in conflict cases.47

A finding of preemption tends to be a perfunctory constitutional decision. It is analogous to the Court's practice of deciding a case on other than constitutional grounds if at all possible.48 Thus, preemption allows the Court to postpone decisions on what might be difficult or close questions of law. In Burbank, for example, tenuous Commerce Clause implications of local regulation of aircraft have been cautiously deferred by the preemption finding. Tactically, preemption puts Congress on notice that a certain area will be exclusively federally regulated unless it acts to amend the questionable legislation which had been reviewed by the Court. Thus, Congress, and not the Court, is in the position of invalidating state or local law, and criticisms of judicial legislating are neatly parried.

(1938) (which allowed state regulation of the width of trucks using its highways as not unduly restrictive of interstate commerce).

43. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973). Rehnquist, J., writing in dissent abruptly dismissed any question of undue burden on interstate commerce by first stressing that commerce clause implications should be considered case-by-case and not by illusive hypotheticals and by then noting that only one flight per week was affected in this instance. 411 U.S. 624, 654 (1973).


45. U.S. Const. art. VI, cl. 2 reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."


Unlike a finding of direct conflict which is narrow and factual, a finding of preemption is broad and presumptive. Consequently, it may present certain disadvantages or dangers. Only limited federal regulation of a particular area may exist, and many opportunities for nonconflicting or even reinforcing state and local regulations may be offered. These opportunities remain open if the court finds only conflict, but they are abruptly foreclosed if it finds preemption. In the case of preemption, until federal regulations are promulgated or until Congress amends the original legislation, there may be an absence of rules, standards, and enforcement in an area now immunized from state and local control. The result is confusion and uncertainty, at best. The developments since Burbank tend to confirm the dangers of choosing preemption as grounds for invalidation.

B. THE "FLAWS" OF THE BURBANK DECISION

Two major flaws in the reasoning of the Burbank decision have become increasingly apparent since its pronouncement in 1973 by the Supreme Court: (1) the stated reliance on legislative history as the basis for a preemption finding and (2) the stated limited applicability of the decision to municipalities (or state government agencies) in their exercise of police power over local airports to control noise.

The legislative history cited by the majority of the Court was ambiguous and failed to establish a solid and clear Congressional intent and purpose. For each cite offered, Justice Rehnquist, dissenting, countered with authority that the Congressional intent was not to disturb the existing federal, state, and local governments' balance of power. The majority's evidence of preemptive intent was particularly weak given the established standard that such intent has to be strong and persuasive in order to overcome the historic presumption of the validity of state and local police power regulations.

49. E.g., the use of statements by Senator Tunney and Representative Staggers to establish Congressional intent. Supra, note 37. Statements made from the floor of Congress generally are not viewed as reliable indicators of intent and are often discounted as mere grandstanding. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 642 n.1 (1973) (dissenting opinion).


The applicability of Burbank was limited in the often cited note 14 to a municipality's exercise of its police power to control local airport noise. The decision expressly does not concern a municipality's exercise of its proprietary rights as owner and operator of the airport. In fact, the Hollywood-Burbank Airport is an anomaly; it is the only major national airport which is privately owned. But the holding of Burbank does not singly apply to that airport. It would also be determinative in those instances of one municipality's attempt to control noise at a neighboring municipality's airport. There have been a few attempts to exercise such police powers subsequent to Burbank. Yet in most cases the municipality or other governmental unit is the owner and operator of the local airport and therefore is not expressly prevented by Burbank from exercising its proprietary rights by regulating noise levels.

If the great bulk of airport noise cases are not to be affected, however, the rationale of Burbank is defeated. Basic to the Burbank holding is "[t]he interdependence of [safety, efficiency and the protection of persons on the ground which] requires a uniform and exclusive system of federal regulation. . . ." If this requirement of uniformity exists, it should make no difference whether the local regulation is based on the state's police power or the owner's proprietary power.

The dichotomy creates a senseless contradiction unless it may be viewed as a restriction on a kind of action rather than on a category of


[T]he proposed legislation [Noise Abatement Amendments of 1968] will not affect the rights of a state or local public agency, as the proprietor of an airport . . . . and the Court's own explication:

[W]e are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power . . . . We do not consider here what limits, if any, apply to a municipality as a proprietor.


54. The following cases relied on the Burbank-declared federal preemption to invalidate one community's attempt to control the noise of another community's airport: Village of Bensenville v. City of Chicago, 16 Ill. App. 3d 733, 306 N.E.2d 562 (1973) (denied an attempt by a group of contiguous municipalities to prevent increased noise pollution incumbent with the proposed expansion of O'Hare Int'l Airport); Township of Hanover v. Town of Morristown, 135 N.J. Super. 529, 343 A.2d 792 (Super. Ct. 1975) (vacated a prior decision to enjoin certain jet flights at a town's airport which had been sought by the neighboring township).


56. Also consider that the Supreme Court does not note probable jurisdiction to hear a case unless an issue with general impact or national significance is presented. Yet if the extreme limitation of note 14 is taken literally, Burbank becomes a decision of nearly unique application.
airport ownership. A municipality which owns and operates an airport, in effect, may play two roles in the control of noise pollution. One role is manifested in the exercise of its police power to protect the local citizenry, by such techniques as setting altitude minimums and prescribing stringent take-off and touchdown operational procedures.57 The other approach involves the exercise of the municipality's fundamental proprietary rights in terms of land and facilities use, equivalent to those of any individual or corporation, such as terminal and facilities leasing, take-off and landing fee levies and expansion and development plans.

The municipality's police power flows from the Tenth Amendment and from the local government's equivalent of a constitution, perhaps a city charter or incorporation document.58 This power is exercised to protect and preserve the public health, welfare, and safety and is often enforced and sanctioned by criminal action. On the other hand, the municipality's proprietary power generally does not have a legislative base but is "a common-law right which inheres to the owner and operator of the land."59 Proprietary restrictions are exercised to protect and benefit the owner and are enforced through civil proceedings.

The nature of control of noise through the municipality's police power flight restrictions, and not through proprietary leasing or contracting, is the legislative area which can "... admit only of one uniform system, or plan of regulation..." in the terms of the traditional preemption rule.60 This type of control is to be provided solely by the FAA and EPA and is thus federally preempted.

Even this conciliatory reading of the Burbank rationale with its exceptional limitation prompts more questions than it answers. What are the contours and limits of these two roles of a local government? Don't they often overlap?61 Between the FAA and the municipal proprietor of an airport, who is to control and who is to enforce which noise restrictions? And finally, who is to bear the responsibility for non-control and non-enforcement?

57. For a general discussion of operational techniques to abate airport noise, see Comment, Port Noise Complaint, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 61 (1970).
61. E.g., preferential runway systems which limit populated area overflights, number and frequency of fleet landings, and take-off restrictions.
In *Burbank* a general rule was stated: local police power attempts to control airport noise were invalid because the area of airspace management had been federally preempted. But the precision of the rule’s dimensions and the nuances of its possible implications were far from clear.

II. **Inverse Condemnation: Aaron v. City of Los Angeles**

Local government police power legislation is not the only means available to attempt to abate airport noise pollution. Private individuals can seek property damage recoveries from the airport owner-operator and thus may spur other local attempts to lower noise levels to avoid future liability. In January, 1975, the United States Supreme Court denied certiorari in one such private property action, *Aaron v. City of Los Angeles.* The Court left standing a California Court of Appeals decision which held the city fiscally liable to its airport’s neighbors for damages in reduced property values suffered from noise pollution. The trend in cases declaring exclusive federal control of airport noise regulation, set by the *Burbank* preemption decision and followed in a flurry of state and local government cases subsequent to it, did not forewarn of this continued local liability in private property owner actions. In the Environmental Protection Agency (EPA) report of July 31, 1973, to the Senate Committee on Public Works, the administrator forecast a liability shift to the federal government collateral with its proclaimed preemption of airport noise control. Legal commentators made similar reasonable predictions of a liability shift.

The FAA apparently had recognized the risk of incurring the cost of noise damage and in 14 C.F.R. § 36.5 issued an equivocal noise regulation standard that failed to set a noise ceiling for individual airports: “No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into or out of, any airport.” The FAA comment to accompany § 36.5 explicitly stated that the responsibility for this determination remained with the proprietor of each airport.

These cases, predictions, and equivocations set the stage for Aaron, which presented an action in inverse condemnation by neighboring homeowners against the city as proprietor of Los Angeles International Airport (LAX) to recover damages for the diminution of their property values due to airport noise.

An action in inverse condemnation is based on the Fifth or Fourteenth Amendment Due Process Clause or the Fifth Amendment Compensation Clause of the United States Constitution. It may also invoke similar, but sometimes broader, guarantees under the individual state constitutions. It involves a claim and proof that the governmental defendant took certain private property for public use without the procedures or just compensation required in an exercise of eminent domain.

The California appellate court formulated the state rule governing recoveries in inverse condemnation as follows:

The municipal owner and operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking.

The California rule is an assimilation of the legal history of compensable constitutional “takings” of air easements by local airports over their neighbors’ property which had been growing in federal and state courts for thirty years. From these cases, two general profiles developed as to when and under what circumstances recovery would be had. The federal courts followed a traditional trespass theory and required direct overflights or actual physical invasion of the superadjacent airspace for the property owner to recover. The state courts tended to follow a nuisance theory and did not require proof of direct overflights. This approach was clearly set out by the Washington Supreme Court in Martin v. Port of Seattle:


69. Compensable “takings” of air easements were at issue in Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); City of Boston v. Massachusetts Port Authority, 444 F.2d 167 (1st Cir. 1971); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Bennett v. United States, 266 F. Supp. 627 (W.D. Okla. 1965); Thornsburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962); and Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989 (1965).

70. E.g., Batten v. United States, 306 F.2d 580, 584 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).
We are unable to accept the premise that recovery for interference with the use of the land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff’s land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the near-by flights which interfere with the use and enjoyment of their land.  

In all cases, the owner and operator of the airport was held liable, not the federal government, even though a federal agency had set the standards, approved the plans and designs, and sponsored the construction or expansion of the airport.

Aaron held that no overflight requirement was necessary for recovery in California. The court cited the above passage from Martin to emphasize that such a requirement was arbitrary and unreasonable. The requirement was found not scientifically sensible in an age when accurate noise measurement technology is available. Further, it was not necessary under the state constitutional definition of a “taking” of private property. Unlike the narrow United States constitutional concept of the “taking” of property for public use by eminent domain, the California Constitution and Code of Civil Procedure broadened the state definition of compensable “taking” to include damaging or interfering with the use and enjoyment of property.

The City of Los Angeles raised as a defense in Aaron the Burbank federal preemption of aircraft and airport noise regulation. The city contended that if the federal government had the right of exclusive control of airport noise, it must consequently bear sole liability for its resultant damage. The court denied this defense and held first that in terms of navigable airspace, the federal preemption of Burbank did not alter in any way the city’s responsibility as airport owner and operator to acquire the necessary land and air easements for safe aircraft approaches and

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72. In Griggs v. Allegheny County, 369 U.S. 84, 89 (1962), the Supreme Court denied an argument that the federal agency regulating aviation rather than the airport owner-operator was responsible for “taking” an air easement over neighboring property.
73. The Federal Government takes nothing; it is the local authority which decides to build an airport vel non, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.
74. CAL. CONST. ART. 1, § 14; CAL. CODE OF CIVIL PROC. § 1239.3 (West 1972).
take-offs.75 Consequently, the city would not be immune from liability for failure to make adequate appropriations and provisions.76 Second, the court held that in terms of noise control, the federal preemption did not relieve a municipal proprietor of an airport of its traditional liability in inverse condemnation to neighboring property owners. The court built on the flaws in the reasoning of the Burbank decision (the equivocal legislative history and the exceptional limitation of the decision's application) to establish this unchanged municipal liability.

The California court declared that the legislative history of the Federal Aviation Act of 1958 and the Noise Control Act of 1972 revealed a Congressional intent to leave untouched the traditional areas of state and local government proprietary control and concomitantly the areas of local owner-operator liability.77 Burbank, was limited by its note 1478 to a municipality's exercise of its police power and not its exercise of proprietary powers and the consequential liabilities it bore as owner and operator of an airport.

The court indicated the city was not powerless, as it claimed, to control airport noise. As proprietor it could establish reasonable restrictions for airport use as in Port of New York Authority v. Eastern Air Lines, Inc.79 and Stagg v. Municipal Court80 or it could resort to the many options set forth in the California Public Utilities and Administrative Codes.81

With this statement of alternatives available to the city, the Aaron court appeared to widen Burbank's note 14 distinction between the municipality


77. Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 489 & n.12, 115 Cal. Rptr. 162, 174 & n.12 (Ct. App. 1974), cert. denied, 419 U.S. 1122 (1975). To illustrate the equivocal nature of the legislative history, here the California appellate court, id., relied on S. Rep. No. 1353, 90th Cong., 2d Sess. 6-7 (1968) to demonstrate that local proprietary liability for noise damage was unaffected by the Noise Control Act. This is the same Senate report on which the majority had relied in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 634-35 (1973) to establish a federal preemption of airspace management, and on which the dissent, id. at 648-50, had relied to deny the existence of a preemption.


79. 259 F. Supp. 745 (E.D.N.Y. 1966) (which allowed a system of preferential runway use to abate airport noise).

80. 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (Ct. App. 1969) (which permitted an airport flight curfew to stand).

in its exercise of police power and the municipality in its exercise of proprietary rights. *Port of New York Authority* and *Stagg* were of questionable validity in 1974 after the *Burbank* preemption decision. Further, the California statutory restrictions and administrative regulations had been adopted after *Burbank*, were not scheduled to be fully effective until 1985, and were as yet unchallenged in the courts. But the California Court's recommendations suggested the municipal proprietor's right, in theory, to exercise some control over the noise pollution for which it was now held liable.

Cases subsequent to *Aaron* have defined and affirmed the municipal proprietor's liability. For example, *City of Los Angeles v. Japan Air Lines, Co.* held, pursuant to a cross-complaint by Los Angeles against all the licensed airlines using LAX, that the city could not recover its disbursement in damages awarded in *Aaron* under a theory of equitable indemnity. The airline-airport lease contained no provisions of indemnification for noise pollution damages; the liability rested ultimately with the city.

The dollar recoveries in these suits have made headlines, but inverse condemnation alone is not an adequate remedy to airport noise pollution. The nearby property owners receive damages but no relief, the noise continues or worsens. The cities, operating on tight, if not

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83 The doctrine of equitable indemnity is applied when the conduct or occurrence is removed by situs or subject matter from the provisions of a contractual indemnity. *People ex rel. Dep't of Public Works v. Daly City Scavenger Co.*, 19 Cal. App. 3d 277, 281, 96 Cal. Rptr. 669, 671 (Ct. App. 1971). But when the parties have expressly contracted to indemnify the conduct or occurrence in issue, the provisions of the contract are determinative and the doctrine of equitable indemnity may not be applied. *Markley v. Beagle*, 66 Cal. 2d 951, 961, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967).
84 The airlines in *City of Los Angeles v. Japan Air Lines Co.*, 41 Cal. App. 3d 416, 428 & n.3, 116 Cal. Rptr. 69, 77-78 & n.3 (Ct. App. 1974) had expressly contracted in the lease agreement to indemnify certain harm caused by aircraft take-offs and landings at LAX, but the lease provisions did not include damages resulting from noise pollution. The conduct, aircraft take-off and landing, expressly covered in the contract was therefore dispositive and the doctrine of equitable indemnity would not be applied.

Obviously a final solution to the problem will require numerous different approaches to it and the cooperation of airplane manufacturers, the airlines, federal, state and local government [footnote omitted].

deficit budgets, are plainly unable to absorb these enormous demands for damages.88 Yet the air transportation industry and the FAA escape virtually unscathed and unpressured to reduce noise levels.

III.  FAA AND EPA REGULATION

With few exceptions therefore, the local governments as proprietors of the airports were to bear the fiscal responsibility for damages due to noise pollution, but the federal government was to make the rules to control and abate it. The legal assumption of effective federal rule-making and enforcement was not, however, grounded in reality.

Section 611 of the Federal Aviation Act, as inserted in 1968,89 required the FAA to promulgate noise abatement regulations. There was not only a significant delay in the promulgation of these regulations,90 but when finally issued the regulations addressed aircraft certification and not airport standards.91 By statutory directive, only those standards, rules, or regulations which were "economically reasonable, technologically practicable, and appropriate" were to be issued.92 As a result the standards, rules, and regulations were remarkably lenient. Further, they contained many broad exceptions. They did not apply to military aircraft, supersonic aircraft, carriers in international commerce, or model types of carriers already in service when the regulation was issued. Consequently, the regulations covered less than 10% of the aircraft in service.93 The woefully inadequate standards posed a harsh threat to the public health "... that could have been prevented with stricter regulations."94

But even if the regulations had been adequate, the FAA has a poor record of enforcement.95 In Virginians for Dulles v. Volpe96 the federal

90. Sec. 611 was added by Pub. L. No. 90-411, § 1, July 21, 1968; proposed regulations were published the following January, 34 Fed. Reg. 453 (1969); but final regulations were not issued until November, 34 Fed. Reg. 18364 (1969), to be effective December 1, 1969.
91. Noise Standards, 14 C.F.R. § 36 (1975); Part 36 of the Federal Aircraft Regulations is often referred to as "FAR 36."
95. For an overview of FAA regulations and enforcement inadequacies see: Comment, Toward the Comprehensive Abatement of Noise Pollution: Recent Federal and New York City
district court denied a citizens’ class action for relief of noise at Washington National Airport but noted "... a certain timidity on the part of the FAA in enforcing operational guidelines for the airlines at the airport, [the evidence showing] not a single instance of a pilot being disciplined for violations of a voluntary or regulatory limitation ... ." On occasion a court has compelled the FAA to abide by its own policies and regulations. A federal district court in *City of Boston v. Coleman*, courts sometimes decline jurisdiction, particularly when promulgation and enforcement of a specific regulation is discretionary with the Agency under the Federal Aviation Act.

Resort to court action for FAA enforcement, however, is expensive, time-consuming, and not always successful. Although citizens’ suits are authorized under the Noise Control Act, courts sometimes decline jurisdiction, particularly when promulgation and enforcement of a specific regulation is discretionary with the Agency under the Federal Aviation Act.

The new combination of the Environmental Protection Agency (EPA) with the FAA by the Noise Control Act in the federal scheme of aircraft-airport noise regulation was, at first, an encouraging sign. The general framework of the EPA is designed to center pollution control in one agency which does not have the additional and often conflicting task of encouraging development of an industry. But the EPA participation in noise control regulation is limited to a role as a compiler of studies and maker of recommendations and has been further reduced by severe agency budget cuts. The EPA has also been accused by certain Senators and environmentalists of “willful non-enforcement” of the Noise Control Act.

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*Noise Control Legislation, 4 ECOL. L.Q. 109 (1974); Comment, Port Noise Complaint, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 61 (1970).*

97. Id. at 577.
102. A freeze on funding was offered as the reason for proposed regulation deferments by EPA Director Train, 5 ENV. REP. CURRENT DEV. 1053 (1974). The Senate and House threatened a complete cut-off of EPA funding under the Noise Control Act for the agency's failure to show any progress, but finally approved a short term extension of the EPA appropriations with the proviso that the Senate would begin EPA noise abatement oversight hearings. 5 ENV. REP. CURRENT DEV. 1835 (1975); 6 ENV. REP. CURRENT DEV. 1353 (1975).
103. 5 ENV. REP. CURRENT DEV. 651, 946 (1974).
In fact, it was only in February, 1975, that the Administrator finally submitted the long-promised noise regulation recommendations for aircraft. The Agency is still reviewing airport noise control proposals.

The slack in affirmative action by the EPA has not been taken up by citizen suits under the National Environmental Policy Act (NEPA) attacking airport noise pollution. These environmental suits have generally failed either on their facts or because of NEPA loopholes. In Life of the Land v. Brinegar, the Ninth Circuit Court of Appeals refused to enjoin a runway extension under construction at Honolulu Airport because the Environmental Impact Statement (EIS) projected a noise reduction rather than an increase through this diversion of approaches and take-offs. In Friends of the Earth, Inc. v. Coleman, the Ninth Circuit refused to enjoin construction of facilities expansion at San Francisco International Airport for lack of an environmental impact statement because the project was not totally federally funded. Ventures with joint federal and local funding have escaped NEPA controls or delayed their application until environmentally preferable alternatives were no longer practicable.

One final hope for EPA leadership in airport noise control may have expired with the issuance of a recent directive by EPA Administrator Train. Regulations were to be limited to those required by statute and tailored with acceptability to the regulatee in mind. Regulations concerning noise pollution were specifically included in the list.

The FAA, consistently, and the EPA, more recently, have failed to make adequate rules or even effectively enforce less-than-adequate ones in the area of airport noise control. This failure is particularly bitter when it is remembered that the Supreme Court through all its obfuscation ultimately grounded the federal preemption decision in Burbank on evidence of agency preliminary action. One might wonder whether the finding would be the same today after three years of agency inaction.

IV. Tentative Signs of Federal/State/Local Government Cooperation: Air Transport Association of America v. Crotti

In February, 1975, in Air Transport Association of America v. Crotti, a

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105. 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).
106. No. 74-3490 (9th Cir., May 28, 1975).
109. N.Y. Times, Sept. 28, 1975, at 1, col. 1 (city ed.).
110. But see 42 U.S.C. §§ 4321, 4331 (1970), which declare the policy and purpose of NEPA in terms of the public’s health and welfare, not in terms of an industry’s receptivity.
glimmer of hope for limited state and local regulation of airport noise, notwithstanding the federal preemption of "airspace management" was revealed. This case established that if the local control were proprietary in nature, passive, and not in direct conflict with the preeminent federal scheme, it was not per se invalid.

The action was filed by an association representative of virtually all licensed air carriers against the Director of Aeronautics for the State of California and several county and city officials in their role as operators of local airports. The suit, brought before a three judge federal district court, challenged the constitutional validity of California aircraft and airport statutes and administrative regulations. The court declined to abstain, although the case required a determination of state law, since the plaintiff's contention and the ultimate issue involved the federal preemption doctrine of Burbank.

The statutes in question directed the California Department of Aeronautics to promulgate noise regulations to govern the operation of California airports and the aircraft using those airports. Violations of the regulations by aircraft operators would carry misdemeanor sanctions and would be enforced by the local counties. Violations by airport operators would carry the risk of temporary or permanent loss of essential state operating permits.

The challenged implementing regulations, in turn, detailed the objective of gradual reduction of airport noise under two headings: 1) Community Noise Equivalent Level (CNEL) which prescribed the maximum airport noise profile to be achieved by December 31, 1985, for continued airport operation, the monitoring and measurement techniques to scrutinize noise levels, and some suggested means of reducing these noise levels which were available to local operators; and 2) Single Event Noise Exposure Levels (SENEL), which prescribed the maximum individual aircraft noise emission level for carriers in flight and were specifically addressed to the problem of sonic booms.

The state thus set required noise limits and issued suggested means of compliance which were available to the local owner-operators. The

112. The United States, representing in particular the interests of the FAA and the EPA, appeared as amicus curiae.
115. CNEL level is based on actual monitoring data, uses the decibel unit (dB), measures noise levels of separate events and the frequency of events each day and night against certain normalizing constants. For a general introduction to CNEL and other noise level description systems see Cerchione & Sims, In Search of an Aviation Master Plan, Planning, Environmental Science, Aviation 133 (A.B.A. 1974).
power of the state to regulate its political subunits is well settled and a local airport authority can reasonably be considered one of those political subunits.\textsuperscript{117} That the state and not the municipality set maximum noise levels does not alter the right of the local authority to issue certain regulations to reduce its airport noise and not to issue others.\textsuperscript{118} The question to be decided was, what are legitimate local regulations and what are not?

The court in \textit{Air Transport} held the SENEL regulation was per se invalid. SENEL, the court stated, was an unlawful attempt to exercise local government police power to control aircraft in flight, a control which had been declared federally preempted in \textit{Burbank}. The court, however, held that the CNEL regulations were not per se invalid but apparently a lawful attempt to exercise local government proprietary powers to mitigate consequent damages for which it was ultimately liable. As to the CNEL regulations, "... the Airlines' total reliance upon \textit{Burbank} [was] misplaced."\textsuperscript{119}

Alluding to the presumption favoring constitutional validity of state statutes and regulations,\textsuperscript{120} and mindful of the legal and fiscal reality of an airport proprietor's responsibility for noise pollution,\textsuperscript{121} the court of appeals built once more on what have been identified as the flaws in reasoning of the \textit{Burbank} decision to reach its conclusion of the validity of the CNEL regulations. Concerning the stated reliance in \textit{Burbank} on legislative history, the court cited the same Senate report used by the majority and the dissent in \textit{Burbank} to deny the existence of an intention by Congress to alter federal/state/local power relationships in the area of proprietorship control.\textsuperscript{122} The lack of Congressional intent was further evidenced by the FAA's failure to set definitive noise levels for individual airports.\textsuperscript{123} Concerning the stated limitation of the \textit{Burbank} holding, which included a municipality's exercise of its police power to control aircraft flight, but

\textsuperscript{117} City of Trenton v. New Jersey, 262 U.S. 182, 185-87 (1923), Trans World Airlines, Inc. v. City & County of San Francisco, 228 F.2d 473, 477 (9th Cir. 1955).
\textsuperscript{118} Air Transport Ass'n of America v. Crotti, 389 F. Supp. 58, 63-64 (N.D. Cal. 1975).
\textsuperscript{119} Id. at 63.
\textsuperscript{121} Air Transport Ass'n of America v. Crotti, 389 F. Supp. 58, 63 (N.D. Cal. 1975). The court cited the inverse condemnation cases Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Ct. App. 1974), cert. denied, 419 U.S. 1122 (1975); and by reference all the state court precedents relied on in Aaron.
\textsuperscript{122} Air Transport Ass'n of America v. Crotti, 389 F. Supp. 58, 64 (N.D. Cal. 1975) (citing S. Rep. No. 1353, 90th Cong., 2d Sess. 6-7 (1968)). \textit{See note 77 supra.}
\textsuperscript{123} 14 C.F.R. § 36.5 (1975).
expressly excluded a municipality's exercise of its proprietary power as owner-operator of an airport, the court declared in unequivocal terms: "[W]e take as gospel the words in footnote 14 in Burbank . . . ."\textsuperscript{124}

A tone of praise for the state's airport noise control efforts generally underlay the \textit{Air Transport} opinion and specifically premised the CNEL holding.\textsuperscript{125} The CNEL requirements for monitoring and measuring noise levels were justified "passive" functions of local operators which were "innocuous to aircraft traffic."\textsuperscript{126} The CNEL suggestions for land and facilities use and development were unmistakably within the bounds of local control.\textsuperscript{127} Only § 5011(d), a curfew restriction overly reminiscent of Burbank Municipal Code § 20-32.1, appeared suspect to the court.

In summarizing its position the court contracted the breadth of its holding. It reserved jurisdiction to determine whether those regulations which were valid on their face, once implemented, would also be valid in effect. The requirements and regulations, in fact, might prove to be "unrealistic, arbitrary and unreasonable," "an abuse of police powers" or an undue "burden on interstate and foreign commerce."\textsuperscript{128} The bounds of each of the CNEL regulations would not be considered hypothetically, but would be determined later in actuality when their implementation was under way. Thus not only was a decision on these specific regulations postponed but, more significantly, a specific enumeration of the municipal proprietor's powers to control airport noise was also delayed.

\textbf{CONCLUSION}

How far can a municipal proprietor go to abate the airport noise for which it will be held financially responsible? After \textit{Air Transport} the question still has not been fully answered. The outer limits of permissible regulation by a municipal proprietor have been set out, but determinations of the validity of intermediate controls have not been made.

A municipal proprietor can monitor and measure airport noise levels. But airport noise data is of little use if subsequent controls can not be applied to reduce those levels, if noisier jets can not [sic] be banned or at least assessed landing fees proportionate to the noise generated, if number and frequency of flights can not be determined and reworked with the carriers, or if towing can not [sic] replace excessive taxiing.

The municipal proprietor of an airport can not [sic] sanction exces-
sive noise emissions, specifically sonic booms, of aircraft in flight. But whether it can prescribe a system of preferential runway use for take-offs and landings over its less inhabited periphery or require a series of operational procedures to limit the expanse of noise pollution is still unresolved.

Air Transport or a similar challenge arising in another state may reach the United States Supreme Court for review and a definitive statement of a municipal proprietor’s powers may then be had.\textsuperscript{129} A blanket exclusion of all local proprietary controls similar to the federal preemption over police power controls in \textit{Burbank} would be straightforward but tragic if the FAA and EPA continue their inadequate regulation and enforcement procedures.\textsuperscript{130} An alternative of case-by-case review of local regulations in the courts or before regional FAA-EPA panels would be slower but ultimately fairer to the airport owner-operator and more satisfactory to its neighbors. Determinations then would be of specific and actual conflict with federal law, not general presumptive fiat based on an overbroad preemption finding. They would be based on the problems of an individual airport and its periphery.

\textit{Burbank} would not have to be discredited. The limitation of note 14 would simply have to be taken “as gospel”\textsuperscript{131} and not as an uncertain disclaimer. It would also be read as a limitation on a kind of action and not merely a category of airport ownership. The \textit{Burbank} preemption of noise control regulations governing aircraft flight under the Federal Aviation Act and the Noise Control Act would ultimately be sustained by recognition of the need for a uniform system for practical and safe functioning of air commerce, not by reliance on a selective and unpersuasive legislative history. Airport land and facilities use, however, would be subject to

\textsuperscript{129} The three-judge federal district court in \textit{Air Transport} granted partial summary judgment on the SENEL regulations but reserved jurisdiction pending further implementation of the CNEL regulations. The parties have exchanged a new series of interrogatories and the next step appears to be a trial at that level before an appeal can be taken to the Supreme Court. (Jan. 12, 1976 conversation with Lawrence King, Sacramento, Cal., counsel for defendant.)

Legislation similar to the California airport noise control laws has been enacted or at least filed in several states, including Illinois, Minnesota, New York, and Pennsylvania. AIRCRAFT/AIRPORT NOISE STUDY—TASK GROUP 1 REPORT, \textit{Legal & Institutional Analysis of Aircraft & Airport Noise & Apportionment of Authority Between Federal, State and Local Governments}, 41, 43 & n. 190 (NTID 73.2 July 1973); and 23 COUNCIL OF STATE GOVERNMENTS, \textit{Suggested State Legislation} 10-21 (1974). Individual airport operators, including the Mass. Port Authority, have proposed or instituted noise level restrictions for their airports. MASS. PORT AUTHORITY, \textit{Draft Master Plan for Logan International Airport} 16-32 (Jan. 1976). Court challenges may arise from any of these or other noise abatement attempts.

\textsuperscript{130} The enormous physical psychological, and economic damages due to aircraft/airport noise would only be compounded. Today, greater than 12% of the population of the United States (over 16 million people) are adversely affected by this noise. 6 ENV. REP. CURRENT Dev. 1079 (1975) (quoting EPA ass’t adm’t Roger Strelow).

\textsuperscript{131} Air Transport Ass’n of América v. Crotti, 389 F. Supp. 58, 63 (N.D. Cal. 1975).
proprietary restrictions. The proprietary restrictions could not be unreasonable, discriminatory, unduly burdensome on interstate commerce or inconsistent with "airspace management."

EPA Assistant Administrator Strelow recently introduced a possible third alternative: federal regulations which would include participation of the airport operator in the preparation of noise profiles and constraints for each airport.\footnote{132} This alternative would be similar to a case-by-case review for direct conflict in its individual airport consideration but would be more advisory than adversarial. Again it must be remembered that under the Noise Control Act the EPA can make only recommendations, not final promulgations, of regulations.\footnote{133} In light of past performance it is questionable whether ultimate FAA restrictions would have any substance or effect. Perhaps the increased threat of local legislation and litigation would provide the incentive necessary to overcome the agency's former lenience in regulation making and reticence in regulation enforcing.

\footnote{132} This alternative was introduced in the Assistant Administrator's October 24, 1975 address to the Airport Operators Council in Puerto Rico, \textit{6 Env. Rep. CURRENT DEV.} 1079 (1975).
