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* Mr. Mastro is a Principal in the law firm of Semmes, Bowen & Semmes, P.C. in Baltimore, Maryland and a graduate of the University of Baltimore School of Law. His practice is devoted, in part, to the representation of freight railroads and other transportation companies.
I. INTRODUCTION

"Safety first!" is a slogan attributed to a railroader of a bygone era.1 Throughout the history of rail transportation, safety always has been a concern for the industry, as well as the government.2 However, it was not until 1970, more than 140 years after the nation's first railroad was chartered,3 that Congress passed the first comprehensive railroad safety law.4 The Federal Railroad Safety Act ("FRSA")5 establishes uniform national safety standards for railroads to abide by.6 In order to achieve uniformity, this federal law displaces state law, including common law, whenever there is federal law covering the subject matter of the parallel state law.7 This federal preemption of state law has led to increased railroad safety,8 but simultaneously, has left some victims of railroad acci-

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2. See Bhd. of R.R. Trainmen v. Va. State Bar, 377 U.S. 1, 2-3 (1964) (The Brotherhood of Railroad Trainmen was formed in 1883 founded as a fraternal and mutual benefit society to promote the welfare of the trainmen. The case observed that railroad work in the late 19th Century was quite dangerous; the odds in 1888 against a brakeman dying a natural death were almost 4-1 while the average life expectancy of a switchman in 1893 was seven years). In 1908, Congress enacted the Federal Employers' Liability Act, 45 U.S.C. § 1(1908), in response to the "tremendous loss of life and limb on the railroads." See Melvyn L. Griffith, The Vindication of a National Public Policy Under the Federal Employers' Liability Act, 18 LAW & CONTEMP. PROBS. 160, 163 (1953)) (quoting from 45 CONG. REC. 4041 (1910)). For a comprehensive survey of the history of the FELA, see id. For a greater understanding of railroad injuries and accidents during the early part of the 20th Century, see Ralph C. Richards, The Safety First Movement on American Railways, Proceedings of the Second Pan-American Scientific Congress, Vol. XI, 326-50 (Gov't Printing Office 1917).


7. Id.

8. Between 1978 and 2006, the total number of rail-related accidents and incidents saw a
dents without a remedy.9

In 2007, Congress amended the preemption provision of the FRSA in response to two federal court decisions foreclosing relief to plaintiffs who suffered injuries in a major train derailment in North Dakota.10 In each case, the court held that the FRSA preempted the plaintiffs' state law negligence claims irrespective of whether the railroad was in compliance with applicable federal regulations at the time of the derailment.11 Congress subsequently "clarified" the preemptive effect of Section 20106 of the FRSA to legislatively overrule these decisions,12 but how far did Congress scale back preemption under the statute?

This article examines the state of federal preemption under the FRSA following the 2007 amendment. Section II reviews the history of the FRSA and the preemption provision at issue. Section III discusses the North Dakota derailment and the subsequent court decisions that triggered the amendment to Section 20106. Section IV focuses on the legislative history of the amendment to Section 20106 while Section V compares the amendment to former law. Finally, Section VI discusses judicial and agency reactions to the new law.

II. History of the FRSA and § 20106

A. Purpose of the Act

The FRSA was enacted in 1970 to promote safety in all areas of rail-

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9. See, e.g., Mehl v. Canadian Pac. Ry. Co., 417 F. Supp. 2d 1104, 1120-21 (D.N.D. 2006) (observing that the FRSA "fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies."); Sharon L. Van Dyck, A Clear Path for Railroad Negligence Cases, TRIAL, Feb. 2008, at 50 ("court have perverted th[e] purpose [of the FRSA] by applying the doctrine of preemption to deprive Americans grievously injured in railroad accidents of any remedy").


11. See discussion infra §§ IIIB-C.

road operations, to reduce railroad-related accidents and incidents of death, and prevent bodily injury to persons.\textsuperscript{13} The legislation aimed to reduce the number of rail accidents, which had steadily increased for more than a decade prior to the enactment of the FRSA.\textsuperscript{14} The rising accident rate, coupled with the tremendous growth in the transportation of hazardous materials by rail in the 1960's, raised the prospect of future accidents with more catastrophic results.\textsuperscript{15} These circumstances troubled Congress, which sought to remedy the situation by enacting the most comprehensive rail safety legislation in our nation's history.\textsuperscript{16}

Given the interstate nature of rail transportation, Congress recognized their goal of increased safety could not be achieved "by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems."\textsuperscript{17} So, Congress assumed "broad federal regulatory authority over all areas of railroad safety" in order to establish

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\item\textsuperscript{14} H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4105-06. Prior to the passage of the FRSA, the number of rail accidents in the United States had increased for 12 consecutive years. \textit{Id.} at 4106. In 1969, there were 8,543 such accidents, which represented a six percent increase over the previous year and a 60 percent jump over the total from five years earlier. \textit{Id.} Train accidents claimed 2,299 lives in 1969 and injured 23,356 persons. \textit{Id.}
\item\textsuperscript{15} The House Committee received evidence of several contemporary National Transportation Safety Board investigations of rail accidents involving the release of hazardous materials. \textit{Id.} at 4107. The Committee’s Report highlighted several derailments, including a Jan. 1, 1968 derailment and collision of two Pennsylvania Railroad trains in Dunreith, Ind. \textit{Id.}; see also NTSB Railroad Accident Report, \textit{Pennsylvania Railroad Train PR-11A, Extra 2210 West and Train SW-6, Extra 2217 East, Derailment and Collision, Dunreith, Indiana, January 1, 1968} (NTSB/RAR-68/03) (adopted Dec. 18, 1968). A broken rail caused a car on the westbound train to derail and strike several cars on the eastbound train, including one filled with hydrogen cyanide. William J. Watt, The Pennsylvania Railroad in Indiana \textit{169} (Indiana Univ. Press 1999). A total of twenty-six cars derailed and a tank car carrying anhydrous ammonia exploded. \textit{Id.} The resulting fire destroyed a local cannery, which was the town’s major industry, and caused extensive property damage to nearby homes and businesses. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4107. Local residents were evacuated for two days and returned to find that the local water supply had been polluted as a result of the accident. \textit{Id.} The Committee also focused on a Jan. 25, 1969 accident in Laurel, Miss, where 15 tank cars carrying liquefied propane gas derailed from a Southern Railway-owned train. \textit{Id.; see also NTSB Railroad Accident Report, Southern Railway Company Train 154, Derailment with Fire and Explosion, Laurel, Mississippi, January 25, 1969} (NTSB/RAR-69/01) (adopted Oct. 6, 1969); Alabama Great So. R.R. Co. v. Allied Chem. Corp., 501 F.2d 94 (5th Cir. 1974). The resulting explosion and fire fatally injured two residents, hospitalized 33 others and caused widespread property damage. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4107.
\item\textsuperscript{17} \textit{Id.} at 4109. "The railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. Unlike the gas pipelines, the vast bulk of railroad mileage, and operations there over, are by companies whose operations extend over many state lines. . .To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce." \textit{Id.} at 4110-11.
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national rail safety standards.\textsuperscript{18} To implement this national scheme, Congress granted the Secretary of Transportation broad authority to "prescribe regulations and issue orders for every area of railroad safety."\textsuperscript{19} The Secretary delegated his authority under the FRSA to the Federal Railroad Administration ("FRA"),\textsuperscript{20} who promulgated a comprehensive scheme of safety regulations.\textsuperscript{21} The enforcement of these regulations, with limited exception, is vested in the Secretary of Transportation and by extension, the FRA.\textsuperscript{22}

Meanwhile, states may regulate a given area of railroad safety only until the Secretary prescribes a uniform national standard in that area.\textsuperscript{23} Once a federal regulation has been issued, state regulation of the same area must cease.\textsuperscript{24} States, however, are permitted to regulate an "essentially local" safety hazard—one that is so unique that it is "not capable of being adequately encompassed within uniform national standards."\textsuperscript{25} Otherwise, the role of states is limited to "investigation and surveillance activities," subject to oversight and certification by the Secretary of

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\item \textsuperscript{18} Id. at 4108. The FRSA declares as federal policy that "all laws, regulations and orders" related to railroad safety "shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1); see also H.R. Rep. No. 91-1194, reprinted in 1970 U.S.C.C.A.N. 4104, at 4116.
\item \textsuperscript{20} 49 C.F.R. § 1.49(m) (1998).
\item \textsuperscript{21} See, e.g., 49 C.F.R. Parts 213-238 (2010).
\item \textsuperscript{22} 49 U.S.C. § 20111(a) (1993); see also H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4109 ("all enforcement [is] federal in nature. The secretary will have exclusive authority to assess and compromise penalties and to recommend court action for the recovery of such penalties"). Only when the Secretary fails to act, may a State pursue enforcement. 49 U.S.C. § 20113(1994). Thus, for example, if the Secretary fails to bring an enforcement action within 15 days after being notified of a safety violation by a State authority, the State authority may commence an action for injunction relief in a federal district court. 49 U.S.C. § 20113(a) (1994). Similarly, a State authority may commence an action in a federal district court to impose and collect a civil penalty for a safety violation when the Secretary fails to impose a penalty within 60 days after receiving notice of a safety violation by a State authority. 49 U.S.C. § 20113(b) (1994). Congress initially considered a larger enforcement role for the States, see H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4117 ("As originally considered by the Committee, this section [State Participation] allowed for certifying states to adopt all federal standards and . . . enforce them at the state level"), but ultimately decided to centralize enforcement, presumably in an effort to foster national uniformity. See id. ("The committee believes, however, that such a vital part of our interstate commerce as railroads should not be subject to this multiplicity of enforcement by various certifying states as well as the federal government.").
\item \textsuperscript{25} 49 U.S.C. § 20106(a)(2) (2007); see also H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4117. Congress did not believe that allowing States the leeway to regulate "essentially local" hazards was inconsistent with its goal of uniformity. Id. ("Since these local hazards would not be statewide in character, there is no intent to permit a state to establish statewide standards superimposed on national standards covering the same subject matter.").
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B. PREEMPTIVE EFFECT OF § 20106

Federal preemption has a deep history in our nation’s railroad laws. Prior to the passage of the FRSA, the federal government regulated only discreet aspects of railroad safety, such as locomotives and signal systems. However, fields in which federal regulation was present, state laws were preempted. In drafting the FRSA, Congress did not disturb these existing railroad safety laws, but rather, built upon them a “broadscale federal legislation . . . to assure a much higher degree of railroad safety.” Like the earlier railroad legislation, the FRSA preempts state law in order to promote national uniformity of safety regulation. In this way, the FRSA embodies the historical approach to railroad regulation, i.e. “that railroads should be regulated primarily on a national


27. See infra notes 28-29; U.S. CONST. art. VI, cl. 2 (titled “The Supremacy Clause”); see, e.g., CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Gade v. Nat’l Solid Wastes Mgt. Ass’n, 505 U.S. 88, 98 (1992); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990); Schneidewind v. ANR Pipeline Co., 485 U.S. 295, 300 (1988); Fla. Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Md v. La, 451 U.S. 725, 746 (1981) (explaining that there are three kinds of preemption: express, which exists where a federal statute says that it supersedes state law; field, which occurs whenever federal regulation of a particular field is so pervasive that it is reasonable to infer that Congress intended federal regulation to be exclusive; Conflict, which is present when it is impossible to comply with both federal and state regulations and the presence of preemption requires the offending state to yield to federal law.).


29. See H.R. REP. NO. 91-1194, reprinted in 1970 U.S.C.C.A.N. 4104, 4108 (“At the present time where the federal government has authority, with respect to rail safety, it preempts the field.”).

30. Id. at 4105 (“These particular laws have served well. In fact the committee chose to continue them without change.”).

31. See Burlington N. and Santa Fe Ry. v. Doyle, 186 F.3d 790, 794 (7th Cir. 1999) (“The FRSA also advanced the goal of national uniformity of regulation because one of its provisions expressly preempts state laws regulating rail safety”); Ouellette v. Union Tank Car Co., 902 F. Supp. 5, 10 (D. Mass. 1995) (“By pervasively legislating the field of railroad safety, Congress demonstrated its intent to create uniform national standards and to preempt state regulation of railroads”).
level through an integrated network of federal law.”

Section 20106 of the FRSA contains an express preemption provision. Essentially, state regulation of railroad safety and security is prohibited unless: (1) the Secretary of Transportation (or his designate) has not yet regulated the subject matter of the state regulation; or (2) the state regulation is: (a) necessary to eliminate an essentially local safety or security hazard, (b) is not incompatible with federal law, and (c) does not unreasonably burden interstate commerce. The Secretary will be deemed to have regulated in an area wherever the federal regulation “covers,” or “substantially subsumes” the underlying safety concerns the state regulation addresses.

C. IMPORTANT SUPREME COURT FRSA PREEMPTION CASES

Two cases involving interpretations of the FRSA have reached the Supreme Court: CSX Transp., Inc. v. Easterwood and Norfolk So. Ry. Co. v. Shanklin. In each case, the Supreme Court held that the FRSA preempted common law tort duties. In Easterwood, a truck driver was killed when his truck collided with a CSX train at a grade crossing in Cartersville, Georgia. The driver’s widow subsequently brought an action against CSX alleging that the railroad was negligent under Georgia law for operating the train at an excessive speed and failing to maintain adequate warning devices at the crossing. The Supreme Court held the

32. R.J. Corman R.R. Co. v. Palmore, 999 F.2d 149, 152 (6th Cir. 1993) (stating uniformity of railroad regulation is desired, if not essential, for the safe and practical operation of railroads. Railroads operate across many state and jurisdictional boundaries. Train equipment and crews regularly move between states to transport freight and passengers. Freight and commuter railroads share track with one another. The structural interdependence and interoperability of railroads are fostered through uniformity in operating procedures and rules).


35. Norfolk So. Ry. Co. v. Shanklin, 529 U.S. 344, 352 (2000). (“For preemption to take effect, the federal regulation must cover the same subject matter and not merely touch upon or relate to that the subject matter”); Easterwood, 507 U.S. at 662 (federal regulation setting maximum train speeds preempted state common law duty to operate train at a safe speed); Burlington N. R.R. Co. v. Mont., 880 F.2d 1104, 1106 (9th Cir. 1989) (holding that FRSA “preempts all state regulations aimed at the same safety concerns addressed by FRA regulations”).


40. See Easterwood, 507 U.S. at 661; Easterwood v. CSX Transp., Inc., 742 F. Supp. 676, 678 (N.D. Ga. 1990) (granting summary judgment in favor of CSX, holding that both claims were
excessive speed claim was preempted, but that the negligence claim based on the absence of warning devices was not.41

At issue in Easterwood were the FRSA regulations setting the maximum allowable operating speed for freight and passenger trains on various classifications of track.42 These regulations established a maximum train speed of 60 miles per hour for the stretch of track, including the grade crossing where the accident occurred.43 The Court concluded that the regulations “covered the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings.”44

Shanklin also involved a grade crossing accident.45 Unlike Easterwood, however, the Supreme Court found the plaintiff’s claim of inadequate warning devices to be preempted because reflecting cross buck signs46 at the crossing had been installed using federal funds. These funds were made available through a federal program that provided signs for all railway-highway crossings.47 As a result, “the federal standard for adequacy” set forth in the applicable regulations displaced state statutory and common law addressing the same subject matter resulting in preemption of the claim.48

III. THE MINOT DERAILMENT AND ITS AFTERMATH

A. THE DERAILMENT OF CANADIAN PACIFIC TRAIN 292-16

In the early morning of January 18, 2002, about one-half mile west of

41. Easterwood, 507 U.S. at 661, 673, 675-76 (holding that the excessive speed claim was preempted).
42. Id. at 673; see generally 49 C.F.R. §§ 213.9(a), 213.51-213.63, 213.109 (2005).
43. Easterwood, 507 U.S. at 674-75 (irrelevant is the contention that these regulations were adopted to prevent derailments rather than to ensure safety at grade crossings because the FRSA “does not... call for an inquiry into the Secretary’s purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter” at issue).
44. Shanklin, 529 U.S. at 359.
45. Shanklin, 529 U.S. at 347, 350 (motorist was killed when his truck was struck by a Norfolk Southern train at a grade crossing in western Tennessee and driver’s widow sued the railroad alleging that the signs posted at the crossing provided insufficient warning to drivers).
46. Id. at 350 (cross buck signs are black and white X-shaped signs reading “RAILROAD CROSSING”).
47. Id. at 347-48, 350; see generally 23 U.S.C. § 130 (2006); 49 U.S.C. § 20134(a) (1994); 23 C.F.R. §§ 646.214(b)(3), 646.214(b)(4) (2005) (cross buck signs were partially paid by federal funds in accordance with regulations, also cross buck signs met standards set forth by statutes); see also Easterwood, 507 U.S. at 671-73.
48. Shanklin, 529 U.S. at 359.
the city limits of Minot, North Dakota, an eastbound Canadian Pacific Railway freight train traveling at roughly 41 miles per hour derailed 31 of its 112 cars, including 15 tank cars carrying anhydrous ammonia. Five of the tank cars suffered catastrophic ruptures causing the instantaneous release and vaporization of 146,700 gallons of anhydrous ammonia. The resulting vapor plume rose an estimated 300 feet in the air and gradually expanded five miles downwind of the accident site over a population of approximately 11,600 people, roughly one-third of Minot.

One person died due to prolonged exposure to anhydrous ammonia while trying to flee the area in his pickup truck shortly after the derailment occurred. Eleven others suffered serious injuries resulting from exposure to the toxic gas and 322 others were treated for minor injuries. The accident caused nearly $2.5 million in property damage, and required Canadian Pacific to spend more than $8.3 million in environmental remediation.

The National Transportation Safety Board ("NTSB") later determined that the joint bars fastening a section of "plug rail" to the continuous welded track fractured under a prior train or as the accident train passed over the joint. After the joint bars fractured, the plug rail, which itself was weakened by small fatigue cracks, also fractured and broke away from the joint, ultimately causing the train to derail.

49. For more information about Minot, South Dakota, see City of Minot, ND, Community Data Profile, http://minotnd.org/community_data.htm (last visited Feb. 2, 2010).
51. Id. at 5.
54. Id. at 10-11. The serious injuries included chemical burns to the face and feet, respiratory failure, and erythema, an abnormal redness of the skin caused by capillary constriction. Id. at 10-11 & 10 n.13. The minor injuries included eye irritation, respiratory distress, chest discomfort, and headaches. Id. at 10.
55. Id. at 11-12. Thirty railcars, having an aggregate replacement value of $1,966,000 were completely destroyed in the accident. The value of the damaged or destroyed lading was estimated to be $340,000. Nearly 475 feet of track was replaced at a cost of $180,000. Id. at 11. Additionally, two houses in a nearby neighborhood suffered property damage. Id. at 12.
56. When continuous welded rail (CWR) is repaired, the damaged section is cut out and removed. A section of "plug rail" is then fitted into the CWR. The plug rail is secured to the CWR by joint bars inside and outside the rail that are fastened with bolts through both joint bars. Later, the joint bars can be removed and the plug rail joints can be welded to the CWR. Id. at 16.
57. Id. at 54.
58. Id.
B. THE EIGHTH CIRCUIT'S DECISION IN LUNDEEN

Shortly after the NTSB released its findings, Tom and Nanette Lundeen filed suit against Canadian Pacific in Minnesota state court. The Lundeen suit was one of 31 lawsuits filed against Canadian Pacific in Minnesota state court seeking damages for personal injury and property damage suffered as a result of the derailment. Canadian Pacific removed the cases to federal court based on the common allegation that the railroad had violated "United States law" by negligently failing to inspect the track in accordance with FRA regulations. Plaintiffs sought a remand, but were denied.

The plaintiffs then sought leave to amend their complaint to delete the reference to federal law, and to file another motion to remand. The district court granted the motion for leave, allowed the amendment, then remanded the case to state court for lack of a federal question. Canadian Pacific appealed to the Eighth Circuit, which reversed. The Eighth Circuit concluded that the FRA track inspection regulations, which enumerated how, when and by whom track inspections must be conducted, were intended to prevent negligent track inspections. Therefore, plaintiff's state law negligent track inspection claim was preempted. Moreover, because the track inspection regulations completely occupied the field of track inspection, federal question jurisdiction existed under the "complete preemption" doctrine.

60. Id. at 827.
61. Id. at 828.
62. Id. at 829-31.
64. Id. at *1-2.
65. Lundeen v. Canadian Pac. Ry. Co., 447 F.3d 606, 611 (8th Cir. 2006), vacated, 532 F.3d 682 (8th Cir. 2008). Although appeals of remand orders ordinarily are not allowed, see 28 U.S.C. § 1447(d) (2006), the appeal in this case was properly taken because district court had subject matter jurisdiction upon removal of the case (hence the denial of the initial motion to remand) but declined to exercise supplemental jurisdiction over the plaintiff's remaining state law claims pursuant to 28 U.S.C. § 1367 once the complaint was amended to delete reference to federal law, see Lundeen, 447 F.3d at 611.
67. Lundeen, 447 F.3d at 614.
68. Id. at 614-15. Federal question jurisdiction exists when "...federal law creates the cause of action or [when] the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law." Id. at 611 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983) (alteration to original)). The "complete preemption" doctrine is a corollary to the "...well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). Under the complete preemption doctrine, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and
Upon remand, the district court dismissed all of the plaintiff's negligence claims as preempted by the FRSA. In addition to the negligent inspection claim, the district court found that related claims for negligent track construction and maintenance, negligent train operation, and negligent hiring and supervision were covered by applicable FRA regulations and also preempted, regardless of whether the railroad was in compliance with the regulations at the time of the derailment.

C. The District of North Dakota's Ruling in Mehl

While defending the Lundeen action in Minnesota, Canadian Pacific also was battling a separate class action lawsuit in federal court in North Dakota arising out of the Minot derailment. As in the Lundeen case, the plaintiffs in Mehl pled a variety of state law causes of action, including claims for negligent track inspection, negligent track construction and maintenance, negligent train operations, and negligent training of track inspectors and maintenance of way employees.

While the Lundeen appeal was sub curia in the Eighth Circuit, the District of North Dakota dismissed the complaint in Mehl, finding that the plaintiffs' state law negligence claims were covered by applicable FRA regulations and, therefore, preempted as a matter of law. The court also held that the plaintiffs' common law claims of nuisance, trespass, and intentional infliction of emotional distress were likewise pre-
emptied because they were based on the same allegations underlying the preempted negligence claims.\textsuperscript{75}

The ruling in \textit{Mehl}, however, is likely to be remembered not for its holding, but for its \textit{dicta}, particularly Judge Daniel L. Hovland's expression of frustration with the "harsh result" he felt compelled to reach in light of the then-current state of the law.\textsuperscript{76} Since the FRSA does not provide a civil cause of action for a party injured by a railroad's failure to abide by FRA regulations, the plaintiffs in \textit{Mehl} and \textit{Lundeen} were left without a remedy—a result Judge Hovland urged to be corrected through legislative action.\textsuperscript{77} The outcomes in \textit{Mehl} and \textit{Lundeen} became catalysts for the subsequent amendment to § 20106 of the FRSA.\textsuperscript{78}

\section*{IV. The 2007 "Clarification" Amendment to § 20106}

To say that Congress acted quickly in response to these decisions would be an understatement. Just 53 days after the Minnesota district court's decision dismissing the plaintiff's claims in \textit{Lundeen} upon remand from the Eighth Circuit, the House of Representatives passed legislation

\textsuperscript{75} \textit{Id.} at 1118-19. The court also dismissed the plaintiffs' remaining state law claims of negligence \textit{per se} and strict liability on grounds that North Dakota did not recognize such causes of action. \textit{Id.} at 1118.

\textsuperscript{76} \textit{Mehl}, 417 F. Supp. 2d at 1120-21.

\textsuperscript{77} \textit{Id.} Judge Hovland wrote:

While the Federal Railroad Safety Act does provide for civil penalties to be imposed on non-compliant railroads, the legislation fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies.

Preemption is Not Dead

On March 27, 2007, less than four hours before a vote on H.R. 1401 (the Rail and Public Transportation Security Act of 2007), Rep. Bennie G. Thompson (D-Miss.) introduced a manager’s amendment proposing to radically reshape the preemptive effect of the FRSA. The Thompson Amendment inserted into the bill a new section titled “No Preemption of State Law” which rewrote § 20106 to eliminate federal preemption unless compliance with both state and federal law was impossible. In addition to switching the type of preemption from field to conflict preemption, the Thompson Amendment exempted common law causes of action from preemption by limited preemption under § 20106 to conflicting “positive laws, regulations, or orders.” Lastly, the Thompson Amendment provided that § 20106 did not confer federal question jurisdiction over a state law cause of action. The Thompson Amendment passed with scant debate on the proposed change to § 20106. After passage in the House, amendments § 20106.

81. H.R. 1401, 110th Cong. § 3(a) (2007); 153 CONG. REC. H3123 (daily ed. Mar. 2007). The text of the proposed amendment provided:

Sec. 3. NO PREEMPTION OF STATE LAW.
(a) No Preemption of State Law. — Nothing in section 20106 of title 49, United States Code, preempts a State cause of action, or any damages recoverable in such an action, including negligence, recklessness, and intentional misconduct claims, unless compliance with State law would make compliance with Federal requirements impossible. Nothing in section 20106 of title 49, United States Code, confers Federal jurisdiction of a question for such a cause of action.
(b) Secretarial Power. — Section 20106 of title 49, United States Code, preempts only positive laws, regulations or orders by executive or legislative branch officials that expressly address railroad safety or security. The Secretary and the Secretary of Transportation have the power to preempt such positive enactments by substantially subsuming the same subject matter, pursuant to proper administrative procedures.
H.R. 1401, 110th Cong. § 3(a)-(b) (2007).
82. H.R. 1401, 110th Cong. § 3(a)-(b) (2007).
83. H.R. 1401, 110th Cong. § 3(b) (2007); 153 CONG. REC. H3123 (daily ed. Mar. 27, 2007).
85. 153 CONG. REC. H3138-39 (daily ed. Mar. 27, 2007) (the amendment passed by a vote of 224-199); 153 CONG. REC. H3128 (daily ed. Mar. 27, 2007) (Reps. Oberstar and Thompson supported the amendment with the latter urging that “Congress must act now before more Americans lose their right to a remedy, and that is why we have chosen to add technical language to the Rail Security bill to alleviate this problem on a timely basis. . .The language would clarify that the purpose of the FRSA was and is to set uniform minimum safety standards, and that an expansive application of preemption to deprive accident victims’ access to state remedies is a misapplication of the law.”); 153 CONG. REC. H3128 (daily ed. Mar. 27, 2007) (only Rep. La-Tourette spoke out against the Amendment); 153 CONG. REC. H3128 (daily ed. Mar. 27, 2007) (“section 3 undoes decades of Federal preemption when safety matters are concerned on the Nation’s railroads [sic], and the situation that we are going to find ourselves in is the one that Mr. Shuster described: States will be free to pass 50 different sets of safety regulations, and trains
the bill stalled in the Senate and the Thompson Amendment never was
enacted.87

During a House conference to reconcile differing versions of the Im-
plementing Recommendations of the 9/11 Commission Act of 2007 ("the
"9/11 Act"") that had passed each chamber of Congress, the House ap-
plied the text of H.R. 1401 to the 9/11 Act.88 The conference, however,
revised § 20106 in Section 1528 of the 9/11 Act by adopting compromise
language modeled after a suggestion by the railroad lobby allowing for an
exception to preemption when the railroad was not in compliance with a
regulation.89 The 9/11 Act was signed into law on August 2, 2007, barely
six months after the final ruling in Lundeen.90

V. COMPARISON OF THE AMENDED § 20106 TO FORMER LAW

Section 20106 of the FRSA now reads:

§ 20106. Preemption
(a) National Uniformity of Regulation.—
(1) Laws, regulations, and orders related to railroad safety and laws,
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regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification Regarding State Law Causes of Action.—

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.— Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.91

The amendment creates a new title for 49 U.S.C. § 20106 (“Preemption”) and moves the former title (“National Uniformity of Regulation”) to subhead (a).92 The text of subsection (a) contains the exact text of § 20106, as it existed prior to the amendment.93 This restructuring was done solely for clarification and was “not intended to indicate any substantive change in the meaning of the provision.”94 Subsection (a) retains the express preemption language and remains the operative portion of

the statute.95

Subsection (b) is a clarification of subsection (a).96 It clarifies the exceptions to the general rule of preemption by stating what is not preempted.97 Subsections (b)(1)(A) and (b)(1)(B) directly address the rulings in the Minot litigation that Congress perceived to be at odds with the statute.98 Subpart (A) legislatively overrules the Mehl court’s ruling that noncompliance with a federal regulation is immaterial to the preemption inquiry.99 Subpart (B) overrules the decision in Lundeen finding preemption notwithstanding that the railroad was alleged to have failed to comply with its own internal rules regarding continuous welded rail, which it was required to have under federal regulations.100 Subsection (b)(2) completes the legislative overruling of the Minot decisions by making the clarification retroactive to the date of the Minot derailment.101

Subsection (b)(1)(C) completes the list of what is not preempted by incorporating the exception for essentially local safety hazards contained in subsection (a)(2).102 Thus, subpart (C) links together the two subsections of the new statute. Subpart (C) is a catchall provision that completes the realm of non-preempted claims in subsection (b) by referring the reader back to the traditional categories of claims that were not preempted under the original statute.103

Subsection (c), meanwhile, expressly disavows federal question jurisdiction of state law causes of action for removal purposes.104 It is the only

95. 49 U.S.C. § 20106(a) ("A State may adopt or continue in force a law...until the Secretary...prescribes a regulation...").
98. 153 Cong. Rec. H8589 (daily ed. July 25, 2007) (stating that one of the purposes of § 1528 is "to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent").
99. See Mehl, 417 F. Supp. 2d at 1116 (rejecting argument that railroads must "prove compliance with federal regulations before allowing preemption of state law claims" for negligent inspection).
100. See Lundeen, 507 F. Supp. 2d at 1012-13 (citing 49 C.F.R. § 213.119) (rejecting the argument that the preemption did not apply where railroad did not submit its internal procedures for maintenance and inspection of CWR to the FRA for approval as required by regulation because "[c]ourts deem coverage, rather than compliance, to be preemption’s touchstone").
103. See S. Calif. Reg. Rail Auth. v. Super. Ct, 77 Cal. Rptr. 3d 765, 784 (Cal. Ct. App. 2008) ("in order for a state claim to proceed, it cannot be one that is preempted under subdivision (a)(2)").
provision from the failed Thompson Amendment that made its way into the amended § 20106.105

VI. POST-AMENDMENT PREEMPTION DEVELOPMENTS

A. JUDICIAL DECISIONS REJECTING THE PROPOSITION THAT PREEMPTION IS DEAD

Shortly after the amendment to § 20106 was enacted, some commentators and members of the Plaintiffs' bar proclaimed that federal preemption under the FRSA no longer existed or had been significantly eroded.106 Courts, however, have taken a different view. In fact, every court that has considered the question has reaffirmed the vitality of preemption under the FRSA and held that the 2007 amendment did not overrule the prior precedent of Easterwood and Shanklin.107

The Tenth Circuit, in Henning v. Union Pacific Railroad,108 was the first federal appellate court to rule on the issue.109 The Tenth Circuit rejected the plaintiff's argument that her claim of inadequate signalization of a railroad crossing was permitted under the clarification amendment.
ment to § 20106. In reaching its conclusion, the Tenth Circuit observed that in amending § 20106 "Congress did not overrule Shanklin, but instead provided clarification for courts interpreting Shanklin, establishing [that] FRSA preemption does not apply when a railroad violates a federal safety standard of care," and concluded that "[h]ad Congress sought to overrule Shanklin and Easterwood, it would have done so in express terms." The court also noted that because subsection (b) was labeled a "clarification," it indicated that Congress sought to resolve an ambiguity in the law's application rather than to effect a substantive change.

The District of Oregon, in *Murrell v. Union Pac. Ry. Co.*, became the first federal court to squarely address the argument that "common state law tort claims are no longer preempted" by the FRSA and that the *Easterwood* and *Shanklin* decisions had been overruled by the amendment to § 20106. The plaintiff in *Murrell* pursued a variety of state law negligence claims, including excessive speed and inadequate warning devices, against Amtrak and Union Pacific arising out of a grade crossing accident. He argued that the language in subsection (b)(1)(C) allowed state law torts claims for two reasons: (1) to find that subsection (b)(1)(C) was a restatement of subsection (a)(2) would render it superfluous; and (2) that the term "state law" as used in (b)(1)(C) did not include state common law claims.

For the latter proposition, the plaintiff acknowledged that the *Easterwood* and *Shanklin* decisions held that the word "law" as used in the statute included state common law causes of action, but contended that those decisions had been overruled.

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110. *Henning*, 530 F.2d at 1214-16.

111. *Id.* at 1216. Since the regulations at issue in *Henning*, 23 C.F.R. § 646.214(b)(3) and (4), did not establish a federal standard of care, the court held that the railroad could not, as a matter of law, fail to comply with the regulations and, therefore, the claims were preempted. *Id.* at 1215-16.

112. *Id.* at 1216 (citing Midlantic Nat'l Bank v. N.J. Dep't of Environmental Protection, 474 U.S. 494, 501 (1986) ("[i]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.")).

113. *Id.* (citing Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004) ("explaining that Congress often amends laws to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.")).


116. *Id.* at 1142-43, 1148-56. Plaintiff's other negligence claims consisted of: failure to issue a slow order, failure to warn, inadequate visibility, failure to eliminate a dangerous condition, and failure to keep a proper lookout. *Id.* at 1151-56.

117. *Id.* at 1147.

118. *Id.*; see *Easterwood*, 507 U.S. at 664 (legal duties imposed on the railroad by common
The district court disagreed.\textsuperscript{119} It held that subsection (b)(1)(C) "re-affirmed" the long-standing principle that state law is preempted whenever a federal regulation covers the subject matter of the state law unless one of the exceptions in subsection (a)(2) applies.\textsuperscript{120} The court further held that the amendment "did not explicitly overrule \ldots Shanklin and Easterwood," but rather, modified the analysis of whether preemption applies by adding the railroad's compliance with the standard of care established by federal safety regulations and rules as a factor to consider.\textsuperscript{121}

Other courts considering the issue have reached the same conclusion.\textsuperscript{122} Indeed, it is difficult to see how the amendment to \$ 20106 could be said to have erected a total ban on preemption of state law tort claims. The existing text of \$ 20106, including the express preemption language upon which \textit{Easterwood} and \textit{Shanklin} were decided, was preserved in its entirety without any change.\textsuperscript{123} Subsection (b) was added, according to

\textsuperscript{119} Murrell, 544 F. Supp. 2d at 1147.
\textsuperscript{120} Id. ("Subsection (b)(1)(C) was presumably added to be consistent with subpart (a).").
\textsuperscript{121} Id. at 1148 ("Therefore, the Court's decision in \textit{Shanklin} which held that common law negligence claims are preempted continues to stand today as long as the defendant complies with the requirements listed in section 20106(b)(1).")
\textsuperscript{122} \textit{See supra} Note 107; Nickels v. Grand Trunk Western R.R., Inc., 560 F.3d 426, 432 (6th Cir. 2009) (rejecting argument that subsection (b)(1)(C) added incompatibility of state and federal law as an additional prerequisite to preemption). In \textit{Gauthier}, the court rejected plaintiff's argument that the 2007 amendment "changed federal preemption law \ldots by carving out state law claims seeking damages for personal injury, death or property damage from the preemption scheme of the FRSA" by recognizing that \$ 20106 "was not amended to eliminate preemption of federal claims but \ldots to rectify a situation" in which two federal courts concluded that compliance with federal standards of care was not relevant to the preemption analysis. \textit{Gauthier}, 644 F. Supp. 2d at 831, 835. In Southern Calif. Reg. Rail Auth., the appellate court found it "difficult to read the amendment as permitting state claims as long as they are not incompatible with federal regulations. Such a reading would amount to a significant substantive change in the law of FRSA preemption and there is no indication Congress intended such a change." \textit{S. Calif. Reg. Rail Auth}, 77 Cal. Rptr. 3d at 784-85. In \textit{Smith}, the plaintiff attempted to characterize \$ 20106(b) as an "‘anti-preemption clause’" and advanced the familiar refrain that the amendment "‘sends a loud and clear message that 49 U.S.C. \$ 20106 in no way preempts state common law claims.’" \textit{Smith}, 187 P.3d at 644. After reviewing the legislative history of the amendment, the Supreme Court of Montana concluded that the proposition that \$ 20106(b) was enacted to overrule \textit{Shanklin} and its progeny had "scant support" and was "contrary to settled law." Id. at 646. In \textit{Kill}, the court dismissed a similar argument that "the 2007 amendment to the FRSA substantially eroded the precedential value of \[\textit{Easterwood} and \textit{Shanklin}\] such that it now has little application \ldots." \textit{Kill}, 2009 WL 5067182 at *7. Rather, the court concluded that "in analyzing the 2007 amendment to the FRSA, we find that it does little to alter the preemption analysis \ldots under \textit{Easterwood} and \textit{Shanklin}, other than to provide additional exceptions to preemption.” \textit{Id.} at *7.

\textsuperscript{123} H.R. REP. NO. 110-259 at 351.
As a “clarification,” it does not effect a substantive change in the law but rather, resolves an ambiguity and/or corrects a mistaken interpretation of the law. In this instance, “Congress enacted a very precise cure for the problem presented by Lundeen and Mehl” by amending § 20106 to “clarify] that causes of action under State tort law may be available to injured parties if they are based on the violation of the Federal standard of care created by a Federal regulation or order, or violation of a plan required to be created by Federal regulation or order.”

Furthermore, one would have expected a more definite statement from Congress if it had intended the amendment to effect a landmark change in the law, and overrule Supreme Court precedent in Eas-terwood and Shanklin. The fact that Congress also ultimately chose

125. United States v. Sepulveda, 115 F.3d 882, 885 n. 5 (11th Cir. 1997) (observing that Congress may “amend a statute . . . to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite.”) (quoting Hawkins v. United States, 30 F.3d 1077, 1082 (9th Cir. 1994), cert. denied, 515 U.S. 1141 (1995)); see also, e.g., Brown, 374 F.3d at 259 & n.2, (finding that Congress intended the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 to be “a clarifying amendment, not a substantive change”); Motorola, Inc. v. Federal Express Corp., 308 F.3d 995, 1000 (9th Cir. 2002) (holding that Hague Protocol “only clarified, and certainly did not expand, carrier liability with respect to the affected weight standard.”); Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1290 (11th Cir. 1999) (concluding that Montreal Protocol No. 4 “clarifies the definition of willful misconduct under Article 25 [of the Warsaw Convention], rather than effecting a substantive change in the law”); Liquilux Gas Corp. v. Martin Gas Sales, Inc., 979 F.2d 887, 890 (1st Cir. 1992) (holding that amendment to Puerto Rico’s antitrust statute was “a clarification that did not alter the law [but] merely explicatid it.”).
126. Passenger Equipment Safety Standards, 75 Fed. Reg. 1180, 1208, 1209 (Jan. 8, 2010). In its recently released Final Rule regarding enhanced requirements for the structural strength of cars and multiple unit locomotives used in passenger transportation, the FRA reaffirmed the application and preemptive effect of § 20106 in light of the 2007 amendment. See discussion at § VI.C., infra. The agency’s view on such matters is typically entitled to deference. See California State Legislative Bd. v. Department of Transp., 400 F.3d 760, 765 (9th Cir. 2005); see also H.R. REP. No. 110-259 at 351 (noting that “the restructuring is not intended to indicate any substantive change in the meaning” of § 20106 as it existed prior to the amendment but, rather, “to explain what State law causes of action for personal injury, death or property damage are not preempted” and thereby “rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent”).
127. See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 52 (2004) (observing that if 1995 amendment to Truth-in-Lending Act had intended to repeal the damages limitations applicable to consumer loan, “Congress likely would have flagged that substantial change”); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 176 (1993) (rejecting argument that § 243(h) of the Immigration and Naturalization Act gained extraterritorial effect upon 1980 amendment deleting the words “within the United States” from statute noting that “[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect.”).
128. When Congress intends to overrule Supreme Court precedent, an expression of that
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not to enact the far-reaching Thompson Amendment (and its "no pre-emption of state law" language) militates against finding that § 20106 now permits all state law tort actions to continue.129

B. The Inability to Remove an Action under the Complete Preemption Doctrine

Courts have been uniform in ruling that the amended § 20106 does not permit railroads to remove state court actions to federal court based on the complete preemption doctrine.130 This should not come as a surprise given the clear language of subsection (c).131 The inability to remove a case under the complete preemption doctrine, however, does not preclude a railroad from raising preemption as an affirmative defense.132

The Eighth Circuit squarely confronted the issue in Bates v. Missouri


129. H.R. 1401, 110th Cong. § 3(a) (2007), supra note 81; see, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation."); Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."); Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt, 194 F.3d 176, 185 (1st Cir. 1999) ("[T]he conference committee eliminated this language. Congress sometimes can speak as clearly by opting not to enact proffered language as by enacting it.").


131. See 49 U.S.C. § 20106(c) ("Nothing in this section...confers Federal question jurisdiction for such State law causes of action.").

132. See, e.g., Bates, 548 F.3d at 637 ("Absent diversity, therefore, a state court is the proper forum for litigating [the railroad's] preemption defense"); Joyce, 2009 WL 3248213 at *4 ("Defendants, however, can raise the affirmative defense of preemption to the State trial court that has jurisdiction over this matter"); Hunter, 2007 WL 4118936 at *4 ("the railroad can still raise the affirmative defense of preemption to the trial court that has jurisdiction over the case"). Hunter, 2007 WL 4118936 at *2 "This jurisdictional issue of whether 'complete preemption' exists is very different from the substantive inquiry of whether a 'preemption defense' may be established." (quoting Whitman v. Raley's Inc., 886 F.2d 1177, 1181 (9th Cir. 1989)). Id. "Complete preemption has jurisdictional consequences that distinguish it from preemption asserted only as a defense. The defense of preemption can prevent a claim from proceeding, but in contrast to complete preemption it does not convert a state claim into a federal claim." (quoting Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996)).
& N. Arkansas R.R. Co. 133 In Bates, the plaintiff was injured when his vehicle collided with a train at a crossing in Barton County, Missouri. 134 After the plaintiff commenced an action in state court, the railroad removed the case to federal court on grounds that the plaintiff’s claims were completely preempted by the FRSA. 135 The plaintiff then dropped the sole federal claim that the district court determined was completely preempted. 136 As a result, the district court ordered a remand, declining to exercise supplemental jurisdiction over the remaining state law claims, and the railroad appealed. 137

While the appeal was pending, the amendment to § 20106 took effect. 138 An Eighth Circuit panel, in a 2-1 decision, subsequently affirmed the remand. 139 The majority rejected the railroad’s argument that the retroactivity provision of subsection (b)(2) did not apply to subsection (c), thereby allowing for federal question jurisdiction over claims filed before § 20106 was amended. 140 The dissent, meanwhile, interpreted the retroactivity imposed under subsection (b)(2) as applying only to causes of action authorized under subsection (b)(1), i.e., claims alleging that a railroad failed to comply with a federal standard of care. 141 Since the plaintiff’s amended complaint alleged negligent train operation without identifying a specific violation of a federal standard of care, such as excessive speed, the dissent concluded that the claim did not fall under subsection (b)(1). 142 Thus, subsection (c) did not apply and federal question jurisdiction would lie because the claim was completely preempted under the FRSA. 143

The difficulty with the dissent’s reasoning is that even if subsection (c) is construed to apply only to causes of action provided by subsection (b)(1), it does not necessarily follow that the complete preemption doc-

133. Bates, 548 F.3d at 634.
135. Bates, 548 F.3d at 636.
136. Id.
137. Id.
138. Id. at 637.
139. Id.
140. Id.
141. Id. at 638 (Beam, J., concurring and dissenting) (citing Lundeen, 532 F.3d at 696-702, (Beam, J., dissenting).
142. Id. (Beam, J., concurring and dissenting); see also Lundeen, 532 F.3d at 698-700 (Beam, J., dissenting).
143. Lundeen, 532 F.3d at 698-700.
trine would justify federal question jurisdiction over other causes of action. The complete preemption doctrine flows from the concept of field preemption. Given that the amended statute carves out limited areas where the states may regulate railroad safety, it hardly can be said that federal law so thoroughly occupies the field of railroad safety that there is "no room" for the states to supplement law. Thus, the complete preemption doctrine would not apply even absent the new language in subsection (c).

C. The Federal Railroad Administration's Interpretation of the Clarification Amendment

When Congress was considering the 9/11 Act and the amendment to § 20106, the FRA issued a Notice of Proposed Rulemaking ("NPRM") regarding enhanced requirements for the structural strength of cab cars and multiple unit locomotives used in passenger transportation. On January 8, 2010, the FRA issued a Proposed Final Rule ("PFR") that is scheduled to take effect on March 9, 2010. In connection with its PFR, the FRA issued detailed comments regarding federal preemption, including its interpretation of the 2007 amendment to § 20106.

According to the FRA, "the key concept of Section 20106(b) is permitting actions under State law seeking damages . . . to proceed using a Federal standard of care." In amending the statute, Congress has clarified that "the Federal railroad safety regulations preempt the standard of care, not the underlying causes of action in tort." Since the federal regulations establish the standard of care, there can be no liability, for example, under a common law theory of negligence where the railroad has complied with the applicable standard of care. Consequently, state law causes of action are permitted only where the railroad has breached its duty of care by failing to comply with the standard established by the federal regulation. See, e.g., id. ("under Section 20106(b)(1)(A), a private plaintiff may bring a tort action for damages alleging injury as a result of violation of the Track Safety Standards,"
while preserving the national uniformity of railroad safety regulation.\textsuperscript{152}

Additionally, the FRA interpreted subpart (b)(1)(B) to be inapplicable to plans, rules or standards created by a railroad that exceed FRA minimum requirements.\textsuperscript{153} The FRA offered two reasons for its conclusion: (1) that a railroad-created plan establishing a higher standard than required by federal law “does not fit the paradigm of a Federal standard of care;”\textsuperscript{154} and (2) such a rule, in its view, would not improve railroad safety.\textsuperscript{155} The latter concern voiced by the FRA is valid – there is no incentive for a railroad to adopt a more stringent internal standard if, as a result, it will be subject to liability for failing to achieve that which exceeds what is required by federal law.\textsuperscript{156} Thus, as long as a railroad meets such as for train speed exceeding the maximum speed permitted under 49 C.F.R. 213.9 over the class of track being traversed\textsuperscript{152}).

152. Id. at 1210. The FRA rejected the interpretation advanced by one commenter, a railroad union that would allow for a compliant railroad to be held negligent “for the very behavior required by federal law.” Such an interpretation would “make a nullity of Federal railroad safety laws” according to the FRA and, if such a view were adopted, “the effective railroad safety standard would be set by the most recent jury verdict in each State and national uniformity of safety regulation would no longer exist.”

153. Id. at 1209.

154. Id. (“Federal law does not require [a plan with a higher standard] and, past the point at which requirements of Federal law are satisfied, [federal law] says nothing about [the] adequacy [of a such a plan].”)

155. Id. (“The basic purpose of the statute – improving railroad safety – is best served by encouraging regulated entities that do more than the law requires and would be disserved by increasing potential tort liability of regulated entities that choose to exceed Federal standards, which would discourage them from ever exceeding Federal standards again.”): see also id. at 1210 (“FRA believes that Congress has encouraged railroads to exceed Federal safety standards and that Section 20106 does not increase the potential tort liability of railroads that choose to do so.”).

156. See Passenger Equipment Safety Standards, supra Note 155 at 1210. Another commenter “maintained that Federal regulations are minimum standards and are not intended to provide maximum protection, asserting that the justice system offers a deterrent against railroad companies’ violations of Federal, State and local regulations.” Id. at 1201-11. The FRA acknowledged that this view reflects a difference of opinion as to “whether safety standards are better set by twelve jurors good and true, most of whom probably do not know anything about railroad safety, or by experts in railroad safety to whom Congress has assigned the task,” id., but concluded that the latter approach was more sound. The FRA believed that the logic expressed by Justice Scalia in his opinion in the recent case of Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), which involved federal preemption under a Food and Drug Administration regulation, was equally applicable to preemption under the FRSA. Id. at 1201-11.

A state statute, or regulation adopted by a state agency, could at least be expected to apply a cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. . . It is implausible that the [Medical Device Amendment] was meant to grant greater power (to state standards different from, or in addition to, federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.

Id. at 1211 (quoting Riegel, 552 U.S. 312, 128 S. Ct. at 1008 (internal citations omitted)).
minimum federal safety standards, it will not be penalized for failing to meet a self-imposed higher standard of care.

VII. Conclusion

Two conclusions are readily apparent in light of the clarification amendment to § 20106 of the FRSA and its aftermath: removal based on the doctrine of "complete preemption" no longer is possible, but preemption as an affirmative defense is not dead.157

The express disavowal of federal question jurisdiction in § 20106(c), as amended, has eliminated the strategic option of removal for railroad defendants. With more cases being litigated in state courts as a result, state court judges will find themselves confronting the affirmative defense of preemption with greater frequency. Thus, a larger body of state law decisions regarding preemption under § 20106 is likely to develop.

Nevertheless, it is clear that preemption continues to exist under § 20106(a). The statute will continue to assure that federal regulations regarding particular areas of railroad safety will supersede state laws covering the same subject matter as the federal regulations. Although a federal standard of care is imposed by § 20106(a), injured plaintiffs are no longer without recourse if a railroad fails to abide by the required federal standard of care. In such instances, plaintiffs are permitted to pursue state law causes of action based on the railroad's failure to meet the federal standard of care. This exception to preemption under § 20106(b) does not undermine the FRSA's goal of uniformity of regulation and should not compromise rail safety. In fact, the amendment may lead railroads to have a heightened focus on regulatory compliance given that injury resulting from non-compliance is now actionable under state tort law. If so, one would anticipate that increased attention to regulatory compliance would lead to increased rail safety.

The Employment Classification Issue in the Motor Carrier Industry

James C. Hardman*

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* The author has received a B.S. from Quincy College and an M.B.A. and J.D. from Northwestern University. He has practiced law for over 45 years and has written books, papers, and articles on transportation subjects and lectured at the University of Denver, Sturm College of Law, as well as before business and professional organizations. He has received “Life Time Achievement Awards” from the Transportation Lawyers Association, the Truckload Carriers Association, and the Minnesota Trucking Association. He has been named to “Who’s Who in America” and “Who’s Who in Finance and Business”.

27
I. INTRODUCTION

The trucking industry has a long history of using independent contractors based not only on a number of sound business reasons, but also because the industry offers opportunities for persons who want to be their "own boss," a means of establishing a business within an industry with a history of success stories.

"Independent contractors" include an individual who owns a motor vehicle or holds it under a bona fide lease, or otherwise has lawful possession of the vehicle and leases such vehicle to a motor carrier with driver service to be used in moving freight under bills of lading or other shipping documents indicating the lessor of the equipment as the motor carrier of the freight transported. The terms "independent businessperson," "owner-operator" and "contractor" are used interchangeably.

Contrary to the flawed concept that drivers are forced to become independent contractors rather than driver-employees, alternative opportunities exist in the industry.

The federal and state governments are responsible for the problem that exists in employment classification by passing so many diverse laws and regulations related to employment that it is an overwhelming burden on smaller businesses.¹

This contradictory legislative and administrative action accounts for the morass of confusing and conflicting decisions that are rendered under such laws and regulations.

The trucking industry has, in the past twenty-five years, been one in which relatively all motor carriers operated on low profit margins, if not incurring losses, and thus motor carriers have had need to control the costs of operations.\(^2\)

While the use of independent contractors allows motor carriers to avoid employee benefits costs, unemployment and workers' compensation insurance, as well as unemployment taxes, it should not be assumed that independent contractors are necessarily “worse off” from an economic standpoint.

Independent contractors receive contract payments which reflect a substantial amount over a driver-employee basic wage and benefits, and if the independent contractor operates his business competently, the difference could allow him or her to end up with a monetary advantage and with the freedom to reach the goal of being an “independent” businessperson.

If the monetary rewards as an independent contractor were so “bad” as opposed to that of a driver-employee, the contractor has the opportunity to switch to an employee position, and this has not been occurring or, if so, to an insignificant degree.\(^3\)

At this time, industry members and individuals desiring to establish or validate an independent business relationship are confused because of the diversity of definitions and tests that are used on the federal and state levels to answer the question “employee or independent contractor?”

If two adults desire to contract and they understand the substance of the relationship being created or have reasonable access to determine it, and if there are clear and sensible guidelines available to the parties to follow, there is no reason why their choice should not be recognized and accepted.

The following discussion of the employment classification issue in various segments of the regulatory system will hopefully establish why motor carriers and independent contractors are concerned about current government actions that could lead to the demise of the independent contractor relationship and why legislators and administrators fail to address the real and critical issues involved.\(^4\)

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II. Employment Classification in General

A. Introduction

The issue of whether an individual is an "employee or independent contractor" arises in many areas of trucking operations. After examination of many skirmishes before courts and administrative agencies, it must be asserted that there is no magic formula that can be prescribed to assure success in creating or protecting an independent contractor relationship.

At best, only some facts can be given about the seemingly present position of the law and hints as to what should be done or not done to stay on the cutting edge of the law and to achieve one's business objective.

B. Diversity of Classification Tests

The classification issue is relevant in many areas of law including the following:

<table>
<thead>
<tr>
<th>Federal Level</th>
<th>State Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Taxes – IRS</td>
<td>State Revenue Departments</td>
</tr>
<tr>
<td>Title VII — Discrimination</td>
<td>Workers' Compensation</td>
</tr>
<tr>
<td>Age Discrimination in Employment Act</td>
<td>Unemployment Compensation</td>
</tr>
<tr>
<td>ERISA (including COBRA)</td>
<td>Misc.:</td>
</tr>
<tr>
<td>NLRA</td>
<td>Child Support</td>
</tr>
<tr>
<td>FLSA</td>
<td>Garnishment</td>
</tr>
</tbody>
</table>

The issue of whether an individual is an employee or an independent contractor is difficult to determine because no standardized test exists at the federal or state level.

Contrary to the use of the common law factors by the IRS, which is dictated by the Gearhart Resolution passed by Congress in 1948,\(^5\) other federal and state agencies have proceeded in different directions in adopting tests determining the classification issue.

Various tests are used. The more common tests are:

a. The "Economic Realities" test
b. The "Totality of Circumstances" test
c. Combination of "Economic Realities/Control" tests

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\(^5\) H.R.J. Res. 296, 80th Cong. (1948).
d. "Principles of Agency" test
e. "ABC" test

The following summarizes which test or tests one can expect to be applied in a particular type of case.

<table>
<thead>
<tr>
<th>Statute</th>
<th>Test(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NLRA</td>
<td>Common Law/Control/Totality of Circumstances</td>
</tr>
<tr>
<td>Title VII</td>
<td>Common Law/Economic Realities/Agency</td>
</tr>
<tr>
<td>ERISA (including COBRA)</td>
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</tr>
<tr>
<td>FLSA</td>
<td>Economic Realities</td>
</tr>
<tr>
<td>ADEA</td>
<td>Common Law/Economic Realities</td>
</tr>
<tr>
<td>Workers' Compensation</td>
<td>Common Law</td>
</tr>
<tr>
<td>Unemployment Compensation</td>
<td>Common Law/ABC</td>
</tr>
</tbody>
</table>

These tests can be simply described as follows:

**Economic Realities Test** – Is the service provider as a matter of economic reality dependent upon the business to which he or she renders service? The test emphasizes that where an individual becomes “economically dependent” upon one entity, that individual is an employee.11

**Totality of Circumstances** – No one common law factor is controlling. You must consider all factors and reach a decision on the basis of all factors.12

**Agency Test** – Application of the ten factors set forth in the Restatement (Second) of Agency § 220 (1958) which basically shadows the common law test.13

**ABC Test** – Service performed by an individual for remuneration (or wages) shall be employment irrespective of the common law unless and until it is proven that (a) the individuals are “free from control” as to the means and methods with which they accomplish tasks; (b) the services are performed “outside the usual course of business” of the employer or the employee performs such services outside of all the places of business of the party engaging the service; and (c) the individuals are “engaged in an independently estab-

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lished trade, occupation, profession or business."

It should also be noted that the tests are not applied consistently throughout the United States.

The Age Discrimination in Employment Act serves as a prime example. The Courts are not in agreement as to what test to apply. Various courts of appeals that have dealt with the issue of whether sales representatives were employees or independent contractors applied the following tests:

16. CA- Right to Control test
17. CA- Right to Control test
18. CA- Economic Realities test
19. CA- Economic Realities/Right to Control test

The 2nd Circuit Court of Appeals found the sales representatives involved to be employees, while the other Courts found similar sales representatives to be independent contractors.

In the state law area you will also find similar diversity which will be discussed in more detail in relation to workers' compensation and unemployment compensation.

"Employment classification" remains a major issue in motor carrier law and particularly in terms of owner-operators.

III. THE IRS

A. IN GENERAL

While historically the trucking industry has mainly been involved with the Internal Revenue Service in employment classification issues, this is no longer true because the IRS has done an incredibly good job of educating industry members and its own staff of the principles it felt were relevant and material under the common law test, and also because Congress took steps to assure that industry members were protected from

18. Hickey v. Arkla Indus., Inc., 688 F.2d 1009, 1011, 1013 (5th Cir. 1982), vacated and corrected, 699 F.2d 748, 753 (5th Cir. 1983).
20. Frankel, 987 F.2d at 91, remanded, No. 90CIV.0815 (LLS), 1994 WL 409461 (S.D.N.Y. Apr. 11, 1994); Oestman, 958 F.2d at 306; Zippo, 713 F.2d at 38; Hickey, 668 F.2d at 1013.
21. See 26 C.F.R. § 31.3121(d)-1(c) (2009) (providing the common law test applicable to IRS proceedings).
the application of tests which exceeded the common law.22

"Over the years, the IRS and the Social Security Administration compiled a list of [20] factors" applied administratively and litigated in court "to determine a worker['s] status."23 The result was the adoption of 20 factors to be considered which are sometimes referred to as the Twenty Factor Test.24

While the legal test remains whether the service engager has the right to direct and control the means and details of the work, the Twenty Factor Test was a somewhat helpful analytical total to make the determination.25 The Twenty Factor Test is not industry specific and was used to determine worker status in all industries and, while it was helpful, it had significant problems as no relative weight was given to the specific factors and in some instances some factors were not applicable to some industries.26 IRS auditors varied in determining the weight given to individual factors, and in some cases, the auditors would simply give equal weight to each factor and made a determination on the basis of how many of the twenty factors indicated "employment" as compared to "non-employment."27

Slowly, the IRS became aware of the difficulties in achieving consistent and relevant application of the factors in all industry situations, and in the case of trucking, a Technical Guideline was issued to focus attention on the criteria which were relevant and material to the trucking industry.28

The IRS determined that a strong inference existed that a contractor operator is an independent contractor when the following six factors were present:

(a) He owns the equipment or holds it under a bona fide lease arrangement;
(b) He is responsible for the maintenance of the equipment;
(c) He bears the principal burden of the operating costs, including fuel, repairs, supplies, insurance, and personal expenses to operate the equipment;
(d) He is responsible for supplying the necessary personal services to operate the equipment;

26. Id. at 2-4.
27. Id. at 2-6.
(e) His compensation is based upon a division of the gross revenue or a fee based upon the distance of the haul, the weight of the goods, the number of deliveries, or combination thereof; and

(f) He generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper.29

The IRS later initiated a program to make a thorough study of specific industries and to discuss the employee classification issue with industry personnel in some depth, and in effect, assign weight to the Twenty Factor Test.30

One study involved a household goods motor carrier, and while so designated, after review it is clear that the study results could be applicable to "trucking" in general.31 The study cleared up many issues which were inadequately or even incorrectly decided in decisions based on the Twenty Factor Test.32 The study is fairly detailed and complete and serves as a valuable guide to motor carriers.

A similar program, Märkter Segment Specialization Program (MSSP), existed and produced a document on "trucking," but was generally directed to "audit" procedures related to the trucking industry and did not focus on or discuss the employment classification issue.33

A review of the IRS’ Training Manual34 on workers classification also demonstrates that the IRS has realized that the issue is a complex one and that many of the problems in the past have arisen from the Twenty Factor Test, which was confusing to their personnel as well as to industry personnel.

B. SECTION 530

Apart from the above legal test and analytical tools, motor carriers should be aware of what is commonly referred to as Section 530 Safe Harbor.35

Section 530 allows a putative employer to classify and treat an individual as an independent contractor without the tax consequences of misclassification if the following requirements are met:

(1) The taxpayer must have filed requisite federal tax returns (including information returns) consistent with the treatment of the individuals in question as independent contractors;

29. See id. at 6-7.
30. See id. at 7.
31. Id.
32. Id.
34. See I.R.S. Training Materials, supra note 23.
(2) The taxpayer must have treated all persons holding substantially similar positions as independent contractors; and

(3) The taxpayer must have had a reasonable basis for treating the individuals in question as independent contractors when engagement occurred.36

While the first and second requirements are relatively clear, the third test involves a showing by the motor carrier of classifying the individuals relied upon:

(a) Judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(b) Past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

(c) Long-standing recognized practice of a significant segment of the industry in which such individual is engaged.37

However, because courts interpreted the provision in the third test differently, Congress supplemented Section 530 by adding the following provision:

[I]n no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and . . . . in applying the long-standing recognized practice requirement of subparagraph (C) thereof—

(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.38

Motor carriers faced with an audit related to the classification of operators of motor vehicles under the carrier’s operating authority or otherwise should assess the applicability of Section 530 as a safe harbor.39

C. CHALLENGES TO SECTION 530

On the horizon is the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 which is pending before Congress and which would alter how the propriety of a classification is determined and imposes serious repercussions for motor carriers and others using indepen-

36. Hardman, supra note 22, at 118.
38. Id. at note (e)(2).
The trucking industry is concerned with this proposal because many carriers operate under Section 530 protection. While the American Trucking Association and the Truckload Carriers Association have brought it to the attention of their members, it is yet to be seen what their strategy and efforts will be to defeat the proposed legislation.

D. IRS Summary

While in recent years the IRS has been relatively quiet in pursuing employment classification audits and cases, primarily because of Section 530 safe-harbor and the IRS’ promulgation of reasonable and clear guidelines relative to the employment classification in the trucking industry, the new political climate, evidenced by the above-referenced “Classification Act” and similar-type action in state legislatures, portends that a change in terms of the number of IRS audits and increased judicial and administrative litigation will seriously evolve if the proposed legislation is enacted.

IV. Workers’ Compensation

A. In General

Workers’ compensation coverage has been a significant problem in the motor carrier industry for the simple reason that there has been little uniformity among the fifty states. The wide-spread use of independent contractors by motor carriers has led to significant litigation of the “employment classification” issue since with minimal exceptions, workers’ compensation coverage only applies to an employer-employee relationship.

40. S. 2882, 111th Cong. (introduced Dec.19, 2009). A companion Bill, H.R. 3408, was introduced on Sep. 30, 2009 in the same session of Congress. Each legislative proposal would: (1) require businesses that pay any amount greater than $600.00 during the year to corporate providers of property and services to file Form 1099; (2) significantly increases the penalties for failing to file Form 1099; (3) allow an individual to petition the IRS for a determination of their “employment” status; and requires mandatory reporting of misclassifications to the Department of Labor.
41. See S. 2882.
B. Federal Regulations

The relationship of motor carriage utilizing independent contractors in interstate commerce is governed by regulations promulgated by the Federal Motor Carrier Safety Administration (FMCSA).44

Part of the Regulations requires the motor carrier-lessee to:

Acquire exclusive possession, control, and use of the equipment for the duration of the lease, and

Assume responsibility for the operation of the equipment.45

These two requirements led courts and administrative agencies to find that this provision established a conclusive showing of control and direction as conceived under common law evidencing an employer-employee relationship.46

While the specific language, on its face, could be found to support such findings, the FMCSA entertained a review of the underlying reason for these provisions since the administrative agency and some courts held that a carrier must control the service performance, but need only control the vehicle to the extent necessary to be responsible to the shipper, the public, and the administrative agency for the transportation.47

Eventually, because of confusion caused by the provision, the Interstate Commerce Commission48 promulgated an additional provision reading:

(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.50

45. 49 C.F.R. § 376.12(c)(1) (2009).
46. See Hardman, supra note 42, at 257-58. In the case of North Carolina, its Supreme Court found the provision per se precluded a finding of an independent contractor relationship. See Brown v. L.H. Bottoms Truck Lines, 42 S.E.2d 137 (1947). Since that decision, the legislature enacted legislation which says the classification issue should be resolved by the “common law.” See N.C. GEN. STAT. ANN. § 97.19.1. However, it is a meaningless provision because the legislature also imposes workers’ compensation coverage on independent contractors in the trucking industry within the same section.
48. The Interstate Commerce Commission ["ICC"] was the predecessor agency under which the Leasing and Interchange Regulations were promulgated. The FMCSA now has jurisdiction over the Regulations.
49. 49 C.F.R. § 376.12(c)(4).
50. Id.
While this clarification has alleviated the problem, occasionally, it is still raised in cases involving the employment classification issue in workers' compensation cases as well as in other areas of the law.\textsuperscript{51}

C. SERVING THE "PUBLIC"

The typical problem relates to the issue of independent contractor not being able to serve other carriers or the "public."

Essentially, the persons advancing such argument or the body politic or courts accepting the argument, do not understand that the agreement between the parties is a lease of equipment with driver service. The lease need not and generally does not designate which individual or individuals should or would, in fact, drive the vehicle. Further, the contract payment under the agreement is made to the lessor of the vehicle and generally does not split the payment between the equipment and driver service.

If the lessor decides to drive the leased vehicle and meets government qualifications, he could drive the vehicle, or if he decides to engage a third party to do so, the third party could do so with the caveat that such person would have to meet government qualifications.\textsuperscript{52}

The independent contractor, whether he decides to drive the leased vehicle or not, would have the following opportunities to serve the public:

1. He could choose to become a driver-employee or an owner-operator at another carrier or carriers, including competitors;
2. He could lease another tractor or vehicle to other motor carriers, including competitors of the lessee-motor carrier;
3. He could hold himself out to handle exempt commodities with another tractor or vehicle;
4. He could acquire a registration from the FMCSA and operate as an independent motor carrier.

The independent contractor, however, could not use the vehicle he leased to the lessee-motor carrier because of the government dictate that the lessee-carrier must have "exclusive possession for the duration of the lease."\textsuperscript{53}


\textsuperscript{52} The safety qualification provisions appear at 49 C.F.R. § 391.1 (2009).

\textsuperscript{53} The Leasing and Interchange Regulations do provide that the lessor vehicle can be used in "trip leasing" operations under § 376.22 with the lessor's permission. See § 376.12(c)(2). However, such trip leasing involves a lease between registered carriers and thus, from the standpoint of the lessor to the motor carrier, it becomes essentially a "subcontractor." Significantly, the issue of "trip leasing" arises in many proceedings and is not generally understood or developed of record.
D. STATE STATUTORY OR ADMINISTRATIVE OVERSIGHT

Apart from the problem raised by federal regulations under workers’ compensation statutes, carriers are frequently obligated to have the employment classification issue determined under a morass of state statutory or administrative criteria.

The criteria are frequently based on the common law test, but, in slowly-growing numbers, states have promulgated criteria that are industry-specific and give direction to carriers and independent contractors in terms of how to fashion, create, and maintain an independent contractor relationship.

The ideal situation is to have a simple exemption as is done in various states including Indiana, where the relevant provision reads:

(8) An owner-operator that provides a motor vehicle and the services of a driver under a written contract that is subject to IC 8-2.1-24-23, 45 IAC 16-1-13, or 49 C.F.R. 376 to a motor carrier is not an employee of the motor carrier for purposes of IC 22-3-2 through IC 22-3-6 ["Workers’ Compensation”]. The owner-operator may elect to be covered and have the owner-operators’ drivers covered under a workers’ compensation insurance policy or authorized self-insurance that insures the motor carrier if the owner-operator pays the premiums as requested by the motor carrier. An election by an owner-operator under this subdivision does not terminate the independent contractor status of the owner-operator for any purpose other than the purpose of this subdivision.

However, even where these general exclusions have been adopted, one must be aware that there are some exceptions or some limitations that may still exist such as the type of carriage, type of commodities involved, equipment acquisition from the carrier or a related party, and other limiting exclusions. For example, in Tennessee the exemption only

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54. The common law test is essentially that if a person is controlled, or subject to the “right” of control, as to means by which a result is accomplished, the person is an employee. If a person is subject to control only as to the result to be accomplished, the individual is an independent contractor. See the Common Law Test set forth in 26 C.F.R. § 3121(d)-1(c) (2010) of the Federal Employment Tax Regulations. Various agencies and courts have promulgated different versions of the “common law” test. See James C. Hardman, Administrative Bulls in the Delicate China Shop of Motor Carrier Operations – Revisited, 18 TRANSP. L.J. 115, 121-27 (1989). The application of the “common law” test is one that is often confusing to motor carriers, individuals, auditors, administrators, and courts.

55. In Minnesota, the Department of Labor and Industry promulgated Rules setting forth specific criteria for approximately 24 distinct industries including the trucking and the messenger/courier industries and general criteria for undefined industries. See MINN. R. § 5224.0010 (2009). In 2009, the criteria that covered the two cited industries was combined, slightly modified, and enacted as a statutory provision. See MINN. STAT. ANN. § 176.043 (West 2009).

56. For example, Alabama, Georgia, Indiana, Louisiana, Missouri, Tennessee, and Texas.

57. IND. CODE ANN. § 22-3-6-1(b)(8) (West 2009).

58. Id.
applies to "common" carriage.\textsuperscript{59}

\textbf{e. Forum Shopping}

The variations which exist between states in determining the employment issue also creates forum shopping on the basis of the economic advantages between the states\textsuperscript{60} or other state-specific provisions. For example, in Virginia a maximum burial allowance would be $10,000, whereas in Montana the maximum allowed would be $4,000.00.\textsuperscript{61} Many motor carrier operations are small businesses with a limited number of employees, and compulsory workers' compensation coverage is frequently predicated on the number of employees employed.\textsuperscript{62} Mississippi, for example, makes coverage compulsory for businesses with five or more employees.\textsuperscript{63} Otherwise, coverage is optional.\textsuperscript{64}

The most prevailing goal in forum shopping is to avoid any state with a broad exemption for owner-operators or sage guidance criteria, and file in a state which adopted the common law which reflects a liberal interpretation of what constitutes "employment."

The author served as a consultant in a fairly recent workers' compensation case in South Carolina involving the death claim of an owner-operator who fell asleep at the wheel and was killed when hitting a bridge pillar.

The owner-operator was a resident of Georgia who entered into the lease of the vehicle in Texas with a carrier having a facility in that state, and picked up the load being hauled in Florida. All three states exempt independent contractors from workers' compensation coverage.

The load was destined to Virginia which adopted the common law. The only connection with South Carolina was the scene of the accident.

South Carolina decided that the case fell under the workers' compensation common law of the state, which historically was very unfavorable in terms of motor carriers and the use of owner-operators.

These variations in state laws and decisions obviously encourage forum shopping and make it difficult, if not impossible, for a motor carrier and insurers to determine their risks and costs. Until some uniformity exists, the most motor carriers can do is take advantage of "choice of law" clauses to the extent they are allowable or recognized.

\textsuperscript{59} Tenn. Code Ann. § 50-6-106 (West 2009).
\textsuperscript{62} See Miss. Code Ann. § 71-3-5 (West 2009).
\textsuperscript{63} Id.
\textsuperscript{64} See U.S. Chamber of Commerce, supra note 60.
F. CHOICE OF LAW PROVISIONS

Choice of law provisions involve two contracting parties agreeing that any claim or dispute arising under the contract shall be resolved under a particular state's law. These clauses can, in the context of workers' compensation, avoid forum shopping. However, only a minority number of states have approved such clauses by statute\textsuperscript{65} and others will only enforce a properly-drafted and adopted provision in the absence of a state statute.

In drafting a choice of law provision or a separate agreement, it would be important to express that the "choice" issue arises only if, for any reason, the independent contractor were to file a workers' compensation claim arising from the employment classification issue, and is not designed to avoid liability, and that the putative employee has knowingly agreed to the choice.

In Ohio, and in other states, a specific statutory form has to be filed with the Ohio Workers' Compensation Bureau.\textsuperscript{66}

In the absence of a statutory right to adopt a "choice of law" agreement, the validity will be decided under common law and the determination could well depend upon the specific facts relative to the claim.

G. OTHER MISCELLANEOUS CONSIDERATIONS

Some motor carriers, because of the problems which arise with workers' compensation, reportedly have ceased contracting with sole proprietors and will only contract with partnerships, corporations, or LLCs where some relief is more likely.

This is not an assured position as while some states exempt corporate officers or partners, such exemptions are not universal.\textsuperscript{67} Thus, the motor carriers could still be responsible for workers' compensation coverage if the corporation, LLC, or partnership does not provide it.\textsuperscript{68}

Some motor carriers require sole proprietors, as a condition of contract, to elect workers' compensation coverage.\textsuperscript{69}

Conditioning self-coverage of sole proprietors as a pre-requisite to entering a lease may not fully protect a motor carrier since some statutes

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\textsuperscript{66} \textit{Ohio Rev. Code Ann.} § 4123.54 (West 2009).

\textsuperscript{67} \textit{U.S. Chamber of Commerce, supra note 60.}

\textsuperscript{68} See \textit{id.} at 17-29.

preclude coverage of sole proprietors even if the individual desired to "opt" into the system.  

Likewise, if the individual were found to be an "employee" and entitled to workers' compensation as such, the motor carrier could be subject to fines and an award of damages to the "sole proprietor" based on premiums paid.

H. Summary and Conclusion — Workers' Compensation

The real solution to the problem, which involves the "employment classification" issue in terms of workers' compensation, may lie in a federal legislative solution that would essentially define the terms of employment in the context of the trucking industry and that the test would be mandatory within the state's system, or seek further explicit exclusions or a model or uniform provision on a state-by-state basis.

V. Unemployment Compensation

A. In General

The diversity of unemployment compensation laws enacted by states, like workers' compensation laws, has caused considerable problems for motor carriers and particularly motor carriers utilizing independent contractors to move loads tendered to them by shippers, brokers, or other carriers in interchange service, or trip leasing.

While some states specifically exclude independent contractors in their statutes and, as a matter of logic, the other statutes should be limited to "employees," the problem arises when the motor carrier is confronted with the filing of a unemployment compensation claim after the lease is terminated and/or the independent contractor is decertified as an

70. See generally Hardman, supra note 42 (discussing problems with the lack of uniformity in state statutes).
71. U.S. Chamber of Commerce, supra note 60, at 17-29; see also Hardman, supra note 42, at 270.
72. See Hardman, supra note 42, at 270-72.
73. See American Trucking Association, American Trucking Association Proposal Re Workers' Compensation (The American Trucking Association ("ATA") has adopted model language to use on a federal or state-by-state effort) (the proposal is contained below in appendix 1).
75. 49 C.F.R. § 376.2(c) (2010) (defining "Interchange").
76. 49 C.F.R. § 376.22 (2010) (covering "Trip Leasing").
operator and the individual decides he or she was, in fact, an employee or if for some reason an audit arises.

In many, if not most instances, the carrier will face a hearing officer who sincerely believes that all "workers" should be covered by unemployment compensation and that the party who engages the individual, despite the contractual status, is an "employer." This position also occurs, to a large extent, because specific language indicates that coverage under the statute is to be interpreted liberally or broadly construed.\(^7\)

Although the "employment classification" issue has been litigated in many administrative and judicial cases, uncertainty still exists among motor carriers as to the law, exposing them to awards and perhaps to extensive damages by a claim being filed.

**B. TESTS UTILIZED**

Minnesota,\(^7\) along with Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Nebraska, New Jersey, Oklahoma, Texas, and Virginia have some legislative version of an owner-operator exemption.\(^8\)

In Minnesota, the legislature recently passed a provision, which duplicated the test to be utilized under the states' workers' compensation statute, and made the test applicable to the messenger/courier industry as well as to the trucking industry.\(^8\) Motor carrier industry-specific tests in Minnesota have existed under statute or administrative rules since 1991.\(^8\)

The exemption reads as follows:

Subd. 25b. Trucking and messenger/courier industries; independent contractors. In the trucking and messenger/courier industries, an operator of a car, van, truck, tractor, or truck-tractor that is licensed and registered by a governmental motor vehicle agency is an employee unless each of the following factors is present, and if each factor is present, the operator is an independent contractor:

1. The individual owns the equipment or holds it under a bona fide lease arrangement;

2. The individual is responsible for the maintenance of the equipment;

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\(^7\) See, e.g., Miss. Code Ann. § 71-5-3 (West 2009).

\(^8\) Minn. Stat. Ann. § 268.035 subdiv. 25(b).


\(^8\) Minn. Stat. Ann. § 268.035 subdiv. 25(b).

\(^8\) Minn. R. 3315.0100 (1991) (repealed 2004).
(3) The individual is responsible for the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses. The individual may be paid the carrier's fuel surcharge and incidental costs, including, but not limited to, tolls, permits, and lumper fees;

(4) The individual is responsible for supplying the necessary personal services to operate the equipment;

(5) The individual's compensation is based on factors related to the work performed, such as a percentage of any schedule of rates, and not on the basis of the hours or time expended;

(6) The individual enters into a written contract that specifies the relationship to be that of an independent contractor and not that of an employee; and

(7) The individual substantially controls the means and manner of performing the services, in conformance with regulatory requirements and specifications of the shipper.83

C. THE ABC TEST

In other states such as one of Minnesota's neighbors, South Dakota, the ABC Test is used.84 The test can be described as follows:

Service performed by an individual for remuneration (or wages) shall be employment irrespective of the common law unless and until it is proven that (a) the individuals are free from control as to the means and methods with which they accomplish tasks; (b) the services are performed outside the usual course of business of the employer or the employee performs such services outside of all the places of business of the party engaging the service; and (c) the individuals are engaged in an independently established trade, occupation, profession, or business.85

The use of this test is contrary to what federal legislators envisioned with the Social Security system.86 In United States v. Silk, the Supreme Court established the "economic reality" test as being applicable to Social Security legislation.87 It held that two groups of owner/operators were small, independent businessmen as a matter of economic reality, chiefly because of their investment in equipment, hiring of helpers, and their opportunity for profit depended upon their own efforts.88 The Court considered the facts that owner/operators are integral to the carrier's business and that, in one instance, the owner/operator was under an

83. MINN. STAT. ANN. 268.035 subdiv. (25)(b).
87. Id. at 713-14.
88. Id. at 719.
exclusive contract was important, but not controlling.\textsuperscript{89}

In essence, the consideration of these latter factors was the foundation of the ABC test. However, when the Treasury Department attempted to issue regulations embracing the ABC test developed in the decisions, Congress passed a joint resolution emphasizing that only common law factors should be considered for purposes of the legislation.\textsuperscript{90} Congress felt that the \textit{economic reality} test would mislead the public and was not consistent with legislative intent.\textsuperscript{91} Despite the fact that federal courts, since the Resolution, have acknowledged that strict application of the common law control test should be applied, the majority of states have continued to apply the \textit{economic reality} test or, more appropriate, the ABC test.

In applying the test, the carrier has the burden of proof\textsuperscript{92} and all three prongs of the test must be met.\textsuperscript{93}

1. \textit{Prong A — Control}

Although this prong is literally the common law control test which, if met under the common law test, would establish an independent contractor relationship or at least be a dominant factor in the determination,\textsuperscript{94} this is not necessarily the case in unemployment compensation cases.

Some courts have indicated that the control test in the ABC Test is not equivalent to the Prong A test and have held that less control needs be shown to establish an individual as an employee, and further, that Prong A carries no more weight than any other factors.\textsuperscript{95}

2. \textit{Prong B — Usual Course of Business}

It will be noted that this prong involves separate tests and satisfaction of either part of the test will satisfy the prong.\textsuperscript{96}

The first test under this prong is whether the services are performed outside the usual course of the employer’s business.\textsuperscript{97}

Administrative agencies and courts have frequently interpreted this

\textsuperscript{89} Id.
\textsuperscript{90} H.R.J. Res. 296, 80th Cong. 2d Sess. (1948).
\textsuperscript{91} Id. The current Federal Employment Tax Regulation now embraces the common law test. Employment Taxes and Collection of Income Tax at Source, 26 C.F.R. § 31 (1968).
\textsuperscript{92} See, e.g., 820 ILL. COMP. STAT. ANN. 405/212 (West 2009).
\textsuperscript{94} See, e.g., Meredith Pub. Co. v. Iowa Employment Sec. Comm’n, 6 N.W.2d 6, 10 (Iowa 1942); Murphy v. Daumit, 56 N.E.2d 800, 805 (Ill. 1944).
\textsuperscript{95} See, e.g., Nordman v. Calhoun, 51 N.W.2d 906, 909 (Mich. 1952); Murphy, 56 N.E.2d at 803-04.
\textsuperscript{96} See, e.g., Carpet Remnant Warehouse, Inc. v. N.J. Dep’t of Labor, 593 A.2d 1177, 1186 (N.J. 1991).
\textsuperscript{97} Id.
test very narrowly and considered carriers and owner-operators as being in the same business, for example, transportation.98

In 1994, the author made the following comments on this position:

The practical effect of rulings . . . is to eliminate subcontracting or any type of joint venture. A particular company may desire to have a third party do part of the work it initially performed or held itself out to do. The ability to do so should not be conditioned on the company accepting the subcontractor as an employee.

It is difficult to conceive that legislators had this in mind when adopting the test. A company's use of subcontractors may be based on many legitimate purposes, none of which is the avoidance of unemployment compensation responsibility. Similarly, persons may desire to work as an independent contractor for legitimate business reasons.

In motor carriage, carriers may desire to utilize owner/operators because they do not have sufficient capital to purchase or lease tractors; they may believe owner/operators as entrepreneurs may perform the actual transportation function more effectively; or the employment market may not provide sufficient numbers of driver-employees to meet their needs.

What real difference is there if an individual performs the transportation aspects of a carrier's business or if the carrier engages a lawn service to cut and maintain its lawn? This distinction is really one without substance. In other industries subcontractors are freely used and held to be independent contractors.

In the construction area, for example, the general contractor assumes responsibility for constructing a building. Essential to the construction of that building is the laying of a foundation, steelwork, masonry, plumbing, and electrical work. Subcontractors are engaged for specific parts of the project. The relationship with such subcontractors is normally one of an independent contractor.

There does not appear to be anything unique about the "usual course of business" which should determine whether an individual is an employee and entitled to coverage. If a motor carrier chooses to subcontract a portion of its obligation, the furnishing of a vehicle and driver and the physical movement of the goods, this should not preclude the subcontractor from being classified an independent contractor.99

These comments are still applicable at this time.

3. **Prong B – Place of Performance**

The second part of Prong B examines if the service is performed outside of all places of business of the service engager.100

100. Carpet Remnant Warehouse, Inc., 593 A.2d at 1186.
Courts have gone in different directions in interpreting this test to the point where a motor carrier is faced with the concept that any activities in the business area in which a company operated constitutes its place of business.\textsuperscript{101}

In 1994, the author made the following comments on this position, and as stated above, stands by these comments today:

While one would agree that the test does not mean simply the home office or headquarters of a company, it is difficult to conceive that the test would be as broad as applied . . . If a company did a nationwide business, presumably work could never be performed outside the company's place of business.\textsuperscript{101} A motor carrier could never meet the test as the vehicles of the owner/operator would be moving from the carrier's terminal or a shipper or customer's site to another customer's site all within the state or states in which the carrier operates.

Similarly, picking up a semi-trailer at a carrier's terminal should not constitute doing business at the place of the engager any more than if a manufacturer contracts with an independent businessperson to repair parts utilized in the production process and that person picks up the broken parts at the factory and, after repairs, returns them to the factory.\textsuperscript{102}

4. **Prong C — Independent Business**

This test essentially attempts to determine if the individual is an entrepreneur and service is performed by him or her in that capacity.

In *Solar Age Mfg., Inc. v. Employment Sec. Dept.*, the court noted that the adverb "independent" modified the word "established" and meant that the trade, occupation, profession, or business was established independently of the employer.\textsuperscript{103} This view would not hinder a motor carrier, as in most instances owner/operators are already in business when they contract with a carrier. They normally have their own equipment and make independent decisions to become an owner/operator. It is merely the choice of which carriers to contract with that occurs when the contract is executed.

However, some courts take a much more literal view. In *Stafford Trucking, Inc. v. State Dep't. of Indus., Lab. and Human Rel.*, a dependent business was found because the vehicle lessor was dependent on the carrier for customers, trailers, insurance, and operating authority.\textsuperscript{104}

In some instances, the test is set forth by statute.\textsuperscript{105} In Oregon, a

\begin{flushleft}
\textsuperscript{101} See Murphy, 56 N.E.2d at 805.  \\
\textsuperscript{102} Hardman, supra note 85, at 28.  \\
\textsuperscript{103} Solar Age Mfg. v. Employment Sec. Dep't, 714 P.2d 584, 587 (N.M. 1986).  \\
\textsuperscript{104} Stafford Trucking, Inc., 306 N.W.2d at 84.  \\
\textsuperscript{105} See, e.g., COLO. REV. STAT. ANN. § 8-70-115(1)(C) (West 2003); OR. REV. STAT. ANN. § 670.600(3) (West 2009).
\end{flushleft}
A business or service is considered to be independently established when four or more of the following circumstances exist:

(a) The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;

(b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;

(c) Telephone listing and service are used for the business that is separate from the personal resident listing and service used by an individual who performs the labor or services;

(d) Labor or services are performed only pursuant to written contracts;

(e) Labor or services are performed for two or more different persons within a period of one year; or

(f) The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.106

This prong, if it embraces such concepts as having an “office” advertising one’s service, having established clientele, a telephone listing separate from the personal resident listing, and serves two or more different persons in a period of one year, would clearly create problems for a motor carrier.

These latter versions of the third prong of the ABC Test create problems for the motor carrier. Owner/operators are essentially engaged in a one-person operation. The business is one in which he or she purchases products or services from others, whether it be tractor repairs, fuel, or bookkeeping services.

The test, as applied by administrators and by the courts, frequently ignores the realities of the industry and consequently hurts both carriers and contractors.

D. Applicability of State Statutes

Compounding the problems which a motor carrier faces is the issue of which state law will apply. Generally, it is not the lessee which will determine which state has jurisdiction, but the place where the service is performed, directed, and controlled are the determinates.107 However, in

106. OR. REV. STAT. ANN. § 670.600(8). But see OR. REV. STAT. ANN. § 670.600(3) (reflecting revisions to OR. REV. STAT. ANN. § 670.600(8) (West 1999)).
107. See, e.g., EVCO v. Jones, 409 U.S. 91, 93 (1972) (showing jurisdiction established to tax through performance); Northwood Constr. Co. v. Township of Upper Moreland, 856 A.2d 789,
some instances, the situs of the individual’s residence will control.\textsuperscript{108} Owner/operators frequently contract with a carrier at the carrier’s headquarters or branch locations. They generally do not report to a carrier location on a regular basis, and they go from shipper site to shipper site. The owner/operator may be receiving dispatch information from a central location or from multiple locations depending where he or she is operating at the time or the operating procedures of the carrier.

Contract payments may be sent by mail or at multiple locations, one of which is chosen by the owner/operator. No taxes are withheld or remitted to the federal government or a state government. Operations could occur in all states or be concentrated in one or more states, frequently at the choice of the owner/operator, and without conscious knowledge of the motor carrier. Thus, a carrier must anticipate that claims might arise in any state and that it might be forced to defend under any one of the various tests discussed. There is no feasible way to avoid the problem under the existing statutory scheme.

\textbf{E. Exchange of Information and Its Implications}

Finally, a warning is proper concerning motor carriers’ past approaches to unemployment claims.

Although motor carriers and their attorneys will defend their “employment classification” decision in disputes and litigation with the IRS and state revenue departments because of the severity of the back-taxes due, interest, and penalties, they will often not contest an employment compensation claim on the basis that the costs of paying such compensation are not significant, particularly considering the cost of litigation which would be incurred.

However, a motor carrier must now give greater thought to unemployment claims made by independent contractors who, at contract end, say that they were really an “employee” and assert such under an unemployment statute.

In 2007, the IRS and the United States Department of Labor, Employment and Training entered into a “Memorandum of Understanding” with a fair number of states\textsuperscript{110} including Minnesota to facilitate information sharing and other collaboration for tax administration purposes.

\textsuperscript{804} (Pa. 2004) (showing jurisdiction established to tax through directing and controlling of activities from taxing state).


\textsuperscript{109} Hereinafter, “MOU”.

poses in conjunction with Questionable Employment Practices.\textsuperscript{111}

To some degree, federal and state agencies have shared information in the past, but the MOU portends that the practice will be much more formal and intense.\textsuperscript{112}

While there is no uniformity at this point in time as to what specific information will be shared by the states, Minnesota has agreed to send its determination to the IRS as have its bordering states of Iowa, North Dakota, South Dakota, and Wisconsin.\textsuperscript{113}

It can be expected that if the claimant in an unemployment compensation audit or a legal suit is found to be an employee and has been misclassified as an independent contractor, this information will be sent to the IRS which might lead to an IRS audit regarding income and/or employment taxes.

\textbf{F. SUMMARY – UNEMPLOYMENT COMPENSATION}

The unemployment compensation situation suffers the same infirmities as with the employment tax and workers’ compensation situations, and similar to what was concluded in examination of those areas, the only sensible resolution of the “mess” which exists is to have a federal act or a model or uniform legislative exemption or a test to determine the employment classification issue.\textsuperscript{114}

\textbf{VI. CONCLUSIONS}

The foregoing areas of law discussed in detail are merely examples of what confusion and problems exist in determining “employment classification.” It is a sad commentary of our legal system that the statutes, administrative rules, and court decisions are so voluminous, incoherent, and inconsistent that all participants in the motor carrier arena are unable to reach a reasonable, if not infallible, answer to the question “employees or independent contractors?”

The “employment classification” issue is, in reality, a more-pressing issue in the trucking industry than securing and retaining drivers.\textsuperscript{115}

Because of the number of “drivers” being utilized under indepen-
dent contractor leases, the demise of the independent contractor relationship would cause significant upheaval and problems. Many, if not most, motor carriers could not convert to a driver-employee operation because of the capital costs in doing so. The cost of reverting to a driver-employee operation would involve, for example, the necessity of the carrier to purchase or lease equipment (without driver); acquire equipment repair and maintenance facilities; acquire land for parking of tractor vehicles; and increase cost of human resource functions, etc.

The real issue of how many independent contractors who want to be independent businesspersons would continue as driver-employees if the independent contractor status is crimped.

Motor carriers and other entities and individuals cannot and should not sit back and not challenge the present and projected adverse action taken on the employment classification issue. Legal scholars, experienced and knowledgeable businesspersons, federal and state legislators and administrators, and other interested parties must Stand Up and Be Heard in the political arena.
Appendix 1

American Trucking Association Proposal RE
Workers' Compensation

CHAPTER 49 — LIABILITY FOR INJURIES TO DRIVER-EMPLOYEES

§ • LIABILITY OF CARRIERS OF PROPERTY BY MOTOR VEHICLE IN
INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO
DRIVER-EMPLOYEES

Every carrier of property by motor vehicle within the jurisdiction of
Title 49, United States Code, while engaging in commerce between any of
the several States or Territories, or between any of the States and Territo-
ries, or between the District of Columbia and any of the States or Territo-
ries, or between the District of Columbia or any of the States or
Territories and any foreign nation or nations, shall be liable to its driver-
employees for compensation in every case of work related injuries, death,
or occupational diseases arising out and in the course of employment
without regard to the question of negligence, unless otherwise excluded
or not covered by applicable state law.

§ • APPLICABILITY OF STATE LAW

The liability of a carrier, subject to the provisions of this chapter,
shall be determined under the workers' compensation law of the state in
which the carrier has its principal place of business (except to the extent
inconsistent with the provisions of this chapter) and such law shall be
recognized and enforced by any and all state agencies and courts which
assume jurisdiction of causes of action under this chapter.

§ • DRIVER-EMPLOYEE DEFINED

Any employee of a carrier, any part of whose duties as such em-
ployee shall involve operating a motor vehicle in the furtherance of inter-
state or foreign commerce, or shall, in any way directly or closely and
substantially, affect such commerce as above set forth shall, for the pur-
poses of this chapter, be considered as being employed by such carrier in
such commerce and shall be considered as entitled to the benefits of this
chapter.

§ • INDEPENDENT CONTRACTOR DETERMINATION

A person operating a motor vehicle for a carrier of property under
this chapter shall be considered an independent contractor and not an employee if each of the following factors is substantially present:

a. The person makes a significant investment or incurs a significant obligation related to equipment contracted to the carrier and used in performing service.

b. The person has direction and control in meeting and performing contract obligations subject to conformance with governmental dictates, lawful requirements of third parties relative to transport or other contractual obligations undertaken, and any reasonable administrative and clerical procedures needed for contract administration.

c. The person has the principal burden of any operating costs and personal expenses related to contract work.

d. The person's compensation is based primarily on factors related to contract work and not on number of hours worked and affords the person the opportunity to realize a profit or loss based on the relationship of business receipts and expenditures.

e. The person is responsible for hiring or otherwise engaging and paying the necessary personnel to operate the equipment and meet any contract obligations related to it.

f. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

A person meeting the foregoing criteria shall not be covered under the provision of this chapter or under any state statute or regulation relating to the subject matter of liability relative to work injuries, death, or occupational diseases except as hereafter provided.

§ • Election of coverage

To the extent the workers' compensation act of a state having jurisdiction pursuant to Section of this Chapter allows corporate officers, corporate directors, sole proprietors, and partners of partnerships to elect coverage, such an election may be made under this Chapter by an independent contractor without costs to a carrier if qualified under any such classification.

§ • Exclusive nature of remedy

This chapter is exclusive and not cumulative.

§ • Non-impairment of duties, liabilities, or rights

Nothing in this chapter shall be held to limit the duties or liabilities of carriers or to impair the rights of their employees under any other Act or Acts of Congress.
Proposed Factor Test/State

INDEPENDENT CONTRACTOR DETERMINATION

A person operating a motor vehicle for a carrier of property under this chapter shall be considered an independent contractor and not an employee if each of the following is substantially present:

a. The person makes a material investment or incurs a material obligation related to equipment contracted to the carrier and used in performing services.

b. The person has direction and control in meeting and performing contract obligations subject to conformance with governmental dictates, lawful requirements of third parties relative to the transport or other contractual obligations undertaken and any reasonable administrative and clerical procedures needed for contract administration.

c. The person has the principal burden of any operating costs and personal expenses related to contract work.

d. The person's compensation is based primarily on factors related to contract work and not on number of hours worked and affords the person the opportunity to realize a profit or loss based on the relationship of business receipts and expenditures.

e. The person is responsible for hiring or otherwise engaging and paying the necessary personnel to operate the equipment and meet any contract obligations related to it.

f. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

Proposed Blanket Exemption/Federal and State

GENERAL EXEMPTION:

An independent contractor is an individual who owns or holds under a bona fide lease a motor vehicle which the individual leases to a motor carrier and who personally operates such leased equipment under a written agreement with the motor carrier that specifies that such operations involve an independent contractor relationship.

Optional Provisions For Use With Factor and Blanket Exemptions

OPTION ONE — STATUTORY EMPLOYMENT LANGUAGE:

No motor carrier shall be held responsible for the liabilities of an independent contractor exempted under Section ____ to the indepen-
dent contractor's employees under the workers' compensation laws of any\textsuperscript{116} state where the motor carrier has taken reasonable steps to ensure the independent contractor has secured its responsibilities to the independent contractor's employees by obtaining a certificate of workers' compensation for any such employees at the time the independent contractor is engaged and where no notice of cancellation of such coverage has been received by the motor carrier.

**Option Two — Chargeback Language:**

A motor carrier and an independent contractor meeting the criteria contained in Section ____ may agree in writing that the independent contractor and any of the independent contractor's employees may be covered by the motor carriers' workers' compensation policy and that the independent contractor and any of its employees would be deemed to be employees of the motor carrier for purposes of workers' compensation only. The motor carrier may charge the independent contractor for any premiums, or if self-insured, for any equitable assessments for such coverage. Such election shall not affect the employment status of the independent contractor for any purpose other than for workers' compensation.

\textsuperscript{116} For use at state level, the word "any" should be replaced with the word "this".
Forget What You Intended: Surprisingly Strict Liability and COGSA versus Carmack

Matthew K. Bell*

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INTRODUCTION

International shipping has evolved from a luxury to a necessity in recent decades, becoming a booming industry due in large part to the

As an industry grows and expands across the world, various and often conflicting legal regimes emerge, and the expansion of the global marketplace has been no different. International carriers have attempted to combat uncertainty and conflicts of laws in a number of ways, most notably by use of Himalaya Clauses in through bills of lading. A Himalaya Clause within a bill of lading "seeks to extend to non-carriers partial immunity or other protections afforded to the carrier by the bill of lading." Although the United States Supreme Court stressed the importance of certainty and predictability in the international shipping industry in *Norfolk Southern Railway Co. v. Kirby*, the current circuit split over the applicability of the Carmack Amendment to inland portions of multimodal shipments creates neither certainty nor predictability. This paper will analyze the background of the laws involved, specifically the Carriage of Goods by Sea Act (COGSA), and the cases that currently comprise the circuit split, and propose a rational framework for the harmonization of the law in this increasingly important area.

Part I will provide the background information related to the passage of the laws that currently affect the analysis. Part II will analyze the Supreme Court's decision in *Kirby* and point out the portions of the opinion that are relevant to an understanding of contractual extension of COGSA and waiver of Carmack. Part III will provide a brief synopsis of each case involved in the present circuit split and the rationale for the leading cases out of the Eleventh and Second circuits. Finally, Part IV will develop the rational framework necessary for the harmonization of this area of the law.

## I. BACKGROUND OF LAW

Containerization began in 1956 when fifty-eight aluminum truck bodies were shipped as an experiment, which resulted in a completely

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2. See *id.* at 1462-70.
new and vastly more efficient business method for international shipping. Prior to containerization, cargo had to be individually loaded and unloaded from one carrier to another. This now outdated process proved to be inefficient, and the modern world of international shipping and multimodal transport was born. Multimodal is defined as the carriage or transportation of goods by multiple modes, including air, rail, truck, and ocean vessels. The ability to transfer cargo from one mode to another in a uniform container has transformed the world as we know it. The increasing volume of cargo being transported under a “through” bill of lading has caused some concern, especially in the United States, because different laws apply to different modes of transportation.

While the legal schemes applied to shipments have evolved throughout the twentieth century, there are some laws that still appear to conflict with the customs and intent of the parties contracting for international shipments. In 1893, Congress enacted the Harter Act, which was intended to combat inconsistent liability regimes in the international shipping world. Specifically, the Harter Act prohibits carriers from entering into certain exculpatory clauses in contracts for the carriage of goods, but does not provide specific defenses to cargo loss or damage. Jurisdictionally, the Harter Act only applies if at least one of the ports involved is a U.S. port. Without defining “proper delivery,” the Harter Act mandates that the statute apply from the time the goods are delivered to the carrier until “proper delivery” is made. Fortunately, cases have given some guidance and defined the term “proper delivery” to mean “upon a fit and customary wharf.” “Proper delivery” has also been deemed to have occurred when the carrier “gives notification to the consignee, makes the cargo accessible to the consignee, and allows the consignee a

11. Id.
14. § 30704 (preventing a carrier from exculpating itself from “loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery” of cargo in its possession); § 30705 (prohibiting a carrier from relieving itself from the obligation to “exercise due diligence to—(1) make the vessel seaworthy; and (2) properly man, equip, and supply the vessel”); § 30706 (providing a carrier with defenses such as errors in navigation, dangers of the sea, and acts of God if the carrier has exercised due diligence to make the vessel seaworthy).
15. § 30702(a).
16. § 30701; Tapco Nig., Ltd. v. M/V Westwind, 702 F.2d 1252, 1255 (5th Cir. 1983).
17. Tapco, 702 F.2d at 1255 (quoting Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166, 168 (5th Cir. 1981)).
reasonable opportunity to take possession of the cargo.” ¹⁸

In 1936, Congress incorporated the Hague Rules of 1921, as amended by the Brussels Convention of 1924, into U.S. domestic law when it enacted the Carriage of Goods by Sea Act (COGSA). ¹⁹ COGSA applies to “[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States.” ²⁰ COGSA establishes a liability scheme based on negligence, and permits a carrier to limit its liability for lost or damaged cargo to $500 per package. ²¹ However, in order to take advantage of this limitation, “common law principles require a carrier to provide a shipper with a fair opportunity to declare a value greater than $500.” ²² Section 1301(1)(e) of COGSA contains what is known as the “tackle-to-tackle” provision, which provides that COGSA only applies during “the period from the time when the goods are loaded on to the time when they are discharged from the ship.” ²³ However, 49 U.S.C. § 1307 extends the protections of COGSA when the parties agree that COGSA will govern liability “subsequent to the discharge from the ship on which the goods are carried by sea.” ²⁴ This extension is accomplished through the use of a “clause paramount” in the bill of lading, or the inclusion of a “Himalaya Clause” in the bill of lading, which extends the $500 per package limitation to noncarriers and subcontractors. ²⁵ Combined, these two contractual options allow parties to extend COGSA protections to the entire shipment, including periods of inland transport.

COGSA and the Harter Act both cover carriage of goods by sea, but carriage of goods on land is generally covered by the Carmack Amendment to the Interstate Commerce Act (ICA). ²⁶ Congress enacted the ICA in 1887, and also established the Interstate Commerce Commission (ICC), in order to create uniform law related to interstate shipments. ²⁷ Nearly twenty years after the ICA, Congress passed the Carmack Amendment which infused common law principles into the liability

¹⁸. Force, supra note 12, at 56.
¹⁹. § 30701; Force, supra note 12, at 58.
²⁰. § 30701.
²³. § 30701 hist. n. tit. I, § 1(e).
scheme.\textsuperscript{28} Congress enacted Carmack in order to create "a national scheme of carrier liability for goods damaged or lost during interstate shipment and to 'relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.'"\textsuperscript{29} Specifically, the Carmack Amendment governs any rail carrier or motor carrier that falls within the jurisdiction of the ICC, now the Surface Transportation Board.\textsuperscript{30} The Carmack Amendment generally "governs transportation between two states or between the United States and a place in a foreign country 'to the extent the transportation is in the United States.'"\textsuperscript{31} Carriers subject to Carmack are essentially held to a strict liability standard as long as the plaintiff can prove its prima facie case.\textsuperscript{32}

In 1980, Congress passed the Staggers Rail Act of 1980 (Staggers Act).\textsuperscript{33} Congress's purpose for the Staggers Rail Act was "to rid railroads of unnecessary and inefficient regulations that [had] impeded the railroads' ability to compete with other modes of transportation."\textsuperscript{34} The Staggers Act provided sweeping deregulation, including transportation "provided by a rail carrier as part of a continuous intermodal movement."\textsuperscript{35} Important to the focus of this paper, the Staggers Act has been interpreted as requiring that rail carriers offer an option of full Carmack coverage.\textsuperscript{36} For example, the Seventh Circuit held that a carrier must offer "alternative terms," meaning full Carmack coverage or some lesser negotiated terms, in order to avoid strict and unmitigated liability.\textsuperscript{37} Now


\textsuperscript{29} Crowley, supra note 1, at 1464 (quoting Reider v. Thompson, 339 U.S. 113, 119 (1950)).


\textsuperscript{31} Crowley, supra note 1, at 1464-65 (quoting 49 U.S.C. §§ 13501(1)(C), 13501(1)(E) (2006)); see also, 49 U.S.C. § 10501(1)(F) (2006) (approved Feb. 1, 2010) ("[T]he Board has jurisdiction over transportation by rail carrier that is . . . between a place in . . . the United States and a place in a foreign country."); 49 U.S.C. § 13501(1)(E) (2006) ("The [Surface Transportation] Board [has] jurisdiction . . . over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier . . . between a place in . . . the United States and a place in a foreign country to the extent the transportation is in the United States . . . ").


\textsuperscript{34} Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc., 996 F.2d 874, 877 (7th Cir. 1993) (citing H.R. REP. No. 96-1430, at 80 (1980) (Conf. Rep.)).


\textsuperscript{36} Tokio Marine, 996 F.2d at 879; Am. Trucking Ass'ns v. ICC, 656 F.2d 1115, 1124 (5th Cir. 1981).

\textsuperscript{37} Tokio Marine, 996 F.2d at 880; accord Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.,
that the background laws have been discussed and a foundation laid in
the law, the next section will discuss the Supreme Court case that estab-
lished the applicability of federal law to through bills of lading, but failed
to address the specific conflict between COGSA and Carmack.

II. NORFOLK SOUTHERN RAILWAY CO. v. KIRBY

In 2003, the Supreme Court decided *Norfolk Southern Railway Co.
v. Kirby*, where a shipper sued an inland railroad carrier for cargo dam-
age related to the derailment of a train on its way to the ultimate destina-
tion of Huntsville, Alabama.\textsuperscript{38} Kirby, an Australian manufacturing
company, contracted with International Cargo Control, an Australian
freight forwarder, for the shipment of ten containers of machinery from
Australia to Huntsville, Alabama.\textsuperscript{39} International Cargo Control issued a
through bill of lading, which included a Himalaya Clause and a Clause
Paramount, to Kirby and listed the ultimate destination as Huntsville, Al-
abama.\textsuperscript{40} The clauses included in the through bill of lading essentially
extended the application of COGSA and its limited liability to the inland
portion of the multimodal transportation. International Cargo Control
hired Hamburg Süd, a German shipping company, to carry the goods to
the United States.\textsuperscript{41} Hamburg Süd then issued International Cargo Con-
trol a second and separate through bill of lading which contained both
clauses.\textsuperscript{42} Unfortunately, Hamburg Süd does not provide land transpor-
tation and therefore contracted with Norfolk Southern Railway Company
(Norfolk) to provide rail transportation for the final leg of the journey
from the port to Huntsville, Alabama.\textsuperscript{43} Tragically, the train derailed on
the way to Huntsville, causing significant damage to Kirby's cargo.\textsuperscript{44}

The Supreme Court considered two issues, the first of which required
the Court to determine whether a shipper is bound by contracts entered
into by the freight forwarder.\textsuperscript{45} The second issue required the Court to
determine whether a multimodal through bill of lading, which limits lia-
bility, can be relied upon by a subcontractor who is not in privity with the
freight forwarder or shipper.\textsuperscript{46} Before reaching a conclusion on these is-

\textsuperscript{39} Id. at 19.
\textsuperscript{40} Id. at 19-20.
\textsuperscript{41} Id. at 21.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Brief of Petitioner at i, Kirby, 543 U.S. 14 (2004) (No. 02-1028).
\textsuperscript{46} Id.
sues, the Court held that federal law applied because the contract fell within the parameters of maritime jurisdiction and was not inherently local. The Court stated that “[i]f a bill’s sea components are insubstantial, then the bill is not a maritime contract.”

Because the Kirby case involved through bills of lading and the primary portion of the journey was by ocean, the Court held that it had admiralty jurisdiction over the dispute. After expressing the need for uniformity and efficiency in applying one law to contracts for international shipping, the Court held that the matter was not inherently local.

With respect to the first two issues presented to the Court, it noted that:

The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land, as is true of the Hamburg Sud bill. Such liability clauses are regularly executed around the world. Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. Confusion and inefficiency will inevitably result if more than one body of law governs a given contract’s meaning. When “a [maritime] contract . . . may well have been made anywhere in the world,” it “should be judged by one law wherever it was made.” Hamburg Sud would not enjoy the efficiencies of the default rule [of limited liability under COGSA] if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.

Additionally, the Court clarified the applicability of Himalaya Clauses by holding that a railroad carrier, although not named in the Himalaya Clause, is the intended beneficiary of a broadly written Himalaya Clause. While the Supreme Court clarified the scope of Himalaya Clauses, established the application of federal law to through bills of lading involved in multimodal shipments, and confirmed that subcontractors who are not in privity with the cargo owner or freight forwarded may still rely on the protections of a Himalaya Clause, the Court did not address the conflict between COGSA and Carmack. Without guidance from the Supreme Court, a circuit split has developed surrounding this conflict of liability schemes. This circuit split will be discussed in the next section.

47. See Kirby, 543 U.S. at 22-29.
48. Id. at 27.
49. Id.
50. Id.
51. Id. at 28-29 (citations omitted).
52. Id. at 32.
53. Id. at 29.
III. THE CIRCUIT SPLIT

Over the past few decades, numerous district courts and six circuit courts have ruled in varying ways on the applicability of the Carmack Amendment to the inland portion of multimodal shipments covered by through bills of lading. The first section will discuss the approach taken by the Eleventh, Fourth, Sixth, and Seventh Circuits. The next section will discuss the approach endorsed by the Ninth and Second Circuits. Comparisons will be made between the conflicting approaches in the body of each section.

A. SWIFT APPROACH

The case that created the circuit split comes from the Eleventh Circuit in Swift Textiles, Inc. v. Watkins Motor Lines, Inc.54 The Eleventh Circuit held that “when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey ... will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.”55 The holding in Swift is based on the Supreme Court’s decision in Reider v. Thompson, where the Court applied Carmack to the domestic leg of a voyage that had a separate bill of lading.56 Swift was reaffirmed in Atladis USA, Inc. v. Sea Star Line, LLC, where the Eleventh Circuit held that Carmack did not apply to the domestic leg of a shipment covered by a through bill of lading, extending COGSA to the inland portion of the shipment for which a separate bill of lading had been issued.57

In Shao v. Link Cargo (Taiwan) Ltd., a shipper sought recovery for the loss of a multimodal shipment covered by a through bill of lading from Taiwan to Baltimore, Maryland because the cargo was accidentally sent to a warehouse in Florida and subsequently was destroyed by a fire.58 The Fourth Circuit, citing Swift, held that the Carmack Amendment “does not extend ... to shipments from a foreign country to the United States unless a domestic segment of the shipment is covered by a

55. Id. at 701.
56. See Reider v. Thompson, 339 U.S. 113, 117 (1950) (“The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated. ... Thus it is not significant that the shipment in this case originated in a foreign country, since the foreign portion of the journey terminated at the border of the United States. The obligation as receiving carrier originated when respondent issued its original through bill of lading at [the discharge port]. That contract of carriage was squarely within the provisions of the [Carmack Amendment].”) (citations omitted).
57. Atladis USA, Inc. v. Sea Star Line, LLC., 458 F.3d 1288, 1294 (11th Cir. 2006).
58. Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 701 (4th Cir. 1993).
separate domestic bill of lading.” Unfortunately, the Fourth Circuit provided little original analysis and accepted the Eleventh Circuit’s position without much discussion.

In American Road Service Co. v. Consolidated Rail Corp., a subrogee sought recovery for damages paid on goods damaged by the inland rail carrier. The shipment was multimodal and covered by a single through bill of lading from Germany to Detroit, Michigan. American Road Service, after compensating the shipper for his loss, sought recovery under the Carmack Amendment against the inland carrier. The Sixth Circuit held that the Carmack Amendment only covers those “shipment[s] over which the Interstate Commerce Commission . . . has jurisdiction . . . [and] . . . the ICC’s jurisdiction does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading.”

Similarly, in another case dealing with a multimodal shipment covered by a through bill of lading, the Seventh Circuit held that the Carmack Amendment “does not extend to shipments by water, rail or motor carriers from a foreign country to the United States, . . . unless a domestic segment of the shipment is covered by a separate domestic bill of lading.” Like the Fourth and Sixth Circuits, the Seventh Circuit cited with approval the Eleventh Circuit’s opinion in Swift and gave little further discussion to the issue. As has been demonstrated by the previous paragraphs, the Eleventh Circuit is the seminal case for the circuit split, it is the only circuit to provide a rationale for its position, and it has been cited with approval by three sister circuits. The next section will analyze the other side of the circuit split, the Ninth and Second Circuits.

B. NINTH AND SECOND CIRCUIT APPROACH

Contrary to Swift, and without citing authority or providing analysis, the Ninth Circuit held, in Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co., that the Carmack Amendment “encompasses the inland leg of an overseas shipment conducted under a single ‘through’ bill of lading, . . . to the extent that the shipment runs beyond the dominion of [COGSA].” In Neptune, a cargo owner sought recov-

59. Id. at 703.
61. Id.
62. Id. at 567.
63. Id. at 568 (decided before the Surface Transportation Board replaced the ICC).
64. Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394 (7th Cir. 1992) (citations omitted).
65. Id.
ery for damage to cargo shipped pursuant to a single through bill of lading. While *Swift* was decided nearly 15 years prior to *Neptune*, the Ninth Circuit does not mention or distinguish the opinion laid down by its sister circuit. The Fourth and Seventh Circuit opinions were also on the books at the time of the *Neptune* decision.

The Second Circuit provided reasoning and solidified the circuit split in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, where thirty-two tractors shipped by the Kubota Tractor Corporation suffered damage when their train derailed in Texas. The tractors were shipped pursuant to three separate through bills of lading and were found to have "covered the entire journey from start to finish, including both the ocean and land legs." The bills in question contained both a "Period of Responsibility Clause" and a Himalaya Clause. Both clauses professed to extend the benefits of COGSA to all subcontractors of Mitsui OSK Line Limited, the original carrier, including Union Pacific Railroad. In direct conflict with the *Swift* decision, the Second Circuit held that a shipment from a foreign country to the United States that is shipped pursuant to a through bill of lading is governed by both Carmack and the Staggers Act, which impose nearly strict liability upon Union Pacific. The court reasoned that COGSA only applied ex contractu to the inland portion and was trumped by Carmack and Staggers due to their status as federal statutes.

The *Sompo* court specifically questioned the Eleventh Circuit’s holding in *Swift* and the requirement of a separate domestic bill of lading for Carmack application. The court noted that the requirement of a separate bill of lading was irrelevant once the *Swift* court held that the intent of the parties for the continuous voyage would take precedence. The court also noted that the version of Carmack relevant to the *Swift* decision “explicitly provided that a motor (or rail) carrier’s failure to issue a bill of lading did not remove the carrier from Carmack’s reach . . . .” The *Sompo* court agreed with the *Swift* court on how these cases should be analyzed and applied the same two-step analysis for deciding when to

67. *Id.*
68. *Id.* at 1119-20.
70. *Id.* at 56.
71. *Id.* at 56-57.
72. *Id.*
73. *Id.* at 69.
74. *Id.* at 76.
75. *Sompo*, 456 F.3d at 62.
76. *Id.*
77. *Id.*
apply Carmack.78 After determining that Carmack applied to the inland portion of Kubota's shipment, the court held that while COGSA allows parties to extend its protections beyond the tackles, such extension must give way to conflicting laws such as Carmack.79 In support of this proclamation, the court cited several cases that supposedly stand for the proposition that federal law takes precedence over COGSA extended by contract beyond the tackles.80 The Second Circuit also attempted to distinguish Sompo from Kirby by explaining that the issue of Carmack's applicability was not reached by the Supreme Court in the Kirby decision.81 While the Second Circuit makes a compelling argument based on statutory language, the next section will explain why Carmack does not and should not trump contractual agreements to extend COGSA protection beyond the tackles.

IV. Carmack Should Not Apply

The circuit split has brought international scrutiny upon the United States and its varying treatment of contractual realities. While there are four circuits that have held Carmack inapplicable to domestic inland segments of multimodal shipments subject to through bills of lading, they all rely upon the Eleventh Circuit's opinion in Swift, and provide little original analysis or reasoning for Carmack's inapplicability.82 While some may view Swift and its progeny as lacking the necessary reasoning or justification to make Carmack inapplicable, there are a number of reasons that should be articulated when deciding such an internationally important issue. Carmack should not apply to domestic inland segments of multimodal shipments subject to through bills of lading for the following reasons: Carmack's own language must be given effect; Supreme Court precedent requires it; judicial economy and economic certainty demand a bright-line rule; and the Kirby decision, when applied to such situations, calls for the inapplicability of Carmack.

A. Carmack Language

The Carmack Amendment provides that "[a] rail carrier providing


78. Id. at 63 (The court described the two-step test as follows: "[W]e must first determine the nature of the shipment in question—whether it is a single continuous intermodal shipment or multiple shipments consisting of separate ocean and domestic legs. Then we must determine whether Carmack applies to the shipment at issue.").
79. Id. at 74-75.
80. Id. at 71.
81. Sompo, 456 F.3d at 74.
82. See Altadis USA, Inc. v. Sea Star Line, LLC, 458 F.3d 1288, 1294 (11th Cir. 2006); Am. Rd. Serv. Co. v. Consol. Rail Corp., 348 F.3d 565, 568-69 (6th Cir. 2003); Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 703 (4th Cir. 1993); Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394 (7th Cir. 1992).
transportation or service subject to the jurisdiction of the [Surface Transportation] Board... shall issue a receipt or bill of lading for property it receives for transportation...”83 But, the statute also states that “[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier.”84 Similarly, the rules governing motor carriers provide that “[a] carrier providing transportation or service subject to [the Board’s] jurisdiction... shall issue a receipt or bill of lading for property it receives for transportation...”85 But again, the statute contains contradictory language, stating that “[f]ailure to issue a receipt or bill of lading does not affect the liability of a carrier.”86

In Sompo, the Second Circuit relied on the above language in 49 U.S.C. §11706, but failed to give any effect to the first sentence, specifically 49 U.S.C. §11706(a)(1).87 Section 11706(a)(1) contains unambiguous language that a carrier must issue a domestic bill of lading to fall within the Board’s jurisdiction and be subject to Carmack.88 The argument is simple according to the statute. A carrier that does not issue a separate bill of lading for the inland portion of a multimodal shipment, subject to an internationally issued through bill of lading, is not governed by the Carmack Amendment because the Surface Transportation Board lacks jurisdiction over the carrier.

B. Supreme Court Precedent

The Eleventh Circuit, in Swift, properly relied upon the Supreme Court’s decision in Reider v. Thompson.89 In Reider, a cargo owner sought recovery of damages from the railroad carrier who damaged the cargo, which originated in Buenos Aires, Argentina, during its passage from New Orleans to Boston.90 The facts of this particular case included a separate domestic bill of lading issued by the railroad carrier. The Supreme Court held that the domestic rail portion of the shipment was governed by Carmack, even though it originated in a foreign country, because the shipment was not subject to a through bill of lading.91 Without a through bill of lading, the ocean portion of the shipment terminated upon issuance of the domestic bill of lading in New Orleans.92 The Court also noted that the Carmack Amendment applied because jurisdiction

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84. §11706(a).
86. §14706(a)(1).
87. Sompo, 456 F.2d at 59-60.
91. Id. at 117.
92. Id.
was invoked through the issuance of a domestic bill of lading for the inland segment of the shipment.\textsuperscript{93} Finally, and most importantly, the Court specifically distinguished the \textit{Reider} situation from the case of \textit{Aiwine v. Pennsylvania Railroad Co.}, a case where the Carmack Amendment was held not to apply to the inland segment of a shipment subject to a through bill of lading because issuance of a separate domestic bill of lading terminates the ocean voyage and subjects the inland carrier to the Carmack Amendment.\textsuperscript{94} The Court’s emphasis on the fact that the shipment was covered by a separate domestic bill of lading and its distinguishing of the \textit{Aiwine} case both form the foundation for the inapplicability of Carmack to the inland segments of multimodal shipments subject to through bills of lading.

C. JUDICIAL ECONOMY AND ECONOMIC CERTAINTY

Carmack should not apply to the inland segments of multimodal shipments subject to a through bill of lading because it would unnecessarily increase litigation and create uncertainty through conflict between contractual terms and domestic laws. It would also require judicial determination as to the exact point in time when the ocean carrier and the inland carrier exchange the risk of loss for the goods. No point is delineated by statute, and determining the exact point in time may require increased litigation. If Carmack did not apply to inland carriers working pursuant to a through bill of lading, then all carriers would be subject to a single uniform liability scheme. Additionally, a bright-line rule would assist the shipping industry by providing clarity and predictability in their contractual relationships.

The current circuit split creates uncertainty for carriers entering into multimodal shipping contracts and creates disparate treatment of land versus ocean carriers. If Carmack is determined to be inapplicable to the multimodal shipments subject to through bills of lading, all carriers would be treated equally, and contractual terms would be given the proper respect. Also, the shipper would still be protected by the fair opportunity doctrine under COGSA because carriers would have to offer shippers a fair opportunity to declare a higher value for cargo before invoking COGSA’s $500-per-package limitation of liability.\textsuperscript{95} Finally, shippers would be protected because a carrier cannot exculpate itself from liability for negligence in the carriage of goods.\textsuperscript{96}

\textsuperscript{93} Id. at 118.

\textsuperscript{94} Id. at 117-18.

\textsuperscript{95} See, e.g., Couthino, Caro & Co. v. M/V Sava, 849 F.2d 166, 169 (5th Cir. 1988); Komatsu, Ltd. v. States S.S. Co., 674 F.2d 806, 809 (9th Cir. 1982).

D. The Kirby Decision

In Kirby, the Supreme Court issued a decision providing guidance on several important issues related to international multimodal shipments. First, the Court declared that federal law applies to the inland segment of the shipment because “[a]pplying state law to cases like this one would undermine the uniformity of general maritime law.” The need for a single liability limitation applied to both land and ocean carriers was explained because “[c]onfusion and inefficiency will inevitably result if more than one body of law governs a . . . contract’s meaning.” The Court also stressed the importance of efficiency by noting that an ocean carrier “would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility.” In addition, the Court explained that the purpose of COGSA, the desire to promote efficiency in international ocean shipments, would be defeated if more than one law applied.

The Court’s reliance on uniformity and efficiency apply with great force to the tension between Carmack and COGSA. Carmack should not apply to inland segments of multimodal shipments subject to a through bill of lading, with COGSA applying to the other segments of the shipment, because this would destroy uniformity in maritime law. The Kirby Court acknowledged the application of COGSA to an entire shipment covered by a through bill of lading when it noted that a single liability scheme is often applied to both land and ocean carriers under a single bill of lading. Furthermore, confusion would abound within the international shipping industry if laws contradictory to the terms of the contract are applied. The confusion is enhanced because Carmack and COGSA apply completely different liability schemes, have different requirements and obligations for carriers, and have different defenses to liability. As the Supreme Court noted, “[c]onfusion and inefficiency will inevitably result if more than one body of law governs” a single through bill of lading. Carmack should not apply to international multimodal shipments subject to a through bill of lading which purport to subject the entire shipment to the extended protection of COGSA.

98. Id. at 28.
99. Id. at 29.
100. Id.
101. Id.
102. Id. at 28.
103. Id.
104. Id. at 29.
CONCLUSION

The containerization movement has drastically increased the number and size of international shipments. International shippers desire certainty and uniformity in the laws applied to their contracts. The conflict between Carmack and COGSA is preventing this certainty and uniformity. The circuit split has brought international scrutiny upon the United States and its varying treatment of contractual realities. While some may view Swift and its progeny as lacking the necessary reasoning or justification to make Carmack inapplicable, there are a number of reasons that should be articulated when deciding such an internationally important issue. Carmack should not apply to domestic inland segments of multimodal shipments subject to through bills of lading for the following reasons: Carmack's own language must be given effect, Supreme Court precedent requires it, and judicial economy and economic certainty demand a bright-line rule. Additionally, the Kirby decision, when applied to such situations, calls for the inapplicability of Carmack. For the reasons already discussed above, the intent of the parties to a contract for a multimodal shipment subject to a single through bill of lading should be respected and COGSA protections extended to the exclusion of the Carmack Amendment.
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Articles

The Great Schism:
Federal Bicycle Safety Regulation and the Unraveling of American Bicycle Planning

Bruce Epperson*

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* Bruce Epperson, P.A., Attorneys and Planners, 4495 SW 67th Terrace, Suite 207, Davie, FL 33314, (954) 815-2972, BruceEpp@aol.com; J.D., Shepard Broad Law Center, Nova Southeastern University, 2004; M.U.R.P., University of Colorado, 1990; B.S., University of Kansas, 1988. He is the author of PEDDLING BICYCLES TO AMERICA: THE RISE OF AN INDUSTRY (McFarland & Co. 2010).

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Between 1971 and 1974, a great bike boom swept America. In just three years, over 40 million bicycles were sold, a volume so impressive that one bicycle executive called it “an unbelievable figure to those of us in the trade.” At the peak of the boom, some seventy-three million Americans rode bicycles regularly, with about fifty million of those riders being adults. Since World War II, bicycle makers have been trying to figure out how to turn adults into cyclists, and, by extension, customers. In the 1960's, bicycle makers paid for a handful of new urban bicycle paths. Beginning in 1973, they pledged $56,000 to the venerable League of American Wheelmen (“L.A.W.”) so the League could hire an executive director for three years. For the first time since William McKinley was president, the League could boast of a paid office staff. “The L.A.W. has been a do-nothing organization for 70 years,” said one of the organization's directors, but “[t]he time has come for the L.A.W. finally [to] do something positive . . .” The L.A.W. “must regain the leadership it has failed to provide.”

But by 1980, everything seemed to have fallen apart. The incoming L.A.W. president was calling the bicycle makers “[c]ycling's old ene-


2. See Trent Germano et al., The Emerging Needs of Bicycle Transportation, 436 HIGHWAY RESEARCH RECORD 8, 8-18 (1973) (defining “adult” as old enough to possess a regular driver’s license); Frank J. Berto, The Great American Bicycle Boom, in CYCLE HISTORY 10: PROCEEDINGS OF THE 10TH INTERNATIONAL CYCLE HISTORY CONFERENCE 133, 133-41 (Hans Erhard Lessing & Andrew Ritchie eds., 1999). The author thanks Mr. Berto, who provided many of the BICYCLING and BIKE WORLD articles from 1973-76 cited in this article. Mr. Berto does not necessarily agree with all conclusions or opinions in this article.


5. Id.
The industry responded by pulling its money out of the League. Dedicated federal funding for bicycle facilities dried up and stayed dry for the next fifteen years. How did this happen? This article will argue that the promulgation of a set of product safety standards by the then-new Consumer Product Safety Commission ("CPSC") triggered an irrevocable ideological schism between experienced recreational cyclists, government, and the bicycle industry. Of course, there were adult cyclists well before the 1960s, but they amounted to a small number of hardy devotees. While most of these cyclists welcomed the popularity brought about by the great bike boom, a group of "club cyclists," racers, and marathon-distance semi-competitive tourists (called "randonneurs") devoted to featherweight precision-built European bicycles, wanted the new cycling populism nipped in the bud and the clock rolled back to what they saw as an idyllic pre-1967 insularity.

Although never large in numbers, this group successfully challenged an emerging consensus of industry, government, and consumers by taking advantage of the industry's fragmented and sometimes confused approach to the development of the new CPSC bicycle rules. In less than a decade, the ideology of a handful of elite, high-performance cyclists on exotic bicycles priced more than some used cars came to dominate the bicycling community. The consequences were enormous. The American industry, once home to thousands of well-paying, blue-collar jobs, simply disappeared. In 1973, eight domestic firms produced 8.7 million bicycles and employed 12,000 workers. By 1995, only three major firms were left, employing a total of about 6,500. A decade later, these three firms had

8. See Forester, supra note 6, at 25-26. The term "club cyclist" is Forester's.
10. Comments of the Bicycle Manufacturers Association of America Regarding "Made in the USA" Claims With Respect to Bicycles, Made in the USA Policy Comment, FTC File No.
moved their production overseas and only two smaller firms, suppliers to the specialty bike shop market, remained.\footnote{P894219, http://www.ftc.gov/opp/jointvent/madeusa/ftp/usa/o45.txt. The domestic content of their bicycles was as low as 50 percent. Comments of DynaCraft Industries Regarding “Made in the USA” Claims With Respect to Bicycles, Made in the USA Policy Comment, FTC File No. P894219.} They produced fewer than 250,000 bicycles and employed about 2,100 employees.\footnote{11. These firms were Trek Bicycle and Cannondale. \textsc{Frank Berto et al., The Dancing Chain: History and Development of the Derailleur Bicycle 195} (1st ed. 2000), at 303-305. Trek was established in 1976 and Cannondale began bicycle production in 1983. A third firm, Specialized Bicycle Imports, designs, but does not build, bicycles in the United States. \textsc{Encyclopedia of Major Marketing Campaigns} 1540 (2007).} The CPSC regulations not only proved ineffective in improving bicycle safety, but also opened a window of opportunity for those who sought the destruction of the domestic industry and wished to block the efforts of local, state, and federal agencies to improve bicycle safety and revitalize bicycling as a viable transport mode.\footnote{12. \textit{World Players in the Bicycle Market, Bicycle Retailer and Industry News}, July 1, 2008, at 33. United States domestic production was 191,000 in 2005, 260,000 in 2006, and 260,000 in 2007. \textit{Trek Bicycle Corporation}, in \textit{Hoover's Company Records} (last updated April 2, 2010); Aisen J. Darnay and Joyce P. Simken eds., \textit{Manufacturing and Distribution} 2:1603 (2006). Klein Bicycle Corp. employed 500 in 2002, but was absorbed by Trek in 2006. Berto, \textit{supra} note 11, at 304.} Thirty years later, Jay Townley, former vice president of the Schwinn Bicycle Company recalled, “[o]ur whole world changed with [the] creation of the CPSC.”\footnote{13. \textit{Ross D. Petty, The Consumer Product Safety Commission’s Promulgation of a Bicycle Safety Standard}, 10 J. PROD. LIAB. 25, 40-48 (1987).} B. Glossary

Because of the unusually frequent references in this article to industry organizations, government bureaus, and other entities known more by acronym than actual name, I have provided this glossary to define each acronym and explain, at least in a rudimentary way, its meaning.

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>ANSI</td>
<td>American National Standards Institute. This non profit organization develops and publishes industrial standards for a wide variety of products, including bicycles. It is the North American affiliate of the International Standards Organization. See ISO.</td>
</tr>
<tr>
<td>BIA</td>
<td>Bicycle Institute of America. Before 1974, this was the main industry trade group. For the time period covered in this article, the BIA and the BMA are virtually synonymous.</td>
</tr>
<tr>
<td>BMA</td>
<td>Bicycle Manufacturers’ Association. Prior to 1974, a subunit of BIA, afterwards, the primary bicycle industry trade group.</td>
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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Definition</th>
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<tr>
<td>CalTrans</td>
<td>California Department of Transportation.</td>
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<tr>
<td>CPSA</td>
<td>Consumer Product Safety Act. This was the 1973 enabling legislation authorizing the Consumer Product Safety Commission. It shifted responsibility for oversight of children's products from the Food and Drug Administration to the CPSC.</td>
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<tr>
<td>DOT</td>
<td>United States Department of Transportation.</td>
</tr>
<tr>
<td>FDA</td>
<td>Food and Drug Administration. Prior to the 1973 CPSA, this agency was responsible for enforcing safety laws for toys and other children's products under the CPTSA and the Federal Hazardous Substances Act.</td>
</tr>
<tr>
<td>FHSA</td>
<td>Federal Hazardous Substances Act. Between 1969 and 1973, the CPTSA, an amendment to this Act, tasked the FDA with the responsibility of enforcing the safety of toys and children's products. The original 1973 bicycle product safety laws were issued under this Act, only a few days before authority was transferred by the CPSA to the CPSC.</td>
</tr>
<tr>
<td>FHWA</td>
<td>Federal Highway Administration, a part of the United States Department of Transportation.</td>
</tr>
<tr>
<td>HSA</td>
<td>Hazardous Substances Act. See FHSA.</td>
</tr>
<tr>
<td>ISO</td>
<td>International Standards Organization. One of their technical committees, TC-149, develops and publishes standards for bicycles and bicycle components. The United States is represented on ISO by ANSI. See ANSI.</td>
</tr>
<tr>
<td>L.A.W.</td>
<td>A nationwide organization for bicycle enthusiasts. Originally formed in 1881, it expired about 1905, and was resurrected in 1965. From 1973 to 1976 it was financially supported by the bicycle industry.</td>
</tr>
<tr>
<td>LWCF</td>
<td>Land and Water Conservation Fund. Administered by the Bureau of Outdoor Recreation of the Department of Interior, this was the primary source of federal funding for bicycle facilities between 1965 and 1975.</td>
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<tr>
<td>MTC</td>
<td>Model Traffic Code. See NCUTLO.</td>
</tr>
<tr>
<td>NCPS</td>
<td>National Committee on Product Safety. It was under the aegis of this temporary predecessor to the CPSC that the early federal research on bicycle safety was published during 1972-74.</td>
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NCUTLO | National Committee for Uniform Traffic Laws and Ordinances. This nongovernmental organization manages the Model Traffic Code used by the states as the basis for their traffic laws. It reviews and amends the MTC through regular conferences.

NHTSA | National Highway Traffic Safety Administration, a part of the United States Department of Transportation.

TC-149 | Technical Committee 149. ISO’s Committee for the Development of Standards for Cycles. See ISO.

TRB | Transportation Research Board. A division of the National Academy of Sciences, this private non-profit organization is one of America’s leading research organizations in the field of traffic and transportation engineering, planning, and management.

II. POST-WAR BICYCLE TARIFFS AND THE NEW ADULT MARKET

A. YOU ARE EXPENDABLE

The Second World War left Britain economically devastated. After years of anguish carefully hidden behind the closed doors of 10 Downing Street and Whitehall, the government was forced to devalue the pound in 1949 from $4.03 to $2.80, setting off a trans-Atlantic financial crisis.\(^{15}\) Gabriel Hauge, President Eisenhower’s economic advisor, summoned the executives of the Bicycle Institute of America ("BIA") to Washington, including Norman Clarke, president of the Columbia Manufacturing Company, the nation’s oldest bicycle maker.\(^{16}\) Hauge told the group that England needed hard currency, and needed it fast.\(^{17}\) To move dollars across the Atlantic, the Eisenhower administration wanted to immediately enact measures to stimulate British imports. Prior to the war, Britain’s bicycle industry had been the world’s largest, and their cycle factories had escaped damage. Developing a viable import market for British cars would take a decade and cost millions, but a thriving bicycle sector could be cobbled together in only a couple of months. "The Presi-

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16. Interview with Norman A. Clarke, \textit{supra} note 3 (stating that before 1963 Clarke’s firm was named the Westfield Manufacturing Company; prior to 1913 it had been the Pope Manufacturing Company). After World War II, the Bicycle Institute of America (BIA) served as the umbrella group for the bicycle trades. It was comprised of four subsidiaries: the Bicycle Manufacturers Association (BMA); the Bicycle Wholesale Dealers Association (BWDA); the Cycle Parts and Accessories Association (CPAA); and the Merchant Bicycle Dealers Association (MBDA). In 1975, the BIA (but not its subsidiaries) was dissolved amid restraint of trade concerns raised by the Federal Trade Commission. The BMA then became the most visible group, representing the entire industry in matters of overall advocacy and promotion. For the purposes of this article, the BIA and the BMA are virtually synonymous, and both terms are used to retain consistency with contemporary documents. In the 1960s, Schwinn left the BMA over a policy disagreement regarding mass-market retailers such as Sears, but continued to work closely with it. Telephone Interview with William Wilkinson, \textit{supra} note 7; Telephone Interview with Jay Townley, Former vice-president, Schwinn Bicycle Co. (May 23, 2009).
17. Interview with Norman A. Clarke, \textit{supra} note 3.
dent believes you can do other things,” Hauge told the assembled executives.18 He finished with a chillingly blunt summation: “you are expendable.”19

The tariff on bicycles was cut from 30 to 7.5 percent.20 Imports jumped from 67,000 units in 1950 to 595,000 in 1953, while the sale of American-made bicycles fell almost 50 percent.21 The BIA bitterly fought back, and after a bruising round of hearings in 1954, the federal tariff commission voted to raise duties back to 15 percent.22 Eisenhower was required to accept or reject the commission’s action within sixty days. Sixty-four days later, he knocked the tariff down from 15 to 11.25 percent. “We asked the attorneys in Washington, can he do that?” Clarke recalled. “They said no, but nobody sues the President.”23

The industry soon decided the only way to offset its shrinking slice of the market was to expand the entire pie by cultivating adult riders. Clarke had no illusions about why the industry needed adults: “Volume! Good God!” In addition to sheer numbers, increasing the proportion of adults allowed firms to escape the intensely seasonal production cycle that had plagued them since 1910. “Christmas became just another day,” said Clarke, “it wasn’t the same – we didn’t do 40 percent of our business for Christmas anymore.”24 Columbia had always, throughout its ninety-three years, made a lightweight adult bicycle, and in the early 1960s, Clarke was approached by one of his young engineers, Harold Maschin, who asked if he could look into some new technology coming out of Europe. Maschin subscribed to several European cycling magazines and through them learned about a “10-speed gear, actually an 8-speed, which Huret was making in France.”25 Deraillleurs had been around for many years, but the new Huret was an early entry in the market for a simple, rugged, relatively inexpensive alternative to Sturmey-Archer’s 3- and 5-speed internal hub gears.26 Columbia bought several sets, which Maschin rebuilt into 10-speeds. The factory made up prototype bicycles and Clarke “kept them in my garage and let the neighbors ride them to see

18. Id.
19. Id.
20. Id.
22. Id.
23. Clarke, supra note 3. The tariff rate was 11.25% on bicycles up to thirty-six pounds and 22.5% on heaver models. These rates remained in place until 1968. See generally, Two Wheel Drive, BARRON’S NAT’L BUS. & FIN. WEEKLY, Dec. 11, 1973, at 11; Roger Lloyd-Jones & M.J. Lewis, Culture as Metaphor: Company Culture and Business Strategy at Raleigh Industries, 1945-60, BUS. HISTORY 93 (July, 1999).
24. Clarke, supra note 3.
25. Id.
26. Clarke, supra note 3; BERTO ET AL., supra note 11, at 195.
what happened.”27 Unfamiliar with the new gears, the neighbors blew up several sets. But, by using this simple but effective testing system Clarke’s firm “found certain shortcomings we had to fix,” which Maschin fitted into a new 10-speed the factory introduced in 1963.28

To build up the adult market, the BIA wanted to encourage government efforts to promote bicycle safety, but chose a conservative approach. John Auerbach, the BIA’s executive director, cautioned industry executives that “unless safer bike riding facilities are developed, adults could become disenchanted with the bicycle if the hazards of bike riding increase . . . we need state legislation . . . [and] local ordinances.”29 On the other hand, Auerbach warned that “the BIA and each of us as individual manufacturers have to keep a low profile in all of these efforts . . . [t]rade associations and manufacturers frequently carry only a negative influence on legislators.”30

B. We Didn’t Know What to Call Them

The first effort at some sort of bicycle planning in the United States appears to have been in the village of Homestead, Florida, about twenty-five miles south of Miami. Between 1961 and 1963, Homestead designated and signed a network of “secondary, [lightly] traveled roads” to connect residential areas with “schools, playgrounds, shopping centers, ball parks, and other centers of activities.”31 “We didn’t know what to call them,” recounted Auerbach, “so [we] coined the word ‘Bikeway.’”32 They were not intended to divert “the experienced cyclist, capable of riding long distances,” but were instead meant for “the newcomer, the weekend cyclist, [or] the family with children.”33 City planners admitted that the Homestead experiment worked largely because of the town’s unique demographics. It had more bikes per capita than comparable towns, many quiet untracked streets, and a small, tightly knit population centered near an adjacent air base. When Chicago, which had a disconnected set of lakeside trails left over from the 1950s, tried to copy the idea, it found that it would have to build separate facilities if it wanted to close all the gaps in the network. A sixty-four mile system installed in 1965 to 1967 in the affluent Milwaukee suburb of Waukesha was entirely

27. Clarke, supra note 3.
28. Id.; Berto Et Al., supra note 11, at 195. Schwinn introduced an 8-speed in 1963, followed by a 10-speed the following year. Townley, supra note 16.
29. Huffman, supra note 3.
30. Id.
comprised of paved, off-road paths.\textsuperscript{34}

The Waukesha facility was typical of many built during this era: separated from the roadway system, usually running through a park or along a waterway with little transportation potential.\textsuperscript{35} However, this was less the result of any theoretical or ideological presumption than a matter of money. In 1965, Congress created the Land and Water Conservation Fund ("LWCF"), which quickly became a prolific source of money for municipal bicycle engineering activities.\textsuperscript{36} However, its purpose was to promote recreational resources, and the Bureau of Outdoor Recreation rejected many funding requests because they overly emphasized transportation uses.\textsuperscript{37} Many in the bicycle industry hoped the Federal Highway Act of 1973, which for the first time allowed (but did not require) states to use a portion of their roadway funds for pedestrian and bicycle facilities, would rectify this.\textsuperscript{38} It did not because states were loath to divert funds from roadway projects unless they were specifically earmarked for alternative transportation projects, which didn't occur until the Intermodal Surface Transportation Efficiency Act ("ISTEA") of 1991.\textsuperscript{39} The expiration of the LWCF led to the cessation of most new large-scale bike path projects after 1975.\textsuperscript{40}

The BIA responded to the LWCF initiative by surveying local parks and recreation departments about their recommended best practices for construction and maintenance, then issuing these in 1969, as \textit{Bike Trails and Facilities – A Guide to their Design, Construction, and Operation}, probably the first bicycle planning document published in significant numbers in the United States.\textsuperscript{41} The Metropolitan Association of Urban Designers and Environmental Planners ("MAUDEP") held their first MAUDEP bicycle/pedestrian conference in San Francisco in December 1972, followed by annual meetings in Orlando and San Diego.\textsuperscript{42} In May 1973, the BIA hosted the first of its own "Bicycles USA" conferences, a descendent of which, Pro-Bike/Pro-Walk, is still held biennially.\textsuperscript{43} By

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.} at 319.
  \item \textsuperscript{35} \textit{Id.} at 320.
  \item \textsuperscript{37} John B. Corgel & Charles F. Floyd, \textit{Toward a New Direction in Bicycle Transportation Policy}, 33 \textit{Traffic Quarterly} 297, 297-310 (1979).
  \item \textsuperscript{40} Corgel, \textit{supra} note 37, at 301.
  \item \textsuperscript{41} \textit{WALTER L. COOK, BIKE TRAILS AND FACILITIES - A GUIDE TO THEIR DESIGN, CONSTRUCTION, AND OPERATION} (1965).
  \item \textsuperscript{42} Auerbach, \textit{supra} note 32, at 22.
  \item \textsuperscript{43} \textit{Id.}
1974, Auerbach was disclaiming any unique leadership role for the BIA, saying that "the bikeway movement has grown so big and so fast that it is no longer possible to say who is leading it; it no longer matters."  

C. A DARWINIAN PERSPECTIVE

Meanwhile, the small city of Davis, California was investigating the potential and problems of roadway bicycle facilities. Davis, about fifty miles east of the San Francisco Bay Area, had long been the site of the University of California's agricultural research station, but the crush of post-war G.I. Bill students in 1947 started to overwhelm the main campus in Berkeley. California upgraded Davis to a separate UC campus and put it on a crash construction program. Unusually spread out, a legacy of its farm school days, and lacking an adequate campus transportation system, the school's first chancellor, Emil Marak, paved campus roads to be a little wider than usual, restricted cars to peripheral lots, and urged everyone to use bicycles. The city's bikeway movement began in 1963 when faculty members Frank and Eve Child returned from a sabbatical in the Netherlands at almost exactly the same time the city police were implementing a crackdown on errant cyclists and the city council was enacting several new get-tough laws on riders. Assisted by Dale and Donna Lott, who arrived from Seattle in 1965, the Childs made bicycle use an important quality-of-life issue in municipal elections in 1964 and 1966, with an openly sympathetic slate of candidates elected in 1966. A supportive city public works director, Dave Pelz, turned to the University for advice on implementing the new commission's mandate. The Lotts, Robert Sommer, Melvin Ramey, William Adams, and graduate students Bonnie Kroll and Wes Lum, among others, created an informal research group to evaluate bicycle use and the design of facilities. Their work was highly experimental, placing an emphasis on modifying the street system to facilitate utilitarian bicycle trips, often by cyclists of modest ability. "The city streets became our laboratory," recalled Sommer many years

44. Id.
46. Id. at 146.
49. GUMPRECHT, supra note 45, at 151.
later. Donna Lott agrees: “Much of what we did was trial-and-error . . . we put things down . . . we took them up . . . we improved it and tried again.”

Nevertheless, it is clear that the university study group looked to European, particularly Dutch, techniques as a template. These techniques stressed the complete separation of bicycles and motor vehicles, even to the point of placing bicycle lanes behind parked cars or grassed median strips. While such designs improved most cyclists’ perceived comfort in mid-block, they frequently created visibility problems and added conflict points at intersections. The practicing engineers at the city’s public work department, who had to live with such innovations, were not always as enthusiastic as the researchers. “[T]o a man they commented about the intersection problems,” noted Dale Lott and Robert Sommer. The research group believed that most of these could be addressed by placing additional restrictions on motorized traffic, eliminating on-street parking, converting streets to one-way operation, or installing separate traffic-signal phases just for bicycles.

On the other hand, CalTrans engineer Harold Munn believed design treatments to accommodate bicycle use relying on new automobile restrictions were wildly impractical:

Just about everyone seems to believe that an arrangement that will physically separate bicycles from motor vehicles is absolutely necessary . . . [but] the pressure to provide additional capacity for motor vehicles has been unrelenting . . . until very recently, reserving space on the roadway for bicycles was the last thing on anyone’s mind . . . [will] the motoring public accept some minimum provision for bicycle use of the public roads? The possibilities at present are very limited.

The problem is that Munn himself had no real alternative to offer: “There is an inherent risk to the bicyclist when he competes with the motor vehicle for space on the road.” All he could suggest was urging cyclists to become more proficient in riding with traffic and stepping up law enforcement efforts to force cyclists to “operate their bicycles as they do their automobiles,” a principle he called “vehicular integration of cycling,” although he admitted that “observation will reveal that club rid-

50. Bikeway Research, supra note 47, at 48-49.
51. Telephone Interview with Donna Lott, supra note 47.
54. Id.
56. Id. at 757.
ers behave no better than the organized majority.\textsuperscript{57}

Bob Sommer dismissed Munn's "vehicular cycling" philosophy as "a Darwinian perspective, with the road as a test of survival for the fittest."\textsuperscript{58} The Lotts were even more disdainful of vehicular cycling, asserting, among other things, that it was blatantly sexist, with adherents deluding themselves that "the rare sight of a doughty rider challenging taxis, trucks and tornados on a featherweight 15-speed bicycle will inspire a murmured or silent, 'there goes a real man,' from every passerby."\textsuperscript{59} To some extent, they were right: the best systematic study to that point indicated that proficient women cyclists had a higher accident rate than their male counterparts (the opposite was true among the general cycling population by a wide margin), suggesting that a total reliance on cyclist proficiency to master the intricacies of urban traffic presumed a level of brute physical strength that not every potential cyclist could muster.\textsuperscript{60}

The work at UC-Davis resulted in a stridently pro-bikeway report published in the Congressional Record in April 1971.\textsuperscript{61} Its findings were as rosy-eyed as Munn's had been gloomy. "Just as one cannot have a railroad without tracks, or a bus system without highways," it concluded, "no bicycle paths, no bicycles."\textsuperscript{62} Despite later claims by some ardently pro-bikeway advocates that the Congressional Record report formed the bedrock of American bicycle planning, the evidence points to a continuing evolution away from such a categorical approach during the early 1970's.\textsuperscript{63}

In the summer of 1971, the California legislature asked CalTrans to
“study the most feasible and least expensive methods by which existing
and future public streets and thoroughfares can more safely accommo-
date bicycle riders . . . ”64 By the time the project was awarded to
UCLA’s Institute of Transportation and Traffic Engineering, it had some-
how morphed into “A Study of Bicycle Path Effectiveness,” which among
other options, addressed how to incorporate bikeways on existing street
rights-of-way, that is, on bike lanes and sidewalk-style bike paths.65 Its
final report, Bikeway Planning Criteria and Guidelines, retained several
of the more controversial Davis designs such as their sandwich bike lane,
which placed the lane between the curb and a row of parallel-parked
cars.66 This probably shouldn’t be surprising, as much of the work was
done in Davis, and UC-Davis’s Mel Ramey was a co-author. The UCLA
report was briefly influential, but was quickly eclipsed by more advanced
work coming out of the Federal Highway Administration (“FHWA”). In
1974, Bikeways – State of the Art, the first report of a three-year five-
volume project, had identified the sandwich lane as a “problem,” and by
1976, when the final two volumes, Safety & Locational Criteria for Bicycle
Facilities, were issued, it had been relegated to the category of “not rec-
ommended.”67 By now, even the Davis public works staff had written the
sandwich lane off as a “well-intentioned, but ill-fated design,” and had
moved to the FHWA standards.68 It was Safety & Locational Criteria for
Bicycle Facilities that proved to be the template for the next two decades
of American bicycle planning, not the more exotic of the Davis designs.69
Of the UC-Davis group, only Donna Lott, who later joined CalTrans,
stayed active in the field of bicycle planning. The others eventually re-
turned to what she describes as “more or less traditional areas of aca-
demic research.”70

Norman Clarke estimated that in 1965, a third of his firm’s produc-
tion of 650,000 was in some form of multi-geared bicycles: “3-speeds and
5-speeds, some 10-speeds.”71 Between 1970 and 1972, during the great
American bicycle boom, domestic production increased from 4.9 million
units to 8.7 million, and total sales – domestics and imports – shot up

65. See GARY FISHER ET AL., SCHOOL OF ENGINEERING AND APPLIED SCIENCE, UNIV. OF
CAL. LOS ANGELES, BIKEWAY PLANNING CRITERIA AND GUIDELINES (1972) (prepared for Cal.
Dep’t of Pub. Works).
66. Id. at 70.
67. DAN SMITH, FEDERAL HIGHWAY ADMINISTRATION, BIKeways – STATE OF THE ART
17-18 (1974); DAN SMITH, FEDERAL HIGHWAY ADMINISTRATION, SAFETY & LOCATIONAL CRITERIA
FOR BICYCLE FACILITIES USER MANUAL VOL. II DESIGN AND SAFETY CRITERIA 14
(1976).
68. Takemoto-Weerts, supra note 52, at 12.
69. Id.
70. Lott, supra note 47.
71. Clarke, supra note 3.
from 6.9 million to 13.9 million. Clarke insists that the boom was not just something that happened: "Oh, no – we worked like hell for it." But the decision to simultaneously fight imports and aggressively cultivate adult riders was one that would have enormous unintended consequences.

### III. The Early Regulations

#### A. Too Much Timidity and Inordinate Delay

In 1970, the BMA issued a set of voluntary industry standards called BMA/6 to standardize the design and construction of all bicycles with wheels twenty inches or greater in diameter, or bicycles intended for riders over 100 pounds. BMA/6 was issued in anticipation of a federal government report under preparation by the National Committee on Product Safety ("NCPS"). The outcome of a large-scale three-year study, it was believed that the report would be sharply critical of the bicycle industry for not developing product safety standards in general, and particularly, for failing to adopt minimum rules for lights and reflectors. Fred DeLong, technical editor of Bicycling magazine, noted that "[b]ikes have been designed to attract the fancies of children, and sound engineering has often been disregarded." He applauded BMA/6's prohibition of dangerous fads, such as steering wheel-shaped handlebars and extended chopper forks. Echoing a recent French regulation, BMA/6 also mandated the addition of pedal reflectors and a white front reflector to the traditional red rear reflector.

72. Berto, supra note 2, at 133-41.
73. Clarke, supra note 3.
74. Bicycle Manufacturers Association of America, Bicycle Standard BMA/6: Safety Standards for Regular Bicycles (1970) (revised in 1972, second revision in 1974). The definition of a "sidewalk" bike (those excluded from BMA/6) was changed in 1974 to eliminate the 100 pounds specification. After this, all bicycles with wheels less than twenty inches in diameter were considered sidewalk bicycles (including some high-quality adult portable and folding bicycles).
77. Id. at 26-27. Chopper forks and the like were prohibited after July 1, 1971.
78. Id.
In March 1972, the U.S. Food and Drug Administration ("FDA"), which had regulatory jurisdiction over children’s toys under the 1969 Child Protection and Toy Safety Act amendments ("CPTSAA") to the Federal Hazardous Substances Act ("FHSA"), issued its own report on bicycle accidents, including a review of BMA6. Among other things, the report recommended strengthening standards for nighttime conspicuity, suggesting that reflective systems should not only make a bicycle visible at night, but should also make a readily identifiable outline of a bicycle.

In May 1973, the FDA issued a draft “banning order” under the FHSA including any bicycle intended for use by children under age sixteen. Based loosely on BMA6, the regulation in effect prohibited all “hazardous” bicycles and established the minimum criteria a bicycle must meet to avoid being considered hazardous. It did not specify how a bicycle “intended for use by children” would be differentiated from one meant for adults, but the order did contain sections covering quick-release wheel hubs and derailleur gear systems, strongly suggesting the FDA may have had more than sidewalk bikes in mind. Four days later, all authority over the regulations were transferred to a new agency, the Consumer Product Safety Commission ("CPSC"), a commission created by Congress a year earlier under legislation drafted in response to the 1970 NCPS final report. The staff of the Senate Commerce Committee, which drafted the enabling legislation, had been highly critical of the FDA’s existing rulemaking procedures, finding the procedures “marked by too much timidity and inordinate delay." However, due to a quirk in the old 1969 CPTSAA, the new CPSC legislation actually had more stringent rulemaking provisions when it came to toys and other children’s products, a fact that would not come to light for years.
The first major article on the new regulations appeared in the July 1973 issue of *Bicycling* magazine. Based on interviews with Paul Hallman, a CPSC attorney, and BIA staffer James Haynes, the article predicted that the banning order would soon be expanded to include adult bicycles, and claimed that the BIA favored this change. "[W]e have found no biker as yet who supports it," they wrote, "[o]nly the Bicycling Institute of America has stood out in favor of it." The Stockards quoted the BIA's Haynes as saying, "It is fine, as far as it goes, but it doesn't go far enough . . . ."

The article was wrong on both counts. It was true that the CPSC staff was debating whether it was feasible to distinguish between a bicycle intended for children from one intended for adults, but ends up being used by a child. However, there was no way Attorney Hallman could have known of any CPSC decision since none had yet been made. In February 1974, seven months after the article came out, CPSC Assistant General Counsel David Schmeltzer wrote the Commission chairman that it was "questionable . . . whether a regulation applicable to all bicycles, without any distinction made between children and adult bicycles, could sustain a court challenge," and added that he personally believed "a court would rule that a regulation issued under the [FHSA] covering all bicycles is illegal."

Moreover, the BIA was clearly not in favor of changing the banning order to include adult bicycles because they did not support any banning order. A month before the *Bicycling* article appeared, the BMA had petitioned the CPSC to junk the original FDA-based proposal. Instead, it wanted the CPSC to start over again under its own enabling act, the CPSA. True, the CPSA allowed the Commission to continue down the FHSA procedural road for rules already started by the FDA, (the bike rules had been issued four days before the transfer) but whether it was required to do so would later become a source of contention.

than those required under the new act, the old requirements were actually less stringent in the case of toys. Moreover, the new legislation did not eliminate 15 U.S.C. § 1262(e), creating a conflict of laws.

89. Id.
90. Id. at 42.
91. Id.
94. Id.
95. See *Forester*, 559 F.2d at 784, 789.
Regardless, the BIA wanted the banning order dropped for three reasons. First, it had invested a lot of time, effort, and money in BMA/6 and didn’t want to walk away from the industry standard. But, depending on how the CPSC drew the line between a child’s bicycle and an adult bicycle, BMA/6 threatened to create a regulatory nightmare. Recall that BMA/6 covered all bicycles with wheels twenty inches or larger, and those intended for riders over 100 pounds, so-called “regular” bicycles. The smaller and lighter bicycles not included in BMA/6 were called “sidewalk” bicycles. However, BMA/6 made no pretense of considering this a child/adult distinction, as many bicycles in the “regular” category with twenty and twenty-two inch wheels were clearly designed with children in mind.

The BMA firmly believed the CPSC lacked the power to regulate adult bicycles under the FHSA. Their lawyer, Thomas Shannon, told a Congressional subcommittee that the act “only governs toys or other articles intended for use by children.” But even if the CPSC had acquiesced to the industry, unless it used a definition of “child’s bicycle” matching the BMA/6 definition of a “sidewalk bicycle,” its banning order would leave a conflicting hash of BMA/6 and CPSC rules. There would be three different regulatory classifications: no BMA/6, but the banning order, for very small sidewalk bicycles; both BMA/6 and the banning order covering regular bicycles that were still small enough to be considered by the CPSC as intended for children; and BMA/6, but no CPSC, for large, expensive bicycles meant only for adults.

Moreover, firms like Schwinn, which both imported and manufactured bicycles, faced additional problems because their European and Japanese suppliers preferred the standards being promulgated by the Geneva-based International Standards Organization (“ISO”). ISO had created a task group (“TC-149”) in 1973 dedicated to the development of bicycle standards. ISO’s representative in North America, the American National Standards Institute (“ANSI”), soon followed suit with its own group. “The European nations wanted to use the ISO standards being developed by TC-149,” recalled Schwinn’s Townley, “anyone who both imported and built domestically had a great interest in maximizing compatibility between the ISO-ANSI standards and government regulations.” The best thing for all manufacturers, both foreign and domes-

98. Id.
99. Id.
100. Townley, supra note 16.
tic, was simply to ignore the concept of "child's bike/adult's bike" and simply come up with one set of workable specifications that all bicycles, except for small, cheap toy bikes could meet. While domestic-only makers ideally preferred a set of rules based on BMA/6, Townley stated, "compatibility was the real issue."102

A second reason the BIA wanted the proposed FDA regulations scrapped was because banning orders were not product safety standards—they only defined a "hazardous bicycle," and the industry wanted a full set of safety specifications for protection from products liability lawsuits. "[I]t is, at best, legally questionable whether the [FHSA] enables the promulgation of complex, highly technical product standards," cautioned BIA/BMA counsel Shannon, "nowhere in the act or in the legislative history did Congress indicate any intention to grant authority to set prescriptive standards such as those now proposed for the bicycle industry."103 Shannon did not, of course, admit that lawsuits were the concern. Instead, he maintained that the banning order could create an "all-or-nothing" situation where flexible mitigation measures such as repairs, upgrades or partial replacements were not permitted.104 However, the industry had rarely resorted to such measures in the past, and their use was highly speculative.

Third, and most importantly, the bicycle industry wanted preemption. To prevent a manufacturer from having to meet one set of product safety standards in one state, and another in a second state, Congress determined that once the CPSC issued its standards, those rules took precedence over state law.105 The old FDA banning orders did not have preemptive effect. Norman Clarke noted that during just one year, 1973, over 400 bicycle-related laws and ordinances were introduced in state legislatures, and the BIA eventually had to dedicate a staff person, administrative assistant, and fax machine full time to support local lobbying efforts.106 The BIA was especially concerned about rules for nighttime conspicuity. After the original 1972 FDA report calling for enhanced reflectivity standards, the 3M Company developed a reflective tire sidewall for bicycles.107 It wanted the BMA to include these as mandatory equipment in BMA/6, but the industry refused because they were too expensive, costing about five dollars per bicycle at the factory.108 Instead, the

101. Id.
102. Id.
104. Id. at 147.
105. Id. at 148.
106. Clarke, supra note 1, at 550-51.
107. Id.
108. Id.
BMA came up with a “10-reflector system” with front, rear, wheel and pedal reflectors costing about a dollar per bicycle, and this was very near to what the FDA subsequently put in its banning order.\footnote{Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and H.R. 6107, supra note 92, at 26 (comments and recommendations of the Schwinn Bicycle Co.).} \footnote{Quick Digest of Laws to Watch, BICYCLING, Apr. 1974, at 8.} 3M and tire companies tried to do an end-around the federal rules by going to the states. At one point in the spring of 1974, thirty-eight separate bills in twenty-three states were pending dealing with some aspect of bicycle lighting or reflectorization requirements.\footnote{Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000, supra note 96, at 128 (statement of Jay Townley).} Jay Townley explained the problem to a federal congressional committee:

We have three demonstration bicycles to illustrate the conflict we face . . . [this] bicycle cannot be sold in Rhode Island now; in New York after May and in Nebraska after January . . . The second bicycle, we will call our Rhode Island unit . . . cannot be sold in California now; New York after May, Nebraska after January, and Illinois now . . . This third bike, we call our New York unit because it complies with the current regulation there for reflectorized tires, but it cannot be sold in California . . . All three of these bicycles do meet the federal regulations.\footnote{Telephone Interview with Dorris Taylor, former partner of John Forester (Nov. 5, 2007).} \footnote{Letter from John Forester, League of Am. Wheelmen, Inc., to Carroll Quimby, President, L.A.W. (Feb. 6, 1973) (on file with the Transportation Law Journal); Palo Alto, Cal., Resolution 4441 (Apr. 19, 1971); Palo Alto, Cal., Ordinance 2652 (Apr. 24, 1972).} \footnote{Palo Alto, Cal., Ordinance 2771 (Feb. 11, 1974) (repealing the provision after twenty-two months).} \footnote{John Forester, What about Bikeways?, BIKE WORLD, Feb. 1973, at 36-37.} \footnote{Groves, supra note 7.} \footnote{Forester, supra note 6, at 25-26.}

**B. Sarcastic Words about Supposed Sneaky Tricks**

The BIA’s July 1973 petition to the CPSC caught the attention of a San Francisco-area production analyst named John Forester.\footnote{Telephone Interview with Dorris Taylor, former partner of John Forester (Nov. 5, 2007).} A devotee of Harold Munn’s “vehicular cycling” theory, he had become a local cycling advocate in the fall of 1972 when the City of Palo Alto enacted a mandatory sidepath law along his favorite commuting route.\footnote{Letter from John Forester, League of Am. Wheelmen, Inc., to Carroll Quimby, President, L.A.W. (Feb. 6, 1973) (on file with the Transportation Law Journal); Palo Alto, Cal., Resolution 4441 (Apr. 19, 1971); Palo Alto, Cal., Ordinance 2652 (Apr. 24, 1972).} The ordinance was soon repealed, but instigated his campaign for the universal elimination of bike paths and bike lanes.\footnote{Telephone Interview with Dorris Taylor, former partner of John Forester (Nov. 5, 2007).} He had not gained many adherents, and an anti-bike path article he wrote for the February 1973 issue of a regional magazine, Bike World, had gone largely unnoticed.\footnote{John Forester, What about Bikeways?, BIKE WORLD, Feb. 1973, at 36-37.} “He was an arcane technical kind of guy without much in the way of persuasive skills,” explained Morgan Groves.\footnote{Groves, supra note 7.} But a second Bike World article, “Toy Bike Syndrome,” published the following October, did get attention.\footnote{John Forester, supra note 6, at 25-26.}
and American bicycle manufacturers to use bike paths and safety regulations to shut out high-quality imported European racing bicycles, force proficient cyclists off the roads, and create a monopoly for cheap, department-store bikes. Claiming that he spoke for the “true cyclist,” Forester cried, “We are driven off the roads, forced to drive dangerously, and will soon be compelled to ride toy bicycles.”118 He called the CPSC “ignorant bureaucrats,” the BIA-BMA member firms “cycling’s old enemies, the American manufacturers of toy bicycles,” and the new bike-boom era cyclists “the intellectually dissatisfied middle classes,” who “have a basic aversion to machines.”119

Forester’s article reflected a polemical style that frequently alienated potential friends and allies. “He was prone to inflammatory comments,” notes Townley.120 Dorris Taylor, Forester’s partner at the time, admits that “style-wise, there were things that could have been different . . . he knew he was always right.”121 At a national bicycle planning conference later that year, Forester told the audience that when the chairman of his city’s bikeway committee had been struck by a car “we all laughed uproariously. We’d have laughed harder had he been injured seriously,” and described his own cycling technique as “outrunning all those police cars.”122 Morgan Groves cautioned him “you run the risk of a kind of pointless martyrdom unless you can join forces with people with similar concerns, develop a consensus, some realistic strategies, and workable tactics.”123 Even the Bike World editors felt it necessary to distance themselves from Forester’s overwrought article, stating that “we have no right to accuse the government of collusion with the Bicycle Manufacturers’ Association . . . it is no use writing sarcastic words about supposed sneaky tricks between the BMA and the Federal government.”124

It was the idea that the BMA would try to shut out the high-priced foreign racing bicycles prized by enthusiasts that club cyclists really latched onto. “What they plan to enforce will wreck havoc on the sophisticated and expensive bikes that many of us ride,” wrote one worried L.A.W director to Morgan Groves.125 Not only cyclists were taken in.

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118. Id. at 25.
119. Id. at 24-25.
120. Townley, supra note 16.
121. Taylor, supra note 112.
122. John Forester, Planning for Cyclists as They See Themselves, PROCEEDINGS OF THE SEMINAR ON BICYCLE/PEDESTRIAN PLANNING & DESIGN, at 315-27 (1974). The conference was held in Florida in December, 1973, although the title page of the proceedings erroneously provides a 1974 date. The 1974 conference was held in New Orleans.
125. Letter from William Hoffman, N.Y. Area Dir., League of Am. Wheelman, Inc., to Mor-
Brookings Institution researchers Nina Cornell, Roger Noll, and Barry Weingast asserted in 1976 that bicycle regulations were an “egregious example” of a trade association’s attempt to restrict foreign competition. The only source they cited was “Toy Bike Syndrome.” Ross Petty, a lawyer and professor at Boston’s Babson College, looked into Forester’s “protectionist theory” in the 1980s. He recalls Forester “calling me and sending me a pile of papers,” trying to persuade him of an industry-CPSC conspiracy. Petty’s conclusion? There was “little evidence to support the allegation,” because most foreign-made bicycles, whether from Europe or Asia, “readily could be modified to satisfy the standard.” A decade later, Petty was even more blunt, stating, “commentators have criticized [the CPSC] rule as being a blatant attempt to restrict foreign competition. This criticism is misplaced.” While there was, about this time, some concern with “cheap, imported bicycles that were unsafe and giving the industry a bad name,” this was not an important factor, because firms knew that “Japan could easily make a bike to satisfy the CPSC standard, so if the goal was to exclude imported bicycles, this goal would necessarily fail.” In fact, many, if not most, European manufacturers supported the idea of product safety standards, but as noted previously, they preferred an ISO-ANSI framework. Like the BMA, their primary motivation was state law preemption.

Raleigh of America, a wholly-owned subsidiary of British Raleigh, the Chambre Syndicale du Cycle, the French cyclemakers’ association, and the Syndicate des Fabricants d’Equipments et de Pieces Pour Cycle et Motocycles, the association of French cycle parts manufacturers, all wrote Congress supporting the Schwinn-BMA petition to re-start the rulemaking process under the CPSA. Raleigh stated that it “specifically sup-

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126. Nina Cornell, Roger Noll & Barry Weingast, Safety Regulation, SETTING NATIONAL PRI-
128. E-mail from Ross Petty to author (Sept. 17, 2007) (on file with the Transportation Law Journal).
129. Petty, supra note 13, at 37.
130. Id.
131. Petty, supra note 75, at 219. Petty cites several variations on the “CPSC rules as protec-
tionism” myth. I reviewed them, and found that all either relied on Forester’s Toy Bike Syn-
drome article as its source, or on a secondary work derived from it.
132. Id. Petty’s conclusions are outlined in greater detail in several articles, supra note 75. John Forester privately acknowledged the CPSC engineers’ concerns about poorly made Taiwanese bicycles: Letter from John Forester to “Cliff,” [probably Dr. Clifford Graves], with copy to Morgan Groves (Oct. 3, 1973) (on file with the Transportation Law Journal).
133. Fred DeLong, Editor’s Notes: CPSC Standards, BICYCLING, April 1974.
ports Schwinn's primary recommendation that the [FHSA] be repealed in its entirety and that concurrently all existing regulations issued under that Act be transferred to the authority of the [CPSC]."135 The French associations echoed the BMA concerns that "accurately portray the difficulties presently encountered by bicycle manufacturers as a consequence of state regulations."136 They added, "the difficulties are compounded for foreign manufacturers that confront language, communication and transportation problems beyond those borne by domestic manufacturers."137

Forester's "Toy Bike Syndrome" became a seminal article. Coming immediately after Ralph Nader's expose of corporate greed and rapacity in the auto industry, and the increasingly lurid theories spun around the death of President Kennedy by Mark Lane and Harold Weisburg, his article successfully turned the "bikeway issue" from a rather arcane municipal engineering spat into American cycling's version of the Dreyfus Affair. Three months after "Toy Bike Syndrome," a nationwide survey of cyclists in the *Journal of the American Institute of Planners* found that only three percent of arterial street cyclists, mostly commuters, considered bike lanes undesirable or inappropriate, although several complained that some of the very early, non-standard designs should be brought up to current configurations.138 "You have shown that as presently executed, they [bikeways] are more dangerous," Morgan Groves cautioned Forester, "but I do not think it is logical to jump from the fact you have proven to a rigid anti-bikeways position... if cycling enthusiasts neglect the interests of beginners, we all lose."139 Forester could not disagree more: "the only persons who have ever demonstrated the viability of cycling in America are schoolchildren and expert cyclists," he said, "a program to encourage cycling can be successful only if it encompasses all those features that expert cyclists have already found necessary."140

C. WE HAD THE AUTHORITY TO DO SOMETHING

In July 1974, the CPSC promulgated what it hoped would be the final version of the bicycle regulations.141 Rejecting the BIA petition to scrap

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135. *Id.*
136. *Id.* at 267-69 (letter from the Chambre Syndicale du Cycle, and the Syndicate des Fabricants d'Equipments et de Pieces Pour Cycle et Motocycles).
137. *Id.*
140. Forester, *supra* note 122, at 324.
the banning order and start over, it announced it would continue under the FHSA. However, arguing that any product that could foreseeably be regularly used by children was a product intended for children, it extended the banning order to all bicycles.142 The Commission opened a comment period lasting until August 1974, later extended until March 1975.143 Reviewing the latest rules, Bicycling's Fred DeLong determined that "a standard Fuji, Raleigh Professional, Schwinn Paramount or Peugeot PX-10 with reflectors added would pass the specifications."144 Forester didn't even wait for the revision. By October 1973, he had already decided to sue.145

The CPSC claimed they couldn't scrap the old FDA procedure because section 30(d) of the CPSA required them to use the FHSA unless they could prove it was inadequate to eliminate or reduce the risk of injury.146 The BMA countered that a lack of state law preemption hamstringed the effectiveness of the banning order so badly that it could never work, but the CPSC responded that this couldn't be used as a factor in making its evaluation. "Congress said 'you must first look to the [FHSA] and you must regulate under that act unless you lack sufficient authority to get the job done,'" explained CPSC Chairman Richard Simpson, "well, we had authority to ban, to write a standard. We had authority to enforce. We had authority to do something."147 However, as always, there were hidden agendas.

The CPSC, supposedly the model for a new generation of fast, cheap, and efficient federal rulemaking, was getting politically killed. New regulations on swimming pool slides required 570 days, matchbooks, 974; and lawn mowers, 1,670.148 The CPSC was under great pressure to promulgate standards quickly and inexpensively without having to water them down. Chairman Simpson complained to Congress that:

We have encountered what we believe, at least many believe, to be undue delay. There is due process and then there is "never." Some of those procedures seem like they end up being "never." We are not suggesting you should remove the due process procedures, but we have some that we are following on bicycles and fireworks that look like they might never be

143. Skrabak, supra note 141, at 56.
144. DeLong, supra note 133, at 6.
146. Forester, 559 F.2d at 784 n.11.
148. Schwartz, supra note 86, at 63 n.213.
The procedure did sometimes seem endless. In August 1974, Schwinn, the BMA, Bendix, and Raleigh and Shimano submitted formal, written objections to the July final rules, invoking their right to a public hearing. The CPSC, citing the highly streamlined procedures available under the FHSA exclusively for children's toys, denied the request. It is unclear whether the CPSC staff knew at this point whether they had made a mistake. Later actions suggest that they may have known of the mistake.

The following December, the CPSC again postponed the effective date of the rules, but this time, indefinitely. Throughout the first half of 1975, Commission staff met with industry representatives and toured bicycle and component factories in an attempt to iron out differences. "They made many visits," recalled Townley, "Schwinn was the most frequent, but there were also visits to and from China, Japan, Europe, and with ISO and ANSI . . . we ended up in a position where we could determine our own best way to meet the CPSC mandates - using performance specifications, not design restrictions." Ironically, Townley believes that it was this high level of cooperation that helped fuel the conspiracy theories.

In response to the Commission's June 1975 request for comments, John Forester was the only private citizen who filed a comment. Consumers no longer cared. The proposals had been so heavily reworked

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151. Id.
153. Forester, 559 F.2d at 789 n.22. The CPSC did hold a fully noticed meeting on September 9-10, 1974, but it was not a hearing, and the objections submitted were considered petitions (i.e. requests) for changes, not legal challenges. 39 Fed. Reg. 31,943-44 (Sept. 3, 1974); 40 Fed. Reg. 25,480-85 (June 16, 1975).
155. Townley, supra note 16.
156. Id.
that for virtually all performance cyclists, they were now irrelevant. DeLong had hit the nail on the head: if a standard European racing bicycle was only affected to the extent that it had to be delivered with ten cheap, quickly removable reflectors, the rules were a dead issue.158

IV. THE LAWSUIT

A. FROM THE FAT LADY TO FAST EDDY

The final CPSC regulations were issued in November 1975, and were scheduled to take effect the following May.159 Looking to keep litigation in his own backyard, Forester first filed in San Francisco.160 James Berryhill and the Atlanta-based Southern Bicycle League (who filled jointly)161 filed next, along with eight industry plaintiffs, including the BMA; Schwinn; Hedstrom (a maker of sidewalk bikes); Raleigh; Bendix; Union (a German parts maker); Shimano (a Japanese parts maker); and the Chambre Syndicale of French parts makers.162 At the time, Schwinn's Jay Townley said his firm filed only to meet evidentiary and procedural requirements. When asked if the firm actually planned to challenge the regulations, he responded with a flat "no."163

Others were still trying to salvage the process, but they were increasingly becoming voices in the wilderness. Fred DeLong, Bicycling's technical editor, sat on ANSI's technical advisory group and was the American liaison to TC-149, the bicycle committee of ISO.164 He had been working, with travel grants from Schwinn, as a technical liaison between foreign and domestic manufacturers to find a mutually acceptable set of rules.165 Similarly, L.A.W. executive director Morgan Groves warned his organization's president that the FDA "proposal needs serious study, as there are both good and bad points in it."166 He recommended the League "make some input before the regulations are fully adopted."167 He acknowledged that "L.A.W. is in a precarious position

158. Delong, supra note 133, at 6.
159. 40 Fed. Reg. 52,815-835 (Nov. 13, 1975) (Rules for coaster brakes and chain guards were not effective until November, 1976).
161. For this reason, I shall refer to Mr. Berryhill and the Southern Bicycle League collectively as "Berryhill".
162. Forester, 559 F.2d at 781.
164. DeLong, supra note 133.
165. Townley, supra note 16.
167. Id.
in that the industry has put up some money to establish the central office,”168 but insisted that the League “needs to be able to maintain its independence and opportunity to oppose, where appropriate, the desire of the industry . . . . the industry has done a great deal for the League, and it’s time now to show what we can do for ourselves.”169

Groves’s solution was to form an expert policy committee to deal with technical matters such as product safety rules and bikeway specifications, and in November 1973, he wrote Forester inviting “you, Fred DeLong, Dr. Bond, Floyd Frazine, Jim Konski and any others with the background and interest to work on an official position for adoption by the League. Fred is interested, and the need is critical. I think the platform should represent the whole range of cyclists, from the fat lady to fast Eddy.”170 Forester agreed, writing to Groves, “I’ll be very glad to work with others.”171 Groves later thanked Forester for his contribution, telling him, “[y]our work [sic], along with Fred DeLong, Dr. Bond, Carroll Quimby, and many others, has been invaluable to bicycling as a whole.”172 But by this time, the “Toy Bike Syndrome” article had come out, and he went on to advise Forester:

I think the battle has to be fought rationally, and it does no good to write off as enemies the people and institutions who disagree on specific points. Even the BIA and the BMA (which have some grievous faults) can and should be our allies on particular points. We should give them hell, but we should pat them on the back where possible, too.173

Forester could not accept such advice, and the two broke off contact. Fred DeLong became one of those “written off as an enemy.” Forester later accused him of being bought off by government and the industry. “The CPSC obtained the services of Fred DeLong to advise it about changes that would get the cyclists off its back,” he later wrote.174 “DeLong [was] a well-known cyclist with a long history of friendship with the

173. Id.
bicycle manufacturers.” According to Forester, only DeLong’s unique technical knowledge made it possible for the CPSC to secretly modify the original FDA banning order to the point where it could feasibly cover adult bicycles. “Fred should have told the CPSC . . . [that] he would have nothing to do with it,” he wrote, “[i]nstead, Fred jumped right in.” However, he is refuted by his own correspondence from that period, expressing no concern about working with DeLong on CPSC issues through Groves’s L.A.W committee. Jay Townley denies that DeLong was paid by the CPSC, explaining that “Fred didn’t have the breath of contacts to do all the coordination between the manufacturers, standards institutes, and the government, but he was important on the consumer end.” Townley does acknowledge that Schwinn underwrote part of DeLong’s expenses for participating in ANSI committee meetings in California (DeLong lived in Pennsylvania) and in an ISO TC-149 committee meeting in Paris in April, 1974, but these dealt with coordinating BMA/6 and ISO’s new international bicycle standards, not the CPSC rules. Finally, the CPSC was not dependent on DeLong: it had its own engineering staff. “The CPSC engineer was a man named O’Connor,” Townley recalls. Forester knew this, and he mentions O’Connor and DeLong discussing efforts to make CPSC and ISO brake block standards more compatible in a letter he wrote in October 1973, shortly before he and DeLong started working together on the League’s committee.

Relations between the two men were further strained over a bicycle safety education program that DeLong had developed in 1972, and was now updating for a Pennsylvania non-profit organization, the Bicycle and Pedestrian Transportation Research Center and its director, Ralph Hirsch. Hirsch described the education program as combining “the Fred DeLong approach to cycling proficiency training” with a “hazard record approach” resulting from research work that Dr. Ken Cross had done for the California Office of Traffic Safety. In the end, the Pennsylvania group never found the money to widely distribute it. Forester appropriated the program, incorporated Harold Munn’s “vehicular cy-
ling” ideas, jazzed it up with some of his Bike World polemics on “aggressively defensive cycling,” and tried to sell the resulting concoction to the L.A.W. under the trade name “Effective Cycling.” In the end, as Jay Townley recalls, “DeLong and Forester disliked each other intensely.”

Meanwhile, illness had forced Morgan Groves to step away from his position as L.A.W. executive director in the summer of 1975. He resigned in November, although he remained active on the National Committee on Uniform Traffic Laws and Ordinances (“NCUTLO”), an organization that maintains the model Uniform Vehicle Code (“UVC”), used by most states for their traffic laws. As L.A.W. executive director, he had been invited to serve on the committee in 1974, and when the League’s board decided not to immediately hire another executive director, he was asked to stay on.

Forester seemed especially piqued by the CPSC’s brake regulations. In this, he was on the same side as most of the industry, which preferred ISO’s international standards. Forester, however, couldn’t have cared less about ISO. The CPSC rules required caliper brake pads to survive a 250-degree Fahrenheit heat soak (typically in an oven) for thirty minutes without damage. Forester wanted coaster brakes subject to a “similar” heat test. By “similar,” he didn’t mean baking them at 250 degrees (meaningless, as their performance would be unaffected), but rather subjecting them to the same calorific load that a bicycle with front-and-rear handbrakes would have to generate to heat four caliper brake pads to 250 degrees for thirty minutes. This meant heating coaster brakes to over 900 degrees Fahrenheit. Since he knew no coaster brake could take that,
he was essentially demanding that coaster brakes be banned. Neither the CPSC or ISO standards were meant to measure maximum energy absorption or dissipation. They were merely intended to ensure that a brake pad would not melt under normal conditions.\footnote{191}

He argued his case in a lengthy March 1974 \textit{Bike World} article in which he gleefully burned up several coaster brakes while denigrating the CPSC, but admitted in passing that "[t]he government formula is approximately right" and, on a series of test runs, measured caliper-brake pad temperatures within fifteen percent of CPSC estimates.\footnote{192} While again claiming that the only reason for the brake standards was "to favor domestic over superior foreign bicycles,"\footnote{193} he forgot to mention that he had his own conflict of interest: at the time, he was being paid as an expert witness to testify in litigation against the Bendix Corporation, the nation's largest supplier of coaster brakes.\footnote{194} "There is no ideological basis to anything Forester does " complains James Green, a North Carolina engineer, competitive cyclist, and author on bicycle design, "[h]e will sway in the wind depending on who is paying him."\footnote{195}

\textbf{B. TULLIO WAS NOT HAPPY}

Throughout the first half of 1975, the bicycle regulations plodded simultaneously through the administrative, judicial, and legislative processes. In April, the eight separate lawsuits were combined in Washington, D.C. and Congress held hearings on various facets of bicycle safety, with the industry pleading their case for scrapping the banning order and moving everything to the CPSA.\footnote{196} Preemption was still a primary reason. "Why do [we] want to be regulated by a Federal agency?" responded Schwinn's Townley to one Senator's question, "[t]he answer clearly, as he [Chairman Simpson] pointed out in his testimony, is the problem of preemption and conflicting State regulations. If we don't

\footnotesize\textit{scores of runs}. \textbf{Frank Berto}, \textit{The Birth Of Dirt: The Origins Of Mountain Biking} 41 (Van der Plas Publ’ns 1999).
\footnote{191. \textit{Forester}, 559 F.2d at 792-93.}

\footnote{192. \textit{Forester}, \textit{supra} note 190. "[T]he front rim exceeded 175 deg. F., but did not exceed reach 200 . . . the rear rim did not reach 150 . . . the government formula . . . predicts 160."}

\footnote{193. \textit{Forester}, 559 F.2d at 792 n.24; \textit{see generally} \textit{Forester}, \textit{supra} note 190.}

\footnote{194. \textit{See Bendix Corp. v. United States}, 79 Cust. Ct. 108, 117 (Cust. Ct. 1977); \textit{see also} \url{www.johnforester.com}, \textit{Completed Cases with Deposition or Testimony}, \url{http://www.johnforester.com/Consult/cases1.htm} (last visited March 27, 2010) (indicating that Mr. Forester assisted the prosecution against Bendix).

\footnote{195. Letter from James M. Green to author (Sept. 7, 2007) (on file with the Transportation Law Journal); \textit{see also} \textit{Bendix}, 79 Cust. Ct. at 117.}

\footnote{196. \textit{See generally} \textit{S. Rep. No. 94-251}, at 4 (1975) (explaining that Congress held "5 days of hearings" and "received testimony from a variety of interested parties including trade associations, consumer groups, lobbying organizations, manufacturers, national retailers, independent testing laboratories, and the Consumer Product Safety Commission itself."
have one good national standard, quite honestly in these times there are manufacturers that will go out of business. ...”\(^{197}\) As a substitute, the CPSC proposed adding a preemption clause to the FHSA so that banning orders would preempt state laws, but even Chairman Simpson acknowledged that this could be too little, too late: “they [the bicycle industry] still would be faced with another problem, that the standard itself or the regulation may be stricken,” he told the Senate committee, “there are some suits currently pending which challenge the legality of the regulation as covering all bicycles. ...[s]o I think they had two problems.”\(^{198}\) Ultimately, Congress settled on the compromise: it granted state law preemption power to banning orders.\(^{199}\) Congress also gave the CPSC greater discretion to discontinue FHSA carry-over rulemaking and start anew under the CPSA,\(^{200}\) but the Commission, under heat from consumer advocacy groups for dragging its feet and mired in the Forester case, soldiered on.

The last final version of the bicycle rules was published in November 1975.\(^{201}\) The final version of the rules had an effective date of May 1975.\(^{202}\) In December, Schwinn, the last of the industry plaintiffs, withdrew from the lawsuit, leaving only Forester and Berryhill.\(^{204}\) David Schmeltzer, of the CPSC legal staff, explained that the industry plaintiffs either had been seeking extensions to the effective date or refinements to the standards, and these had been “granted or ironed out.”\(^{205}\) Jay Townley agreed: “we ended up in a position where we could determine our own way to meet the regulation ... [so] we backed off.”\(^{206}\) He recalled a meeting he attended in Milan in May 1976. “Tullio [Campagnolo, the famous bicycle component-maker,] was not happy - he was quite upset - but by the end we had assured him, showing him plans and specifications,

198. Id. at 303 (statement by Richard O. Simpson, Chairman, Consumer Prod. Safety Comm’n).
200. Id. § 16 (repealed 2008).
204. Skrabak, supra note 141, at 59.
205. Id.
206. Townley, supra note 16.
that it could be done with minor changes. This was true throughout the industry - Shimano, Huret, SunTour, all of them.” Bicycle makers, both foreign and domestic, withdrew, leaving the field to the advocates for whom they no longer had much empathy.

Looking for an objective point of view, Bike World asked Paul Hill, a lawyer, researcher at Omaha’s Creighton University Law School, avid cyclist, and later a widely published author in bicycle law, to review the case. He concluded, “as far as the average rider is concerned, the only rule of consequence to him apparently will be the reflectors requirement,” and recommended, “we stop quibbling over it.” He warned, “we may be past the point of CPSC rules or nothing. We may instead have CPSC rules or bizarre and conflicting state and local laws.” After examining the oft-repeated claim that a banning order could not be applied to adult bicycles, Hill cautioned that “I do not think the CPSC is as vulnerable on this point as some cyclists feel.”

Many dealers and distributors focused on the meaning of “one of a kind” bicycles, which were exempt from regulation. Forester attended a May 1976 CPSC meeting, after which he complained that staff members refused to precisely define what a “one-of-a-kind” bicycle was. In fact, the Commission had already issued two advisory opinions in writing clarifying the matter. Keep in mind that all bicycles are shipped to retailers in various degrees of disassembly, but some high-end bicycles are assembled on a made-to-order basis from a frame and components individually selected by the customer. Although neither the frame nor parts are individually tailor-made, the resulting bicycle is, as a whole, a unique creation. The CPSC was concerned that some firms would attempt to circumvent the regulations by simply shipping stock bicycles lacking a few components in one box and the missing parts in another, so they based the definition on what they labeled an “individuality” requirement. Unless “the assembly process is unique by individual order and substantially involves non-stock components,” a bicycle was considered stock.

207. Id.
209. Id. at 28-31.
210. Id. at 28.
211. Id. at 29.
212. The exemption is in 16 C.F.R. § 1512.1 (2009). The definition of “one-of-a kind” is contained 16 C.F.R. § 1512.2(e) (2009): “One-of-a kind bicycle means a bicycle that is uniquely constructed to the order of an individual consumer other than by assembly of stock or production parts.”
ester claimed this meant the CPSC would exempt only utterly unique bicycles made completely from scratch.216

However, his assertion ignored a second written advisory opinion issued almost two years earlier explaining that “imported frames . . . are not covered by our regulation because they are not fully assembled or ready-for-assembling bicycles but merely parts of bicycles . . . [and] the finished bicycles you build on those frames are not covered because . . . they are classified as ‘one-of-a-kind bicycles,’”217 Thus, there was no need to agonize about whether components were “stock” if the frame they were going on was individually made or imported and the assembly process was “unique by individual order.”218 Bicycling’s Don and April Stockard, never fans of the CPSC, had explained this to the cycling community back in September 1974. “The best explanation” they wrote, could be given through an example familiar to most readers. “If you order a bicycle and it must be built to your specifications, the bicycle would be exempt. If, on the other hand, it is not necessary to construct the bicycle specifically for you, no matter how expensive . . . it would be subject.”219 Forester tried to use the San Francisco meeting to bully the CPSC into a verbal interpretation that would open a new “two-box” loophole, but by now the CPSC staff knew him well enough not to give him a straight answer.220

Oral arguments were heard in October 1976. Ironically, most of the plaintiffs’ arguments were those originally raised by the BMA: 1) the FHSA allowed only outright product bans, not product specifications (Forester and Berryhill); 2) the FHSA permitted only the specification of prohibited features; it could not create positive rules defining a good bicycle (Forester); 3) the FHSA was limited to items intended for use by children and could not be used to regulate adult products (Forester); 4) the rulemaking process violated the plaintiffs’ Constitutional due process protections (Berryhill); 5) the sixteen rules actually promulgated were so

216. Forester, supra note 213, at 7.
220. Forester, supra note 213, at 7.
technically flawed that they were ineffective in eliminating cycling injuries (Forester).221

None of these arguments were as strong as they could have been. Berryhill argued against the tortured procedural history of the rules on Constitutional grounds, not as mere statutory violations.222 This proved to be a strategic decision that even the court itself eventually called into question.223 Forester's strongest argument was that the FHSA's "products intended for children" language couldn't be stretched to cover bicycles clearly meant for adults, and thus the CPSC could only regulate small, cheap, toy bicycles. However, he dissipated most of his time, effort, and brief pages on what were essentially pointless digressions.

For obscure reasons, the 10-reflector rule became his bête noire. His position on nighttime conspicuity changed repeatedly over the course of the litigation. Back in 1973, he had demanded no federal conspicuity standards at all, claiming that "we'd be better off neglected,"224 a position he still held a year later when he told Bike World readers that he was suing the CPSC "to have the whole sorry mess set aside as incompetent and illegal."225 However, in his opening brief, he admitted that the Commission did have the authority to regulate children's bicycles, but argued that the standard should have mandated a front headlight requirement instead of reflectors.226 Apparently, he believed it was more likely the court would restrict the Commission's jurisdiction to children's products than void the rules completely.227 Following his hunch, he hoped he could convince the court to change the conspicuity requirement from reflectors to lights.228 If successful, children's bicycles would need to be equipped with a headlight, while adult bicycles would go unregulated. He may have come closest to revealing his strategy in a 2002 memoir of the case, when he wrote that "the manufacturers were terrified that they might be required to provide lighting systems," and that "for the kind of bicycles that the BMA sold, provision of a lighting system that would

221. Forester, 559 F.2d at 774 (other issues pertaining to product labeling have been omitted for brevity).
223. "It is unclear why these petitioners chose to rely upon the Constitution rather than upon specific provisions of the Administrative Procedure Act." Forester, 559 F.2d, at 787.
224. Forester, supra note 6, at 27.
226. Forester, 559 F.2d at 797.
228. Also at this time, Forester started a bicycle accessories firm, which sold a proprietary front headlight system. Forester claimed that the only two worthwhile headlight systems were his and acetylene lamps, which hadn't been made for 50 years because of their propensity to explode. JOHN FORESTER, EFFECTIVE CYCLING 344-55 (MIT Press 6th ed. 1993) (1976) (illustrating his headlight systems).
continue to function under childish use would probably double the cost of the bicycle."229

Forester seemed to be aiming for some type of domestic bicycle tariff, one that would serve the dual purpose of driving American cycle makers out of business while making bicycles too expensive for the casual, occasional, or indifferent cyclists he loathed so much. "The bicycle didn't exist from around 1920 to 1965," he wrote, "adult cyclists were generally respected [because] there were too few to be a nuisance to auto drivers. Now we have 10 to 50 times as many cyclists - enough to be uncomfortably visible."230 Forester hoped to use the CPSC ruling to turn the clock back to an idyllic, pre-bike boom era. "Before 1970, cyclists were able to operate on the road," his former partner, Dorris Taylor, explains,231 "Government started making rules and regulations . . . John saw [it as] catering to the least common denominator."232 However, in his last reply brief, Forester returned to his original position that the bicycle rules should contain no nighttime conspicuity standards at all, probably as a result of his belief that the BMA was trying to outflank him through the UVC.233

V. THE NCUTLO AFFAIR
A. A REAL TIRADE

The Forester case was extraordinarily drawn out. Although oral arguments were heard in October 1976, the court didn't hand down a ruling for another eight months. In the spring of 1977, while everyone waited, Schwinn and the BMA submitted a proposal to NCUTLO requesting a change to the UVC to eliminate the requirements for reflectors and brakes on small sidewalk bikes.234 Ostensibly, this would make the UVC more consistent with CPSC rules. "Any state mandating equipment which is not identical to the [CPSC] requirements will be preempted," they explained, "[if approved] no state can establish a requirement applicable to bicycle equipment regulated by the CPSC unless it is identical to the CPSC requirement."235 The specific amendment language was limited to sidewalk bikes, but the supporting documentation seemed to make no distinction between sidewalk and regular bicycles.236

229. John Forester, American Cycling From the 1940's as I Remember It, http://www.johnforester.com/Articles/Social/My%20History.htm (last visited Oct. 21, 2008).
230. Forester, supra note 115, at 36.
231. Taylor, supra note 112.
232. Id.
233. Forester, 559 F.2d at 797.
234. Agenda for NUTCLO Subcommittee on Operations Meeting, supra note 227.
235. Id.
236. The proposal amended four sections of the UVC. Sections 12-703 (rear reflectivity), 12-
Previously, 3M had approached the NCUTLO with a proposal inserting reflective sidewalls as mandatory equipment into the UVC, or at least permit them as an alternative to the 10-reflector system. “3M wanted reflective sidewalls on all bicycles and Schwinn and the others didn’t want it,” recalls Morgan Groves who, though no longer with the L.A.W., still sat on NCUTLO. The firm was the world’s largest maker of reflective materials, and Groves said they “had a heavy hand in its [NCUTLO] rulemaking.”

The industry believed that there was a functional difference between federal regulations that required makers to equip their products with mandatory safety equipment, and state laws directing the owners of those products to use optional safety devices for certain types or methods of operation. The former was an “equipment” regulation, while the later was a “use” regulation. In 1972, Schwinn’s southern distributor had been sued in Georgia by the parents of a twelve-year-old boy struck while riding his Stingray on a state highway at night. The parents argued that Schwinn and its dealer had committed various product liability torts because they did not equip the bicycle with a headlight. Schwinn countered that a bicycle without a headlight is adequate for the ordinary uses of a bicycle, and that a headlight is an accessory device the user must add to mitigate the obvious peril of nighttime riding. Schwinn prevailed, and the industry was now trying to codify the idea that if a bicycle met the CPSC standards it met all “equipment” mandates, and while states were free to impose other “use” requirements, these obligated only the owner/operator, not those in the chain of commerce.

At best, the rationale for the amendment was nebulous, and just the idea of affirmatively blocking states from adopting their own conspicuity or brake requirements for sidewalk bicycles that may yet find their way on to the road – if that’s what was intended – was fairly cynical. Townley denies that this was, in fact, the case: “we did not attempt to use

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704 (side reflectivity), and 12-706 (requirement for brakes) received almost identical language exempting bicycles with maximum seat heights of less than 25 inches. A new subparagraph (b) was proposed for Section 12-701 (equipment on bicycles) explicitly stating that “nothing herein is intended to be, nor shall be construed as being in conflict with the requirements of the Federal Bicycle Safety Standard . . . .” Id. at 77-83.

237. Groves, supra note 7. Not all bicycle makers opposed reflective sidewalls. Ross bicycle (Chain Bicycle Corp.) supported the idea, but agreed to remain silent so as not to oppose the BMA position. Townley, supra note 16.

238. Groves, supra note 7.


240. Id. at 816.

241. Id.

242. Poppell was a somewhat thin reed to lean on, as the court’s decision suggested that had the parents simply told the dealer the boy planned on nighttime use, selling a bicycle unequipped with a headlight may have amounted to selling an unfit product. Id.
NCUTLO and the CPSC to preempt local highway laws . . . these were use-oriented laws, not equipment requirements." On the other hand, the supporting arguments submitted by the industry gave the impression that, even if this wasn't the intent, it could become the result, as a clear use/equipment distinction did not always appear in the written arguments. While the motives involved are murky, it was clear that the proposal didn't do the one thing Forester claimed it did: prevent states from adopting headlight laws.

Both Forester and Morgan Groves attended the Chicago meeting. Afterward, Forester claimed that the BMA lawyers warned the Committee that the 10-reflector rule already preempted state headlight laws. However, Groves says that the BMA lawyers insisted only that the 10-reflector standard prohibited the mandatory imposition of 3M's reflectorized sidewalls. Groves characterized the meeting as "a real tirade," and both left angry with the other. Groves became the latest Forester ally to now be "written off as the enemy." Forester later claimed Groves had snubbed him when he asked the L.A.W. to join him as a plaintiff in the CPSC litigation because Groves was an industry plant who "made damn sure that the L.A.W.'s directors did not hear about the proposed bicycle standard . . . ." This is simply not true. On August 2, 1973, Groves sent L.A.W. president Carroll Quimby a copy of the original FDA draft rule, warning him, "[t]he proposal needs serious study." As previously discussed, Groves asked Forester to work with a committee consisting of Fred DeLong and League board members Robert Bond, Floyd Frazine, and Jim Konski to develop policy responses to federal bikeway and product safety initiatives. Forming a standing technical committee to "represent L.A.W. in the development of safety and performance standards for bicycles" was identified as a "Board Involvement

243. Townley, supra note 16.
244. See Agenda for NUTCLO Subcommittee on Operations Meeting, supra note 227, at 79.
245. See id. at 84. Although he later denied making such a categorical statement, Forester did say this in his agenda comments to the NUCTLO: "When the CPSC regulations came into effect in May 1976 all requirements in state vehicle codes for bicycle brakes and nighttime protective equipment became theoretically null and void." But see id. at 78. However, the proposed amendment did not change Section 12-701 of the Uniform Vehicle Code, requiring that "[e]very bicycle when in use [during darkness] shall be equipped with . . . a lighted lamp. . . ." Thus, it is very unlikely that the proposed amendment, had it been adopted, would have been preemptive.
246. Forester, supra note 229.
247. Groves, supra note 7.
248. Id.
249. Forester, supra note 160 (claiming that Groves deliberately refrained from commenting on the CPSC's proposed rules in order to deny the organization standing to sue).
Goal" in the 1974 Draft Work Plan submitted by Groves to the L.A.W. board in October 1973, although it is not known if the board acted on this recommendation.\textsuperscript{252} Finally, Groves opposed a suggestion by outgoing president Carroll Quimby and incoming president Phil Menninger in the fall of 1974 that the League attempt to fix its long-standing financial problems by selling high-priced corporate memberships, explaining that his "reason for not wanting to pursue major dues contributions from the industry is that L.A.W. needs to be able to maintain its independence and opportunity to oppose, where appropriate, the desires of the industry."\textsuperscript{253}

There is no record that Forester asked the L.A.W. to join the CPSC suit as a co-plaintiff, but Forester did write a friend in October 1973, informing him he was going to sue the CPSC and asking him to spread the word that "I am trying to get some philanthropic foundation money to finance my support while I undertake this in the public interest."\textsuperscript{254} He then forwarded a copy of the letter to Groves at the L.A.W. offices.\textsuperscript{255} Forester had been out of work since 1972, and when he started his bicycle advocacy work, he promised his partner, Dorris Taylor, that she would have to support him for only two years.\textsuperscript{256} With the imminent end to his court appeal in the Palo Alto bikeways case, (it was decided against him in November 1973),\textsuperscript{257} the clock was running out. What he probably wanted from the L.A.W. wasn't a co-plaintiff, it was a subsidy, and Groves wouldn't give him one.

A year after the NCUTLO meeting, Forester joined the L.A.W.'s board and immediately started pitching his "Effective Cycling" education course to the organization. The board subsequently adopted it,\textsuperscript{258} and Forester set up a company to act as the sole-source provider of the textbook. Some parts of the book were highly critical of the BMA and American firms, and the industry withdrew its financial support from the League, not to return for over a decade.\textsuperscript{259} Tim Blumenthal, who directs the bicycle industry promotion group that has provided some financial support since 1999 to the L.A.W., believes that the League was very for-

\textsuperscript{252} Morgan Groves, \textit{Draft Work Plans-1974} 1 (League of Am. Wheelmen).
\textsuperscript{254} Letter from John Forester, to "Cliff" (probably Dr. Clifford Graves) with copy to Morgan Groves (Oct. 3, 1973).
\textsuperscript{255} Id. (carrying an L.A.W. office date stamp of October 11).
\textsuperscript{256} JOHN FORESTER, NOVELIST & STORYTELLER: THE LIFE OF C.S. FORESTER 783 (2000).
\textsuperscript{258} Bill Hoffman, A Brief History of the League (May 26, 2007), http://www.labreform.org/history.html.
\textsuperscript{259} Blumenthal, supra note 7.
tunate to survive the decade after the retirement of Morgan Groves: “had the old-line cycling organizations continued to act the same way they acted in the late 70’s and early 80’s, they’d be out of business now.”

B. Obstacles In The Road

The reflector question itself was finally resolved a year after the For- ester decision was handed down, when Fred DeLong sought an advisory opinion from the CPSC.261 “There appears to be a great question in many minds about the pre-emption position of the CPSC regulations,” he wrote.262 “The statement has been made that since lighting isn’t included in the CPSC specs, that the pre-emption makes the State Laws that call for bicycle lighting at night are over-ruled,” he continued.263 “In my initial discussions with CPSC personnel . . . it was flatly stated to me that this [omission] was not meant in any manner to preclude lighting [regulations].”264 The CPSC’s response, Advisory Opinion 270, relied heavily upon section 17 of the Consumer Product Safety Commission Improvements Act (“CPSCIA”) of 1976 - the legislation that retroactively incorporated preemption into the FHSA.265 This was the provision the bicycle makers had to settle for when the CPSC would not scrap the bicycle banning order and start over under the CPSA. It became effective on May 11, 1976266 by no coincidence, also the effective day of the bicycle rules.

Section 18 of the CPSCIA prohibited states from imposing regulations “designed to protect against the same risk of illness or injury” as any CPSC rule.267 However, a state law did not fall within this prohibition if it was designed to protect users from a different risk or injury.268 Because the CPSC reflector regulations were meant to reduce the risk of injury from inadequate cyclist visibility to cars, but were not meant to reduce the risk from “obstacles in the road that may not be visible to a cyclist at night,” the Commission “believe[d] that a state lighting requirement for

260. Id.
262. Id.
263. Id.
264. Id.
267. An exception allowed the states to implement a law if the language was identical to its federal counterpart, but that was not the case here. Consumer Product Safety Commission Improvements Act, 90 Stat. at 510.
bicycles ridden at night would not be preempted.”

Schwinn and the BMA objected to that part of the advisory opinion, asserting that the “Commission inexplicably responded by discussing a hypothetical proposition, namely whether the state provision dealt with a risk of injury associated with an obstacle in the road.” They were clearly concerned that the Commission’s “two risks” argument gave them Poppell-type product liability protection only when it came to nighttime auto-bike collisions, leaving them exposed for injuries an unlit cyclist may suffer upon hitting, say, a pothole on a dark street. However, the CPSC’s letter clearly stated that the Commission staff itself had come to the conclusion that bicycle lights protect cyclists against the two separate risks of injury.

The BMA-Schwinn letter also complained that the CPSC should have clearly stated that preemption would not pertain to any “use” requirements, but only to “equipment” provisions. Townley argues that the industry was not after a ruling that would block local government headlight laws, but was “still worried about 3M trying to push reflectorized tires to the states.”

On January 16, 1979, the CPSC issued a revised Advisory Opinion 270-A. “While we are not withdrawing that opinion,” the Commission’s general counsel wrote, “we believe that further discussion of the question you raised is needed.” It followed with an even broader finding than that in the original Advisory Opinion 270: “Because the Commission’s regulation does not define how a consumer may or may not use a bicycle, the Commission believes that the [FHSA] does not prohibit states or localities from issuing or enforcing a requirement that lighting


273. Townley, supra note 16.


275. Id.
be used on bicycles ridden at night.” Bicycle makers should have quit while they were ahead.

In any case, it was a moot argument, one that had, for all intents and purposes, already been decided in the Forester decision. There, the Court noted that “most states require use of headlights and rear reflectors when actually riding at night . . . the [CPSC] regulation is not inconsistent with these state statutes.” Thus, even if the CPSC did admit that the industry was right about its “same risk” argument, it could point to the court’s reasoning, which assumed a priori that the CPSC 10-reflector rule was meant to be applied in coordination with state nighttime headlight codes, as proof that it lacked the power to make its reflector rules preemptive of any state headlamp laws.

VI. LAWN DARTS AND BODY COUNTS: THE COURT DECIDES

The D.C. Circuit Court of Appeals rendered its opinion in June 1977. As seemed to be true for everything else in this controversy, the stated issues weren’t the real issues and the outcome may, in fact, have been negotiated months before. On paper, the CPSC came out ahead. The bicycle regulations were legal, they could be applied to both children’s and adult bicycles, and twelve of the sixteen rules were valid, although four were found to be arbitrary and capricious and were remanded back to the CPSC for further consideration. Both sides declared victory.

When the industry plaintiffs settled and withdrew in the fall of 1975, their lawyers and experts went with them. They knew where the real Achilles’ heel of the CPSC’s case was, but because their clients no longer had a stake in the matter, it wasn’t their place to meddle. However, Washington is a small town and soon the word got around. There were two real issues, neither directly argued by the plaintiffs, and both related. The first had to do with the correct procedure for promulgating the bicycle regulations. Berryhill had argued that the CPSC’s procedures had violated his Constitutional due process rights. While they had not, they had, however, broken the law. As discussed earlier, the rulemaking procedures under the old FHSA were more demanding than those under

276. Id.
277. Forester, 559 F.2d at 797-98.
278. Id. at 774.
279. Id. at 789-98.
280. Townley, supra note 16.
281. See generally Forester, 559 F.2d at 784-90 nn.11 & 22 (discussing the overlap between the scope of the Federal Hazardous Substances Act and the Consumer Product Safety Act and mentioning that the parties did not raise the issue of the proper procedures and standard of review of the Consumer Product Safety Act).
the superseding CPSA, with one exception: toys. The so-called “1262(e) exception” allowed toy safety rules to be promulgated under the old FHSA under informal rulemaking protocols without formal public hearings, and required rule challengers to meet an “arbitrary, capricious and an abuse of discretion” standard. On the other hand, rules for toys and other children’s products issued under the new CPSA had to meet the same requirements as any other product: a public hearing, mandated express findings of need, and court challenges based on a lower “substantial evidence on the record” standard.

The CPSC asserted that they only had to meet the less restrictive 1262(e) requirements because they were carrying over FHSA rulemaking, not promulgating rules first released under the CPSA (recall that the bicycle rules were initially published four days before the FDA-CPSC changeover). They were wrong. Transfer language in the CPSA overrode the 1262(e) exemption for carryovers. The Commission held a public meeting on the bicycle rules in September 1974, but asserted at that time that it was not a public hearing, and that the objections lodged by the manufacturers did not constitute a rule challenge requiring administrative adjudication. Instead, it considered them using the same informal petition process under which the BMA had sought to have the original May 1973 banning order scuttled. Also, the technical challenges Forester raised in his lawsuit did not have to meet an arbitrary and capricious standard. He only had to show that based on a preponderance of evidence in the record that each rule would not carry out its intended function. However, Forester didn’t raise this argument and framed his technical arguments assuming an “arbitrary and capricious” standard.

The second issue dealt with the showing of need that the CPSC had to document. Under the 1262(e) exception, the FDA did not have to document.

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282. 15 U.S.C. § 1262(e) (2008); 5 U.S.C § 706(2)(A) (1970); see also Forester, 559 F.2d at 784-90 nn.11 & 22 (elaborating on the decision to carry out judicial review as if the rules had been promulgated under informal APA rulemaking and thus were subject to the “arbitrary and capricious” standard of review in 5 U.S.C § 553).

283. Forester, 559 F.2d at 789 n.22.

284. “The regulations establishing safety requirements for bicycles were issued in accordance with section 3(e) of the Federal Hazardous Substances Act . . . the procedures for issuing certain regulations which are set forth elsewhere in section 2(q) of the Act are not applicable to and were not used in the proceedings by which the bicycle regulations were issued. Because the bicycle safety regulations were not issued in accordance with the procedures of sections 3(a) or 2(q) of the Act . . . provisions of 16 C.F.R. 1500.201, relating to the filing of objections and requests for public hearings are not applicable in this matter.” Meeting Notice, 39 Fed. Reg. 31,943 (Sept. 3, 1974).

285. “[Petitioners] objected to various provisions of the regulations and requested a public hearing under 16 C.F.R. 1500.201. After consideration of these communications, the Commission concluded that 16 C.F.R. 1500.201 was not applicable to the bicycle regulations.” 40 Fed. Reg. 25,481 (July 16, 1975).
identify the risk that each rule sought to reduce, but the CPSC did. Forester asserted that the Commission was hiding behind 1262(e) because it couldn’t meet this "identify the risk" requirement. That was irrelevant as the CPSC could easily meet this requirement if it tried to, at least facially. However, because 1262(e) was overridden, the CPSC also had to meet another standard, a requirement that it make a “concise general statement of purpose,” which, legal niceties aside, was pretty close to an “identify the risk” requirement. Just like “identifying the risk,” jumping the “concise general statement” hurdle was not a problem, except that the CPSC did not do it. Again, Forester argued the Commission had continued under the FHSA because it couldn’t meet the “concise general statement” requirement, and again, he made the same error—it wasn’t that the CPSC couldn’t meet the standard, but that they did not do it. However, he was close enough to the truth that his arguments should have been rebutted by the CPSC, who merely fluffed him off on the basis of 1262(e) - a mistake, and a bad mistake. Either the CPSC lawyers were blissfully unaware their client had made serious procedural errors, which is unlikely, or more probable, they did know, but didn’t want to admit it for fear of opening a Pandora’s box. The CPSC’s lawyers were dancing around the truth, and believed they could get away with it because the heavy-hitters had pulled out and all they faced were a bunch of amateurs—especially Forester, who unwisely believed he was competent to act as his own lawyer. Unfortunately, the court caught on, and was not

286. Forester, 559 F.2d at 784 n.11.
287. "The Commission is required to hold public hearing and prepare a transcript, and to make express findings concerning the need for and effect of the proposed regulations... The parties have not raised or argued the issue. While the administrative record and findings would not satisfy the procedural requirements [of the CPSA],... the Commission has held hearings, compiled an extensive record, and otherwise substantially complied... We therefore assume that the present case is controlled by the provisions of 5 U.S.C. §§553 and 706(2)(A)." Id. at 789 n.22.
288. Id. at 784 n.11.
289. "I figure that I am the best qualified combination of cyclist, engineer, and amateur lawyer around." Letter from John Forester to "Cliff" (Oct. 3, 1973) (on file with the Transportation Law Journal). Ironically, there has also been some question as to Forester's credentials as an engineer, as he has no degree in that discipline. Forester was originally a physics major, but he failed a crucial mid-term examination and switched his undergraduate major to English, graduating in 1951. FORESTER, NOVELIST AND STORYTELLER, supra note 256, at 563-67; 576-78; Curriculum Vitae of John Forester, MS, PE, available at http://www.johnforester.com/Consult/currvita.htm. His professional engineering license is in industrial engineering. Database of California license holders: California Department of Consumers Affairs, available at http://www2.dca.ca.gov/pls/wlpub/wlqueryS.startup.action. Prior to 1973, the State of California granted "professional engineer" certificates to many types of para-professionals, such as "boiler engineer," "agricultural engineer," "quality engineer," and the like. CAL. GOV'T. CODE § 6732 et. seq (West 2009). Forester received a certificate in industrial engineering in 1951 and a master's degree in production management in 1964. In California, a professional engineer's license in industrial engineering is a business management specialty consisting of "systems of per-
happy.

At this point, things get murky. It appears that the court did not want to throw out the bicycle rules entirely. It also wasn’t inclined to consider the plaintiffs’ core argument that the CPSC could not regulate adult bicycles under a law meant only to cover products intended for children because the court believed this issue had been adequately addressed in a previous case, *R. B. Jarts Inc. v. Richardson* (concerning lawn darts), and it didn’t want to revisit the issue.290 On the other hand, it did very much want to clarify what the phrase “unreasonable risk of personal injury or illness” meant, not because it was terribly central to this case, but because several lower courts were waiting for guidance on this point.291 In short, the *Forester* court didn’t want the CPSC to get away with its disingenuous 1262(e) arguments, but on the other hand, it didn’t want to throw out the CPSC entirely because it needed this ruling to clear up several other cases that were backed up in its lower courts.

So, it appears likely that the court told the CPSC to go back to the bicycle makers and forge a consensus as to how many of the sixteen rules, based upon a lower “preponderance of evidence in the formal record” standard they could all live with. Townley is circumspect in regards to acknowledging the extent to which Schwinn and the other firms were involved in the case after their complaints were dismissed, noting only “Schwinn was ready in 1975 to meet all the CPSC requirements - including the ones that were thrown out.”292 It is probably no coincidence that all four of the rules remanded back to the CPSC were generally of greater concern to foreign firms, and were still the subject of active discussions by ISO’s technical committee, TC-149. The caliper brake rules, which the BMA had argued from the start should be covered by ISO standards, were struck, as was the protrusion rule (the one that had angered Tullio Campagnolo so much), the handlebar width rule (it had the potential to block some models of Italian Cinelli and Japanese SR drop bars), and the pedal tread rule (which could have outlawed the replaceable aluminum bodies of high-end racing pedals).293 Once it had this information, the court reviewed the technical merit of all sixteen CPSC rules, ostensibly

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290. Lawn darts were oversized plastic and metal darts about a foot long that players attempted to arc over a distance of 50 to 100 feet into a 3-foot plastic hoop laid on the ground. The CPSC completely banned them. *R. B. Jarts, Inc. v. Richardson*, 438 F.2d 846 (2d Cir. 1971).

291. In the five years after the *Forester* decision, the head notes referencing various facets of the “body count” ruling were cited almost a hundred times.

292. Townley, *supra* note 16.

293. *Forester*, 559 F.2d at 784-94.
using an "arbitrary and capricious" standard, and remanded the sacrificial lambs back to the Commission.294

The court upheld the R. B. Jarts holding which states that a product nominally intended by the manufacturer for adult use can be regulated by the toy act if it is reasonably foreseeable that the product would be subject to more than incidental or exceptional use by children.295 As to the issue the court needed to rule on, whether a precise statistical showing of the positive impact of any given rule was required, it said that the CPSC was under no obligation to develop a "body count" of the injuries reduced by each individual rule. Forester had argued that the CPSC was required to show each standard would eliminate entirely a specific hazard, a contention the court swept away with the admonition that "he has misread both the requirements of the FHSA and the relevant standard of review."296 Forester became known forevermore as the "body count" case.

VII. We Will Have to Go Through All of This Again

The CPSC never reissued any of the four standards remanded back to it, and the rest of the bicycle rules have gone unrevised, falling into obsolescence over the years. Ross Petty, who has closely examined their safety impact, twice concluded that they have been ineffective in reducing bicycle accidents and injuries.297 The BMA disbanded in 1984, and the last of its former member firms, the Murray-Ohio Company, went out of business in 1998.298 In 1991, the Schwinn Bicycle Company fell into bankruptcy and was purchased by the Scott Sports Group, who acquired it only for name. Scott itself disbanded in 2001, and Schwinn was sold to a Wisconsin bicycle distributor, Pacific Cycle Corporation.299 The last American mass-production bicycle factory closed in 1999, and only very expensive racing, touring and off-road machines are made in America.300

294. Id. at 789-98.
295. Id. at 786 & n.14.
296. Id. at 788.
298. The BMA was briefly (and unsuccessfully) resurrected in the mid-1990's to deal with "made in the USA" labeling issues under the Latham Act. It was replaced in 1999 by a combination of the Bikes Belong Coalition, which handles bicycling advocacy matters, and the Bicycle Product Suppliers' Association, which concerns itself with issues of trade, tariffs, and product regulation. "Made in the USA" issues: FTC File Number P894219, available at http://www.ftc.gov/opp/jointvent/madeusa/ftp/usa/045.txt (last visited Oct. 2, 2009); Blumenthal, supra note 7; Wilkinson, supra note 7.
In 1974, the American industry made 10.1 million bicycles and employed about 12,000 workers. By 1995, this was down to about 5.5 million units and 6,500 employees, with another 1,300 working for suppliers. Today, fewer than 2,100 workers remain; making around 250,000 bicycles annually. In early 2009, one of the two remaining American bicycle manufacturers, Cannondale, announced that it would discontinue all domestic production after 2010.

Jay Townley, who now spends most of his time advising American bicycle importers on doing business in Asia, worries that we are on the verge of another bicycle regulation war:

The new [Obama] administration will, after a very long time, finally fund the CPSC and have it do the job it should have done, and they will update the [bicycle product safety] regulations, which are obsolete. Because of the attitudes of people like Forester, we will have to go through all of this again, because there has been no industry education about product liability.

Bicycle planning has also suffered. By the mid-1990s, it was apparent to most that it was in deep trouble. Ronald Engle of the National Highway Traffic Safety Administration ("NHTSA") told an audience in 1994:

[Congress wants] to increase the amount of commuting, so forth, so on, trips by walking and bicycling. They also wanted to decrease the casualties by 10 percent. But at the same time Congress did that, they also took 70 percent of the funds that would go to pedestrians and bicycling safety and drew them away. So I think there's a message there from Congress ... So many of the things we would like to have available, and we planned to do this coming year, they're not going to happen. As a matter of fact we don't have any bicycle safety program for the next couple of years. . . .

As state and local transportation budgets continued to shrink throughout the 80s and 90s, many agencies turned to the type of skill-
based, anti-facilities program Forester advocated, not necessarily because it was the best approach, but because it was the cheapest. "Politicians latch onto his books and kill funding," says James Green, the cycling civil engineer, "this puts the public at risk and is deplorable."³⁰⁷ Local governments who wanted to continue developing bicycle facilities increasingly shifted the cost burden to real estate developers through impact fees or mandatory dedication ordinances.³⁰⁸ Not surprisingly, developers grew increasing strident in their opposition to bikeways and other "quality of life" mandates that increased their costs, banding together to form new political action groups such as the Portland-based "Building the American Dream Coalition," run by former staff of the ultra-conservative Cato Institute. Forester, these days an author and speaker for the American Dream Coalition, now grudgingly concurs with his former opponents on the impact of bicycle facilities: "Yes, there is a correlation between the amount of bicycle transportation and the presence of bikeways," he said in 2005.³⁰⁹

Predictably, however, he still parts ways with planners in conceding that this is a benefit: "those who cycle for transportation to any significant extent can be divided into the voluntary and involuntary cyclists. The involuntary cyclists... are those under driving age... those attending universities... those unable to obtain or retain a motoring license... these are all niches with little significance."³¹⁰ Government, he argues, should focus on voluntary cyclists, tourists, and racers. Such cyclists are "more likely to be found among professors, scientists, engineers, technicians, attorneys, doctors," and others who comprise the "respected and conservative portion of society."³¹¹ At this, Jay Townley merely sighs, ruing that "if it hadn't been for the CPSC case, Forester would have ended up some obscure bike club president somewhere."³¹²

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³¹⁰. Id.
³¹¹. Id. at 4, 9.
³¹². Townley, supra note 16.
Public Transit: Looking Back and Moving Forward

A Legislative History of Public Transportation in the United States and Analysis of Major Issues for the Authorization of the Surface Transportation Bill

Reasa D. Currier*

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INTRODUCTION: HUMBLE BEGINNINGS

In 1827, a 12-passenger horse drawn carriage began transporting passengers along Broadway in New York City, marking the debut of mass transportation in the United States.1 The horse drawn carriages soon gave way to electric streetcars that were owned and operated by private entities. High operational costs and limitations imposed on streetcar operations by the communities in which they operated created obstacles for the operators. When the automobile arrived on the scene in the 1920’s, transit operations continued to struggle as all levels of government devoted their transportation resources to the construction and improvement of highways.2 At the start of the 1950’s, the majority of the nation’s transit systems were privately owned and operated and on the brink of fiscal and physical collapse.3

Despite the pressing needs of mass transportation, the federal government was slow to respond. The Housing Act of 19614 was the first federal legislation to address public transit. The most notable provision of the Act was the authorization of $25 million for mass transportation demonstration projects.5 The Act also authorized federal aid to encourage transportation planning as part of urban planning6 and established a small low-interest loan program for mass transit systems.7

However, it was not until April 5, 1962, when President John F. Kennedy addressed Congress on the subject of transportation that the needs of public transportation were seriously addressed on the federal level. In his speech, President Kennedy proposed a $500 million, 3-year program

5. Id. § 303.
6. Id. § 310.
7. Id. § 501.
to revitalize and expand urban mass transportation systems.\textsuperscript{8} His transportation message prompted a new era for mass transportation and led to the passage of the landmark Urban Mass Transportation Act of 1964.

I. **Urban Mass Transportation Act of 1964**

The Urban Mass Transportation Act of 1964 provided a much anticipated federal response to metropolitan and urban areas that were both rapidly expanding and also deteriorating by authorizing $375 million in capital assistance to be provided over three years in support of public transportation activities and $50 million to extend the low-interest loan program created in the Housing Act of 1961.\textsuperscript{9}

In signing the legislation into law, President Lyndon B. Johnson said:

Only a very short time ago, six out of ten Americans lived in rural areas. As we meet here today, seven out of ten live in urban areas. The change has come rapidly and has come dramatically, and today our urban congestion is an unpleasant fact of everyday life for too many millions of Americans. All of us recognize that the curses of congestion in commuting cannot be wiped away with the single stroke of a pen, or 50 pens that we have here. But we do know that this legislation that we are coming to grips with faces the realities of American life and attempts to put in motion a movement to do something about it.\textsuperscript{10}

A. **Grants and Loans**

The Act established two discretionary programs of matching grants as well as funds for research, development, and demonstration projects.

1. **Long-Range Program:**

Under a long-range program, the Act authorized capital grants for up to two-thirds of the net project cost if the Administrator of the Housing and Home Financing Agency within the U.S. Department of Housing and Urban Development ("HUD") determined that assistance was needed to carry out a program for a unified or officially coordinated urban transportation system, which was part of the comprehensively planned development of the urban area. The term "net project cost" was defined as the portion of the total project cost that could not be reasonably financed from transit revenues.\textsuperscript{11}

\begin{itemize}
  \item Urban Mass Transportation Act of 1964 § 4.
\end{itemize}
2. Emergency Program:

The Act authorized an emergency program of grants to cover one-half of the net project costs in localities where planning was incomplete but an urgent need for the preservation or provision of mass transit facilities was demonstrated. Once planning was complete, the federal share could be increased to the full two-thirds allowed under the long-range program.12

3. Research and Demonstration:

The Act authorized the use of up to $30 million of the $375 million for 100 percent federal share grants for research, development, and demonstration projects.13

B. Labor Standards

The Act directed the Administrator to take such action as may be necessary to ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of loans or grants under this Act were paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.14

C. Air Pollution

The Act required the Administrator to “take into consideration” whether a federally-aided mass transportation system complied with criteria for air pollution control established by the Secretary for Health, Education, and Welfare.15

II. Urban Mass Transportation Act of 1966

To fill in gaps and expand the programs established by the Urban Mass Transportation Act of 1964,16 Congress passed the Urban Mass Transportation Act of 1966.17 The 1966 Act authorized annual appropriations of $150 million through 1969 for matching grants and loans to enable states and localities to construct and improve mass transit facilities. The bill also expanded the 1964 Act by authorizing use of two-thirds federal matching share for three new purposes: (1) planning, engineering,
III. The Department of Transportation Act of 1966

The U.S. Department of Transportation ("DOT") was created with the enactment of the Department of Transportation Act of 1966 ("DOT Act"). The new department was established to coordinate and effectively manage transportation programs, provide leadership in the resolution of transportation problems, and develop national transportation policies and programs. However, the DOT Act did not clarify the division of responsibility for urban mass transportation between the newly created DOT and HUD, where mass transit programs were housed.

Consequently, state and local governments that were developing comprehensive transportation plans had to coordinate with two separate federal agencies, DOT and HUD. In order to streamline services and programs, President Johnson transferred most of HUD's mass transit capacity to DOT, effective July 1, 1968. Responsibility for these programs was given to the newly established Urban Mass Transportation Administration (now the Federal Transit Administration).

IV. The Urban Mass Transportation Assistance Act of 1970

The Urban Mass Transportation Assistance Act of 1970 was another landmark in federal funding of mass transportation, authorizing the first long-term commitment of federal funds for mass transportation. Prior acts had authorized funds for only a few years at a time. As a result, it was difficult for state and local governments and transit agencies to plan and implement mass transportation projects over several years due to the uncertainty of funds. The Act authorized a federal expenditure of $10 billion over a 12-year period "to permit confident and continuing local planning, and greater flexibility in program administration."
A. Grants and Loans

The Act authorized the Secretary of Transportation to make direct grants or loans to assist states and local public bodies and agencies in financing the acquisition, construction, reconstruction, and improvement of facilities and equipment for use in mass transportation service in urban areas. The Act authorized $3.1 billion for grants to state and local governments to meet up to two-thirds of the net cost of construction and improvement of mass transit systems and authorized aggregate totals of $80 million in Fiscal Year ("FY") 1971, $310 million in FY 1972, $710 million in FY 1973, $1.26 billion in FY 1974, $1.86 billion in FY 1975, and $3.1 billion thereafter.24

B. Planning

The Act required state and local governments seeking loans or grants to hold public hearings on projects that “substantially affected communities or their mass transit systems” so that consideration was given to the social, economic, and environmental impacts of the project.25

C. Elderly and Disabled

One of the most significant provisions in the Act was the requirement that “special efforts” be made in the planning and design of mass transportation facilities and services “so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal <sic> programs offering assistance in the field of mass transportation should contain provisions implementing this policy.” The Act authorized the Secretary to make grants and loans for mass transportation services specifically in order to meet the special needs of elderly and handicapped persons. The Act also established a clear national policy that elderly and disabled persons have the same right as other persons to utilize mass transportation facilities and services.26

V. National Mass Transportation Assistance Act of 1974

The National Mass Transportation Assistance Act of 1974 was passed in response to the high maintenance and operational costs experienced by aging transit agencies. The Act authorized $11.8 billion over a six year period for capital and operating costs. The passage of the Act was a milestone in transit’s history because it was the first time that fed-

24. Id. § 3(b).
25. Id. § 2.
26. Id. § 8.
eral funds had been authorized for mass transit operating subsidies.\textsuperscript{27}

A. **Formula Program**

The Act authorized $4 billion to be allocated to urbanized areas by a formula based on population and population density. The funds could be used for either capital projects or operating assistance with a 50-percent federal matching share.\textsuperscript{28} The Act authorized $7.8 billion for capital assistance at the discretion of the Secretary. Up to $500 million of the capital fund was reserved for rural areas. Funds used for capital projects were to have an 80 percent federal matching share.\textsuperscript{29}

B. **Elderly and Disabled**

As a condition to receiving funds, transit agencies were required to charge elderly and disabled individuals no more than one-half the regular fare during off-peak hours.\textsuperscript{30}

C. **Reporting System**

The Act also required the DOT to establish a data reporting system for financial and operating information and a uniform system of accounts and records. After July 1978, no grant could be made to any applicant unless they were reporting data under both systems.\textsuperscript{31}

VI. **Federal Public Transportation Assistance Act of 1978**

President Jimmy Carter sought to streamline and integrate federal transportation programs in order to make them more responsive to the needs of state and local governments. As a result, the Federal Public Transportation Act of 1978, Title III of the Surface Transportation Assistance Act, was the first federal act to combine highways, public transportation, and highway safety authorization into one piece of legislation. The Act authorized $15.6 billion for mass transit aid over five years and established both discretionary and formula grant programs.\textsuperscript{32}

A. **Discretionary Grant Program**

The Act authorized $7.48 billion for discretionary grants. The legis-
lation required that at least $350 million of the total funds in the program be spent on reconstruction and improvement of existing public transit systems. Up to $200 million annually was earmarked for urban development projects involving transit facilities, and $45 million was earmarked for projects along the Northeast rail corridor. The Act formalized the “letter of intent” process whereby the federal government committed funds for a transit project through the discretionary grant program.

B. FORMULA GRANT PROGRAM

The Act expanded the formula grant program established in the National Mass Transportation Act of 1974 by increasing authorizations under the existing formula. In addition, the Act created a “second tier” formula program for the nation’s largest cities where funds for construction and operating assistance were to be split so that 85 percent went to urbanized areas over 750,000 in population and the remaining 15 percent to smaller areas. The Act also authorized a formula program for the purchase of buses and bus facilities, and commuter rail and fixed guideway systems. Additionally, the Act created a small formula grant program for non-urbanized areas for capital and operating assistance.

C. PLANNING

The Act changed the planning requirements so that state and local officials needed to consider energy conservation and alternative transportation systems when formulating transportation plans and programs. The Act also authorized local officials, through Metropolitan Planning Organizations (“MPOs”), to carry out the urbanized planning process.

D. TRANSPORTATION RESEARCH CENTERS

The Act authorized $10 million annually for grants to universities and colleges to establish transportation research centers.

E. INTERCITY BUS

The Act authorized $40 million annually for four years for the purchase, construction or improvement of intercity bus terminals, and an additional $30 million annually for subsidies for the initiation, improve-

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33. Id. at 2735-2738.
34. Id. § 302(E)(4), 92 Stat. 2735-2737.
35. Id. § 304(a)(2)(A), 92 Stat. 2739-2741.
36. Id.
37. Id. § 313, 92 Stat. 2748-2749.
38. Id. § 305, 92 Stat. 2743-2744.
39. Id.
40. Id. § 307, 92 Stat. 2745.
ment or continuation of intercity bus service.\textsuperscript{41}

\section*{F. Buy America}

Title IV included a "Buy America" provision applying to all contracts over $500,000. The provision could be waived if the application was inconsistent with the public interest, domestic supplies were not available or of unsatisfactory quality, or if the use of domestic products would increase the cost by over 10 percent.\textsuperscript{42}

\section*{VII. Federal Public Transportation Act of 1982}

When President Ronald Reagan took office, he expressed his disapproval of federal funding for public transit and was often quoted saying "Why should someone in Sioux Falls pay taxes so that a bureaucrat in Washington, D.C. can ride to work on transit?"\textsuperscript{43} Leading the fight to reduce federal spending was David Stockman, the Director of the Office of Management and Budget ("OMB"), and one of his priorities was to phase out all transit operating subsidies by 1984. OMB also took a strong interest in eliminating operating subsidies because the outlays spend down very quickly, as opposed to funds for capital projects, which spend down at a slower pace.

Despite the Reagan Administration's best efforts, their attempts to phase out operating assistance were thwarted by the National Conference of Mayors, the American Public Transit Association, and the transit workers' unions. As a result, The Federal Public Transportation Act of 1982\textsuperscript{44} included funds for operating assistance, although the subsidies were capped at 80\% of the previous apportionment, depending on the size of the population served by the project. In addition, the Act only authorized operating assistance to come from the General Fund, not the Mass Transit Account of the Highway Trust Fund.\textsuperscript{45}

The Act authorized $16.5 billion for mass transit through 1986. In order to fund repairs to deteriorating roads and transit systems, the Act increased the gasoline tax for the first time since 1959. The five cent tax was expected to raise revenues of $5.5 billion a year. The most notable provision of the Act was that one cent of the increased gas tax was earmarked for mass transit. This was the first substantial diversion of the Highway Trust Fund for public transportation purposes. Although transit

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} Id. § 323, 92 Stat. 2754-2755.
\item \textsuperscript{42} Id. at tit. IV, 92 Stat. 2756.
\item \textsuperscript{45} Id.
\end{itemize}
\end{footnotesize}
was provided with a new and dedicated source of funds, this Act cut federal transit aid by 20 percent and established a trend that continued throughout the Reagan Administration.\(^\text{46}\)

VIII. **FEDERAL MASS TRANSPORTATION ACT OF 1987**

The Federal Mass Transportation Act of 1987, Title III of the Surface Transportation and Uniform Relocation Assistance Act of 1987, authorized $17.8 billion for federal mass transit assistance for FY 1987 through FY 1991.\(^\text{47}\) The Act was passed by overriding the veto of President Reagan, who in his veto message stated, "This bill is a textbook example of special interest, pork-barrel politics at work."\(^\text{48}\) The Act codified a process for evaluating projects seeking funds for new or expanded rail systems, or "New Starts." The Act also created a new Rural Transit Assistance Program to provide funds and support services for nonurbanized areas.\(^\text{49}\)

A. **DISCRETIONARY GRANT PROGRAM**

The Act authorized discretionary spending of $6.25 billion through Fiscal Year 1991, funded from the Mass Transit Account of the Highway Trust Fund. Of that amount, 40 percent was allocated for new rail starts and extensions, 40 percent for rail modernization projects, 10 percent for bus needs, and 10 percent for allocation at the discretion of the Secretary of Transportation.\(^\text{50}\) In order to receive funds for new starts, the project had to be: (1) based on alternatives analysis and preliminary engineering; (2) deemed cost effective; and, (3) supported by an acceptable degree of local financial commitment.\(^\text{51}\)

B. **FORMULA GRANT PROGRAM**

The Act authorized $10.4 billion through 1991 from the General Fund for the formula grant programs. The Act allowed a newly urbanized area with a population of 50,000 to use up to two-thirds of its formula grant apportionment during the first full year it received funds to help pay for transit operating expenses. The operating assistance cap for other urbanized areas with a population of less than 200,000 was in-

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46. *Id.* at 2140-2146.
50. *Id.* § 305.
51. *Id.* § 303.
creased by 32.2 percent.\textsuperscript{52}

C. PLANNING

The Act required the development of long-term financial plans for regional urban mass transit improvements and the revenue available from current and potential sources to implement such improvements.\textsuperscript{53}

IX. THE FEDERAL TRANSIT ACT AMENDMENTS OF 1991

The Federal Transit Act Amendments of 1991, Title II of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), authorized $31.5 billion for mass transit over six years, resulting in the largest funding increase since the federal government first created funding programs for transit in 1964. Of this amount, $18.2 billion came from the Mass Transit Account of the Highway Trust Fund, and the remaining $13.3 billion came from the General Fund. ISTEA established "guaranteed" funding levels or "firewalls," so that $36 billion of the $41 billion authorized had to be spent on transit projects. Prior to the Transportation Equity Act for the 21st Century ("TEA-21"),\textsuperscript{54} funding for surface transportation programs was one priority among many competing for federal budget dollars. The Act also changed the name of the Urban Mass Transportation Administration to the Federal Transit Administration in order to reflect the broader mandate of the agency.\textsuperscript{55}

A. DISCRETIONARY GRANT PROGRAM

The Act authorized $12.4 billion over six years for discretionary grants. The funds were divided as follows: 40 percent for New Starts, 40 percent for rail and fixed-guideway modernization, and 20 percent for buses and bus facilities.\textsuperscript{56} In order to make funding more predictable, authorizations for rail modernization were allocated by formula rather than on a discretionary basis as in the prior Act of 1987.

The Act established new criteria for New Starts projects. The project had to be (1) based on the results of alternative analysis and preliminary engineering; (2) justified based on mobility improvement, environmental benefit, cost effectiveness, and operating efficiency; and (3) supported by an acceptable degree of local financing. The alternative analysis requirement could be waived if a small portion of the total costs was sought from

\begin{itemize}
  \item \textsuperscript{52} Id. \S 312.
  \item \textsuperscript{53} Id. \S 310.
  \item \textsuperscript{54} See infra Section X.
  \item \textsuperscript{56} Id. §§ 3006-10.
\end{itemize}
the federal government or if the project was needed to help a state comply with their air quality plans.57

B. Formula Program

The Act authorized $17.4 billion over six years for formula grant programs. Of that amount, $16.2 billion was authorized for capital and operating assistance and $941.7 million for rural transit programs, an increase of 2.6 percent.58 ISTEA added a provision requiring states to spend not less than 5 percent of their rural apportionment in 1992, 10 percent in 1993, and 15 percent in 1994 and thereafter to carry out a program for the development and support of intercity bus transportation.59 ISTEA retained federal operating assistance for all mass transit systems, despite the Bush administration’s proposal to eliminate operating assistance for urban areas of over a million. The Act retained the matching ratio for operating assistance of 50 percent of net operating costs.60

In addition, the Act permitted the discretionary transfer of capital formula funds to highway projects in Transportation Management Areas.61 ISTEA also created a new Surface Transportation Program (“STP”) and the Congestion Mitigation and Air Quality Improvement Program (“CMAQ”), which provided funds that could be transferred from highways to transit projects. These new programs were intended to realign the focus of transportation planning toward a more inclusive, environmentally-sensitive, and multimodal approach to addressing transportation problems.62

C. Transit Planning and Research

ISTEA authorized $478.4 million for national and state level research and planning of transportation programs. ISTEA established a Transit Cooperative Research Program, modeled after the National Cooperative Highway Research program to conduct problem solving for transit operators.63 Metropolitan Planning Organizations (“MPOs”) were given a more significant role in the planning process. Each MPO was required to develop and periodically update a long-range plan taking into account project finances, land use, air quality, traffic congestion, and

57. Id. § 3010.
58. Id. §§ 3013, 3025.
59. Id. § 3023.
62. Id. § 1008.
63. Id. § 3030.
other related factors. MPOs were also required to develop Transportation Improvement Programs ("TIP"), which contained a prioritized list of projects.64

X. THE FEDERAL TRANSIT ACT OF 1998

The Federal Transit Act of 1998, Title II of the Transportation Equity Act for the 21st Century ("TEA-21"), increased funding levels by 70 percent from ISTEA. The Act authorized $41 billion for transit programs, with $29.34 billion coming from the Mass Transit Account of the Highway Trust Fund and $11.65 billion authorized from the General Fund.65 Two new programs were created by this Act, the Clean Fuels Formula Grant program66 and the Job Access and Reverse Commute program.67 The Act eliminated operational assistance for urban areas with populations greater than 200,000, but allowed urban formula and fixed guideway funds to be used to support preventative maintenance.68

A. DISCRETIONARY GRANT PROGRAMS

1. Capital Investment Program:

ISTEA authorized $18.32 billion for discretionary programs for capital investments: $8.18 billion for New Starts, $6.59 billion for Fixed Guideway Modernization,69 and $3.55 billion for bus and bus-related facilities for FY 1998 to FY 2003.70 ISTEA established new considerations for the Secretary when evaluating New Starts projects: (1) population density and current transit ridership in the corridor; (2) the technical capability of the grant recipient to construct the project; and, (3) factors reflecting differences in local land, construction, and operating costs.71

2. Job Access Reverse Commute:

The Act authorized $500 million for the newly created Job Access and Reverse Commute ("JARC") program, which was established to address the unique transportation challenges faced by welfare recipients and low-income persons seeking to secure jobs. Many entry-level positions require commuting from inner city areas into suburban areas on nights and weekends when regular transit service is not readily available.

64. Id. § 3012.
66. Id. § 3008.
67. Id. § 3037.
68. Id. § 3007.
69. Id. § 3028.
70. Id. § 3031.
71. Id. § 3009(e)(3).
The Act required JARC project selection be made through a national competition based on statutorily specified criteria.72

**B. FORMULA GRANTS**

The Act authorized $19.97 billion for formula grants: $2 billion for the Clean Fuels Grant Program, $18.03 billion for the Urbanized Area Formula Grant Program, $24.3 million for Rural Transportation Accessibility Incentive Program, and $1.18 billion for the formula grant program other than urbanized areas for FY 1998 to FY 2003.73

1. **Clean Fuels:**

The newly created Clean Fuels Formula Grant Program provides funds for adoption of clean fuel technologies. Eligible projects included the purchasing or leasing of clean fuel buses and facilities, and the improvements of existing facilities to accommodate clean fuel buses.74 Two-thirds of the funds were designated for urban areas with a population of at least one million.75

2. **Urbanized Areas:**

For urbanized areas with populations less than 200,000, TEA-21 continued to allow funding for either capital or operating costs. The Act eliminated operating assistance for urbanized areas with populations of 200,000 or more. However, the Act revised the definition of “capital,” allowing urbanized area formula funds and fixed guideway funds to be used for preventative maintenance of transit equipment and facilities.76

3. **Elderly & Disabled/Rural/Other than Urbanized Areas:**

The Act authorized $456 million through 2003 to serve the special needs of elderly individuals and individuals with disabilities.77 This funding was to be apportioned based on each state’s share of the national elderly and disabled population.78 TEA-21 authorized $24.3 million through 2003 to assist public and private over-the-road bus operators to finance the incremental capital and training costs of complying with the DOT’s final rule on accessibility and over-the-road buses.79 “Other than urbanized areas” received $1.18 billion for capital, operating, State <sic>
administration, and project operation expenses. 80

XI. THE SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") authorized $53.6 billion in transit funding for FY 2005 through FY 2009. 81 This was a 46 percent increase over TEA-21 funding levels. The authorization of SAFETEA-LU was not only a milestone in terms of transit funding levels, but also due to the creation of several new programs and funding categories. To reflect the broad array of programs that Congress authorized the DOT Federal Transit Administration ("FTA") to oversee, the Act replaced the term "mass transportation" with "public transportation." 82

A. DISCRETIONARY PROGRAMS

SAFETEA-LU created two new discretionary programs: Alternative Transportation in Parks and Public Lands and the Alternative Analysis Program.

1. Alternative Transportation in Parks and Public Lands Program:

SAFETEA-LU created a new program to develop public transportation in national parks, with the goal of improving mobility while reducing congestion and pollution. DOT and the U.S. Department of Interior were to work cooperatively to develop and select capital projects.83

2. Alternatives Analysis Program:

SAFETEA-LU authorized $25 million each fiscal year from FY 2006 through FY 2009 for alternatives analysis for New Starts projects.84

3. Rural Program:

SAFETEA-LU significantly increased funding for the rural program of the transit formula program. The Act also created a new formula tier that was based on land area to address the needs of low-density states. Indian tribes were added as eligible recipients, and a portion of funding was set aside each year for Indian tribes: $8 million in FY 2006 and rising

80. Id. § 3014.
82. Id. § 3003.
83. Id. § 3021.
84. Id. § 3037.
to $15 million by FY 2009.85

4. **Clean Fuels Grant Program:**

The Clean Fuels grant program switched from a formula program to a discretionary program. Funds were provided for the purchase of clean fuels buses, including clean diesel vehicles in certain non-attainment areas and areas trying to maintain compliance with clean air standards.86

**B. CAPITAL INVESTMENT PROGRAMS**

The Act authorized $22.7 billion for Capital Investment projects which include New Starts, Fixed Guideway Modernization, and the Bus and Bus Facility program. The Act created a new program for smaller capital investment projects: Small Starts. The Act did not make any changes to the Fixed Guideway Modernization Program.87

1. **New Starts:**

The Act authorized $4.5 billion for the New Starts program and retained the maximum New Starts federal share of 80 percent. The three-level rating system for New Starts was replaced by a five-level system: High, Medium High, Medium, Medium-Low, and Low. Economic development and land use were added to the project justification criteria. FTA was directed to implement New Starts Program changes with a rulemaking and to provide an opportunity for notice and comment on changes to New Starts policies. The Act also created a pilot program to demonstrate the benefits of public private partnerships.88

2. **Small Starts:**

SAFETEA-LU authorized $600 million for the newly created Small Starts Program. This program was for smaller projects with a federal share of less than $75 million, including streetcar, bus rapid transit (including non-fixed guideway BRT), and commuter rail projects.89

3. **Bus and Bus Facilities:**

Although SAFETEA-LU made few changes to the bus program, the Act authorized $4.8 billion for the Bus and Bus Facilities Program – a significant increase in funding from TEA-21. However, 600 earmarks were included in this section; thus, taking about half of the discretionary

85. *Id.* § 3013.
86. *Id.* § 3010.
87. *Id.* § 3011, at 1573-90.
88. *Id.*
89. *Id.*
bus program resources in each fiscal year through FY 2009.90

C. FORMULA PROGRAMS

SAFETEA-LU authorized $28.4 billion for formula programs and created the New Freedom Program.91

1. New Freedom:

The Act authorized $339 million over six years for the newly created New Freedom program.92 This program provided formula funding for new transportation services and public transportation alternatives beyond those required by the Americans with Disabilities Act ("ADA") to assist persons with disabilities.93 The New Freedom Program is allocated using a formula based on the disabled population in a state, with 60 percent of the funds allocated to urbanized areas with populations larger than 200,000, 20 percent to states for use in urbanized areas of less than 200,000, and 20 percent to states for use in rural areas.94 The funds are made available to transit systems and the states. The program contains language mandating coordination of transportation services with other federal human service programs.95

2. Urbanized Areas:

SAFETEA-LU preserve[d] the existing formula program and its distribution factors, but create[d] several new programs or tiers to distribute a portion of the funds to urbanized areas (UZAs).96 It establishe[d] a new tier for transit intensive urbanized areas with fewer than 200,000 in population and extends the authority to use formula funds for operating purposes in [UZAs] reclassified as being larger than 200,000 in population under the 2000 Census.97

3. Metropolitan and Statewide Planning:

The Act authorized $560 million for Metropolitan and Statewide Planning.98 The Act maintained the requirement for separate transportation plans and transportation improvement programs ("TIP") and re-

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90. Id.
91. Id. § 3019.
93. Id.; SAFETEA-LU, supra note 81, § 3019(b)(1).
94. SAFETEA-LU, supra note 81, § 3019(c)(1).
95. Id. at (f)(1), (3).
97. Id.; SAFETEA-LU, supra note 81, § 3009(c)(2)(A)(i).
required certification and updating of the metropolitan plan and TIP every four years.\textsuperscript{99} The Act required a new public participation plan to afford parties who participate in the metropolitan planning process with a specific opportunity to comment on the plan and TIP before its approval.\textsuperscript{100} The Act added a new provision that required the Secretary to issue rules regarding the publication of the projects in the transportation improvement program for which funds have actually been obligated.\textsuperscript{101}

4. \textit{Elderly and Individuals with Disabilities:}

SAFETEA-LU maintained the current program for special needs of elderly individuals and individuals with disabilities, but established a new seven-state pilot program to determine whether to expand authority to use up to 33 percent of the funds apportioned under section 5310 for operating costs to improve services to elderly individuals and individuals with disabilities.\textsuperscript{102}

5. \textit{Job Access and Reverse Commute:}

The Act switched the Job Access and Reverse Commute ("JARC") program from a competitive discretionary grants program to a formula program.\textsuperscript{103} "The formula is based on ratios involving the number of eligible low-income and welfare recipients" in each urbanized area, "with 60 percent of funds going to urban areas with more than 200,000 population, 20 percent for urban areas with less than 200,000 population, and 20 percent to rural areas."\textsuperscript{104} The Act required coordination between private, non-profit, and public transportation providers and other federal programs in the JARC program, the New Freedom Program, and the Elderly and Disabled program.\textsuperscript{105}

XII. Moving Forward, but Moving Slowly: Issues for Reauthorization

The current six year federal transportation act, SAFETEA-LU, expired on September 30, 2009, but Congress is nowhere near passing new long-term authorizing legislation. On July 6, 2009, the DOT sent a two-page document to Congressional committees containing an outline of the

\textsuperscript{99} SAFETEA-LU, supra note 81, §§ 3005(j)(1)(D), (k)(5)(A)(ii), 3006(g)(1).
\textsuperscript{100} Id. § 3005(i)(5)(A).
\textsuperscript{101} Id. §§ 3005-3006.
\textsuperscript{102} Id. § 3012(b)(1).
\textsuperscript{103} SAFETEA-LU: A GUIDE TO TRANSIT-RELATED PROVISIONS, supra note 97, at 7.
\textsuperscript{104} Id.; SAFETEA-LU, supra note 81, § 3018(c)(2)(A)-(C).
\textsuperscript{105} SAFETEA-LU: A GUIDE TO TRANSIT-RELATED PROVISIONS, supra note 97, at 7.
Obama Administration’s proposal for what it called the “Stage I Reauthorization” of federal surface transportation programs. This document outlined the Administration’s proposal for the first stage of surface transportation reauthorization, consisting of an 18 month extension plan that addresses the Highway Trust Fund shortfall and contains many of the same themes, although on a much more limited scale, as The Surface Transportation Authorization Act of 2009: A Blueprint for Investment and Reform, which was introduced by Congressman Jim Oberstar (D-MN), Chairman of the Committee on Transportation and Infrastructure, U.S. House of Representatives, on June 18, 2009.

The announcement of this extension was met with great protest from Chairman Oberstar and other members of the House Transportation Committee. In a letter to President Obama, signed by the Democratic Members of the House Transportation Committee, Oberstar states,

An 18-month extension of current law and temporary restoration of the Highway Trust Fund will leave states without the certainty and reliable funding source that they need to plan, design, and construct significant multi-year highway and transit projects. States will slow investments – as they have done during past extensions – and this slowdown will offset much of the benefit of the increased transportation investment provided under the American Recovery and Reinvestment Act of 2009 (P.L. 111-5). However, the leaders of several Senate Committees are supportive of a 6 to 18 month extension of the federal surface transportation authorization and are expected to approve an extension soon.

Both Congress and the Obama Administration will be addressing the following major issues in their legislative proposals:

106. Memorandum from the Department of Transportation to Congressional Committees (June 30, 2009), available at http://www.ncsl.org/documents/transportation/HillReauthMemo070109.pdf (the surface transportation bill will authorize the federal surface transportation programs for highways, highway safety, transit, and possibly transit safety, for a 5-year period).


108. Letter from James L. Oberstar, Chairman, Comm. on Transp. and Infrastructure, to Barack Obama, President, United States (June 24, 2009), available at http://transportation.house.gov/Media/file/Full%20Committee/Letter%20to%20the%20President_ExtensioE.pdf.

109. This authorization has already been extended twice, most recently through Dec. 31st, 2010. The latest extension, signed into law on March 18, 2010 was a part of the “Hiring Incentives to Restore Employment Act” (HIRE). It has become public law number 111-147, and the part regarding SAFETEA is under Title IV, Subtitle A, Section 411(a), http://wshofederalfunding.blogspot.com/2010/03/safetea-lu-extended-through-dec-31-2010.html.
A. OPERATING FUNDS

As a result of the recent economic downturn, the issue of operating subsidies for transit agencies has come to the attention of several members of Congress. During a hearing before the U.S. Senate Committee on Banking, Housing, and Urban Affairs on March 12, 2009, Senator Jack Reed (D-RI) asked Transportation Secretary Ray LaHood about operational funds and expressed his concern that systems were not receiving adequate funding for operations. The Secretary responded that he will be "open-minded" to the possibility of allocating funds towards operating assistance, particularly as the American Recovery and Reinvestment Act ("ARRA") has provided additional funding for transit capital costs.

On May 21, 2009, the Senate passed S. 1054, the "Supplemental Appropriations Act, 2009," for additional funding for the wars in Afghanistan and Iraq. The bill includes a provision sponsored by Senator Patty Murray (D-WA), the Chairwoman of the Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, which would allow transit agencies to use up to 10 percent of their ARRA Transit Capital Assistance funds apportioned pursuant to formula for operating costs. The corollary House bill, H.R. 2346, does not contain such a provision. The Senate report language, S. Rept. 111-20, articulates that the Congressional intent of providing operating subsidies as necessary to address the immediate need for job preservation and economic recovery. There is no indication that the Appropriations Committees will seek to enact legislation permitting urbanized area with a population of 200,000 or over to use FTA urbanized formula grants for operating expenses. The Appropriations Committees will likely leave the matter to the Authorizing Committees.

B. STREAMLINING NEW STARTS

The streamlining of FTA's New Starts program has been the subject of several Congressional hearings as a result of the high costs and lengthy process associated with getting a transit project to completion. FTA's

111. Id.
113. Id. § 1202.
116. See generally A Fresh Start for New Starts: Hearing Before the Subcomm. on Housing Transportation and Community Development of the S. Comm. on Banking, Housing, and Urban
discretionary New Starts program is the federal government’s primary financial resource for supporting locally-planned, implemented, and operated transit “guideway” capital investments.\textsuperscript{117} It typically takes anywhere from 6 to 12 years for a transit project to progress from the initial planning process to final design. Critics of the New Starts program say that the process is too rigorous and FTA is risk averse. FTA’s project justification criteria have also come under intense scrutiny.\textsuperscript{118} Currently, of these criteria, Cost-Effectiveness and Transit Supportive Land Use are weighted 50 percent to determine the overall rating for Project Justification.\textsuperscript{119} The other criteria (Economic Development, Environmental Benefits, Operating Efficiencies, and Mobility Improvements) are evaluated but not included in calculating the overall Project Justification Rating.\textsuperscript{120} As a result, critics argue that viable projects are refused federal funding due to the burdensome cost effectiveness criteria.

C. SAFETY

Recent transit accidents in Washington, D.C., California, and Massachusetts have brought the federal role in regulating transit rail systems to the attention of Congress. “Our nation’s rail transit systems operate under two very different federal safety regimes.\textsuperscript{121} Some FTA funded rail transit systems are governed by the Federal Railroad Administration[’s] ("FRA") safety regulations while others are governed by the States <sic>,” through State Safety Oversight Offices.\textsuperscript{122} Transportation Secretary LaHood, formed a U.S. Department of Transportation Safety Council, to examine safety issues facing the department, including expanding the role of the FTA to regulate transit safety.\textsuperscript{123}


\textsuperscript{119} Id. at 7.

\textsuperscript{120} Id.


\textsuperscript{122} Id.

\textsuperscript{123} Press Release, U.S. DEP’T TRANSP., Newly Formed Safety Council to Take Safety Com-
On February 22, 2010 the Obama Administration's transit safety proposal was introduced in Congress. The proposal provides the Secretary of Transportation with oversight authority over transit agencies and operators and requires the Secretary to promulgate regulations to establish a federal certification program for employees and contractors who carry out state public transportation safety program activities in compliance with the Act. The proposal also provides federal funds to state safety oversight (SSO) agencies for hiring, training, inspections, and other safety-related activities. If passed, this bill would create more uniformity among the performance and capabilities of SSOs; thus, ensuring that transit systems throughout the country are meeting baseline safety requirements.

XIII. CONCLUSION

In 1964, the federal government began a tenuous relationship with public transportation. However, in recent years that relationship has changed. The many economic, environmental, and energy conservation benefits that public transportation provides have become increasingly more quantifiable and understood both by the general public and by local, state, and federal lawmakers. Additionally, public transportation is no longer limited to major metropolitan areas. Individuals living in small and mid-sized cities and rural communities are increasingly relying on public transportation to get where they need to go. As a result, there is more demand than ever, from both sides of the isle in Congress, for greater federal investment in rail, bus, and other public transportation systems.

Yet, there are no guarantees that the next surface transportation bill will usher in a new era for public transportation with a comprehensive national transportation plan, new funding mechanisms, restructured programs, and adequate capital funds for shiny new systems. Existing transit systems are aging and are in desperate need of federal funds to maintain a state of good repair, to enhance safety, and to meet basic operational needs. In addition, public transportation is competing with many other programs and services for a limited amount of federal resources. Until Congress gets further along in the drafting process, it will remain unclear whether they will create a bill that "faces the realities of American life


and attempts to put in motion a movement to do something about it"125 or legislation that simply patches up what already exists.

Note

Is It Time Congress Revisits the Laws Restricting Gambling at 35,000 Feet?

Matthew Sinowetski*

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* Mr. Sinowetski graduated in May 2010 from the University of Denver Sturm College of Law. Prior to attending the University of Denver, he received his Bachelor of Science in Accounting from the University of Akron in 2007. Mr. Sinowetski would like to give a special thanks to John J. Tipton, Esq. for all of his assistance with this article.
INTRODUCTION

In tough economic times, federal and local governments examine laws to determine if laws unnecessarily prohibit the economy from prospering. The government will change tax laws, the Federal Reserve will alter lending interest rates, regulate the amount of currency in circulation, enforce additional restrictions on trade, or propose other similar laws. The government's goal is to jump start the economy by changing current regulations to create increased cash flow by providing consumers with more disposable income or less expensive goods to purchase. In a last ditch effort to save struggling industries, the government will provide taxpayer funds known as a bailout to these industries.

Recently, the United States government has been doing many things to try to revive our struggling economy. The federal government has changed tax laws to provide taxpayers with more disposable income and provide incentives to taxpayers purchasing items such as new homes. State governments are also revising laws. Delaware recently passed a controversial law that will allow sports betting and table games in casinos. Although Delaware faced strong opposition, the state government passed the law in an effort to increase gambling revenue to remedy the estimated $600 million state budget deficit for the upcoming fiscal year. The federal government has also bailed out the financial industry with $700 billion of taxpayer money and is currently looking at bailing out struggling domestic automobile manufactures. If this happens, the next industry that may be asking for federal funding is the airline industry. With the struggling economy, increasing fuel cost over the past several years, and enormous financial losses, many airlines are on the brink of going out of business. These factors, coupled with fewer people traveling because of the economy results in continued shrinking profit margins

6. Id.
9. See id.
for airlines. Shrinking profit margins means an increase in airfares or potential corporate turmoil, and since the airline industry is critical to the overall economy and national security, it is imperative the government address ways to bolster the industry.

A major way the aviation industry can increase revenue on domestic and international flights is if the government revisits a law implemented over a decade and a half ago. Congress needs to reevaluate its decision to restrict gambling on airlines, not only for the struggling airline industry, but also because of the sheer changes in the country since the law’s enactment fifteen years ago. Delaware realized it needed to be creative in this time of economic downturn, and likewise, it is time for the federal government to get creative and revisit the Gorton Amendment and the Johnson Act. This paper will focus on the federal government’s role in this process, however, state governments may also have a role in the regulation of gaming activity, especially domestically, and involving an aircraft traveling to or from a particular state.

It is important to review the basics of how we got to where we are before we can decide where to go in the future. It will be necessary to review gambling's history and the gaming laws impacting the transportation industry. After reviewing the nuts and bolts of the regulatory structure, we will move on to examine current gaming onboard common carriers, restrictions placed on the airlines, and a Department of Transportation (“DOT”) study of video gambling on airlines. Finally, we will examine what, if anything has changed since the DOT’s study, determine there is a need for another study, and if the government should lift the restriction on gambling onboard airlines.

PART I: WHAT IS GAMBLING?

For a game to be considered gambling, there are three requirements that must be met. The game must include: 1) consideration put up by the player, 2) in a game of chance, 3) for a prize. Using a slot machine as an example, a player puts money into the machine (consideration) to play the machine. The machine has a random number generator over which the player has no control, but the player hopes he or she will get the correct combination of pictures or objects (a game of chance) to win money (prize). However, it is not always that simple to say that a game


11. See generally Sportsbetting, supra note 5 (discussing legalization of sportsbetting).

found in a casino can be considered gambling. Games such as “Texas Hold’Em” have become mainstream in the past decade due to the dramatic increase in televised events as well as the ability to play the game outside of a casino.\textsuperscript{13} Many professional poker players and people in general view poker as a game of skill, not a game of chance because there is skill involved in betting and “reading” an opponent.\textsuperscript{14} But ultimately, if a poker hand is played to the end, there is an element of chance because of the probability of certain cards being in play.\textsuperscript{15} So, is poker only gambling when a hand is played all the way to the end? Courts in a variety of states have ruled that if there is an element of skill, then the game, according to some state’s definitions of gambling, cannot be considered gambling.\textsuperscript{16} The same is true in a number of foreign countries where the skill feature takes the game out of the definition of gambling.\textsuperscript{17} As of April 2009, Pennsylvania, Colorado, and South Carolina have all ruled that poker is a game of skill.\textsuperscript{18} However, not all jurisdictions are willing to agree.\textsuperscript{19}

As is evident by the recent court splits, there is no bright line rule as to what games are considered gambling and what games are not.\textsuperscript{20} No matter what side of the argument the game falls on, the history of gambling in the U.S. is well established.

\textbf{PART II: THE HISTORY OF GAMING THE UNITED STATES}

The modern history of legalized gaming in the United States began with casino gambling in 1931 in Nevada.\textsuperscript{21} Until the 1950's, there was no real regulation of the gaming industry.\textsuperscript{22} The federal government could not regulate the gaming industry because they did not have authority under the United States Constitution.\textsuperscript{23} The Tenth Amendment states that any authority not expressly granted to the federal government is re-
served for the states. Therefore, the only way for the federal government to gain control of the gaming industry was to begin taxing casinos. Several senators introduced legislation to impose a 10% tax on gross gaming revenue of casinos. This tax would have put casinos out of business because gross gaming revenue involves the amount the casino takes in from gaming before paying any winnings or costs of operation. In response to this proposed legislation, Senator McCarran from Nevada convinced the Senate to reject the proposed tax law and permit Nevada to create a regulatory system to control the gaming industry. In 1955, Nevada created the Nevada Gaming Control Board (“NGCB”) and the Nevada Gaming Commission (“NGC”). The NGCB and NGC are the controlling bodies for all gaming in the state of Nevada, with the NGC having final authority. Since then, the gaming industry has expanded dramatically because casinos are no longer just located in Nevada.

In the late 1970's, Atlantic City, New Jersey became the second major U.S. jurisdiction allowing casino gaming. Following California v. Cabazon Band of Mission Indians, decided by the U.S. Supreme Court, Congress passed the Indian Gaming Regulatory Act (“IGRA”) in 1988. The decision in the case, as well as the passage of IGRA, allowed Native Americans to have their own casinos on tribal lands. The National Indian Gaming Commission was created by IGRA to regulate most of the gaming operations on the tribal lands. In 1991, Iowa was the first state to allow riverboat gaming. Today, 48 out of 50 states in the U.S. allow some form of gaming. The two states that do not allow gaming are Utah and Hawaii. Each state regulates gambling activities within the framework of a number of different regulatory structures. Some states

24. Id.
31. Id.
allow a number of types of gaming, while others have limited gaming.\textsuperscript{36} Other states have dog or horse tracks, others have lotteries, or bingo, while other states have full gaming casinos.\textsuperscript{37} Each state has the right to charge casinos different tax rates, have different minimum winning requirements, or any other regulation they deem necessary.\textsuperscript{38} As a result, Nevada may tax their casinos at a different rate than New Jersey taxes their casinos.

Although gaming remains a state issue, the federal government has passed certain laws pertaining to gaming devices onboard common carriers under the Commerce Clause.\textsuperscript{39}

\textbf{PART III: GAMING LAWS IN EFFECT IN THE UNITED STATES}

There are three statutory frameworks currently in place that deal with gambling and gaming devices onboard common carriers. The three laws are: 1) The Gaming Ship Act of 1948, 2) the Gaming Device Act of 1968, and 3) Section 205 of the Federal Aviation Administration Act of 1994.

\textbf{A: THE GAMING SHIP ACT OF 1948}

The Gaming Ship Act states once a ship enters U.S. jurisdiction, it is illegal to gamble on the vessel.\textsuperscript{40} When enacting this law, the government recognized that if a ship is outside U.S. territorial waters, the ships do not need to comply with laws of the country. The Act also prohibited gaming onboard any ship that was registered as a U.S. vessel, whether or not it was operated out of the U.S.\textsuperscript{41} This is better known as "flying the flag" of the United States.\textsuperscript{42} Prior to 1988, the U.S. recognized its territorial waters as anything within 3 nautical miles of the coastline.\textsuperscript{43} However, in 1982 the United Nations held the Convention on the Law of the Sea.\textsuperscript{44} The U.S. Senate approved the acceptance of the treaty that was estab-
lished at the convention.\textsuperscript{45} In 1988, President Reagan proclaimed that the territorial waters of the U.S. had been expanded to anything within 12 nautical miles from the coastline.\textsuperscript{46} The U.S. was the 105th nation to proclaim the 12 nautical mile limit under the treaty.\textsuperscript{47} Therefore, a vessel now has to be at least 12 nautical miles from the United States' coastline to commence gaming activities.


The Gambling Device Act, better known as The Johnson Act, states in section 1175(a) of the Act that it is “unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 . . . or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 . . ., including on a vessel documented under chapter 121 of title 46 . . . or documented under the laws of a foreign country.”\textsuperscript{48} Thus, it prohibits domestic common carriers from not only offering gaming, but also from transporting any gaming devices.

1. What Is A Gambling Device?

According to the Johnson Act, a gambling device means any “‘slot machine’” or “any other machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and which when operated may deliver, as the result of the application of an element of chance, any money or property, or . . . a person may become entitled to . . . money or property . . . .”\textsuperscript{49} In addition to slot machines, this would also include video gaming machines, roulette wheels, and bingo equipment.\textsuperscript{50} The definition of a gambling device is so broad that it could conceivably cover most, if not all, things needed to play a game of chance.

2. What Areas Of Transportation Does The Johnson Act Impact?

Most areas of transportation have been able to obtain waivers from the Act. Trucks transporting gaming devices from the manufacturing site

\textsuperscript{46} Rosenthal, supra note 43.
\textsuperscript{47} Id.
\textsuperscript{49} Id. at § 1171(a) (2010).
\textsuperscript{50} See id.
to casinos can apply for a waiver of the Johnson Act.\textsuperscript{51} This waiver must be applied for yearly, and must be kept in the cab of the truck during the transport of gaming devices.\textsuperscript{52} Cruise ships may also obtain a waiver from the Johnson Act.\textsuperscript{53} Cruise ships are permitted to have gaming devices aboard the vessel when they are in the United States' jurisdiction so long as the gaming devices are not available to be played while the vessel is in U.S. territorial waters.\textsuperscript{54} The Gaming Device Act was amended in 1992 to permit gambling aboard U.S.-flagged ships, but only when they were outside of U.S. territorial water.\textsuperscript{55} This amendment was implemented to eliminate the competitive advantage foreign-flagged ships had by being allowed to offer gambling aboard their vessels.

Two years after the amendment to the Johnson Act, Congress passed another amendment to eliminate any possible competitive advantage a foreign airline might obtain by offering gaming because domestic airlines had not obtained a waiver of the Act.\textsuperscript{56}


Section 205 of the Federal Aviation Administration Authorization Act of 1994 is more commonly know as The Gorton Amendment.\textsuperscript{57} Section 205 prohibits an “air carrier or foreign air carrier” from installing, transporting, operating, or permitting the use of any gambling device on board an aircraft in foreign air transportation.\textsuperscript{58} The purpose of this section was to eliminate any competitive advantage foreign aircrafts coming to and from the United States could have, if they were to offer gaming to their passengers.

PART IV: CRUISE SHIP GAMBLING

Prior to the amendment passed in 1992, the only cruise ships allowed to offer gaming were foreign vessels in international waters.\textsuperscript{59} These foreign vessels were allowed to dock in U.S. ports, but were not allowed to


\textsuperscript{52} Id. at 2.

\textsuperscript{53} See id.

\textsuperscript{54} S.C. CODE ANN. §3-11-320 (2009)

\textsuperscript{55} S. 1191, 114th Sess. (S.C. 2002).


\textsuperscript{58} 49 U.S.C. § 41311(a) (2010).

offer gaming when they were within U.S. jurisdiction. After the amendment to the Johnson Act in 1992, all domestic and foreign cruise ships were allowed to offer gaming onboard their vessels once in international water. The method that cruise ships offer for gaming onboard their vessel is fairly simple. When the vessel was within 12 nautical miles of the U.S. coastline, the gaming devices onboard the ship were disabled. The more common description of the devices is to say they were “dark.” Once the vessel was past the U.S. territorial waters, the cruise ships would turn on all gaming devices.

Since these vessels are not within U.S jurisdiction or any of their territories, the cruise ships are not bound by any of its laws regarding gaming. For the cruise ships, this means the government cannot tax gaming revenue because it was earned outside of U.S. jurisdiction. More importantly, no state or regulatory body enforces any gaming laws on the cruise ships, so cruise ships can set their own winning percentages on slot machines and payout rates for other games. This means the consumers of the gaming services onboard the vessel do not have the assurance that the cruise ship is treating them fairly. For example, a cruise ship could set a slot machines pay out rate to be 20%, which, in its most basic form, means the player will only win 20% of their money back over a certain period of time. However, if that same player goes to a regulated gaming jurisdiction, most jurisdictions require certain minimum slot payouts. For example, Colorado requires that a slot machine must have a minimum slot machine payout of no less than eighty percent. Therefore, without a regulatory structure, consumers can be taken advantage of when gambling aboard a cruise ship. This is mitigated to some extent by the competitive nature of the cruise industry because cruise ship casinos are judged against other cruise ship casinos, and therefore must be competitive in the market place.

60. See id.
61. See id.
63. Id.
64. Id.
the law, some companies offer "cruises to nowhere," which are trips on a
vessel from a U.S. port to a point outside of the territorial waters for the
sole purpose of gambling.\textsuperscript{70}

The current laws and regulations applicable to cruise ships are the
basis for dealing with the issues when it comes to the possibility of gam-
bling onboard an aircraft.

\section*{PART V: GAMBLING ON AIRLINES}

Since airlines have not been granted a waiver of the Johnson Act,
and the Gorton Amendment is a clear prohibition of gaming aboard air-
lines, it is not possible for an airline to offer gaming on a domestic flight
in the U.S. or an international flight with U.S. origin, termination or tran-
sition.\textsuperscript{71} Flights that are exclusively outside the U.S. are not restricted
from offering in-flight gaming to their passengers by U.S. law, but may be
restricted by the laws by which those flights are governed.\textsuperscript{72} With these
restrictions, not many airlines have attempted to offer in-flight gaming.

\subsection*{A. INTERNATIONAL FLIGHTS}

One airline that tried to offer in-flight gaming was Singapore Air-
lines. Singapore Airlines installed slot machines at the rear of planes that
did not travel in or out of the United States.\textsuperscript{73} However, instillation
caused serious safety issues. Since more people moved to the back of the
plane to play the slot machines, the plane’s weight ratio was thrown off
balance.\textsuperscript{74} To adjust for the additional weight in the rear of the plane, the
aircraft was forced to carry more fuel, meaning an increase in operating
expenses for the aircraft.\textsuperscript{75} Ultimately, Singapore Airlines decided it was
not worth the extra costs and risks to operate slot machines.\textsuperscript{76} Although
foreign airlines have tried to offer gaming, domestic airlines have not.

\subsection*{B. DOMESTIC FLIGHTS}

The Johnson Act and Gorton Amendment make it illegal for any

\begin{itemize}
  \item \textit{Rules, supra} note 66; ICCL Gambling Guidelines Policy Statement, www.hollandamerica.com/
  \item \textit{See Gambling on "cruises to nowhere," Marine Log,} Sept. 1, 2001, \textit{available at http://}
  \item \textit{See Video Gambling, supra} note 56, at 38-39.
  \item \textit{Fred Gebhart, High Fliers for High Stakes,} \textit{N.Y. Times}, Oct. 9, 1995, \textit{available at http://}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{See id.}
\end{itemize}
domestic flight or any flight to or from the United States to offer in-flight gaming. On its face, a law that regulates, restricts, or allows gambling on a totally intra-state airline could be held constitutionally invalid because the Tenth Amendment of the U.S. Constitution states that a power not expressly given to the federal government is reserved for the states. This constitutional argument has been upheld since land based gambling became prevalent in the early 1900's. However, the Airline Deregulation Act of 1978 ("ADA") expressly pre-empts the states from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." According to the U.S. Supreme Court in Morales v. TWA, the government considers in-flight entertainment as a service, a term used to describe gambling for years. Since gambling is viewed to be "entertainment" under the ADA, a federal law, the ADA preempts the states' historical police power over gambling. Therefore the Johnson Act prohibits gaming on domestic flights and the Gorton Amendment restricts gaming on flights to and from the United States. As part of the Gorton Amendment, the Secretary of Transportation was required to do a study of in-flight video gaming on foreign flights.

PART VI: THE DEPARTMENT OF TRANSPORTATION STUDY

The DOT conducted the study required by the Gorton Amendment. In this study, the DOT based its report on three different aspects. The DOT studied the risks involved, the competitive advantages for foreign competitors, and the consumer reaction to in-flight entertainment.

A: TECHNICAL RISKS

When the DOT examined the risks involved with in-flight gaming, they looked not only at the technical risks, but also the behavioral risks. First, the DOT studied whether video gaming devices would have a technical risk to the airplane's electrical controls. The FAA studied whether

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78. U.S. Const. amend. X.
84. Video Gambling, supra note 56, at 1-2.
85. Id. at 4-5.
86. Id. at 31.
implementation of television screens for in-flight entertainment purposes would create a risk to the airplane and its controls. The FAA determined the monitors that were to be installed would not create any electromagnetic interference with an airplane’s sensitive instrumentation. The FAA further determined the weight of the monitors, as well as the software needed, would not create any risks for the airplane. The FAA concluded the monitors and systems presented in the study would have been cleared for use inside a commercial aircraft. Next, the DOT looked at the possible behavioral risks associated with in-flight gaming.

B: Behavioral Risks

The Association of Flight Attendants ("AFA") and other parties expressed concern over possible behavioral issues associated with in-flight gaming. To determine whether there would be an increase in behavioral risk, the DOT examined the FAA-approved security training courses that all crewmembers must complete yearly. The DOT determined crewmembers would be already trained to deal with any behavioral risks that could arise due to in-flight gaming according to the current training requirements. However, the DOT also assumed behavioral risks that are associated with problem gambling would increase the risk. The DOT would not give a definite answer since there had never been in-flight gaming and no actual evidence could be evaluated. In the end, the DOT assumed there would be an increase in behavioral risk due to the nature of gambling.

After studying the risks involved with in-flight gaming, the DOT studied the possible competitive advantages foreign airlines would have if they were not restricted from providing in-flight gaming.

C: Possible Competitive Advantages For Foreign Airlines

The DOT examined the competitive advantage the foreign air carriers would have over domestic carriers if foreign air carriers were allowed to offer in-flight gaming. Since the Johnson Act prohibits the transportation of any gaming devices without a waiver, domestic airlines cannot

87. See id. at 33.
88. See id. at 34.
89. Video Gambling, supra note 56, at 34.
90. Id.
91. Id. at 35.
92. Id. at 36.
93. Id.
94. Video Gambling, supra note 56, at 37.
95. Id.
96. Id. at 38.
have gaming devices onboard their aircrafts. Airlines are not only restricted from operating such gaming devices, but also from merely having them onboard. When the Gorton Amendment was presented in Congress, Congress considered the possibility of lifting the restriction on the domestic aviation industry. However, Congress decided not to lift the application of the Johnson Act from domestic airlines and proceeded with the Gorton Amendment. Therefore, the DOT was required to examine the competitive advantages non-domestic airlines would have over domestic airlines if they were allowed to offer in-flight gaming.

The DOT estimated in-flight gaming around the world would generate approximately $592 million of revenue per year for the airline industry. Foreign airlines traveling to and from the U.S. would generate $112 million of revenue. In 1996, this translated to $1 million of gaming revenue per aircraft per year. The DOT also estimated that U.S. airlines, if given the opportunity to offer in-flight gaming, would generate $225 million of net gaming revenue per year. At the time the study was conducted, this amounted to about 13 percent income generated from international flights by major U.S. airlines. The DOT also estimated that, if it was available, video gambling would be used by 18 percent of all passengers. Even with the potential revenue for the airline industry, Congress was unwilling to allow domestic airlines to offer in-flight gaming. Since the government did not want to further harm the domestic airline industry, it created the Gorton Amendment to eliminate any potential competitive advantage in favor of foreign airlines. After considering the potential competitive advantage for foreign airlines, the DOT concluded its research by studying consumer reaction to possible in-flight entertainment.

D: Consumer Reaction To Possible In-Flight Entertainment

Finally, the DOT studied consumer reaction to the possibility of in-flight gaming as a form of entertainment. The DOT hired Yankelovich

98. Video Gambling, supra note 56, at 1.
99. Id.
100. Id. at 1-2.
101. Id. at 39.
102. Id.
103. Video, Gambling, supra note 56, at 48.
104. Id.
105. Id. at 39.
106. Id.
107. Witt, supra note 69, at 353-54.
108. Id. at 354.
Partners Inc., a marketing firm to conduct, a survey of consumer reactions to various types of in-flight entertainment including gaming. Yankelovich polled 394 people about the possibility of in-flight entertainment. 196 people, or just less than half, were asked about their thoughts and reactions to in-flight entertainment such as on-demand movies, shopping, and fax, but without mention of video gambling. The other half, 198 people were asked about the same questions, but the description also included video gambling. Of those polled, 92% thought in-flight entertainment that included gambling was a fair to excellent idea. Only 8% of respondents said it was a bad idea or did not respond to the question. 94% of those polled thought in-flight entertainment without gambling was a fair to excellent idea. Only 6% of respondents thought in-flight entertainment without gambling was a bad idea or did not respond, meaning only a 2% increase in the opposition of in-flight entertainment with gambling as compared to in-flight entertainment without gambling. On the basis of the minimal difference, the DOT concluded flights without video gambling was a better solution. At the study’s conclusion, Congress decided not to amend the Act, and the Gorton Amendment remained in the FAA Act. However, there always is an opportunity to test the strength and validity of the laws in place, and this case is no exception.

PART VII: HAVE CASINOS OR AIRLINES CONSIDERED GAMBLING IN THE AIR?

Even though the law prohibits an airline from transporting gaming devices, one wonders if a casino or airline has considered providing gaming in the air. However, many casinos question the legality of providing gaming on an airplane. After reading the laws, one would assume the same thing. However, due to the canons of statutory interpretation, many enacted laws are subject to debate.

A: POSSIBLE INTERPRETIVE APPROACHES TO THE LAWS

In order to comply with laws such as the Johnson Act and Gorton
Amendment when seeking to provide gaming on aircraft, one must look at the statutory construction and interpretation. The first statutory interpretation issue is the definition of the term “gaming device.” Does this include all table games like craps, blackjack, etc? As it was discussed earlier, gaming device could include everything needed to perform a game of chance. The second statutory interpretation issue deals with the definition of a game. As it was discussed prior, certain games such as poker can be considered to be games of skill, not chance. The third, and probably most interesting interpretive issue, is the meaning of the term “air carrier.” Does the Amendment apply to chartered or private aircrafts? A brief look at the government’s definition of “air carrier” shows exactly how complex this issue can be.

B: LEGAL DEFINITION OF “AIR CARRIER”

There are varying definitions of air carriers between the U.S. Code and the Code of Federal Regulations. In 49 U.S.C.A. § 40102, air carrier is defined as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” The definition under the Code differs slightly from the definition in the Federal Regulations. Under 14 C.F.R. § 119.21, “[e]ach person who conducts airplane operations as a commercial operator engaged in intrastate common carriage of persons or property for compensation or hire in air commerce, or as a direct air carrier” must be certified under Part 121 of the Federal Aviation Regulations. Likewise, pursuant to 14 C.F.R. § 119.23, “[e]ach person who conducts operations when common carriage is not involved with airplanes having a passenger-seat configuration of 20 seats or more, excluding each crewmember seat, or a payload capacity of 6,000 pounds or more” must be certified under Part 125 of the Federal Aviation Regulations. Finally, “[e]ach person who conducts rotorcraft operations for compensation or hire” much be certified under Part 135 of the Federal Aviation Regulations.

The different definitions of the term might tempt someone to test the Gorton Amendment’s meaning of “Air Carrier.”

1. Would There Be A Challenge To The Definition Of “Air Carrier”?

There has been speculation that casinos have considered purchasing an aircraft and creating a casino onboard. This aircraft would travel
around the world and transport high profile clients.\textsuperscript{125} The casino would provide numerous types of in-flight gaming during the trip from the client’s location to the casino.\textsuperscript{126} Even if a favorable interpretation exists, it appears to be risky and expensive to test out the legislation.

However, foreign airlines and their owning countries may have international law arguments regarding the Gorton Amendment’s reach. They could argue the Gorton Amendment oversteps the U.S. government’s regulatory authority. Before any legal debates arise, the government should consider doing a new study, not just for foreign airlines, but also domestic airlines.

\textbf{PART VIII: WHY SHOULD THERE BE A NEW STUDY?}

The Gorton Amendment was enacted in 1994 and the DOT’s study concluded in 1996. Congress has not revisited the issue of gambling on airlines in 15 years. Since amendment was enacted and the study completed, many things have happened that changed the landscape of the airline industry. In 2009, the airline industry is struggling, as is the U.S. economy. As airlines struggled with rising fuel costs and a shrinking profit margin, the industry started to become worse. Many of the major airlines 15 years ago are now bankrupt or have merged with another airline due to the economics of the industry. However, despite the poor economic situation facing the airline industry, airlines continue to move forward with many technological advances.\textsuperscript{127}

\textbf{A. TECHNOLOGY 15 YEARS LATER}

When the Gorton Amendment became law 15 years ago, technological issues and feasibility of in-flight gaming were realistic concerns for the DOT. However, a decade and a half later, these issues seem no longer relevant because of technological advances. The 1996 DOT study expressed concern of technical risks, as well as the lack of technology such as electronic entertainment devices. Today, it has become standard for airlines to have in-flight entertainment devices located on seatbacks.\textsuperscript{128} These in-flight entertainment systems offer everything from music to on-demand movies and satellite television. Some airlines have even begun to offer wireless Internet on their aircrafts.\textsuperscript{129} The DOT also expressed concerns about the plausibility of an air-to-ground communication net-

\textsuperscript{125} Id.
\textsuperscript{126} See id.
\textsuperscript{129} Alana Semuels, In-flight wireless Internet to expand to hundreds of American Airlines
work that would be necessary to handle transactions. Today, most major airlines accept credit cards to pay for meals, alcoholic beverages, and in-flight entertainment. The air-to-ground communication systems that the DOT expressed doubts about have been implemented in today’s airline industry, and technological issues recognized in the study have been conquered.

The type of systems needed for in-flight gaming have taken even greater strides forward. Today, handheld video gaming devices have been developed. These devices allow a person to use a portable gaming device wherever they are located. The NGCB conducted BETA testing on this device, and has recently approved the use of these devices. The development of these gaming devices makes the initial capital expenditure concerns for airlines at a minimum. Airlines reluctant to install monitors or purchase aircrafts equipped with the video devices in the seatbacks would have the option of using these handheld devices. This is just one example of how the gaming landscape has changed since the Gorton Amendment.

B. Gaming Landscape 15 Years Later

In 1998, two years after the DOT study, consumer spending on Commercial Casino Gaming was $19.7 billion. In 2007, the consumer spending on casino gaming has almost doubled, totaling $34.13 billion. Casino gaming has become even more popular following the Gorton Amendment. The question is whether this increased popularity would translate into an increased interest for in-flight gaming.

In 2008, a public opinion survey was taken to determine consumers’ favorite casino games. Slot machines lead the way with 56% followed by blackjack at 24%. This suggests that the easiest casino games for software developers to create for in-flight gaming would be blackjack and


130. See Video Gambling, supra note 56, at 8.


133. Id.


135. Id.

136. Id. at 37.

137. Id.
slots, since many of the slot machines and poker machines in casinos are software and video based, and that most popular games would most likely be offered on in-flight gaming devices. However, there are still major concerns with the country’s attitude towards gambling.

American perception of gambling has always been at the forefront of discussions, especially in the DOT study. In the past 10 years, there has been no change in public perception. About 15% of people believe gambling is not acceptable or didn’t respond both in 1999 and 2008.138 This means that 85% of people believe gambling is acceptable form of entertainment. However, problem gambling continues to be a topic of discussion among those who are a part of the anti-gambling backlash.139

Problem gambling was a topic of discussion in the DOT study, as well as when Congress was implementing the restrictions. The AFA believed behavioral risks would increase with problem gamblers. A recent study conducted by the National Council on Problem Gambling shows that up to 4% of Americans suffer from moderate (problem gambling) to severe (pathological gambling) forms of disordered gambling.140 Comparing the number of problem gamblers to the number of alcoholics in the U.S., about 8 million Americans are considered dependent on alcohol or are alcoholics.141 However, the government and the flight attendants provide alcohol to passengers on flights. One solution certain jurisdictions and casinos have implemented is to set limits on the amount of money a player can wager in attempt to reduce the risk of problem gaming.142

When the Gorton Amendment was being debated in Congress, many airlines stated they would set a maximum limit on gaming losses of around $200.143 Thus, when the DOT conducted their study, they used this hypothetical “limited gaming” scenario.144 It was not clear to the DOT what the consumer reaction would actually be to a limit placed on their losses. However, 15 years later, American attitude toward responsible gaming shows significant numbers that support low-stakes gaming. In a recent American Gaming Association survey of casinos, 84% of people

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144. Id. at 9, 45-46.
said they always set a budget before they started gambling. The study also showed that 75% of people set their budgets for under $200. This study shows that the possibility of a low limit in-flight gaming system would be appropriate for most consumers gambling habits. Besides studying the social issues involved, it is imperative to examine potential economic benefits of changing gaming laws.

C. Possible Tax Dollars

The government could lift the restriction in exchange for taxing the net gaming revenue. In 1996, the possible net gaming revenue for all domestic and foreign air travel to, from, and within the United States was estimated at $225 million. In today's dollars, if the government taxed the net revenue from gaming at a rate of 20%, there would be a minimum increase of $70 million per year in tax revenue. In the grand scheme of things, $70 million appears to be a minimal cost after the government spent $800 billion on the financial industry, but there is more than the tax revenue. Airlines would also have a significant increase in revenue from the gaming revenue. This could translate to an economically healthier airline industry, stabilization in the cost of air travel, and an overall increase in tourism.

With a struggling economy and industries that are in even worse shape, Congress should look at all possibilities to jump-start the economy and all of the struggling industries. The DOT's study 13 years ago estimated $225 million of net gaming revenue for domestic airlines, if they were permitted to offer in-flight gaming. Several airlines have stated they could dramatically decrease fares and possibly even offer free flights if they could to offer video gaming on their aircrafts. The airline industry would obviously benefit, but so too would passengers. In tough economic times, with airlines charging for checked bags, the cost of travel is too much for most families. Therefore, tourism is reduced and the popular travel locations are losing business. Thus, everyone could benefit by allowing airlines to offer the same services cruise ships have offered for decades.

145. State of the States, supra note 133, at 38.
146. Id.
148. Id.
Congress acted arbitrarily by placing restrictions on airlines providing onboard gambling, but allowing cruise ships to do that exact thing. In 1948, the federal government recognized that once a common carrier, i.e. cruise ship, travels to international waters, the common carrier is outside of U.S. jurisdiction.\textsuperscript{151} Congress realized that it could not compel vessels to abide by the laws of the country once in international waters. Therefore, cruise ships are allowed to offer gambling once they are in international waters. They were granted a waiver from the Johnson Act, allowing them to dock in a U.S. port with gaming devices. The government realized that foreign-flagged ships had a competitive advantage by offering gaming onboard. The Johnson Act was amended in 1992 to allow U.S.-flagged ships to offer gaming once in international waters.\textsuperscript{152} However, when the competitive advantage issue arose concerning airlines, the government's reaction was completely different.

Airlines were never granted a waiver of the Johnson Act like cruise ships and other common carriers were given. Therefore, U.S. airlines could not transport any gaming device or offer gaming onboard any flight. This meant that even when a flight was over international waters, clearly out of U.S. jurisdiction, they could not offer gaming because they weren't allowed to even have gaming devices onboard the aircraft when in U.S. territory. Two years after realizing U.S. ships should be permitted to offer gaming in international waters where there was no jurisdiction, Congress passed the complete opposite law for airlines.\textsuperscript{153} In 1994, Congress passed the Gorton Amendment, which restricted any foreign airline from having gaming devices aboard their aircrafts when in U.S. territory. By allowing cruise ships to do the exact thing they are restricting airlines from doing, Congress has created double standard.

A. Allowing Foreign Flights to Gamble

If airlines that were traveling to and from the United States were allowed to offer in-flight gaming, they would operate very similarly to cruise ships. While flights are still in the jurisdiction of the United States, the gaming devices would be "dark." Devices are turned dark so the airlines and their passengers don't violate U.S. laws. Once a flight is past U.S. jurisdiction, the gaming devices would then be turned on, enabling passengers to gamble.

Simply repealing the Gorton Amendment and granting a waiver of

\textsuperscript{151} 18 U.S.C. § 1081 (1949).
\textsuperscript{152} S. 1191, 114th Sess. (S.C. 2002).
the Johnson Act to airlines would legalize gambling on airlines. However, regulating the gaming on board airlines is not as simple.

PART X: POSSIBLE DIFFICULTIES ALLOWING IN-FLIGHT GAMING

The DOT report raised concern of the regulatory issues involved. The study questioned who would regulate in-flight gaming if Congress were to lift the restriction on all flights. If the airlines were allowed to offer in-flight gaming, there are many regulatory issues to be decided. As noted earlier, each state regulates and taxes gaming pursuant to their state law. If gaming were allowed on domestic flights, there could possibly be as many as 48 different regulatory structures. So, if the government were to allow in-flight gaming, there is no doubt that there would need to be one governing body. However, it is questionable whether the states would allow the federal government to be the sole regulator of gaming on airlines. For example, if there were domestic in-flight gaming, there would need to be a restriction on gaming on flights to Utah and Hawaii, the two states which do not allow gaming. This issue would arise due to the prior legislative acts of certain states concerning the sale of alcohol on airlines.

States control liquor licenses that are granted to the airlines. In a recent state action, New Mexico denied Frontier Airlines a liquor license. With the denial of the liquor license, Frontier could not serve alcohol on flights into New Mexico, and New Mexico also ordered US Airways to discontinue the service of alcohol on in-bound flights. US Airways has filed a lawsuit against New Mexico in U.S. District Court challenging this restriction. If in-flight gaming were allowed on flights domestically, there is a strong probability that Utah and Hawaii would desire similar restrictions as New Mexico has in the U.S. Airways action. Other than regulatory issues, there are also issues with taxing net gaming revenue.

A: TAXATION OF GAMING REVENUE

States would be unlikely to relinquish regulatory control and permit the federal government to regulate gaming on airlines without compensation. States would most likely wish to have rights to tax net gaming revenue. Each state could equally share in lump sum of tax dollars from all airline gaming, or they could each individually tax revenue. Most likely,

157. Id.
states would tax revenue on in-flight gaming that occurred on flights into and within their borders. However, there are major jurisdictional issues involved. For guidance, we can examine a similar situation of airline taxation. Wisconsin and Georgia and others tax alcoholic beverage sales within the state on flights.\textsuperscript{158} However, major difficulties might arise when determining where the sale was actually made. With this possible trouble, the best option would be for all states to share in a percentage of the tax on gaming revenue.

1. Taxation In International Waters

For taxing flights to and from the U.S., there is more of precedent to follow. Regardless of a decision to repeal the domestic in-flight gaming restriction, if the government removes the restriction on all international flights (i.e. repealing the Gorton Amendment), the taxing jurisdiction issue has been answered by cruise ship gaming. Once a cruise ship is in international waters, the federal and state governments of the U.S. have no taxing jurisdiction over gaming revenue.\textsuperscript{159} The State of Florida’s Department of Revenue (“DOR”) challenged this jurisdictional restriction when they sued New Sea Escape Cruises, LTD. for tax owed on gaming revenue earned while in international waters.\textsuperscript{160} The Florida DOR argued that because the vessel ports in Florida, the state has the right to tax the revenue under Florida law.\textsuperscript{161} The Supreme Court determined that Florida did not have the right to any portion of the gaming revenue earned in international waters because international water is outside of Florida and U.S. jurisdiction.\textsuperscript{162} Therefore, if an airline is allowed to operate gaming devices when they enter international waters, federal and state governments have no legal right to tax the gaming revenue earned.

As you can see, the U.S. would not directly benefit from lifting the Gorton Amendment without also allowing domestic airlines to offer gaming. There is no direct benefit because the government would receive nothing directly from gaming on airlines in international waters. However, there would be a potential indirect benefit to the economy with the increased cash flow and the possible resurgence of the airline industry.


\textsuperscript{160} Florida Dep’t of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 956 (Fla. 2005).

\textsuperscript{161} ld. at 957-58.

\textsuperscript{162} ld. at 962-63.
Conclusion

With the airline industry struggling to stay afloat and the domestic economy in a recession, the government should look into the laws prohibiting gaming on domestic and foreign aircrafts. It has been 15 years since Congress has last contemplated the prospects of in-flight video gaming. Technology has dramatically increased and the issues that concerned Congress with allowing in-flight gaming have subsided. At a minimum, the DOT should conduct a new study to see if current restrictions are justified. The major issues supporting the decision have been nullified by technology and time.

If the government looks entirely at direct benefits received from repealing the Gorton Amendment alone, it would not make sense for the government to repeal the amendment. If the amendment were repealed, the U.S. would have no legal right to tax any of the gaming revenue. Therefore, there is no direct economic benefit for the government to just allow foreign flights to offer in-flight gaming. However, if Congress focuses on the indirect benefit to the U.S. economy via increased revenue for domestic airlines, then there would be a reason to repeal the Gorton Amendment. Alternatively, Congress could lift the ban on all in-flight gaming, international and domestic. If the government were to lift the restriction on all in-flight gaming, there would be substantial direct economic benefits for not only the airline industry, but also for the government, the economy, and taxpayers. Congress should consider conducting a new study and discuss restrictions on in-flight gaming because of the potential benefits if the laws were repealed.
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Full-Body Scanners: Full Protection from Terrorist Attacks or Full-On Violation of the Constitution?

Andrew Welch*

“They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”

Benjamin Franklin

Historical Review of Pennsylvania, 1759

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* Andrew Welch is a third-year law student at the University of Denver Sturm College of Law. He received his B.S. in Economics from the University of Utah and an A.S. in Paralegal Studies from Utah Valley University. The author is also former Business Editor of the Transportation Law Journal. A special thanks to transportation lawyers Peter A. McLauchlan and Frank J. Mastro for their guidance and comments on this article. Additionally, the author would like to thank and recognize his wife, Tami Welch, for her unwavering support.
In a post-9/11 world, it is hardly debatable that there must be some sort of security measures to “welcome” air travelers as they prepare to board commercial airplanes. After the 2009 Christmas Day bombing attempt aboard U.S.-bound Northwest flight 253, the Transportation Security Administration (“TSA”) announced plans to step up its use of state-of-the-art “advanced imaging technologies,” or full-body scanners. TSA has plans to make the advanced imaging technologies a “primary ... rather than secondary . . . screening measure.” Currently, air travelers can be subjected to a millimeter wave or backscatter full-body x-ray search in more than fifty airports in the United States. In March 2010, TSA began deployment of 450 backscatter machines.

This paper first discusses the historical context in which security screening became a necessity, including the birth of TSA. The paper then moves into its major focus, an examination of whether constitutional


4. Id.
prohibitions on unreasonable searches and seizures or the right to privacy protect air travelers from TSA’s use of full-body scanners. The paper ends with a brief discussion of whether full-body scanners will deter terrorists and finally concludes that TSA’s plan to make full-body scanners a primary screening measure is unconstitutional.

II. Brief Aviation History

In 2009, U.S. carriers operated 8.8 million domestic and international flights. However, in 1903, the dream of flight was just beginning to be realized. Flight continues to captivate the human mind and probably has done so since the first bird was spotted floating effortlessly through the sky. The chase to accomplish the dream of flight started long before August 8, 1908, but on that special day Wilbur Wright completed his first public flight near France’s Le Mans, Hunaudieres racetrack. That simple flight earned the Wright Brothers “first place in the history of flying machines.”

Since that day, the airplane has improved dramatically. It affects the daily lives of billions by turning ordinary people into globe trotters and creating new industries, allowing the far corners of the globe to be opened to international commerce. Additionally, “[t]he frail contraption of wood, wire, and fabric [has] evolved into the definitive weapon of the century, a machine that redefined the way in which we fight our wars, and radically altered our traditional notions of what constitutes a battlefield and who qualifies as a combatant.”

While some, such as novelist Herbert G. Wells (whose 1908 novel depicted German aerial vessels attacking New York), offered a dark vision of the fast-approaching air age, many others were not initially convinced of the airplane’s potential military power. In March 1913, French General Ferdinand Foch—who would eventually be named Su-

7. Id.
10. Id. (quoting THE LONDON TIMES, August 14, 1908).
11. Id. at 10-11.
12. Id. at 10.
13. Id. at 8-9 (citing H.G. WELLS, THE WAR IN THE AIR, AND PARTICULARLY HOW MR. BERT SMALLWAYS FAKED WHILE IT LASTED (George Bell and Sons 1908)).
14. CROUCH, supra note 9, at 151.
preme Commander of the Allied armies during World War I—stated, “[a]viation is fine as a sport . . . as a weapon of war, it is worthless.” After having observed test flights in 1908, Secretary of War Luke E. Wright stated, “[airplanes] are remarkable in that they represent the actual conquest of the air, but until they are further developed, I do not think they will be of much service from a military standpoint.”

After the start of World War I and after having seen the increased use of the airplane in warfare, a surprised Orville Wright commented in 1917 that “[w]hen my brother and I built the first man-carrying flying machine, we thought that we were introducing into the world an invention which would make further wars practically impossible.” However, just a few short years later, the chief of the Engineers Directorate and commander of the French army’s first aeronautical unit Colonel Pierre August Roques disagreed with General Foch and stated that the airplane was “as indispensable to armies as cannons or rifles.”

A. WARFARE, CRIMINALS, AND TERRORISTS: THE AIRPLANE AS A WEAPON

It didn’t take long for the airplane to become an indispensable part of warfare. “On October 5, 1914, Pilot Sgt. Joseph Franz and his observer, Quenault, of l’Aviation Militaire, brought down a German Taube with a forward-firing machine gun mounted on their Voisin pusher, scoring the first aerial victory in history.” Fast forward to the skies above Pearl Harbor at 7:55 A.M., on the morning of Sunday, December 7, 1941. The Japanese conducted a surprise attack that would be remembered as the ‘Day of Infamy.’ The Japanese successfully brought the United States into World War II with their airplanes: forty-nine bombers, forty torpedo bombers, fifty-one dive-bombers, and forty-three fighters.

As aircraft technology advanced beyond the imagination of its early

15. Id.
17. Id. at 9 (citing with some alteration MIRACLE AT KITTY HAWK: THE LETTERS OF WILBUR AND ORVIL WRIGHT, Letter from Orville Wright to C.H Hancock, June 21, 1917 405) (Fred C. Kelly ed., Da Capo Press 2002) (1951)).
18. CROUCH, supra note 9, at 151.
20. CROUCH, supra note 9, at 154.
21. Id. at 396.
22. President Franklin D. Roosevelt, Presidential Address to Congress (Dec. 8, 1941).
23. CROUCH, supra note 9, at 396.
creators, the airplane’s capabilities became more apparent to those seeking new weapons that could be used to “intimidate and terrorize.”24 In one dramatic moment, terrorists “can exert leverage out of all proportion to the small weapon [they] hold” by threatening to kill hundreds of people and destroying “a technological symbol of society.”25 In the early 1920's, “pillagers” used gunfire to force a French airplane down in the Spanish Sahara.26 They eventually took control of the aircraft and held it and its crew for ransom.27 The first recorded “hijacking” of an airplane was accomplished by Peruvian revolutionaries in 1931.28 The hijackers used the plane to drop anti-government pamphlets.29

Upon walking into an airport in 1950, it was common to see air travelers purchasing flight insurance from coin-operated vending machines just before boarding their flights.30 On November 1, 1955, John Gilbert Graham planted a bomb on a United Airlines flight that his mother was on in hopes of collecting her life insurance.31 The bomb ended the lives of thirty-nine passengers and five crew members.32 Graham confessed to placing a timer and twenty-five sticks of dynamite in his mother’s suitcase.33 Ironically, because his mother’s suitcase exceeded the weight limit by thirty-seven pounds, she had paid a $27.82 surcharge to get it on the plane.34 It wouldn’t be until after the September 11, 2001 terrorist attacks, nearly forty-six years after Graham stashed explosives in his mother’s baggage, that Congress would mandate that all checked baggage be screened by an explosive detection system.35 While all passenger bags are currently being screened, not all air cargo is: TSA is still working on complying with a congressional mandate to screen 100 percent of cargo transported on passenger aircraft.36

When it came time for United States Attorney Donald Kelley to charge Graham with blowing up the plane, Mr. Kelley was shocked to

25. Id.
26. Id. at 9-4 (citing R. Chambre, Histoire De L’Aviation 304-10 (1948)).
27. Id.
29. Id.
31. Id.
32. Id. at 12.
33. Id. at 66.
34. Id.
36. Id.
discover that there was no federal statute on the books that made it a crime to blow up an airplane.37 About eight months later in July 1956, President Eisenhower signed a bill providing for up to twenty years in prison for acts of aircraft sabotage not resulting in death, and the possibility of the death penalty for any person convicted of committing an act of aircraft sabotage that resulted in death.38

As air travel increased, more deadly hijackings occurred. Between 1949 and 1985, 1,539 people were killed in eighty-seven aircraft bombings.39 During that same timeframe, there were a staggering “498 successful and 281 failed hijacking attempts worldwide.”40 In 1969, there were more than fifty hijackings or attempts made on U.S. operated airlines.41 January 1969 alone saw eight U.S. airliners hijacked to Cuba.42 In February 1969, the Federal Aviation Administration (“FAA”) was desperate to do something. Its Task Force on the Deterrence of Air Piracy recommended using profiling and constructed a hijacker profile from shared behavioral characteristics of past hijackers.43 "When used in conjunction with a FAA-developed magnetometer weapons screening device, the profile system offered a promising method of preventing potential hijackers from boarding aircraft."44

Despite the use of profiling techniques and the magnetometer screenings, the threat of hijackings continued.45 FAA realized that it had to do more, and in December 1972, it issued a “landmark emergency rule” that required U.S. air carriers to scan each passenger with a metal detector and inspect all carry-on baggage for dangerous items, beginning in January 1973.46 If a metal detector was not available, the rule required that a “physical search, or pat down,” be conducted and provided that anyone refusing to consent to the physical search would not be permitted to board the plane.47 In August 1974, President Nixon signed the Anti-
Constitutionality of Body Scanners

Hijacking Act of 1974 which, among other things, required the FAA to keep its new security screening procedures in place and allowed the FAA to use federal personnel to supplement law enforcement officers in airport security programs.48

On the morning of September 11, 2001, nineteen terrorists hijacked four U.S. domestic airplanes after having penetrated security at three major airports.49 Three of those planes were turned into jet-powered missiles that killed thousands, destroyed the World Trade Center in New York City, and damaged the Pentagon in Arlington, Virginia.50 Realizing the hijacker’s plans, the courageous passengers of United Flight 93—one of the four hijacked planes—fought back. At 10:03 A.M., their plane crashed in Stony Creek Township, Pennsylvania, killing all on board.51

At 9:04, one minute after United Flight 175 crashed into the south tower of the World Trade Center, FAA’s Boston Air Route Traffic Control Center stopped all air departures in its jurisdiction.52 Not long after, FAA decided that drastic measures were needed and, for the first time in U.S. aviation history, instated a national ground stop—banning takeoffs of all civilian aircraft regardless of destination.53 It was not until September 19 that the FAA lifted most restrictions on U.S. registered general aviation aircraft.54

B. The Creation Of The Federal Aviation Administration

The sensation of freedom and success undoubtedly felt by Wilber Wright during his first public flight in 1908 has since been undermined by numerous rules and regulations.55 The first significant legislation involving the airplane was the Air Mail Act of 1925.56 Not only did this legislation begin the contractual relationship between the Post Office and airlines to carry the mail, it “facilitated the creation of a profitable commercial airline industry, and airline companies such as Pan American Airways, Western Air Express, and Ford Air Transport Service began commercial passenger service.”57

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48. Id. This was to become the Civil Aviation Security Service. Id.

49. Id.

50. Id.

51. Id. at 127.

52. Id.

53. Id.

54. Id. at 128.


56. See generally Kraus, supra note 42, at 1.

57. Id. Instead of insisting on cargo aircraft, the postmaster general spurred the passenger segment of commercial airlines by encouraging the airlines to use passenger aircraft to deliver the mail. Id.
At the urging of the aviation industry, President Calvin Coolidge signed the Air Commerce Act in 1926, which charged the Secretary of Commerce with licensing pilots, certifying aircraft, establishing airways, issuing and enforcing air traffic rules, fostering air commerce, and operating and maintaining aids to air navigation.\textsuperscript{58} Having been charged with the responsibility for aviation oversight, the Department of Commerce created the Aeronautics Branch, which began focusing on safety rulemaking.\textsuperscript{59} Wanting to take more control of the aviation industry after a series of midair collisions, Congress repealed the Air Commerce Act of 1926, along with other aviation related acts,\textsuperscript{60} and replaced it with the Federal Aviation Act.\textsuperscript{61}

C. The Emergence Of The Transportation Security Administration

FAA would not be in charge of aviation security forever; after September 11, 2001, President George W. Bush signed the Aviation and Transportation Security Act into law.\textsuperscript{62} This created a new agency—the Transportation Security Administration ("TSA") within the Department of Transportation—that would take over responsibility for aviation security.\textsuperscript{63} By the end of 2002, "passage of the Homeland Security Act (Public Law 107-296) brought TSA into the new Department of Homeland SecurityFalse"\textsuperscript{64}

Continuing in the legacy of the Aeronautics Branch, TSA has continued to focus the federal government’s eye on aviation security. Notwithstanding the fact that "over the past two decades the number of flight hours logged by air carriers ha[s] almost doubled and the number of departures ha[s] increased by 50 percent,\textsuperscript{65} the period “[b]etween 2001 and 2007, aviation witnessed one of its safest periods for scheduled air carriers.”\textsuperscript{66} Years earlier in 1972, however,

[o]ne airline executive expressed surprise that the screening procedures [then enacted] were so readily accepted. ‘It seems ironic... we find ourselves

\begin{footnotes}
\item[58] Id. at 3.
\item[59] Id.
\item[60] Id. at 9. On August 23, 1958 the Federal Aviation Act was passed repealing the Air Commerce Act of 1926, the Civil Aeronautics Act of 1938, and the Airways Modernization Act of 1957. Id.
\item[61] Id. This act created the Federal Aviation Administration. Id.
\item[62] Id. at 129.
\item[63] Id.
\item[64] Id.
\item[65] Id. at 147 (statistics from the National Transportation Safety Board).
\item[66] Id. “Not counting the terrorist activities of September 11, 2001, there were only three fatal accidents in 2001; none in 2002; two in 2003; one in 2004; three in 2005; two in 2006; and none in 2007.” Id.
\end{footnotes}
in a situation where each and every air traveler in the United states [sic] is treated as a suspect as soon as he enters an airline terminal. It would seem ironic to the citizen of 1937 that air travelers today not only submit willingly to searches of their person and carry on baggage, but actually laud the virtues of and need for such action.\textsuperscript{67}

With TSA rolling out full-body scanners, one can only imagine what this airline executive, not to mention a citizen of 1937, would think of the security screening measures of today.

III. SECURITY SCREENING PROCEDURES AND THE FOURTH AMENDMENT

Responding to the increased hijackings of the day, FAA “mandated passenger profiling in the 1960sFalse\textsuperscript{68} If a passenger fit the profile—twenty-five characteristics compiled from historical data on known terrorists\textsuperscript{69}—only then was the passenger subjected to further scrutiny.\textsuperscript{70} However, FAA believed the practice was ineffective and abandoned profiling in 1972.\textsuperscript{71} Instead, FAA implemented X-ray searches of all carry-on luggage at global security checkpoints.\textsuperscript{72} The idea of profiling as a means of screening passengers did not come to the forefront again until TWA Flight 800 exploded soon after takeoff in 1996.\textsuperscript{73}

Shortly after the tragedy aboard TWA Flight 800, President Bill Clinton created the “White House Commission on Aviation Safety and Security”—commonly known as the “Gore Commission.”\textsuperscript{74} Having been charged with “develop[ing] and recommend[ing] to the President a strategy designed to improve aviation safety and security, both domestically and internationally,” the Gore Commission made several “recommendations including the revitalization and reformulation of passenger profiling from the 1960s.”\textsuperscript{75} Northwest Airlines was the first to develop a computer passenger profiling system in 1996 under a grant from the FAA and “released the profiling software to other airlines through the FAA in 1997.”\textsuperscript{76}

The government avoided calling the “Computer Assisted Passenger

\textsuperscript{67} Dempsey et al., supra note 24, at 9-53 (citing Fenello, Individual Rights v. Skyjack Deterrence: An Airline Man’s View, 18 Vill. L. Rev. 996 (1973)).

\textsuperscript{68} Ravich, supra note 28, at 9.

\textsuperscript{69} Id. at 10. These characteristics were known as the “Anti-Air Hijack Profile.”

\textsuperscript{70} Id. at 9-10.

\textsuperscript{71} Id. at 10.

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 10-11. It was determined that TWA Flight 800, flying from New York, was brought down by a defective fuel tank, not terrorists. Id. at 10.

\textsuperscript{74} Id. at 10.

\textsuperscript{75} Id. at 11 (quoting Exec. Order No. 13,015, 61 Fed. Reg. 43,937 (Aug. 22, 1996)).

\textsuperscript{76} Id.
Prescreening System” ("CAPPs") a profiling system, but instead tried to sell it as a “management tool,” whose goal was “not to pick a needle out of the haystack . . . but to make the haystack smaller.”77 While the government will not—and possibly more importantly cannot reveal—why a traveler would be identified by CAPPs as a potential threat, as a “selectee” of CAPPs, the traveler is “subject to secondary screening.”78 Despite promises to modify the system,79 TSA abandoned CAPPs II in July 2004, amid growing opposition that was hard to ignore, especially after the United States General Accounting Office (“GAO”) expressed privacy concerns.80

After failing to garner public acceptance of both CAPPs and CAPPs II, TSA implemented the “Secure Flight” program in August 2004.81 This program, too, has met with opposition.82 While CAPPs and CAPPs II were criticized for spreading the net too wide and bearing too many “false positives” and “false negatives,”83 TSA hoped that, by taking over the airlines’ duty of checking government watch lists before a passenger is issued an airplane ticket, Secure Flight will “reduce the number of domestic airline passengers pulled aside for more rigorous screening while increasing the chance of catching known or suspected terrorists.”84

On September 19, 2005, Secure Flight was dealt a serious blow when

77. Id. at 11-12 (quoting Bill Dedman, FAA Looking To Expand System, BOSTON GLOBE, Oct. 12, 2001, at A27).
78. Id. at 12-13.
79. Id. at 18. TSA offered to modify CAPP II in three specific ways: (1) TSA would “erase most passenger information in the CAPPs II system within seven days after passengers completed their scheduled travel,” (2) TSA would provide an appeals process for those passengers that were erroneously targeted, and (3) TSA would “limit[ ] the use of private commercial data to compose a traveler’s security profile.” Id.
80. Id. at 19. The GAO added insult to injury when it stated that “[u]ntil TSA finalizes its privacy plans for CAPP II and addresses such concerns, we lack assurance that the system will fully comply with the Privacy Act.” Id. (quoting U.S. GEN. ACCOUNTING OFFICE, AVIATION SECURITY: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges 42 (2004)).
81. Id. The 9/11 Commission Report recommended that TSA take over watch list matching from the airlines. This recommendation was codified by the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”). IRTPA requires Homeland security and TSA to take over from the airlines the function of conducting pre-flight comparisons of airline passengers’ information to federal government watch lists. The Secure Flight Rule is an attempt to comply with this Congressional mandate. Id. at 20. See also Transp. Security Admin., Secured Flight: Frequently Asked Questions, http://www.tsa.gov/what_we_do/layers/secureflight/faqs.shtm#Basics (last visited Oct. 9, 2010) [hereinafter, TSA FAQ].
82. Ravich, supra note 28, at 22; see also Yevgenia S. Kleiner, Racial Profiling In The Name Of National Security: Protecting Minority Travelers' Civil Liberties In The Age Of Terrorism, 30 B.C. THIRD WORLD L.J. 103, 134-35 (2010).
83. Ravich, supra note 28, at 8.
84. Id. at 19-20.
the Secure Flight Working Group ("SFWG")—a panel of nine experts in security and privacy—and the Aviation Security Advisory Committee both refused to recommend the program to TSA.\footnote{Id. at 24. SFWG's primary concern was that TSA had not articulated specific goals for Secure Flight and had no way of knowing whether TSA's goals were realistic, attainable, or how TSA would achieve them. \textit{Id.}} Despite these concerns, TSA's Secure Flight Final Rule required, as of October 31, 2009, all airlines to request, collect, and transmit to TSA Secure Flight Passenger Data ("SFPD").\footnote{Id.} "Secure Flight is being phased in with each airline. Implementation with all domestic airlines is scheduled to be completed in the Spring of 2010 and international carriers by the end of 2010."\footnote{Id.} To address SFWG's concerns TSA has now posted on its website the goals of the program.\footnote{Id.}

Collecting SFPD and sending it to a one-stop shop to compare it with government watch lists may be a better solution than having numerous private airlines, whose primary focus should be on safely flying the plane from point A to point B, do the checking. Not only may this be the most effective way by cutting the amount of personnel needed by numerous airlines down to just TSA personal, but it may also be the best way in regards to privacy issues for two reasons. First, the fewer people pouring over individuals' records the better. Second, SFPD is information that, when requested by the government, can hardly be called an invasion of privacy. SFPD includes date of birth and gender, both of which are found on a Certificate of Live birth, which is usually kept by a state or local government agency.

A. STATE-OF-THE-ART ADVANCED IMAGING TECHNOLOGY

Regardless of whether the threats have become so great or the technology has advanced to such a degree (or both), "TSA began deploying state-of-the-art advanced imaging technologies in 2007."\footnote{Imaging, supra note 3.} TSA claims that, in only a matter of seconds, "[t]his technology can detect a wide range of threats to transportation security," and will protect passengers and airline crews.\footnote{Id.} TSA currently utilizes two types of imaging technol-
ogy: the backscatter and the millimeter wave machines.92 The millimeter wave full-body scanner produces “an image that resembles a fuzzy photo negative;” a three-dimensional image of your naked body.93 If the backscatter full-body scanner is used instead, the TSA claims that it will produce a two-sided94 “image that resembles a chalk etching” of your naked body.95 Some have called this a “virtual strip search”96 or “nude” scanners.97

The above image is an example of the millimeter wave technology.98

92. Id.
94. Testimony, supra note 1, at 6.
95. Id.
98. TSA, How it Works, supra, note 94.
Constitutionality of Body Scanners

In addition to privacy concerns and concerns regarding the efficacy of full-body scanners, many have also expressed concerns that full-body scanners expose air travelers to radiation emitted from the machines. However, according to TSA, “[b]ackscatter technology projects low level X-ray beams over the body to create a reflection of the body displayed on the monitor.” TSA also claims that “[m]illimeter wave technology bounces harmless electromagnetic waves off the body to create a black and white three-dimensional image.” Regardless of how scientific and harmless TSA tries to make these machines sound, many commentators have called the screening technique highly invasive and a “virtual strip-search.”

99. Id.


101. TSA How it Works, supra, note 94 (emphasis added).

102. Id. (emphasis added).

B. **FOURTH AMENDMENT HISTORY AND ITS APPLICATION IN AIRPORTS**

Although Colonial residents could not imagine a "virtual strip search," or modern air travel, they were all too familiar with the abuses of personal privacy that transferred from Great Britain to the American Colonies.\(^{105}\) Having been subjected to general warrants and writs of assistance, the Founding Fathers had good reason to protect against such abuses in the Constitution.\(^{106}\)

The immediate object of the Fourth Amendment was to prohibit the general

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\(^{104}\) This picture was taken August 11, 2010, by the author at the Denver International Airport. The words “All persons and property are subject to additional screening beyond this point” greet passengers just after some passengers have been searched by full-body scanners. The sign is probably ignored by most passengers, but it begs the question of when enough is enough. While this article will not discuss screening that occurs after passengers have gone through the security checkpoint to get into the airport, which is where the search by full-body scanners takes place, TSA has announced that they will begin randomly swabbing passengers hands and luggage in conjunction with Explosive Trace Detection technology used not only at the security checkpoint but also after they have passed through the security checkpoint in the boarding areas. Transp. Security Admin., *TSA Expands Use of Explosive Trace Detection Technology at Airports Nationwide*, February 17, 2010, available at http://www.tsa.gov/press/releases/2010/0217.shtml.


\(^{106}\) *Id.* at 15. General warrants and writs of assistance were both used in colonial times. General warrants “required no oath or affirmation to support their claims, no grounds explaining the basis of suspicion as to why someone had broken the law, and placed no limits on the locations to be searched or the objects which could be seized.” The general warrant was “limited to a single specific event that created the cause behind the search. Writs of assistance were similar, but . . . continued in operation until six months after the death of the sovereign under whom they were issued.” The Court of the Star Chamber was created to broaden the broad search and seizure powers of the government and approved of the King’s messengers’ practice of searching “any subject at any time, day or night, to enforce the laws . . .” *Id.* at 15-16.
warrants and writs of assistance that English judges had employed against the colonists [internal citations omitted]. That suggests, if anything, that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.\textsuperscript{107}

Soon after declaring independence, eight states included protections against abusive searches and seizures in their state constitutions; five states proposed amendments to the United States Constitution providing similar protections during the ratification debates.\textsuperscript{108} When all was said and done, the Fourth Amendment of the United States Constitution was sent to the states and ratified in 1791.\textsuperscript{109} The Fourth Amendment guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.\textsuperscript{110}

The issue with advanced imaging technology is whether it infringes on the “right of people to be secure in their persons” from “unreasonable searches” in an airport setting. The threshold question is whether the Fourth Amendment is applicable in an airport setting. When one walks into an airport, he or she is typically greeted by long lines of people being herded barefoot through metal detectors and x-ray machines while their bags are also being screened. Congress has mandated that “[t]he Under Secretary of Transportation Security shall provide for the screening of all passengers and property,”\textsuperscript{111} and that “the screening shall take place before boarding and shall be carried out by a Federal Government employee.”\textsuperscript{112}

The answer to whether the Fourth Amendment applies to security searches at airports is an easy one, thanks to the explicit wording in 49 U.S.C.S. § 44901\textsuperscript{113} calling for all passengers to be screened by federal government employees. Years before the statute was enacted, the United States Supreme Court, in Burdeau v. McDowel, made it clear that the Fourth Amendment “protection applies to government actions. . . . it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than government agen-

\textsuperscript{108} McINNIS, supra note 105, at 19.
\textsuperscript{109} Id. at 20.
\textsuperscript{110} U.S. CONST. amend. IV.
\textsuperscript{112} Id. (emphasis added).
\textsuperscript{113} Id.
The Fourth Amendment is needed more than ever to protect against unfettered airport security screening—the modern-day equivalent of a general warrant—where suspicion is not based on probable cause, where there is no sworn oath or affirmation, and where one’s body and luggage are subject to invasive searches.115

As a general rule, in order to be considered reasonable under the Fourth Amendment, searches must be based on probable cause and “conducted pursuant to a judicially issued warrant.”116 Courts have managed to come up with numerous justifications to keep airport security screenings within the bounds of the Fourth Amendment.117 For example, courts have found airport searches reasonable where “exigent circumstances” exist, or when the right to be free from unreasonable searches has been waived, and courts have even distinguished airport searches as administrative searches.118 However, courts have found the “critical zone” or border theory most persuasive119 because an “airport, like the border crossing, is a critical zone in which special fourth amendment considerations apply.”120

In United States v. Skipwith,121 the Fifth Circuit Court of Appeals applied the critical zone test. In 1971, unwilling to present identification and having met the FAA anti-hijacking profile, Lee Skipwith III was de-

115. McInnis, supra note 105, at 15.
116. Dempsey et al., supra note 24, at 9-54; see Katz v. United States, 389 U.S. 347, 357 (1967) (stating, “Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause” for the Constitution requires “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . . Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,” and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delimited exceptions.”) (internal citations omitted) (citing Wong Sun v. United States, 371 U.S. 471, 481-482 (U.S. 1963); U.S. v. Jeffers 342 U.S. 48, 51 (1951); Agnello v. United States, 269 U.S. 20, 33 (U.S. 1925)).
117. While this paper will not discuss exceptions to the warrant requirement imposed by the Fourth Amendment outside the context of airport searches, there are many United States Supreme Court cases that do discuss exceptions in various scenarios. See, e.g., United States v. Robinson, 414 U.S. 218, 224 (1973) (discussing warrantless searches incident to arrest); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (stating warrantless searches are justified if officers are in “hot pursuit”); Coolidge v. New Hampshire, 403 U.S. 443, 465, (1971) (declaring that “under certain circumstances the police may seize evidence in plain view without a warrant.”).
118. Dempsey et al., supra note 24, at 9-62.
119. See United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); see also United States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984) (embracing tripartite analysis set forth in Skipwith); United States v. Albarado, 495 F.2d 799, 805 (2d Cir. 1974) (considering need for the search, ‘inefficiency’ of search, and intrusion on privacy interests).
120. United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973).
121. Skipwith, 482 F.2d at 1274-77.
tained at the Eastern Airlines boarding gate at the Tampa International Airport and questioned by a deputy United States marshal.\textsuperscript{122} The court noted that Skipwith had not simply been stopped and frisked\textsuperscript{123} by the marshal, but Skipwith had reported to the boarding area where “he knew or should have known all citizens were subject to being searched.”\textsuperscript{124} The court found that the airport search of Skipwith at the boarding gate was constitutional because

the standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations. In the critical pre-boarding area where this search started, reasonableness does not require that officers search only those passengers who meet a profile or who manifest signs of nervousness or who otherwise appear suspicious.\textsuperscript{125}

While endorsing the critical zone theory, the court set forth a three-part balancing test.\textsuperscript{126} The court stated that while the dangers posed by air piracy were even greater than the dangers at border crossings, necessity alone does not make a non-probable-cause search reasonable.\textsuperscript{127} “Reasonableness requires that the courts must weigh more than the necessity of the search in terms of possible harm to the public.”\textsuperscript{128} The court identified three factors in its balancing test: (1) public necessity, (2) efficacy of the search, and (3) degree of intrusion.\textsuperscript{129}

C. THE TRIPARTITE TEST TO DETERMINE THE REASONABleness OF AIRPORT SEARCHES

Applying this test to TSA’s plan to implement advanced imaging technology,\textsuperscript{130} the dangers posed by terrorists and other evil-doers makes factor one—public necessity—not even debatable.\textsuperscript{131} There is no question that public safety calls for a thorough and effective screening pro-

\begin{itemize}
  \item \textsuperscript{122} Id. at 1273.
  \item \textsuperscript{123} Id. at 1274; see also Terry v. Ohio, 392 U.S. 1, 27 (1968) (creating exception to warrant requirement in situations where a law enforcement officer would be allowed to “stop and frisk” someone without probable cause in search of a weapon if law enforcement officer had reasonable suspicion that he might be in danger).
  \item \textsuperscript{124} Skipwith, 482 F.2d at 1274.
  \item \textsuperscript{125} Id. at 1276.
  \item \textsuperscript{126} Id. at 1275.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} Id.; see also Herzbrun, 723 F.2d at 775 (embracing three part analysis set forth in Skipwith); Albarado, 495 F.2d at 805 (considering need for search, “inefficiency” of search, and intrusion on privacy interests).
  \item \textsuperscript{130} Imaging, supra note 3.
  \item \textsuperscript{131} See United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) (concluding that deterring and preventing airplane hijackings is “unquestionably grave and urgent”), overruled by United States v. Aukai, 497 F.3d 955 (9th Cir. 2007); United States v. Hartwell, 296 F. Supp. 2d 596, 602 (E.D. Pa. 2003) (stating “[l]ittle controversy exists regarding the first two factors, public neces-
cess. However, we should be just as skeptical as the founding-era citizens were “of using the rules for search and seizure set by government actors as the index of reasonableness.”132

The second factor—efficacy of the search—is much more controversial. In fact, a lawsuit filed July 2, 2010, by the Electronic Privacy Information Center (“EPIC”)133 may eventually bring this issue before the United States Supreme Court. EPIC is arguing for the suspension of the deployment of the full-body scanners because it claims they violate the Privacy Act, the Administrative Procedure Act, the Religious Freedom Restoration Act, and the Fourth Amendment.134 EPIC specifically cited the invasive nature of the devices and TSA’s disregard of public opinion.135 In its lawsuit, EPIC also stated that full-body scanners are “unlawful, invasive, and ineffective.”136 The President of the EPIC previously testified before Congress asking it to halt the plan to deploy the full-body scanners.137

Under Skipwith, “virtual strip searches” that full-body scanners offer are not effective enough to be constitutional when compared to how invasive they are. While many, such as EPIC and the American Civil Liberties Union (“ACLU”) are questioning whether the new security screening will be very effective,138 so too is the GAO.139,140 In a report released on March 17, 2010, the GAO stated “it remains unclear whether the AIT (advanced imaging technology) would have detected the weapon used in

134. Electronic Privacy Information Center, supra note 132.
135. Id.
136. Id.
137. Id.
138. American Civil Liberties Union, supra note 96.
140. Testimony, supra note 1, at 8-10.
the December 2009 [Christmas Day bombing attempt] incident."

An argument is being made that terrorists can hide explosives by molding them against their body, putting them in body cavities, or placing them in folds of skin. This would make explosives and the like impossible to detect with a full-body scan. Rumors have even been reported that women suicide bombers, recruited by al-Qaida, are having explosives inserted into their breasts using techniques similar to breast augmentation surgery. As the screening technology adapts so do the terrorists. This is not to say that it is a winless battle, but it makes it that much more imperative to ensure that law-abiding Americans are not subjected to humiliating, intrusive, and most importantly, unreasonable searches that in the end are not as effective at stopping terrorists as one might think. We must be very careful when asking citizens to trade their privacy in the hope for safety.

In 2009, CBS News reported that an al-Qaeda terrorist was able to smuggle a pound of high explosives (and the detonator) in his rectum, all in an attempt to assassinate Prince Mohammed Bin Nayef, head of Saudi Arabia's counterterrorism operations. Luckily, the assassination attempt only left the victim slightly wounded. Before making his way to the prince, the "Trojan bomber" had avoided detection by airport secur-

141. A Nigerian national attempted to blow up Northwest Flight 253 from Amsterdam to Detroit on December 25, 2009. Office of the Press Secretary, White House, White House Review Summary Regarding 12/25/2009 Attempted Terrorist Attack, Jan. 7, 2010, available at http://www.whitehouse.gov/the-press-office/white-house-review-summary-regarding-12252009-attempted-terrorist-attack. The attempt failed and the plane landed safely after the terrorist had been restrained. Id. President Obama directed the Assistant to the President for Homeland Security and Counterterrorism to complete a complete review of the terrorist watchlisting system and required key departments and agencies provide input into the review. Id. While applauding the strides that have been made since September 11, 2001, the preliminary White House review blamed "human errors and a series of systematic breakdowns" for failing to stop the terrorist from boarding the plan to the United States. Id.

142. GAO also recognized that TSA has yet to complete a cost-benefit analysis and recommended that they do so. Testimony, supra note 1, at 10. GAO estimates increases in staff alone to cope with TSA's plan to increase the use of advanced imaging technology as a primary search device could cost up to $2.4 billion over the plan's expected service life. Id.


146. MacVicar, supra note 146.
ity, including metal detectors and palace security.\textsuperscript{147} It is unlikely that a full-body scanner would be any more effective in detecting the explosives. GAO reports that advanced imaging technology only performed as well as physical pat downs in operational tests.\textsuperscript{148}

Italy has found the same problems and says that the scanners actually take longer than a physical pat down.\textsuperscript{149} The Italian daily Corriere della Sera recently reported that after six months of testing, Italy will stop using full-body scanners at security checkpoints in airports.\textsuperscript{150} In fact, the scanners are already no longer in use at airports in Rome, Venice, and Palermo because the Italian government not only found them to be slow, but also to be ineffective for detecting weapons and explosives.\textsuperscript{151}

While the technology can see beneath clothing, the image produced by a full-body scanner does not reveal items beneath the surface of the skin.\textsuperscript{152} According to TSA’s website, the full-body scanner “detects metallic and non-metallic threats, including weapons, explosives and other items that a passenger is carrying on his/her person, without physical contact.”\textsuperscript{153} Some believe that the “carrying on” the person is not the same as “carrying in” the person, thereby making the new machines ineffective in detecting “Trojan” or “bosom” bombers.\textsuperscript{154}

Another problem with the machines’ efficacy could be the fact that their locations are published. TSA has published plans to deploy 450 full-body imagers by the end of 2010,\textsuperscript{155} with maps easily accessible on the TSA website of where these machines currently are and where they will be located.\textsuperscript{156} Terrorists can easily avoid the airports that contain this technology simply by looking at TSA’s website. Only time will tell if a successful argument can be made that giving legitimate air travelers who have been subjected to the electronic full-body search a false sense of security (when in fact the terrorists are avoiding airports that use full-body scanners) in and of itself makes the search unreasonable.

\textsuperscript{147} Id.
\textsuperscript{148} Testimony, supra note 1, at 9.
\textsuperscript{151} Id.; Italian Airport Security Axing Body Scanners, supra note 148.
\textsuperscript{152} Electronic Privacy Information Center, supra note 132.
\textsuperscript{154} American Civil Liberties Union, supra note 96.
\textsuperscript{155} Imaging, supra note 3.
\textsuperscript{156} Id.
The third and final prong\textsuperscript{157} of the test—degree of intrusion—could spell doom for airport virtual strip searches. The \textit{Skipwith} court recognized the intrusion of airport searches as “inconvenient and annoying, in some cases it may be embarrassing, and at times it can be incriminating.”\textsuperscript{158} However, it spent very little time discussing the intrusive nature of the searches and instead addressed the factors that it claimed made airport searches less offensive than in other contexts.\textsuperscript{159} The court stated that the search of Skipwith was not intrusive to the degree of unreasonableness because of the “almost complete absence of any stigma” of being searched at the airport, a known and designated search point.\textsuperscript{160}

Distinguishing airport searches from those conducted on “dark and lonely streets at night,” the court was confident that the “circumstances under which the airport search is conducted make it much less likely that abuses will occur.”\textsuperscript{161} The argument that there was no stigma attached to Skipwith’s search would not have held water had Skipwith been searched by a full-body scanner. Abuses and indiscretion are sure to follow a virtual strip search. One need only ask Rolando Negrin, a TSA worker at the Miami International Airport, about the stigma associated with being searched by the full-body scanners.\textsuperscript{162} Mr. Negrin finally snapped after being subjected to jokes about the size of his genitalia on a daily basis.\textsuperscript{163} The daily teasing started when Mr. Negrin stepped through a full-body scanner as part of a training exercise and his supervisor started to make fun of his genitalia, which was made visible by the machine.\textsuperscript{164} Because the search reveals intimate and private areas of one’s body, the stigma is inherent.

The court in \textit{Skipwith} focused on the fact that for one to be subjected to an airport search, one must go to the airport and voluntarily enter the boarding area where the searches are conducted.\textsuperscript{165} Accordingly, “the offensiveness of the screening process is \textit{somewhat} mitigated” by this fact.\textsuperscript{166} At least two federal circuit courts of appeal disagree.\textsuperscript{167}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Skipwith}, 482 F.2d at 1275.
\item \textit{Id}.
\item \textit{Id.} at 1275-76.
\item \textit{Id}.
\item \textit{Id.} at 1276.
\item \textit{Id.} at 1276.
\item \textit{Id.} at 1275-76.
\item \textit{Id.}
\item \textit{Id.} at 1275-76.
\item \textit{Id.}
\item \textit{Id.}.
\item \textit{Id.}.
\item \textit{United States v. Kroll}, 481 F.2d 884, 886 (8th Cir. 1973) \textit{see also Albarado}, 495 F.2d at
\end{enumerate}
\end{footnotesize}
United States v. Kroll, the Eighth Circuit affirmed the district court's order granting defendant's motion to suppress evidence after having been subjected to a mandatory, warrantless search at the airport.\textsuperscript{168} The defendant fit the airline's terrorist profile and was required to pass through a magnetometer machine before being granted entry to his commercial flight.\textsuperscript{169}

The court rejected the government's argument that the suppressed evidence should have come in because the defendant had consented to the search by attempting to board the plane.\textsuperscript{170} The Eighth Circuit agreed with the district court that this act alone did not constitute consent in any meaningful sense . . . . Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent[ed] to the search when to do otherwise would have meant foregoing the constitutional right to travel.\textsuperscript{171}

Compelling travelers to submit to a virtual strip search before exercising their constitutionally guaranteed right to travel (especially when the search's degree of intrusiveness is much greater than its efficacy) can hardly be called free and voluntary consent.

According to TSA, the use of full-body scanners is currently optional.\textsuperscript{172} However, passengers who refuse to submit to this search are required to submit to "an equal level of screening, including a physical pat-down."\textsuperscript{173} Thus, it is "optional" in that the sense that one has a choice between a rock and a hard place. This does not constitute consent when the other option is to submit to a physical pat-down or forfeit your flight all together. Additionally, the "option" to avoid the full-body scanners will not last very long. According to a GAO report, "TSA plans to procure and deploy 1,800 AITs by 2014 and use them as a primary screening measure."\textsuperscript{174} A primary screening measure is conducted on all airline passengers before they are allowed to board a commercial flight, as opposed to secondary screening, which occurs when a passenger trig-

\textsuperscript{806-07} (stating that "[t]o make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, . . . . in many situations a form of coercion, however subtle. While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all.").

\textsuperscript{168} Kroll, 481 F.2d at 887.
\textsuperscript{169} Id. at 885.
\textsuperscript{170} Id. at 886-87.
\textsuperscript{171} Id. at 886 (citing United States v. Meulener, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D. N.Y. 1971)).
\textsuperscript{172} Imaging, supra note 3.
\textsuperscript{173} noagendapdfs.org, supra note 152.
\textsuperscript{174} Testimony, supra note 1.
gers an alarm during primary screening and is then selected for additional screening.

The United States Supreme Court has found that while the word “travel” is not found in the Constitution, it is nonetheless a constitutional right. There is, however, an argument that traveling by plane is simply a mode of transportation and that the mode is not constitutionally protected. The Second Circuit has addressed the mode of transportation question, specifically as it applies to travel by plane. It stated that consent, based on the mere fact that a passenger has notice of a mandatory search before being allowed to board an airplane, was analogous to the government announcing that all telephones would be tapped in order to counter an outbreak of political kidnappings.

The court rejected the proposition that anyone using a telephone consented to a search, even if the public were aware of the government’s wiretapping plan and had the opportunity to avoid using the phone.

It would not matter that other means of communication exist—carrier pigeons, two cans and a length of string; it is often a necessity of modern living to use a telephone. So also is it often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense.

The court’s statement is truer today than when it was made in 1974. Certainly the expectations of the twenty-first century dictate that a business person occasionally must be in New York City one day and in Los Angeles the next.

Considering other modes of transportation, the airplane is not only the fastest and cheapest way, but it is the only way to make it from New

175. *Id.*
176. See *Saenz v. Roe*, 526 U.S. 489, 498-99 (1999) (stating that “[t]he word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”); Shapiro v. Thompson, 394 U.S. 618 (1969) (viewing the right to travel as “fundamental” and triggering strict scrutiny of classifications impinging on that right that would otherwise receive rationality review), overruled in part by *Edelman v. Jordan*, 415 U.S. 651 (1974); United States v. Guest, 383 U.S. 745, 757 (1966) (stating “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”).
177. *Albarado*, 495 F.2d at 807.
178. *Id.*
179. *Id.*
180. *Id.*
181. According to the National Transportation Safety Board, an independent U.S. Federal agency charged by Congress with investigating every civil aviation accident in the United States, Americans feel the need to fly now more than ever. See *Kraus*, supra note 42, at 173. In 1978, four years after the *Albarado* court, there were 328 million enplanements—paying customers—in the United States. *Id.* In 2008 that had more than doubled to 776 million enplanements. *Id.* In 1978 there were 13,830 airports. *Id.* By 2008 there were 19,815. *Id.*
York City to Los Angeles in one day. A ticket from John F. Kennedy International Airport to Los Angeles International would cost around $149 and would take about six and half hours in the air.\textsuperscript{182} Taking the train would cost about $197, take sixty-seven and a half hours, and would require at least one train change.\textsuperscript{183} Another option would be to drive. Driving a car would take about forty-two and half hours\textsuperscript{184} behind the wheel, cost about $358 in fuel,\textsuperscript{185} and cost about $39.20 a day to rent the car.\textsuperscript{186} It goes without saying that in the modern era, traveling by plane can sometimes be, effectively, the only way to travel—the definition of a necessity. It can hardly be said that one is willingly and freely consenting to a full-body search simply by attempting to board a plane, especially when flying may be the only way to get to one’s destination.

Returning to the intrusive prong of the test, TSA boasts that there is no physical contact when submitting to the new screening technology, but that the millimeter wave full-body scanner produces “an image that resembles a fuzzy photo negative;”\textsuperscript{187} a three-dimensional image of your naked body. If the backscatter full-body scanner is used instead, TSA claims that it will produce a two-sided\textsuperscript{188} “image that resembles a chalk etching” of your naked body.\textsuperscript{189} Some have called this a “virtual strip search”\textsuperscript{190} or “nude” scanners.\textsuperscript{191} Unlike previous airport searches where

\begin{itemize}
\item \textsuperscript{182} Not including taxes, one-way coach ticket with a two-week notice. Delta.com, www.Delta.com (last visited April 6, 2010).
\item \textsuperscript{183} Not including taxes, one-way adult ticket with a two-week notice, requires five-and-a-half-hour stop and train change in Chicago. Amtrak, www.amtrak.com (last visited April 6, 2010).
\item \textsuperscript{184} Hours calculated by Mapquest. Mapquest, www.mapquest.com (last visited April 6, 2010).
\item \textsuperscript{186} Rental cost calculated with renting a car for three days to make the trip from JFK to LAX, pick-up at JFK and drop-off at LAX, pricing an economy car. Dollar Rental Car, www.dollar.com (last visited April, 6 2010).
\item \textsuperscript{187} Imaging, supra note 3.
\item \textsuperscript{188} Testimony, supra note 1, at 6.
\item \textsuperscript{189} Id.
one simply walked through a magnetometer, the government's search technique has become much more intrusive because air travelers are now being forced to allow Uncle Sam see them naked.

D. Has the Airport Search Evolved into a "Virtual Strip Search"?

Similar to the full-body scanners, a "visual strip search" does not involve physical contact.\(^{192}\) A visual strip search does require one to remove one's clothing,\(^{193}\) but full-body scanners make the physical removal of clothing unnecessary.\(^{194}\) Another difference is that "[t]he application of the Fourth Amendment to warrantless strip searches has been developed largely in cases involving such searches in prisons and in schools,"\(^{195}\) while the "virtual strip search" takes place in airports prior to boarding the airplane. And while both searches are highly invasive search techniques that reveal the subject's sexual anatomy, TSA's virtual strip search is not conducted pursuant to a warrant, let alone suspicion. In Reynolds v. City of Anchorage, a female police officer conducted a "visual strip search" where she instructed each person subject to the search to remove their clothing and undergarments and "bend over to allow a visual inspection of [their] rectal area."\(^{196}\) "[The female police officer] never physically touched any [one] during the searches."\(^{197}\)

Considering these circumstances, the Reynolds court quoted Bell v. Wolfish\(^{198}\) and determined that the reasonableness of a strip search requires the court to balance "the need for the particular search against the invasion of personal rights that the search entails."\(^{199}\) Applying the Fourth Amendment to warrantless strip searches has largely been tested by cases involving such searches in prisons and schools.\(^{200}\) Despite the difference in settings, Reynolds and Bell are still instructive in the Fourth Amendment inquiry because the searches are similar\(^{201}\) and because airports are "unique places[s] fraught with security dangers," like prisons

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\(^{192}\) Reynolds v. City of Anchorage, 379 F.3d 358, 361 (6th Cir. 2004).

\(^{193}\) Id.

\(^{194}\) Imaging, supra note 3; see also Testimony, supra note 1, at 5-6.

\(^{195}\) Reynolds, 379 F.3d at 362.

\(^{196}\) Id. at 361.

\(^{197}\) Id.


\(^{199}\) Reynolds, 379 F.3d at 364 (quoting Wolfish, 441 U.S. at 559).

\(^{200}\) Id. at 362.

\(^{201}\) The full-body scanners bounce x-ray or electromagnetic waves off of one's body allowing a TSA agent to see beneath the clothing without having to remove the clothing of the person subject to the search. Testimony, supra note 1, at 5-6. There is no physical contact. Id. A "visual strip search" allows the searcher to visually inspect the subject of the search without clothing on. Reynolds, 379 F.3d at 361. There is no physical contact. Id.
and schools. Additionally, cases dealing with both the Fourth Amendment and strip searches focus on balancing "the need for the particular [strip] search against the invasion of personal rights that the search entails." Strip searches have then been deemed reasonable in their "scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the [subject of the search] and the nature of the infraction.

First, the scope of the intrusion caused by full-body scanners is aimed at finding weapons and explosives. Second, the manner in which TSA conducts the searches appears to be straightforward. The subject of the search will walk into the "imaging portal," be asked to remain still while assuming different positions, all while the full-body scanner "creates an image of the passenger in real time." The manner in which the search is conducted seems to be minimally embarrassing, but that does not mean that the search is not—as the TSA agent at the Miami airport could testify. The image that is created and studied remotely by a Transportation Security Officer is highly personal. TSA claims that the image produced cannot be used for personal identification but the Department of Homeland's Security Privacy Impact Assessment Update for TSA Whole Body Imaging report is quick to point out that the image quality is continually improving.

Third, the justification for full-body scanners is to keep the public safe and avoid another September 11th type attack. While this justification is laudable, the means seem to be a little too broad. The scanners will eventually be the primary search technique used to screen all commercial airline passengers regardless of the fact that the overwhelming majority of passengers are completely suspicionless. However, the September 11th attacks were carried out by only a small group of terrorists. Fourth, the search will end up being carried out in every airport that caters to those flying on commercial flights. Courts must then balance the

202. Reynolds, F.3d at 362 (quoting Wolfish, 441 U.S. at 559).
203. Id. (quoting Wolfish, 441 U.S. at 559).
204. Id. (quoting Wolfish, 441 U.S. at 559).
205. Id. at 363 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).
207. Id.
above criteria against the need of the search, which, admittedly, is very high. However, considering that Uncle Sam is taking a photo of travelers' naked bodies, this invasion of personal rights is at an all-time high level. The questions remains, if this type of invasion of personal rights imposed by the search does not outweigh the need for the search, how far are we willing to allow our government to invade into our personal privacy.

Moving on to address the reasonableness aspect, TSA has adopted full-body scanners in an attempt to address holes in security that were exposed by the 2009 attempted Christmas Day Bomber. While this appears to be reasonably related to the objectives of the search, full-body scanners should still face scrutiny because they are inherently intrusive in addition to the fact that their use has not been qualified as to the age or sex of the subject. And as mentioned above, the government itself has doubts as to whether the full-body scanner would have been effective in spotting the Christmas Day Bomber—the whole reason for the step-up in plans to deploy full-body scanners. Additionally, the only infraction that those who are being subjected to the full-body scanners are guilty of—at least before the search—are showing up at the airport to exercise their constitutional right to travel.

E. The Right To Privacy Meets Advanced Imaging Technology

Like the right to travel, the Constitution does not explicitly mention any right to privacy. Also like the right to travel, the United States Supreme Court has found that a right to privacy exists, and has used it to protect personal privacy against unlawful intrusion by the government. The right to privacy has been found to protect against unjustified government interference with personal decisions relating to education, marriage, procreation, contraception, family relationships, and child rearing.

Being broad enough to encompass a woman's reproductive decisions, it isn’t a stretch of the imagination to believe that the right to privacy includes the right to keep an image of one's naked body from being scrutinized by an unknown federal employee in a remote area.

208. Testimony, supra note 1, at 1.
209. See Imaging, supra note 3.
210. Testimony, supra note 1, at 9
211. See Albarado, 495 F.2d at 806-07.
213. Id.
While claiming that the machines will not be used to store and send images, Homeland Security has admitted that they can store images.\textsuperscript{216} This only adds further questions and debate, including questions regarding whether these machines will violate other federal laws, such as laws against the sexual exploitation of children.\textsuperscript{217}

The two final prongs of the \textit{Wolfish} test seem to go hand in hand. The justification for initiating the full-body search is to keep explosives and other weapons off airplanes. The reason the search is conducted in an airport is because that is where people go to board the airplane. It appears to be clear from the statistics and cases already cited in this paper that the justification is more than reasonable. The location of the search actually takes place in two places. The first location of the search takes place in plain sight right out in the open space of the airport, where the subject of the search walks into the full-body scanner.\textsuperscript{218} But then the machine makes an image of the subject and transmits it to a transportation security officer ("TSO") in some remote location where the image is studied and searched for prohibited items.\textsuperscript{219}

To the Reynolds' court, it was important to the reasonableness of the visual strip search that it was made in the "privacy" of a private room and in the presence of only one other person.\textsuperscript{220} Likewise, when the full-body scanner creates the naked image the search will be conducted in a private room.\textsuperscript{221} However, it will be in a secured and remote room that is off-limits to and away from the naked image's "owner." Essentially, the search isn't even conducted in the presence of the subject of the search: "the TSO will not be able to see the actual individual" and the individual will not be able to see the TSO.\textsuperscript{222} This seems to make the search even more intrusive because one never has any actual personal knowledge of what happens to that image. It is up to one's own imagination to picture what actually is going on when one's own naked image is being searched. Perhaps that is how the government is trying to address the right to privacy issue: how can one have a right to privacy when one is not even physically present when the intrusive aspect of the search is conducted? However, the location of the full-body scanner is in the open for all to see.\textsuperscript{223} "Courts across the country are uniform in their condemnation

\textsuperscript{216} U.S. DEP'T OF HOMELAND SECURITY, supra note 205, at 7.
\textsuperscript{217} See 18 USCS § 2252(a) (2010) (containing laws against sexual exploitation and other abuses of children).
\textsuperscript{218} Imaging, supra note 3.
\textsuperscript{219} Id.
\textsuperscript{220} Reynolds, 379 F.3d at 365.
\textsuperscript{221} Imaging, supra note 3.
\textsuperscript{222} U.S. DEP'T OF HOMELAND SECURITY, supra note 205, at 5.
\textsuperscript{223} Imaging, supra note 3.
of intrusive searches performed in public.”

Albeit discussing strip searches conducted by police officers in a holding cell, at least one court has stated that a strip search is, as a matter of law, not reasonable when it is conducted “in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search,” and is an invasion of the right to privacy. Likewise, the full-body scanners will perform a search in a public area, but where the general public will not “actually view[ ] the search.”

F. "Alternatives To The Full-Body Scanner"

There are many other tactics that the government could use to screen and protect privacy rights. One is the possibility of reduced or eliminated government involvement. The “Registered Traveler” program is a privatized effort to develop profiling systems that operate on a voluntary basis. Under the Registered Traveler program, “Trusted Travelers” voluntarily submit biographical information, fingerprints, iris images, and pay a membership fee. After successfully passing a security threat assessment (conducted by TSA), a Trusted Traveler is able to bypass airport screening processes and head straight to a special screening lane. One of the problems with Registered Traveler is that only a few passengers are going to be Trusted Travelers.

While the Registered Traveler has limited government interferences, another option is to take the government out of the security screening business. Much like Hotwire, Travelocity, and other internet travel agencies set up flights now, a private business could connect airline passengers with smaller chartered planes to bypass TSA checkpoints all together. If purchasers of airline tickets were united in their purchasing power, passengers could ensure that the person next to them is not a terrorist by flying on a private chartered plane. Private companies could act as the middle-man and connect persons wanting to travel to particular destinations with other passengers wanting to go to that destination. Those wanting to get on to these smaller chartered planes could go through a private (as opposed to government mandated) thorough screening and background check before being allowed onto the plane.

While there may be problems with increased air traffic and other problems, a system could be worked out that would assure passengers that not only are they safe to fly, but so is the passenger next to them.

224. Campbell v. Miller, 499 F.3d 711, 719 (7th Cir. 2007).
226. Id.
228. Id. at 25-26.
229. Id.
While “profiling” has acquired a strong negative connotation, another avenue in protecting our citizens may be to follow Israel’s lead when it comes to passenger screening. This paper does not focus on the pros and cons of adopting a behavioral profiling system such as Israel’s, but there is an “important, irrefutable, field-tested assertion: persons about to hijack an airplane and end their own lives behave differently than do other persons; these behavioral differences are subtle, but observable to the trained eye.” If someone were to trip the behavioral profile, that would give probable cause for TSA to do a more invasive search, something similar to a full-body scan. Unfortunately in this day and age, it appears that there will have to be some sort of trade off of privacy for safe skies. In the end, it would be better to voluntarily give up some privacy for a more secure flight than to be stripped naked by an Uncle Sam for only a false sense of security.

IV. AFTER ALL IS SAID AND DONE, ARE FULL-BODY SCANNERS A DETERRENT TO TERRORISTS?

According to a USA Today/Gallup (“Gallup”) poll conducted January 5-6, 2010, seventy-eight percent of participants approved of U.S. airports using full-body scanners on air travelers. How a respondent reacted to Gallup depended on his or her gender. At forty-one percent and twenty-six percent respectively, female air travelers were more likely to express discomfort than male travelers when asked if they would be comfortable with being personally subjected to the scan. Regardless of

230. Id. at 37.
231. It has been noted by commentators that Israel may have the most successful aviation system in the world. US Airport Directors Study Israeli Passenger Screening, ISRAEL NEWS, May 7, 2007, available at http://www.ynetnews.com/articles/0,7340,L-3397480,00.html; see also David A. Harris, RACIAL PROFILING SYMPOSIUM: New Risks, New Tactics—An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001, 2004 Utah L. Rev. 913, 942 (2004). It certainly considered a major target for terrorists, yet it has successfully defended itself from terrorist attacks for thirty years. US Airport Directors Study Israeli Passenger Screening, supra.
232. Harris, supra note 230, at 942.
233. Gallup, In U.S., Air Travelers Take Body Scans in Stride, http://www.gallup.com/poll/125018/air-travelers-body-scans-stride.aspx (last visited May 4, 2010). The question posed was: One method of airport security that is expected to be used more widely at U.S. airports is a full body scan of passengers as they go through the security checkpoint. The full body scan would show a graphic image of a person’s body underneath his or her clothes. The image would be viewed only by federal screeners in a separate, private room. Do you approve or disapprove of U.S. airports using the full body scan on airline passengers?
234. Results based on telephone interviews with 542 adults who had taken two or more flights in the past twelve months. Id. For results based on the sample of 542 adults who have taken two or more air trips in the past year, the maximum margin of error is ±5 percentage points. Id.
235. Id.
the disparity in comfort level among the genders, Gallop reports that respondents overwhelmingly believed that full body scans would deter or prevent terrorists from being able to carry out their attacks (eighty-four percent said scans would be effective in preventing terrorists from smuggling explosives or other dangerous items onto planes, and thirty-eight percent believe that full-body scans would be very effective).236

Despite the respondents’ confidence that full-body scans would be effective at stopping terrorists, as noted above, the many departments that are within the federal government do not all share that confidence.237 GAO doubts that advanced image technologies, or full-body scanners, would have effectively prevented the attempted bombing of the Northwest flight on Christmas Day 2009.238 And also mentioned above, Italy, a United States’ ally in the War on Terror, has already pulled the plug on the full-body scanner because it believes that they are not effective.239

As the threat of terrorists hiding explosives in body cavities, Trojan bombers or bosom bombers, becomes more of a reality, the current full-body scanners would not be effective because they can only spot things above the skin.240 Not being effective at stopping terrorists, the current full-body scanner would not be a deterrent to terrorists, and the federal government is in effect only screening law-abiding American citizens that have sacrificed their constitutional rights for a false sense of security.

V. Conclusion

The Wright Brothers believed that their flying machine would bring the end of all wars, but over the years, and especially after World War II and September 11, 2001, airline travel requires intrusive searches before one can even enjoy the exhilaration that comes with flying. Keeping in mind that it is the Constitution that protects the American public from unreasonable searches and protects the right to travel and the right to privacy, it behooves us to never allow terrorists to strip us of those protections out of fear. Fear can cause the government to be less effective in its search for the real enemy and more intrusive into the lives of the governed. The fear that the Christmas Day Bomber of 2009 caused has spurred TSA to roll out the full-body scanners with an eye to use them as a primary search measure. While it is unclear whether these machines would have been effective in preventing the bomber from boarding the

236. Id.
237. Testimony, supra note 1, at 9.
238. Id.
239. Italian Airport Security Axing Body Scanners, supra note 148; see also Italy to Abandon Airport Body Scanners, supra note 149.
240. Imaging, supra note 3.
plane, it is clear that we have become desensitized to our freedoms slipping away when the government can virtually strip away our clothing before allowing us to exercise the constitutional right of boarding a plane.

Finally, the need for some type of security screening at airports cannot be emphasized enough; however, the government needs to find a solution that will be more effective at spotting terrorists, more of a deterrent to terrorists, less intrusive of the American citizenry, and more respectful of the right to privacy. While there are many that believe the Fourth Amendment has been so weakened by its numerous exceptions to the point that it could not possibly be of any protection in an airport scenario, this paper has found enough strength in the Fourth Amendment that the end result should be that subjecting millions of suspicionless, law-abiding American citizens to questionably effective "virtual strip searches" before boarding a commercial flight is not constitutional.
Piracy, Sea Robbery, and Terrorism: Enforcing Laws to Deter Ransom Payments and Hijacking

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* Thaine Lennox-Gentle was recently admitted to the Colorado Bar and is a registered patent attorney with the United States Patent and Trademark Office. Mr. Lennox-Gentle received his B.S. in Mechanical Engineering from the University of Colorado at Denver, in 1999, and earned his J.D. from the University of Denver Sturm College of Law, in May of 2010. The author would like to give a special thanks to his wife, Katherine, and his family for their unconditional support and encouragement. In addition, Mr. Lennox-Gentle would like to thank Professor Robert Hardaway, Peter A. McLauchlan, and the Transportation Law Journal Staff for their time and guidance in preparing this article.
I. INTRODUCTION

In the middle of November 2008, supertanker Sirius Star was captured by Somali pirates approximately 450 nautical miles off the coast of Kenya. The pirates held the ship, cargo and crew for two months, initially demanding $25 million in ransom from the Saudi ship owner. Over time the pirates eventually settled for $3 million, delivered in cash by parachute drop. After the pirates verified and divided the ransom, they left the ship and allowed the Sirius Star to sail into safe waters. By capturing this large vessel far outside of the Gulf of Aden, the Somali pirates demonstrated they were committed to continuing their piratical regime in addition to expanding their territory.

![Figure 1: Ransom delivery by parachute drop onto the supertanker Sirius Star in January, 2009; the ransom package is circled in the upper right-hand corner.](image)

Although piracy is not limited to the navigable waters off the Somali coast, the area has had more successful recent attacks than any other region on earth. The success of these attacks is due in large part to the

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3. Id.
4. Id. (photograph)
number of years the pirates have been operating in addition to the nature of the ships and cargos they hijack.

Since 1995, former fishermen from Somalia have perfected the technique of boarding ships without causing extensive damage to a vessel, cargo, or crew. The entire operation was treated like a business transaction, where hostages were treated well (i.e. not harmed) in exchange for a guaranteed ransom payment from a grateful ship owner or insurer. However, according to recent reports, events have become increasingly violent as the attacks against ships over the past five years have grown.

Conversely, Asian countries saw a drop of 26% in both attempted and successful hijackings between 2004 and 2008. Among other things, this drop has been attributed to the implementation of cooperative arrangements between countries that allow for the simple and easy exchange of information, an expansive definition of piracy, and constant

Figure 2: Chart of the regions with the greatest amounts of reported piracy; note that the Gulf of Aden and Somalia reports alone account for 196 incidents.

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8. Id. at 6.
reporting on recent pirate attacks or attempts.10

This paper will focus on U.S. and international laws that address piracy and present several alternatives, or combinations of alternatives, that may help combat the unlawful attacks on a global level. Like all good policies, an ounce of prevention is worth a pound of cure. By negatively affecting the proportionality of the pirate “risk v. reward” ratio, a nation can protect itself from becoming an easy pirate target. Moreover, by enforcing current laws against terrorism, the U.S. may use its existing policy to encourage local ship owners and insurers to find alternative means to paying ransoms to pirates. Using this combination of law and policy will force carriers, owners, and insurers to create a comprehensive strategy for preventing piracy while allowing them lawful access to a government’s military force in the event of an unforeseen attack. Before addressing the legal consequences of combating piracy and sea robbery, it is important to understand its history, the law, and definitions used in U.S. and international maritime law.

II. A HISTORY OF PIRACY AND SEA ROBBERY

The terms piracy and sea robbery have evolved over the history of maritime law to have different meanings based primarily on the location of an aggressive act upon a vessel. Initially, it was stated that piracy was mere sea robbery, without giving full credit to the negative effects that piracy had on international trade, commerce, and a nation’s navy.11 And, although piracy began as the random robbery of ships, especially of those engaged in commerce, it was not until piracy was sanctioned by nations in the middle ages before it elicited the complete disdain of most states.12 By better understanding the basic history of piracy, it becomes clear why the location of a piratical act is important to its definition.

Piracy has existed in some form or other since the beginning of maritime commerce.13 In their earliest history, pirates would attack a vessel, seize anything of value, and even torture or murder the crew.14 In addition to these depraved acts, early pirates engaged in instances of maritime kidnapping and ransom. One of the more famous instances of kidnapping occurred in 75 B.C. when Julius Caesar’s ship was attacked by pirates.15 The pirates, noticing that the young Caesar was a wealthy man,
demanded 20 talents ransom for his release. Upon hearing of the low ransom demand, Caesar laughed and suggested that he was worth at least 50 talents. When Caesar was eventually released he brought all of his captors to justice by crucifixion.

Later, specifically during the 16th century, pirates were used by nations to add to the strength and effectiveness of their naval resources. Known as privateers, these “pirates” were authorized by a nation to act on its behalf by “letters of mark.” The primary goals of these privateers were to bleed another country’s resources, to train new naval captains before battle officially began, and, in some instances, even to provoke war. Working under these letters of mark allowed pirates to engage in terrorist acts for the first time under the legal sanction of a controlling nation. Queen Elizabeth herself believed that the use of such state-sponsored terrorism was an “ideal way to strike one’s enemy and hide the blade.”

At the end of the Spanish wars, England and Spain found no need to use privateers in furtherance of war. In an act of good faith, King James I revoked all letters of mark and outlawed piracy in any form. This act resulted in hundreds of unemployed privateers to then seek full-time employment as pirates. No longer with a country to call their own, these pirates focused their efforts against all nations indiscriminately and raced to build their barbaric reputations to become the most ferocious. By 1856, most of the world’s maritime powers united to sign the Declaration of Paris that abolished piracy in all forms, including privateering and any state sponsorship of piracy.

After the signing of the Declaration of Paris, it was generally accepted that piracy was a much more serious crime than the simple act of robbery at sea. Pirates acting on their own behalf, without the political motivation of a controlling nation, were considered to be engaging in acts of “maritime terrorism.” Considering that acts of terrorism were condemned by most nations, pirates were classified in most international

16. Id. at 8.
17. Id.
20. Id. at 303.
21. Id. at 302-3.
22. Id. at 303.
23. Id.
24. Id.
25. Id. at 305.
27. Id.
laws as "hostes humani generis," or the "enemy of all mankind." By identifying pirates as those who were "at war" against all of civilization, the law would provide for any nation attacked by pirates to exercise universal jurisdiction over them. Typically, pirates are brought to justice under the jurisdiction of the nation who captures, and in turn takes responsibility for, the pirates. However, in accordance with the concept of universal jurisdiction, this responsibility could be asserted by any nation in the interest of justice.

III. DEFINING MODERN PIRACY

Although piracy is considered a crime against society, the United Nations Convention on the Law of the Sea ("UNCLOS") and U.S. maritime law have narrow definitions of what constitutes piracy. This narrow interpretation is in large part due to the restrictive language contained in the laws themselves. Specifically, the language of Article 101 of UNCLOS, and 18 U.S.C. § 1651, limit piratical acts to those occurring on the "high seas." Only those areas outside a nation's territorial waters are considered the high seas. Under UNCLOS, nations have the right to establish the breadth of their territorial waters not exceeding twelve nautical miles from their coastline. As a consequence, if a possible "piratical" act occurs in any nation's territorial waters the act may only qualify as sea robbery. This territorial limit distinguishing piracy from sea robbery, could be attributed to the sordid history of the effects of privateering and the heinous nature of attacking a ship while on the high seas far from the safety of any port.

In contrast to the definitions of piracy set forth under U.S. and U.N. law, the International Maritime Bureau ("IMB") has classified piracy and sea robbery together: "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with
the apparent intent or capability to use force in furtherance of that act.”  
Expanding the UNCLOS and U.S. definitions of piratical acts into a single definition allows the IMB to gather important data on existing credible threats regardless of arbitrary territorial sea boundaries. Once this information is assembled, the organization can easily identify high-threat areas, issue warnings to carriers, and possibly prevent future attacks in those regions. This important task, of acting as a central organization in compiling information on worldwide maritime attacks, is one reason the IMB was created.

For the purposes of this paper, the term “piracy” will be used in accordance with the definitions set forth under United Nations (“U.N.”) and U.S. law. In examining the recent surge in piracy, data will be used from all attacks, as compiled by the IMB, to better understand the locations of “hot spots” and identify an appropriate course of action for dealing with known pirates.

IV. Legal Strategies for Dealing with Piracy

In addition to defining modern piracy, the nature of modern pirates must be better understood in order to formulate an effective plan for dealing with them. From recent acts of piracy off the Somali coast, it is evident that there are at least two classes of modern day pirate.

One class includes poor fishermen (especially of Somalia), who have had their waters exploited by foreign commercial fishing, turning to a life of piracy as a way to supplement their meager existence. These fishermen-pirates board ships with the intent of stealing personal belongings from the crew or anything of liquid value from the vessel. They do not intend to hijack the ship, kidnap the crew, or demand a ransom. In most instances, these pirates use their own fishing boats or homemade skiffs to launch attacks on opportune vessels.

The other class of pirate is an organized, armed, and motivated group of career-pirates with the skills and support required to coerce larger rewards. In most cases, these career-pirates operate further from the Somali coast, near the Seychelles and in the Gulf of Aden. By employing the use of a “mother ship,” these pirate crews can quickly launch an attack on a vessel by deploying small speed-boats to chase a vessel once it has been targeted. After a show of force by the strategic use of

35. IMB Annual Report 2009, supra note 5, at 3.
36. Id. at 2.
37. PIRATE TACTICS, supra note 6, at 2.
38. See generally PIRATE TACTICS, supra note 6 (showing pirate attack tactics).
40. PIRATE TACTICS, supra note 6, at 2.
AK-47’s and RPG’s, the career-pirate crew will board a ship with the intent of hijacking the vessel, kidnapping the crew, and holding them both for ransom. These career-pirates have developed the infrastructure necessary to coordinate ransom drops, anchor a ship, and procure large amounts of weapons. In 2008, the yearly worldwide costs associated with these career-pirates were estimated between $13 and $16 billion. In order to better combat piracy, a comprehensive approach must be established to deal with both types of pirate. Several countries have implemented successful strategies for dealing with a majority of pirate attacks that are commensurate with both international and local law. One strategy includes the use of preventative measures as a primary objective. Included among these measures is the use of an information center for reporting piracy and promulgating defensive tactics in preventing an attack. Another strategy is to form cooperative agreements between neighboring countries to allow for the quick administration of justice when pirates are captured. Finally, a group of nations may form a well-armed task force of naval vessels that are able to deploy in quick response to a pirate attack or neutralize a pending threat. These strategies used in concert may tend to reduce the overall number of piratical attacks, but without incorporating an approach for eliminating ransom payments they may do little to deter piracy altogether.

Historically, pirates were put to death for their crimes. Taking pirates aboard a ship and holding them indefinitely for the remainder of a ship’s voyage was considered dangerous, so the only feasible alternative was to put them to death. Currently, under U.S. law, if pirates are captured they should be imprisoned for life. Under international law, if a pirate vessel is captured it is the province of the courts of the state that seized the pirate vessel to impose penalties. Although these laws provide certain legal consequences to piratical acts, they neglect to take into account the current real world issues of a more global economy. Many countries fail to exercise their own laws in dealing with piracy for fear of political retaliation, the imposition of economic or legal sanctions, or becoming a target for maritime terrorism.

41. Id.
45. See UNCLOS, supra note 31, art. 105.
In lieu of exercising punitive measures in accordance with a nation’s laws or international law, countries have decided to work on piracy prevention as their main goal. Although this approach fails to address the root of the problem, in dealing directly with the pirates themselves, it has the effect of eliciting positive political endorsements and few, if any, condemnations from the remainder of the world. In the Gulf of Aden, local governments have provided pamphlets on avoiding pirate attacks, best management practices for carriers and ship owners to deter piracy, and an information sharing center to keep ships informed of current or suspected pirate activity in the region. These measures have contributed to an overall reduction in piracy in the region, but have forced pirate attacks further from the coast in an area southeast of the Gulf of Aden. A better alternative to simple deterrence methods is to combat piracy directly with the agreement of neighboring countries.

Asia is one such region to enact a multi-national cooperative agreement on combating piracy. The agreement is known as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, or “ReCAAP” for short. Among other things, ReCAAP adopted the UNCLOS definition of piracy, but has expanded the duties of member countries. Specifically, the agreement states that members should make every effort to arrest pirates, seize their ships, and rescue victims of pirate attacks. Moreover, the agreement provides for the simple sharing of information on recent attacks, or attempts, to a regional information sharing center. From this center, statistics, data, and information alerts are sent expeditiously among all of the contracting parties (member states). By being better informed, ships can modify their routes to avoid target areas, travel in larger and safer groups of ships (known as group transit), and recognize possible threats before they can attack. As a direct result of the implementation of ReCAAP, instances of piracy have dramatically declined in the Asian region.

50. Id. art. 3.
51. Id. art. 4.
52. Id. art. 7.
53. David Tran, ReCAAP Success in Asia Prompts Call for Expansion, GLOBMARITIME,
Recently, on April 1st and 2nd, 2010, two different ships of the United States Navy had encounters with pirate vessels off the coast of Somalia. The first incident occurred near the Seychelles, approximately 1,000 nautical miles off the coast of Somalia, where a pirate vessel fired upon the USS Nicholas, a Navy guided-missile frigate. Responding to the aggression, the USS Nicholas returned fire, sunk the pirate vessel, and captured the pirates’ mother ship with several pirates still aboard. The second incident occurred 300 miles northwest of the Seychelles, where pirates attempted to hijack a commercial vessel, but were intercepted by the USS Farragut, another guided-missile destroyer. The USS Farragut proceeded to sink the pirates’ mother ship and then detained eleven suspected pirates from their skiffs. Each of these incidents involved intervention from U.S. Naval vessels belonging to the Combined Task Force 151 (“CTF 151”).

Figure 3: The USS Farragut passes by the smoke of a pirate ship it disabled in


56. Id.


58. Id.

59. Id.
As described on their website, the "CTF 151 is a multinational task force established in January 2009 to conduct counter piracy operations under a mission-based mandate throughout the Combined Maritime Forces (CMF) area of responsibility to actively deter, disrupt, and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations." From these recent encounters with pirates, it is clear that the CMF has developed a uniquely effective manner of dealing with piracy that is commensurate with both U.N. and U.S. maritime law.

V. MODERN INSURANCE AGAINST MODERN PIRACY

In addition to the aforementioned strategies for dealing with pirate attacks, the policy of paying ransoms must be addressed to negatively affect the "risk v. reward” ratio for a career-pirate. Only when pirate ransoms are not paid as a matter of law, will the motivation of these pirates to attack innocent vessels cease altogether. Most of these ransoms are paid by maritime insurance companies as part of their traditional coverage. However, the recent surge in piracy has resulted in a surge of additional insurance premium sales to carriers who engage in commerce through the Gulf of Aden and along the Somali coast. By continuing to make ransom payments, the insurance companies are implicitly encouraging future pirate attacks on commercial vessels while they continue to sell additional coverage at a premium to carriers.

Since the dramatic increase in piracy, especially along the Somali coast and the Gulf of Aden, maritime insurers have benefitted from increased premiums and sales of additional riders to compensate for gaps in current insurance provisions. Specifically, Lloyd's of London ("Lloyd's"), saw an increase in their 2009 marine premiums of more than 20% compared to the previous year. This increase could be partly attributed to carriers, ship-owners, and cargo-owners who seek to add other forms of cover to protect themselves from the consequences of pirate attack.

64. See id.
65. Id. (showing the increase resulted in a benefit of approximately $2.42 billion for Lloyds).
tacks and hijacking. Or, it could be attributed to the fact that Lloyd’s itself has designated the Gulf of Aden as a high risk zone for piracy thereby requiring additional insurance premiums. In either event, the insurance industry has benefitted from the sale of additional premiums.

In addition to designating the Gulf of Aden as a high risk area, Lloyd’s decided to offer new insurance policies to tackle the “loss of earnings” problem that accompanies a pirate hijacking. According to Lloyd’s, the typical hijacked vessel is held for an average period of two months before it is released. During this time period, a charterer may be paying for a vessel that it has no control over, a ship-owner may be forced to suffer the financial consequences of cancelled contracts, while a cargo-owner may suffer a similar fate. Although the act of piracy itself is listed as a peril that is covered under the International Hull Clauses (“IHCs”), these clauses do not provide cover for loss of earnings and are typically limited to physical harm or damage. Lloyd’s added their new “loss of earnings” coverage as an available additional policy in December of 2008.

Lloyd’s also offers Kidnap and Ransom (“K&R”) coverage to address the costs associated with delivering ransom payments and coordinating the delivery with the pirates. Even though traditional marine policies cover the cost of ransom, Lloyd’s estimates that this cost is only 25% to 30% of the entire costs associated with the hijacking. Working with the pirates, setting up payment terms and delivery, rescuing any hostages held, and arranging security for the ransom delivery team are all costs that greatly exceed the cost of the ransom. The demand for a policy that covered a ship-owner from the associated costs of a pirate attack at the moment when the vessel was seized allowed Lloyd’s to cre-

68. Id.
69. Id.
73. Id.
74. Id.
These new insurance policies provided by Lloyd's and other underwriters, are designed to address the growing demand of ship-owners and carriers who cannot afford to take alternate routes through more peaceful waters to complete their shipments. Moreover, the carriers are becoming increasingly fearful of shipping along the Somali coast without some type of limit to their liability. The fact is that these insurance policies do nothing to deter piracy in the region. In fact, by allowing carriers, ship-owners, and charterers to pay ransoms without the fear of legal recourse, the international community is essentially encouraging piracy to continue. By being complicit in allowing piracy to continue on the high seas, insurance companies will be deterred from paying ransoms if they are held to criminal penalties. The United States has codified several criminal laws dealing with piratical acts and addresses the penalties for those who provide material support to such criminals. These laws may be found in the anti-terrorism section of the U.S. Code.

VI. ANTI-TERRORISM LAWS AND PIRACY

Under United States law, specifically Title 18 U.S.C. § 2332b, certain acts that transcend national boundaries are identified as Federal Crimes of Terrorism. These acts include the following: (1) conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; (2) hostage taking; (3) violence against maritime navigation; and (4) providing material support to terrorists. The reason these four acts have been separated for consideration is they are all common to any Somali career-pirate encounter where a ship and its crew are hijacked in exchange for a ransom. Addressing each section individually will clarify which law, or combinations of law, may be usefully applied to deter the payment of ransoms to pirates.

It is important to note that section 2332b of the United States Code includes a provision that defines a Federal Crime of Terrorism as an offense that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Although the attack against the USS Cole, in October 2000, can be defined as an act of terrorism, by attempting to influence or affect the conduct of government by intimidation or coercion, it is difficult to draw

75. Id.
a parallel to most modern day pirates.\footnote{81} It has been suggested that terrorism is motivated by politics, while piracy is motivated by money.\footnote{82} Additionally, it is theorized that most Somali pirates began their lucrative careers in response to the foreign exploitation of the fishing waters off their coastline.\footnote{83} As discussed above, at least two types of pirates are attacking ships off the coast of Somalia and the Gulf of Aden, but the link between piracy and political motivation is tenuous.\footnote{84} Regardless, several of the piratical acts themselves may be defined as acts of terrorism as described below.

1. 18 U.S.C. § 956 – Conspicry to kill, kidnap, maim, or injure persons or damage property in a foreign country.

The language of this section reads as follows:

> Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).\footnote{85}

It is evident from the language in this section that if a person falls under the jurisdiction of the United States and commits any of the listed offenses abroad (ordinarily outside U.S. jurisdiction), those offenses will be treated as if they were committed within the jurisdiction of the United States. It has already been stated that pirates are "hostes humani generis," or enemies of mankind, and as a result the United States may exercise universal jurisdiction over them.\footnote{86} Because pirates engage in acts that have resulted in the death and kidnapping of their hostages, they will be subject to the effect of this universal jurisdiction.\footnote{87} Therefore, the crimes committed by the pirates on these occasions would be considered as federal acts of terrorism under this section of U.S. law.

2. 18 U.S.C. § 1203 – Hostage Taking

The pertinent language of this section reads as follows:

\footnotesize{
81. See Perl & O’Rourke, supra note 46, at 2.
82. Apostolis & Knott, supra note 9, at 2.
84. Pirate Tactics, supra note 6, at 2.
86. See United States v. Smith, 18 U.S. 153, 156 (1820).
87. See IMB Annual Report 2009, supra note 5, at 12.
}
Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.\(^88\)

This law only applies to U.S. nationals who are being held hostage, captors who are found in the U.S., or if the U.S. government is the governmental organization being compelled to act.\(^89\) By limiting this law to at least one of the three categories listed above, the United States ensures that it has an interest in applying its law in accordance with its jurisdictional limitations. However, in a maritime case, the jurisdictional boundaries become somewhat expansive. For instance, if a U.S. ship and its crew is held hostage by pirates who are aboard the U.S. vessel, according to maritime law and convention, they would be found within the jurisdiction of the United States. This scenario, and proper use of 18 U.S.C. § 1203, would not require the ship’s crew to be U.S. nationals, because the offenders (the pirates) are found in U.S. territory (aboard the ship). Conversely, if pirates hijacked another country’s vessel, but took a U.S. national as a hostage, they too would fall under a successful application of this law. In any of these instances, the United States would find the acts of piracy to commensurate with a federal act of terrorism.


This section includes language defining specific acts that qualify as violence against maritime navigation. As it relates to piracy and sea robbery, the most important subsections are listed below. Section 2280(a)(1) states that any person who unlawfully and intentionally:

(A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
(B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
(E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;
(G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or
(H) attempts or conspires to do any act prohibited under subparagraphs (A)

This law was clearly drafted with the safe navigation of ships as its primary concern. Consequently, it is difficult to think of any instance of piracy, hijacking, or forceful and illegal boarding where a ship's safety would not be negatively affected. Moreover, several hijacked ships have contained hazardous cargo, such as crude oil, military weapons, and industrial chemicals. Among other things, the safe navigation of these ships is paramount in preventing environmental and maritime disasters. Because, in every instance of piracy at sea, the safe navigation of the vessel is endangered, the act of hijacking a ship would qualify as a federal act of terrorism.


Finally, this section of Title 18 addresses those who provide material support to terrorists, the punishments available, and the types of crimes that constitute terrorist acts. The language of section 2339A(a) is as follows:

(a) Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section ... 956, ... , 1203, ... , 2280, ... , or any offense listed in section 2332b (g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

From the language of the law, this section recognizes sections 956, 1203, and 2280 (described above) as federal acts of terrorism. All of these sections address acts that occur during a pirate attack or kidnapping. Furthermore, this section defines material support as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities." Typically, when a vessel has been seized by pirates they demand a ransom from the ship-owner, carrier, or insurer. This ransom cost is usually paid, in the form of cash (currency),

by a carrier's marine policy. Therefore, under 18 U.S.C. § 2339A(a), an insurer that makes such ransom payment to pirates is also providing material support to terrorists and violating U.S. law.

The punishment for violating 18 U.S.C. § 2339A allows for monetary fine or jail time depending on the circumstances. An insurance company may insist that a small fine is reasonable when compared to the immense cost of a lost ship and cargo as a result of pirate action. However, the insurer could still be subject to the penalty of 15 years in a federal prison (or for life if someone dies as a result of the piracy).

This law acts as a deterrent to those who may otherwise pay pirate ransoms. It should not be used to affect current contracts or negotiations where the lives of people, who have depended on the traditional marine policy ransom payment, are at stake. However, any future marine insurance policies must not contain provisions for the paying of ransoms, and the future insured entity should be made aware that such provisions are against U.S. law. Implementing a “no pay” policy for pirate ransoms will dramatically affect the “risk v. reward” ratio, thereby eliminating the reward (cash payments) for hijacking vessels. However, eliminating the payment of ransoms is not itself enough in combating piracy on a global level.

5. COMBATING PIRACY ON A GLOBAL SCALE

Although the anti-terrorism laws discussed in this paper could be used to deter ransom payments by U.S. companies and insurers, the number of United States ships being attacked by pirates is extremely low. Over the past five years, only twenty three attacks have been made against U.S. ships, four of which occurred last year. As a consequence, the United States has never paid a ransom to pirates in exchange for the release of a ship. However, these criminal penalties could be levied against the agent of a ransom paying entity if that agent resides or operates inside the jurisdiction of the United States. Irrespective of ransom payments, the United States has found a more successful manner in dealing with piracy that has its roots in old maritime law.

The United States, under 18 U.S.C. § 1651, has defined the punishment for piracy as follows: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”

94. See Surge in Piracy Prompts Demand for K&R Cover, supra note 72.
98. See King, supra note 66, at 3.
definition of "high seas" has been explored and can mean any area outside of a nation's territorial waters. But, the statute makes reference to the crime of piracy defined by the "law of nations." As used in the statute, the law of nations is a collection of common law that has been compiled over time to shape current laws in the international community. In the landmark case known as "The Antelope," the law of nations was recognized as "a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other." In evaluating this statement, the law of nations can be interpreted to mean the current definition of piracy as used in U.S. and U.N. law, specifically Article 101 of UNCLOS.

In recent history, the United States has successfully intercepted several pirate attacks against U.S. vessels. In each case, the U.S. Navy locates the pirate ship, and if fired upon, immediately returns fire disabling the craft. Then the pirates are detained, and either held for prosecution in the U.S. or given to Kenya, where the authorities have agreed to aid in bringing the offenders to justice. Recently, the overburdened Kenyan courts have refused to accept any more piracy cases. As a result, pirates captured by U.S. ships will be taken to the home port of a naval vessel and tried in a U.S. Federal Court.

In capturing or disabling the pirates' ship and detaining the pirate crew for the administration of justice, the United States is in conformance with the law of nations and international law. Not only has this standard operating procedure prevented the possibility of a hijacked crew and vessel in many cases, but it also serves as a reminder to future pirates to avoid hijacking U.S. ships.

In addition to implementing a "no pay" policy to ransom demands, countries may actively cooperate in mutual agreements or task forces to take action against terrorists. This type of cooperative agreement is promulgated in Asia through ReCAAP, in the Horn of Africa through the Maritime Security Centre Horn of Africa ("MSCHOA"), and through the CMF in Bahrain. These informational centers and task forces allow for nations to pool their resources and act as a single entity in combating piracy. Finally, the International Chamber of Commerce, through the IMB, acts as a single-source of piracy information and report-

100. Id.
102. See UNCLOS, supra note 31, art. 101.
103. Emanuel, supra note 54, at 1.
105. See Best Management Practices, supra note 47.
ing worldwide. With increased cooperation among the nations, the IMB should be able to quickly compile credible threats of piracy and disseminate the information instantaneously to its members.

Through cooperative international laws, a comprehensive policy of prevention, an aggressive plan for dealing directly with pirate attacks, and by enforcing a "no pay" policy for the ransom of pirates, the world may increase the reliability of its maritime commerce while curbing piracy altogether.

Note

Determining the Potential Liability of a Cruise Line for the Injuries Or Death of Their Passengers as a Result of a Pirate Attack

Elaine Vullmahn*

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* The author, Elaine Vullmahn, MBA, CPA, CIA, is a Senior Litigation Accountant at Russell Novak & Company, LLP in Chicago, Illinois. Ms. Vullmahn is also a J.D. candidate at the John Marshall Law School, class of 2011. She has a great love for the sea and is looking forward to practicing in Maritime Law. This Article is dedicated to my mother, Nancy Vullmahn, who introduced me to world travel and the pleasure of cruising.

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ABSTRACT

This Article examines Royal Caribbean Cruise Ltd.’s, the owner of the Royal Caribbean International brand, and Royal Caribbean Interna-
tional’s potential liability to passengers who are injured or die during a pirate attack upon the *Brilliance of the Seas* while on a 14-night Middle East cruise. The Article is primarily concerned with the risks of the Royal Caribbean cruise that is currently scheduled to depart from Barcelona, Spain on January 10, 2011, and terminate at Dubai, United Arab Emirates, on January 24, 2011. The itinerary for this particular cruise indicates that there will be four ports of call offered along the voyage. These ports of call include: Alexandria, Egypt; Suez Canal, Egypt; Al’Aqabah, Jordan; and Safaga, Egypt. This cruise is attractive because of the exotic ports of call and because there will be a total of nine days of at sea travel.

The Article provides a framework and analysis for understanding the risks that the *Brilliance of the Seas*, its crew, and passengers will likely face along their voyage. The Article also discusses the legal challenges Royal Caribbean Cruise Ltd. and Royal Caribbean International could face if a cause of action is brought against them. The Background section surveys piracy in the Middle East waterways and its effect on the transportation industry and on tourism. This section also explains how the *Brilliance of the Seas*’ Cruise/CruiseTour Ticket Contract (the Passenger Ticket) outlines the relationship among Royal Caribbean Cruise Ltd., its Royal Caribbean International brand, and passengers of the *Brilliance of the Seas*. The Analysis section examines reasons why Royal Caribbean Cruise Ltd. and Royal Caribbean International could be held liable for passenger injuries or death. This section also suggests ways in which Royal Caribbean Cruise Ltd. and Royal Caribbean International could protect passengers on the *Brilliance of the Seas* from potential serious injury or death due to a pirate attack while preserving the quality of their product and name.

**INTRODUCTION: PASSENGERS CAN BE MISLED TO BELIEVE IT IS SAFE TO CRUISE IN THE MIDDLE EAST**

You and your loved one have coordinated your schedules and are looking forward to spending two weeks far, far away from work and the daily grind of everyday life. The two of you have decided to take a cruise that will afford you the opportunity to rekindle your relationship as well as the opportunity to catch up on some much needed rest and relaxation. Your travel agent suggested a variety of cruise companies and itineraries. There was much to consider, including: the ports of call, food, entertainment, accommodations, and quality of service each had to offer. The decision was made to book a cruise on one of the Royal Caribbean International1 (“RCI”) cruise ships. This Line recently launched an ad

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campaign to promote how its ships and environment are designed to allow guests to feel like citizens on a “Nation of Why Not.”  Advertisements explain that the choice is totally up to passengers whether they want to “go out and see, do and be more than they had ever thought possible,” or to do nothing at all.

You have booked a 14-night Middle East Cruise that is scheduled to depart from Barcelona, Spain on January 10, 2011, and terminate at Dubai, United Arab Emirates, on January 24, 2011. The itinerary for the ship, Brilliance of the Seas, indicates that there will be four ports of call offered along the voyage. These ports of call include: Alexandria, Egypt; Suez Canal, Egypt; Al’Aqabah, Jordan; and Safaga, Egypt. This cruise was the most attractive option because of the exotic ports of call and because there will be a total of nine days of at sea travel.

Similar to probably many of the other individuals that booked this particular cruise, you have given little to no consideration to the likelihood that this cruise ship could be attacked by pirates. Besides, the thought of pirates conjures up images from childhood tales of a man with a wooden leg, hook, and parrot named Polly. You vaguely remember hearing about an incident with an Italian cruise ship a year ago off the coast of Africa. However, you easily reason that was an anomalous situation as no other attacks have made the top headlines recently. In addition, as an American passenger, you perceive a sense of safety by choosing a global cruise line like RCI and expect that if it were not safe to
travel to the Middle East, RCI would discontinue offering cruises to this destination. But what if things do not go as expected and the ship is attacked while sailing in the Gulf of Aden? Would it be possible to recover if you or your loved one were injured or died during a pirate attack?

This paper examines Royal Caribbean Cruise Ltd.'s ("RCC"), the owner of the RCI brand, and RCI's potential liability to passengers who are injured or die during a pirate attack upon the Brilliance of the Seas while on the 14-night Middle East cruise. The Background section surveys piracy in the Middle East waterways and its effect on the transportation industry and on tourism. This section also explains how the Brilliance of the Seas' Cruise/CruiseTour Ticket Contract (the "Passenger Ticket") outlines the relationship among RCC, its RCI brand, and passengers of the Brilliance of the Seas. The Analysis section examines reasons why RCC and RCI could be held liable for passenger injuries or death. This section also suggests ways in which RCC and RCI could protect passengers on the Brilliance of the Seas from potential serious injury or death due to a pirate attack while preserving the quality of their product and name. The concluding section sets forth some final thoughts.

BACKGROUND: PIRACY IS A RISK CARGO AND PASSENGER VESSELS MUST CONSIDER

This section introduces how piracy poses a real threat to cruise ships and passengers traveling through the Gulf of Aden today. Part I presents an overview of how rampant pirate attacks and attempted attacks have become over the last couple of years off the coast of Somalia. While many nations have deployed naval resources to patrol the Gulf of Aden and surrounding waters, this area continues to be deemed hazardous for vessels and to travel throughout. Part II details the Bureau of Consular Affairs' travel advisors, which warns American citizens about the risks of traveling through the Gulf of Aden and to Middle Eastern countries, such as the Brilliance of the Seas destination point, the United Arab Emirates. Part III describes how the Passenger Ticket establishes the duty and level of responsibility owed by RCC and RCI to passengers of Brilliance of the Seas.

I. PIRACY CONTINUES TO PLAGUE THE GULF OF ADEN

Vessels that travel through the Gulf of Aden are at risk of being

attacked by pirates. Over the last couple of years, the waters off Somalia have been a hotbed for pirate activity. Despite international efforts to guard vessels from being hijacked and held for ransom along with their passengers, an alarming number of actual and attempted attacks continue to occur.

The ICC Commercial Crime Services, which is an organization based in the United Kingdom and affiliated with the International Chamber of Commerce, strives to combat “all forms of commercial crime.” As a part of its mission, this organization has undertaken to collect and track incidents of piracy around the world. From the information it has obtained, the ICC Commercial Crime Services developed interactive piracy maps of the world for the years 2005 through 2009 and a live interactive piracy map of the world for 2010 on its website. Anyone with access to the internet, can view, zoom in/out, and click on red, yellow, and blue markers to read abbreviated summaries or connect to full length reports of actual pirate attacks, attempted pirate attacks, and identified suspicious looking vessels.

In 2008, when RCC and RCI were contemplating and negotiating arrangements for the Brilliance of the Seas to offer cruises to the Middle East, there was great concern among many businesses and cargo carriers worldwide.


16. Id.
about the risk of pirate attacks in that area.\textsuperscript{17} It is evident from the ICC Commercial Crime Services 2008 live piracy map\textsuperscript{18} that their apprehension of voyaging through the Gulf of Aden was well-founded. Publicized statistics also revealed that “111 ships were attacked by pirates in the Gulf of Aden in 2008, a 200 percent increase over 2007.”\textsuperscript{19} Out of the 111 ships, “forty-two of those ships were held for ransom, and 889 crew members were taken hostage.”\textsuperscript{20} “Most ransom demands were between $1 million and $4 million per ship.”\textsuperscript{21}

For economic reasons, many businesses and carriers have accepted the risk of a pirate attack and continue to ship goods through this dangerous zone.\textsuperscript{22} From a logistic standpoint, the Gulf of Aden remains “one of the world’s busiest shipping lanes”\textsuperscript{23} because it is a substantial advantage for vessels to travel through the Suez Canal instead of around Africa.\textsuperscript{24} The continued escalation of pirate attacks, however, has had a real impact on the transportation industry.\textsuperscript{25}

“After a rash of pirate attacks in 2008, the international community rushed a flotilla of naval ships into the waters off the Horn of Africa in an effort to protect international shipping passing through the Gulf of

\textsuperscript{17} Gitanjali Bakshi, \textit{Blue Gold: Somalian Pirates in the Gulf of Aden}, STRATEGIC FORESIGHT GRP. (Oct. 2008), http://www.strategicforesight.com/blue_gold.htm (discussing the drastic increase in pirate activity off the coasts of Somalia, with a reported 76 pirate attacks in 2008, causing many shipping companies to use different shipping routes, such as sailing around the Cape of Good Hope).


\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Maritime Admin., United States Dep’t of Transp., \textit{Economic Impact of Piracy in the Gulf of Aden on Global Trade}, MAR. ADMIN., http://www.marad.dot.gov/documents/HOA_Economic%20Impact%20of%20Piracy.pdf (last visited Oct. 10, 2010) (discussing the economic impact on shipping companies due to pirate attacks in the Gulf of Aden; for “high value consumer goods or items needed for just-in-time manufacturing, the added delay [of sailing around the Cape of Good Hope] is unacceptable to the shipper . . . ,” despite increases in costs such as security, insurance premiums and fuel).

\textsuperscript{23} WORLDATLAS.COM, supra note 11.

\textsuperscript{24} Peter Sands, \textit{Need for Rethinking about When to Sail around the Cape of Good Hope}, BIMCO (Apr. 23, 2010), https://www.bimco.org/Member/Reports/Shipping_Market_Analysis/2010/04/23_Need_for_rethinking.aspx (discussing the drastic increase in costs from increased fuel consumption, extra capacity requirements and increased insurance premiums resulting from sailing around the Cape of Good Hope as opposed to traveling through the Suez Canal).

Lt. Cmdr. Corey Baker, a spokesman for the U.S. 5th Fleet, headquartered in Bahrain, told USA TODAY in an interview in May of 2010 that “[t]he pirates are becoming more brazen.” Somalia “remains chaotic and even a large naval flotilla has struggled to provide security over the 1.1 million square miles of ocean they patrol.”

Many carriers find that traveling through the Gulf of Aden is becoming cost prohibitive despite the savings in overall voyage distance. “Shipping insurance rate increases – with premiums rising by at least tenfold, by some accounts – are primarily due to the increase in risk as the number of piracy incidents has spiked considerably since 2008.” In 2010, concerns over increased insurance expenses, ransom payments, risk to the lives of crew, and destruction of cargo continue to have a substantial impact on the transportation industry.

The ICC Commercial Crime 2010 live piracy map illustrates that piracy remains rampant in and near the Gulf of Aden. Red and yellow markers on the 2010 live piracy map indicate that in each of the first six months of 2010 there have been actual and attempted attacks on ves-
sels traveling through this waterway. For many carriers, these risks and rising costs have become too great and they are opting to sail around Africa instead of through the Suez Canal and the Gulf of Aden. Depending on the success of the *Xuelong*, in the near future, carriers may even have the option to consider transporting goods through the Arctic.

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II. THE BUREAU OF CONSULAR AFFAIRS WARNS U.S. TRAVELERS ABOUT THE RISKS OF TRAVELING THROUGH THE GULF OF ADEN AND TO MIDDLE EAST COUNTRIES

Savvy travelers, and those interested in booking RCI's 14-night Middle East cruise, can access the Travel.State.Gov website to obtain relevant information. The website is a service of The Bureau of Consular Affairs.\(^3\) The mission of this Bureau "is to protect the lives and interests of American citizens abroad."\(^3\) This service provides essential information for any American citizen considering domestic or international travel. There are links to Country Specific Information, Travel Alerts, and Travel Warnings\(^3\) as well as a link to a page dedicated to International Maritime Piracy.\(^4\)

The Bureau of Consular Affairs recommends starting with the Country Specific Information as "[t]his is a good place to start learning about where you are going."\(^4\) Noteworthy information such as "the location of the U.S. embassy and any consular offices; whether you need a visa; crime and security information; health and medical conditions; drug penalties; and localized hotspots" are available for every country of the world.\(^4\) The Country Specific Information for the United Arab Emirates, which is the destination point for the Brilliance of the Seas 14-night Middle East cruise, for example, was last updated on December 17, 2009.\(^4\) At the present time, it is communicated under the Safety and Security heading that "U.S. citizens in the United Arab Emirates should exercise a high level of security awareness."\(^4\) This warning was made because the "Department of State remains concerned about the global threat of terrorism, including the possibility of terrorist attacks against U.S. citizens and interests in the Persian Gulf and Arabian Peninsula."\(^4\)

As of July 2010, the Bureau of Consular Affairs has neither issued an


\(^5\) U.S. DEP'T. OF STATE, BUREAU OF CONSULAR AFFAIRS, INT'L TRAVEL INFO., supra note 38.


\(^7\) U.S. DEP'T. OF STATE, BUREAU OF CONSULAR AFFAIRS, INT'L TRAVEL INFO., supra note 38.

\(^8\) Id.


\(^10\) Id.

\(^11\) Id.
official Travel Alert\(^46\) nor an official Travel Warning\(^47\) specifically for the United Arab Emirates or for any of the other countries where the *Brilliance of the Seas* is scheduled to stop during the 14-night cruise.\(^48\) However, the Bureau of Consular Affairs has issued Travel Warnings for countries that the *Brilliance of the Seas* would be traveling near.\(^49\) These travel warnings and the date they were initially posted includes: Eritrea (9/24/2010), Iran (3/23/2010), Saudi Arabia (2/18/2010), Somalia (12/31/2009), Sudan (10/1/2010), and Yemen (2/25/2010).\(^50\) World events, economic times, and religious and political unrest are only a sampling of the unstable and changing world that drives the formal travel alerts and warnings officially issued.

According to the International Maritime Piracy website, the “number of pirate attacks in the Gulf of Aden has risen significantly” and “[i]n some instances attacks have occurred as far as 300 nautical miles out in international waters.”\(^51\) This website also reports “[m]ost of the attacks in the Gulf of Aden have been directed against cargo vessels” and “[a]ttacks on cruise ships are rare but do occur.”\(^52\) The Department of State acknowledged knowing of two actual and one attempted attack made on cruise ships during 2008, but was “unaware of any injuries or fatalities involving American citizens resulting from these attacks.”\(^53\) De-

\(^{46}\) U.S. Dep’t. of State, Bureau of Consular Affairs, Current Travel Alerts, http://travel.state.gov/travel/cis_pa_tw/pa_/pa_1766.html (last visited Oct. 11, 2010) (“Travel Alerts describe short term conditions affecting a country or region that pose imminent risks to the security of U.S. citizens. Natural disasters, terrorist attacks, coups, election related violence, and major international conferences and sporting events are examples of situations that might generate a Travel Alert.”).

\(^{47}\) U.S. Dep’t. of State, Bureau of Consular Affairs, Current Travel Warnings, http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited Oct. 11, 2010) (“Travel Warnings are issued when long-term, protracted conditions that make a country dangerous or unstable lead the State Department to recommend that Americans avoid or consider the risk of travel to that country. A Travel Warning is also issued when the U.S. Government’s ability to assist American citizens is constrained due to the closure of an embassy or consulate or because of a drawdown of its staff.”).

\(^{48}\) U.S. Dep’t. of State, Bureau of Consular Affairs, Current Travel Alerts, supra note 47; U.S. Dep’t. of State, Bureau of Consular Affairs, Current Travel Warnings, supra note 48.

\(^{49}\) U.S. Dep’t. of State, Bureau of Consular Affairs, Current Travel Alerts, supra note 47; U.S. Dep’t. of State, Bureau of Consular Affairs, Current Travel Warnings, supra note 48.

\(^{50}\) Dep’t. of State, Bureau of Consular Affairs, Current Travel Warnings, supra note 48.

\(^{51}\) U.S. Dep’t. of State, Bureau of Consular Affairs, Fact Sheet: Int’l Maritime Piracy, supra note 41.

\(^{52}\) Id.

\(^{53}\) Id. (“Recent incidents in the region include an attack on Oceania Cruise’s premium cruise ship, the Nautica, in the Maritime Safety Protection Area in the Gulf of Aden; an attempted attack on Transocean Tour’s cruise ship MS Astor in the Gulf of Oman; the hijacking of
spite this fact, since December 31, 2009, the Bureau of Consular Affairs has urged U.S. citizens in its Somalia Travel Warning “to use extreme caution when sailing near the coast of Somalia.” The webpage further indicates that “[i]f transit around the Horn of Africa is necessary, it is strongly recommended that vessels travel in convoys, and maintain good communications contact at all times.”

III. The Brilliance of the Seas Passenger Ticket Defines the Relationship Among RCC, RCI, and Passengers of the Brilliance of the Seas

The Passenger Ticket is a key document. It is mostly acquainted with the rite of voyage as it enables an individual to embark and disembark a cruise ship. Its purpose, however, extends past this fundamental entitlement. This document also delineates the terms and conditions of a contract made between the passenger and the carrier. Courts strictly enforce Passenger Ticket provisions including those that set forth within what time frame a cause of action must be brought against the carrier.

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55. Id.
56. ROYAL CARIBBEAN INT’L, Cruise/Cruise Tour Ticket Contract – Royal Brilliance of the Seas CTC Effective To Those Who Booked On Or After 4/20/08, http://www.royalcaribbean.com/content/en_US/pdf/CTC_BR_Only.pdf (last visited Oct. 11, 2010) (Section 2(f) of both contracts states: “‘Passenger’ or ‘Guest’ or ‘Your’ means all persons traveling under this Ticket Contract and persons in their care, together with their respective heirs and representatives. ‘Passenger’ shall include the plural and the use of the masculine shall include the feminine.”).
57. Id. (Section 2(b) stating that “’Carrier’ shall include: (i) Vessel, or any substituted ship; (ii) the Vessel’s Operator; and (iii) with respect to the RCT Land Tour Portion of any CruiseTour, Royal Celebrity Tours Inc. (‘RTC”) together with the owners, managers, characters, affiliates, successors and assigns of the entities identified in subsections (i), (ii), and (iii) of this sentence. Carrier also shall include the officers, directors, employees, agents, crew or pilots of the entities identified in the preceding sentence. The exclusions or limitations of liability of Carrier set forth in provisions of this Ticket Contract, as well as all rights, defenses or immunities set forth herein, shall also apply to and be for the benefit of agents, independent contractors, concessionaries and suppliers of Carrier, as well as owners and operators of all shoreside properties at which the Vessel of the Transport may call, as well as owners, designers, installers, suppliers and manufacturers of the Vessel or Transport, or any component parts of either, together with the employees and servants of each of the foregoing, and/or any launch, craft or facilities of any kind belonging to or provided by any of the parties identified in this paragraph.”).
where litigation must be commenced,\textsuperscript{59} and under what conditions the carrier might be held liable for passenger injuries. Courts are not persuaded by claims that the terms are in a language not understood by a passenger\textsuperscript{60} or are too microscopic to be read.\textsuperscript{61}

From RCC and RCI's perspective, the Passenger Ticket is an essential document. A constant and common travel problem experienced by cruise passengers is having been injured while aboard a cruise ship. Physical injuries often occur when passengers slip, trip, and fall\textsuperscript{62} as a result of unsure footing due to the movement of the ship or because of slippery surfaces.\textsuperscript{63} Other events that have lead to litigation include injuries sustained from flying coconuts,\textsuperscript{64} stray golf balls,\textsuperscript{65} and discharging shotgun shells.\textsuperscript{66} Pirates have fired upon cruise ships traveling through the Gulf of Aden.\textsuperscript{67} At this time no passengers have been injured, or died, as a result of pirate attacks, so there have been no causes of action for recovery.

\textsuperscript{59} Hughes, 2003 WL 1740460, at *1; Chapman v. Norwegian Cruise Line Ltd., No. 01 C 50004, 2001 WL 910102 at *2 (N.D.III. Jul. 6, 2001) (stating that "[a] forum selection clause is enforceable unless (1) the incorporation of the clause was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court; or (3) enforcement . . . would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.").

\textsuperscript{60} Paredes v. Princess Cruises, Inc., 1 F. Supp. 2d 87, 90 (D. Mass. 1998) (enforcing the time limitations written in the English language in a cruise passenger ticket despite the fact the passenger was unable to read English).

\textsuperscript{61} Lerner v. Karageorgis Lines, Inc., 66 N.Y.2d 479, 485-86, 497 N.Y.S.2d 894, 488 N.E.2d 824 (1985) (enforcing the time limitation in a cruise passenger ticket despite the fact the provision was in four-point type).

\textsuperscript{62} Pratt v. Silversae Cruises, Ltd., No. C 05-0693, 2005 WL 1656891, at *1 (N.D.Cal. Mar. 31, 2003) (An 83-year old woman alleged that she “suffered a broken hip, a torn ACL in her right knee, and severe ankle injuries when she fell on a cruise ship enroute from San Diego to San Francisco.”); Carnival Corp. v. Amato, 840 So.2d. 1088, 1088 (Fla.App. 3 Dist. 2003) (“Injured vacationer brought action against cruise line for injuries sustained when he fell down a flight of stairs on cruise ship.”).

\textsuperscript{63} Carnival Corp. v. Stowers, 834 So.2d 386, 386 (Fla.App. 3 Dist. 2003) (maritime personal injury action following a passenger fall on a granite step against cruise line); Lee v. Regal Cruises, 116 F.3d 465, 465 (C.A.2 (N.Y.) 1997) (maritime personal injury action resulting from passenger slipping on melting ice cubes and falling on a stairway); Norwegian Cruise Line, Ltd. v. Clark, 841 So.2d 547, 548-49 (Fla.App. 2 Dist., 2003) (maritime personal injury action following a passenger fall on a wet deck).

\textsuperscript{64} McDonough v. Celebrity Cruises, Inc., 64 F.Supp.2d 259, 261 (S.D.N.Y. 1999) (cruise passenger was struck on the head by a rum-filled coconut).

\textsuperscript{65} Catalan v. Carnival Cruise Lines, Inc., 1985 AMC 1941, 1941-42 (D. Md. 2004) (cruise passenger was struck in the head by a golf ball).


The terms and conditions of the Passenger Ticket governing RCI's 14-night Middle East cruise on the *Brilliance of the Seas* is available on RCI's website. The currently available PDF includes the Passenger Ticket that is applicable to both those who booked a cruise on the *Brilliance of the Seas* prior to, on, and after April 20, 2008. For the purposes of this comment it will be assumed that the terms and conditions of the Passenger Ticket for those who booked on or after April 20, 2008 are relevant for determining the responsibilities and liabilities RCC and RCI have to passengers of the *Brilliance of the Seas*.

In the event that the *Brilliance of the Seas* is attacked and passengers are injured or die, passengers seeking recovery must refer to the Passenger Ticket and take note of the sections pertaining to the commencement of claims, forum selection, and limitations of liability. In accordance with Section 10(a), *Notice of Claims and Commencement of Suite or Arbitration; Security*, notice must be given to the carrier and an action for personal injury or death must be commenced within six months of the date of the injury or death. Irrespective of where the passengers' native state or country might be, passengers are also obligated under Section 9(a), *Forum Selection Clause For All Lawsuits; Class Action Waiver*, to bring a cause of action “before the United States District Court for the Southern District of Florida Located in Miami-Dade County.” In order for passengers to proceed and prevail, they must establish that RCC and/or RCI may be held liable for their injury or death.

Section 11(a), *Limitations of Liability*, describes the duties and responsibilities RCC and RCI owe to passengers of the *Brilliance of the Seas*:

“CARRIER SHALL NOT BE LIABLE FOR INJURY, DEATH, ILLNESS, DAMAGE, DELAY OR OTHER LOSS TO PERSON OR PROPERTY, OR ANY OTHER CLAIM BY ANY PASSENGER CAUSED BY ACT OF GOD, WAR, TERRORISM, CIVIL COMMOTION, LABOR TROUBLE, GOVERNMENT INTERFERENCE, PERILS OF THE SEA, FIRE, THEFTS OR ANY OTHER CAUSE BEYOND CARRIER’S REASONABLE CONTROL, OR ANY ACT NOT SHOWN TO BE CAUSED BY CARRIER’S NEGLIGENCE.”

The author highlighted and italicized three key portions of this section which will be analyzed in greater detail in the following section.

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69. Id.
70. Id. § 10a.
71. Id. § 9a.
72. Id. § 11a.
ANALYSIS: RCC and RCI May Be Held Liable for Passenger Injuries Resulting from a Pirate Attack on the Brilliance of the Seas While It Travels Through Pirate Prone Areas

“This is your Captain speaking. I am instructing all passengers to return to their cabins immediately. This is not a test – the ship is under attack by pirates!”

This is one announcement that cruise passengers do not normally expect to hear over their ship’s intercom system. Passengers on a Brilliance of the Seas cruise, however, may hear such an announcement. Pirates have become more aggressive in their attempts to seize vessels and passengers for the hefty ransoms they are paid. Despite the danger to the Brilliance of the Seas, its crew, and its passengers, RCC and RCI have persisted in their endeavors to expand international operations and offer cruises to the Middle East.

RCC and RCI may be held liable for passenger injuries or death in the event that the Brilliance of the Seas is attacked by pirates during the 14-night Middle East cruise. RCC and RCI do not include the necessary wording in the Brilliance of the Seas’ Passenger Ticket to limit their liability for such an incident. RCC and RCI, whom have control over the Brilliance of the Seas, have also disregarded travel warnings and alerts concerning voyaging through the Gulf of Aden and continue to offer cruises through these waters. RCC and RCI should consider whether it is prudent to continue to offer cruises through pirate prone areas. If RCC and RCI remain unpersuaded to alter the schedule of the Brilliance of the Seas, they should at least consider safety measures that can be utilized to safeguard the Brilliance of the Seas and its passengers from harm.

I. UNDER THE TERMS OF SECTION 11(A) RCC AND RCI MAY BE HELD LIABLE FOR PASSENGER INJURIES OR DEATH SUSTAINED DURING A PIRATE ATTACK UPON THE BRILLIANCE OF THE SEAS

RCC and its RCI brand are not confined to only offering cruises in the Middle East. These cruise lines function at a global level and are well positioned to provide cruises to exotic destinations around the world, which are much less risky than the Middle East. RCC and RCI chose to expand and to continue to offer cruises to the Middle East despite numerous warnings and alerts against such action. In the event that those risks materialize and a passenger is injured or killed in a pirate attack on the Brilliance of the Seas, it is likely that RCC and RCI will be held accountable.
A. THE BRILLIANCE OF THE SEAS PASSENGER TICKET DOES NOT LIMIT RCC AND RCI'S LIABILITY DUE TO A PIRATE ATTACK

In order for RCC and RCI to limit their liability for passenger injuries or death during an actual, or attempted, pirate attack upon the Brilliance of the Seas, the term “pirate attack” or “piracy” has to be included within the text of the Passenger Ticket. It would be appropriate to include one or both of these terms within Section 11(a), Limitations of Liability. However, RCC and RCI have failed to include either term anywhere within the text of the Passenger Ticket.\(^{73}\)

The only term that has any real potential of being confused with and perhaps argued by RCC and RCI as encompassing piracy is the term “terrorism.”\(^{74}\) While the term “terrorism” is included in Section 11(a), its inclusion should still be insufficient and ineffective in protecting RCC and RCI from liability. Piracy and terrorism have material characteristic differences as well as separate legal definitions and punishments.

1. An Attack Upon the Brilliance of the Seas by Somalian Pirates in the Gulf of Aden Should Not Be Classified as an Act of Terrorism

Terrorism is a separate and distinct concept from piracy. The United States Congress has promulgated laws regarding Terrorism under Title 18, Crimes and Criminal Procedure, of the United States Code and more specifically within Chapter 113B, Terrorism.\(^{75}\) Congress has distinguished international terrorism from domestic terrorism as well. According to 18 U.S.C. §2331, these terms are defined as follows:

(1) the term “international terrorism” means activities that—
   (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
   (B) appear to be intended—
      (i) to intimidate or coerce a civilian population;
      (ii) to influence the policy of a government by intimidation or coercion; or
      (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and . . .
(5) the term “domestic terrorism” means activities that—
   (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

\(^{73}\) See Ticket Contract for Brilliance of the Seas, supra note 69, § 11a.
(B) appear to be intended—
   (i) to intimidate or coerce a civilian population;
   (ii) to influence the policy of a government by intimidation or coercion; or
   (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.76

Sections within this Chapter further specify punishments for specific acts of terrorism such as the use of weapons of mass destruction,77 bombing places of public use (including government facilities, public transportation systems, and infrastructure facilities),78 using missile systems to destroy aircraft,79 and using/dispersing radiological devices.80

It is important to note that nowhere within the definition of either international or domestic terrorism is it mentioned that terrorist acts tend to occur on the high seas. In fact, none of the other sections pertaining to terrorism specify the high seas as a location where specific types of terrorist acts tend to occur either. While the high seas have not been made a part of this criminal section, it is a distinguishing and critical component of the United States Code sections pertaining to piracy.

The United Nations Ad Hoc Committee is currently drafting the United Nation's Comprehensive Convention on International Terrorism.81 The final definition of what constitutes an act of terrorism has not yet been finalized. At present, the working definition of an act of terrorism is:

[A] person's unlawfully and intentionally causing or threatening to cause violence by means of firearms, weapons, explosives, [or] any lethal devices or

76. 18 U.S.C. § 2331 (2001) (“'[I]nternational terrorism' means activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State . . . [that] . . . appear to be intended . . . to intimidate or coerce a civilian population; . . . influence the policy of a government by intimidation or coercion . . . or . . . affect the conduct of a government by mass destruction, assassination, or kidnapping; and . . . occur primarily outside the territorial jurisdiction of the United States.” Id. § 1. “'[D]omestic terrorism' means activities . . . [equal to that of “international terrorism,” but] . . . occur primarily within the territorial jurisdiction of the United States.” Id. § 5.).

77. 18 U.S.C. § 2332a (2004) (“[Violators] shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.”).


79. Id. § 2332g (2004) (stating violators of this section subject to a maximum $2,000,000 fine and minimum prison sentence of 25 years, or $2,000,000 fine and life imprisonment if death results from a violation of this statute).

80. Id. § 2332h (stating violators of this section to a maximum $2,000,000 fine and minimum prison sentence of 25 years; life imprisonment if death results from a violation of this statute).

dangerous substances, which results, or is likely to result, in death or serious bodily injury to a person, a group of persons or serious damage to property – whether for public use, a State or Government facility, a public transportation system or an infrastructure facility.82

Under the current working definition, “[a]cts of terrorism also include such person’s attempt to commit such an offense, participate as an accomplice in the commission of such an offense, or in organizing or directing others to commit such an offense, or in contributing to the commission of such an offense.”83

It should be similarly noted that the United Nation’s current working definition of acts of terrorism does not include the term high seas. While this definition is subject to change, there is no indication in its current state that the performance of this crime on any type of body of water is essential to the definition of what constitutes terrorism. While the term “high seas” has not been included in the current definition of terrorism, it is a central component of the United Nation’s definition of piracy.

Overall, the actions of Somalian pirates do not conform to the definition of terrorism as it is understood in the United States or as currently defined by the United Nations. Despite the real threat of being attacked by pirates, many cargo and passenger vessels remain committed to their plans to continue to sail through the Gulf of Aden. In addition, Somalian pirates’ actions have had little to no political intimidation value on the United States or other nations. To the contrary, the international community has joined in cooperation to eliminate piracy in this area and prevent commercial disruption.84 An attack upon a vessel for the purpose of plundering it and/or holding the vessel and its passengers hostage does not constitute as an act of terrorism. Therefore, an attack by Somalian pirates upon the Brilliance of the Sea should not be deemed as an act of terrorism.

2. An Attack By Somalian Pirates Upon the Brilliance of the Seas in the Gulf of Aden Should Be Classified as a Pirate Attack

Article 1 of the United States Constitution grants Congress the authority “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.”85 Congress has elected to utilize this power and has promulgated laws regarding piracy under Title

82. Id.
83. Id.
18, *Crimes and Criminal Procedure*, of the United States Code, and more specifically within Chapter 81, *Piracy and Privaterring*. According to 18 U.S.C. §1651, “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” Sections within this chapter further specify punishments for specific piracy acts such as conversion of a vessel, plundering a vessel, acts of alien pirates, and robbery by pirates on shore.

Courts within the United States understand piracy as “a forcible depredation upon property on the high seas without lawful authority, done *animo furandi*; that is, as defined in this connection, in a spirit and intention of universal hostility.” Consequently, “[p]irates are generally described as sea-robbers” and “are deemed ‘*hostes humani generis,*’ enemies of mankind, warring against the human race.” “A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet.” Judge Sprague eloquently wrote how “[t]he ocean is the common highway of nations, over which every government has criminal jurisdiction.” He further stated that “pirates are highwaymen of the sea, and all civilized [sic] nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the constitution . . . enables the United States to perform this duty, as one of the family of nations.”

The international community has come to a similar agreement as to what constitutes piracy and the actions that all nations should take to suppress such crime. The 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention of the Law of the Seas defined piracy as consisting of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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86. 18 U.S.C. § 1651 (West 1948).
89. 18 U.S.C. § 1653 (West 1948).
92. *In re Charge to Grand Jury-Treason*, 30 F. Cas. at 1049.
93. *Id.*
94. Baker, 24 F. Cas. at 965.
95. *In re Charge to Grand Jury-Treason & Piracy*, 30 F. Cas. at 1049.
96. *Id.* at 1049.
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

This definition is broad enough to cover both actual and attempted pirate attacks. It was also the consensus of both of these Conventions that all nations should “cooperate to the fullest possible extent in the repression of piracy on the high seas.” Consequently, both Conventions included Articles that addressed repossession of seized property, apprehension of pirates, and the adjudication of piracy.

The actions of Somalian pirates constitute acts of piracy within the understanding of the laws of the United States and the international community. Somalian pirates are private non-state actors that utilize their own private boats to commit illegal acts on the high seas. They have become known for their aggressive tactics to seize vessels, its passengers, and its cargo in order to hold them hostage for large ransoms. Even though the international community has worked, and continues to work, jointly to detect and prevent pirate attacks, such criminal activity has not been eradicated. Vessels that voyage through the Gulf of Aden and the surrounding waters must remain vigilant and take precautions to protect themselves against being attacked and taken hostage by pirates. Should Somalian pirates seize, or attempt to attack the Brilliance of the Seas during its voyage through the Gulf of Aden, their actions should be held as acts of piracy. As piracy is separate and distinct from “terrorism,” RCC and RCI may be held liable for all passenger injuries or deaths occurring as a result of such an incident.

B. RCC AND RCI HAVE REASONABLE CONTROL OVER THE BRILLIANCE OF THE SEA AND ITS DESTINATIONS

In accordance with the Brilliance of the Seas’ Passenger Ticket, RCC and RCI may be “liable for injury, death, illness, damage, delay or other loss to person or property” for causes that are within the carriers reasona-
ble control. While neither RCC nor RCI own the Brilliance of the Seas, they do have the authority over this vessel. Additionally, both RCC and RCI have the power to control where this ship sails and makes port.

In 2002, RCC entered into a 25 year operating lease for the Brilliance of the Seas. RCC wanted to add this ship to its RCI fleet as it is "considered one of the most elegant cruise ships in the world." The ships most stunning features include "an open Centrum with 10-deck high windows and ocean-facing glass elevators." The adult passengers onboard can enjoy "multiple restaurants, lounges and discos throughout the ship, and world-class gaming in the Casino Royale." This ship was also designed to be family friendly as it includes a nine-hole mini-golf course, the iconic rock wall, a sports court, the Adventure Beach waterslide, and self-leveling pool tables.

Under the terms of the lease agreement, the lessor may "cancel the lease at years 10 and 18." Based on current circumstances, RCC fully expects that this lease will reach maturity. Therefore, as of December 31, 2009, RCC reported that it planned to continue to operate this vessel along with 21 other ships under the RCI brand name.

RCI offers cruise packages on the Brilliance of the Seas that complement its overall business strategy. RCI has strategically positioned itself to serve both the upper end of the contemporary and premium segments of the cruise vacation industry. To meet the interests of the premium segment, which tends to be comprised of guests who enjoy traveling and are more affluent, RCI offers cruises that extend from 7 to 14 nights. RCI also "offers a variety of itineraries to destinations worldwide, including Alaska, Asia, Australia, Bermuda, Canada, the Caribbean, Europe, Hawaii, Latin America, the Middle East, the Panama Canal, and New

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100. Ticket Contract for Brilliance of the Seas, supra note 69, § 11a.
101. ROYAL CARIBBEAN INT’L, Annual (Form 10-K), at pages 19, 48 (Feb. 23, 2010).
102. ROYAL CARIBBEAN INT’L, Annual (Form 10-K), at page 12 (Feb. 23, 2010).
103. ROYAL CARIBBEAN INT’L, Annual (Form 10-K), at page F-30 (Dec. 31, 2009).
105. Id.
106. Id.
107. Id.
108. ROYAL CARIBBEAN INT’L, Annual (Form 10-K), at page F-30 (Dec. 31, 2009).
109. Id.
110. ROYAL CARIBBEAN INT’L, Annual (Form 10-K), at page 12 (Dec. 31, 2009).
111. ROYAL CARIBBEAN INT’L, Annual (Form 10-K), at page 1 (Dec. 31, 2009).
112. Id.
Zealand.”

In January 2010, as a part of their international expansion efforts, RCI added sailings from Dubai. Currently, while the **Brilliance of the Seas** and several other RCI ships operate in Europe, the **Brilliance of the Seas** is the only RCI vessel that operates in the Middle East. Due to this unique placement, RCI scheduled the **Brilliance of the Seas** to make several voyages between Barcelona, Spain and Dubai, United Arab Emirates in the future. This enables passengers the opportunity to book a 14-night, 16-night, or 18-night cruise that offers a blend of exotic ports of call and restful days of at sea travel.

C. RCC AND RCI NEGLIGENTLY MADE ARRANGEMENTS FOR THE **BRILLIANCE OF THE SEAS** TO PROVIDE CRUISES THROUGH PIRATE PRONE AREAS

Under the **Brilliance of the Seas’** Passenger Ticket, RCC and RCI may be “liable for injury, death, illness, damage, delay or other loss to person or property” for any act shown to be caused by the carrier’s negligence. During 2008, 2009, and 2010 both RCC and RCI knew, or should have known, they were placing many passengers in harms way by offering cruises to the Middle East. There were numerous indications that Somalian pirates were becoming more brazen in their attacks and that cruise ships, similar to cargo vessels, would be at risk if they sailed through the Gulf of Aden. RCC and RCI did not waver from their efforts over these three years because of motivation to continuously increase profit and expand operations. Today, they continue to disregard sailing warnings and travel advisories against traversing on the very course scheduled as part of the 14-night Middle East cruise and several future cruises offered to/from the Middle East.

113. **ROYAL CARIBBEAN INT’L**, *supra* note 111.
117. Id.
118. Id.
119. Id.
121. See infra Part I(C)(1)-(3).
122. See infra Part I(C)(1).
On October 13, 2008, RCC announced in a press release that RCI was expanding its presence in the Middle East. Michael Bayley, Senior Vice President, International, RCC, remarked on how “Dubai is a dynamic and thriving city that shows great growth potential.” He also explained how deploying the Brilliance of the Seas to this region the company would be building on its brand “reputation for introducing revolutionary cruise experiences.”

Rama Rebbapragada, Regional Vice President, International Sales and Marketing, RCC, also commented on how pleased RCC was by this new arrangement and how their 2008 sales exceeded their target for the Middle East region.

On December 1, 2008, there was a flurry of reports by major news agencies around the world that pirates attacked the Oceania Cruises’ Nautica when it sailed through the Gulf of Aden. Tim Rubacky, a spokesman for Oceania, said that at the time of the incident the “Nautica was in an area patrolled by international anti-piracy task forces when two small skiffs appeared to try to intercept it.” “One of the smaller craft[s],” explained Mr. Rubacky, “closed to within 300 yards and fired eight rifle shots at the cruise ship.” This prompted the Nautica to take “evasive measures” and to accelerate “to its full speed of 23 knots or 27 mph.” Mr. Rubacky further reported that the “Nautica escaped without damage or injury to its 684 passengers and 400 crew.”

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124. Id.
125. Id.
126. Id.
129. Id.
130. Id.
131. Id.
Despite the attack on the *Nautica*, RCC continued to support and endorse RCI's efforts to boost its commercial growth by expanding its array of destinations. RCC announced in its Form 10-K, for the fiscal year ended December 31, 2008, that the *Brilliance of the Seas* would "remain in Europe year round throughout 2009," and then would "begin offering sailings from Dubai starting in January 2010." This Form 10-K also included an acknowledgment by RCC that "[e]vents such as terrorist and pirate attacks, war, and other hostilities and the resulting political instability, [and] travel restrictions" posed a risk to profitability and to its ability to retain qualified crew. While RCC understood the business risks of pirate attacks, it appears to have misunderstood or have disregarded the risk of passenger injury or death.

2. **RCC and RCI Made Strategic Alliances and Promoted Its Middle East Cruises During 2009 Despite the Continued Threat of Pirate Attacks**

On April 26, 2009, news that pirates attacked an Italian cruise ship was reported around the world. The *MSC Melody* "came under attack when it was 200 miles north of the Seychelles and 600 miles off the Somali coast." Cmdr. Ciro Pinto explained how "six men in a small white speed boat approached the *MSC Melody* and opened fire Saturday night, but retreated after the Israeli security officers aboard the cruise ship returned fire." In order to stop the pirates from climbing up over the sides of the vessel, Cmdr. Pinto said, "pistols were handed out to security staff and they opened fire on the pirates . . . we even sprayed them with water with the firehose [sic]." During the ordeal, passengers stayed inside their cabins. MSC Cruises, owner of the *MSC Melody*, an-
nounced after the attack that “[n]one of the roughly 1,000 passengers and 500 crew members were hurt.”\textsuperscript{140} The \textit{MSC Melody}, however, “was slightly damaged by firing from the pirates.”\textsuperscript{141}

Despite this attack and growing fears over piracy in the Gulf of Aden, RCC continued to promote and support RCI’s international expansion and development of its Middle East cruise offerings. On May 4, 2009, RCC made a press release announcing the formation of an agreement between RCI and DUBAILAND, which is a member of Tatweer.\textsuperscript{142} This press release described how RCI “will feature DUBAILAND’s key live attractions in their shore excursion programs, while DUBAILAND will actively promote Royal Caribbean’s Dubai cruises through their global agency network.”\textsuperscript{143}

RCC reiterated in its December 31, 2009, Form 10-K, that “[e]vents such as terrorist attacks, war, and other hostilities and the resulting political instability, [and] travel restrictions” pose a risk to profitability and to its ability to retain qualified crew.\textsuperscript{144} RCC did not justify or elaborate in their Form 10-K why it or RCI would, despite these risks, proceed with offering cruises that included passage through the Suez Canal and Gulf of Aden. RCC also failed to disclose the danger attributable to the \textit{Brilliance of the Seas}, its crew, and its passengers embarking on a cruise scheduled to sail to/from the United Arab Emirates.

3. \textit{RCC and RCI Continue to Offer Cruises to the Middle East During 2010 and Beyond Despite the Risk of Pirate Attacks}

“Helen Beck, Regional Director, International Representative, Europe, Middle East, Africa, commented, ‘The Gulf region is a very popular destination with visitors from all over the world, and as cruises consistently offer significant value for money, we have seen considerable interest in this exciting way of visiting the Middle East.’”\textsuperscript{145} RCI discovered that its Middle East cruises “were particularly popular with British and


\textsuperscript{141} Id.


\textsuperscript{143} Id.

\textsuperscript{144} Form 10-K for the fiscal year ended December 31, 2009, ROYAL CARIBBEAN INT’L, at 22, available at search engine “Form 10-K for the fiscal year ended December 31, 2009.”

Irish passengers.” It also found that “about 10 percent of the passengers on the sailings are American.”

Due to the popularity of the Dubai-based cruises, RCI announced in June 2010, that it planned to expand its presence in the Middle East. RCI “will offer a longer season of cruises and new itineraries in the region out of Dubai on the 2,501-passenger Brilliance of the Seas for the winter season of 2011-2012. When the Brilliance of the Seas returns to Dubai in November 2011, RCI is planning to offer “an increased range of itineraries including longer cruises up to 12- and even 18-nights.”

RCI wants those who have not been to the Middle East, but are interested in booking a cruise to an exotic place like the United Arab Emirates, to know they are sure to be “dazzled” when they arrive. RCI created a webpage that presents highlights of the area, describes places that might be of interest, and explains what to pack. RCI anticipated that after reading through this webpage some viewers may be interested in finding out when sailings will be offered. Thus, RCI has placed a button on this webpage that viewers can click to have a quick search run on future RCI sailings to this area. It should be noted that RCI’s Dubai/Emirate webpage does not provide any travel warnings or discuss the risk that pirates while voyaging in the Middle East could attack the Brilliance of the Seas.

II. RCC AND RCI SHOULD TAKE MEASURES TO MITIGATE THE RISK OF HARM TO PASSENGERS

RCC and its RCI brand have attained the status of being reputable global leaders in the cruise industry. These firms have a proven track record of generating profits and expanding operations. In order to retain that position, RCC and RCI should include passenger security among its core business vision objectives. Pirate attacks can pose significant risks

147. Id.
148. Id.
150. Ammari, supra note 146.
152. Id.
153. Id.
to the integrity of the *Brilliance of the Seas* and the health and safety of its crew and passengers. Costly litigation and claims arising out of pirate attacks can also affect RCC and RCI's bottom line and its investors. Thus, RCC and RCI should strive to strategically limit its exposure to litigation and to not jeopardize the safety of its passengers.

**A. RCC AND RCI MAY NOT BE ABLE TO CONTRACT OUT OF LIABILITY FOR HARM ARISING OUT OF A PIRATE ATTACK**

On its face it would seem that RCC and RCI could avoid having to compensate passengers for injuries sustained during a pirate attack while aboard the *Brilliance of the Seas* by simply revising the language within the Passenger Ticket. Currently, Passenger Ticket provisions include mitigation of liability for injuries arising out of particular events such as acts of God,\textsuperscript{155} perils of the sea,\textsuperscript{156} labor trouble, and fire.\textsuperscript{157} These events all share a common characteristic: RCC and RCI have absolute no control over their occurrence. As a result, RCC and RCI can prepare for, but are not going to be fully able to predict when they might occur.

It could be argued that even though RCC and RCI do not have direct control over Somalian pirates, RCC and RCI have reasonable control over the likelihood that the *Brilliance of the Seas* is attacked. The *Brilliance of the Seas* is an attractive floating target ripe for attack as soon as it crosses through the Suez Canal. First, RCC and RCI have not contracted for a security escort to travel with the *Brilliance of the Seas* or for security personnel to be aboard the *Brilliance of the Seas*.\textsuperscript{158} As such, there is a greater possibility that a pirate attack would be successful. Second, as the *Brilliance of the Seas* is a luxurious vessel, it could surely be held for a hefty ransom. Further, the cruise ship’s passengers are probably affluent and thus could also be held until significant payments were made for their release. Consequently, there is great motivation for pirates to attack the *Brilliance of the Seas*.

RCC and RCI’s legal team more than likely have not overlooked the possibility of including the term “pirate attack” into Section 11(a) of the *Brilliance of the Seas*’ Passenger Ticket. At present, inserting this term in and among the other situations in which RCC and RCI disclaim liability


is likely to be ineffective. RCC and RCI would probably have to reposition the *Brilliance of the Seas* so that it would no longer voyage through the Gulf of Aden or heed pirate advisories before they could mitigate their liability.

B. **RCC AND RCI CAN CANCEL, DEVIATE, OR SUBSTITUTE THE **

BRILLIANCE OF THE SEAS’ ITINERARY

The courts have acknowledged that the primary reason travelers select certain cruises is because of their scheduled ports of call. Indeed, RCI’s 14-night Middle East cruise offers an exceptional itinerary. There is a perfect blend of opportunity to disembark the cruise ship to explore exotic cities in foreign countries and to relax on board while the ship sails to its next destination. Even though RCC and RCI would not want to disappoint travelers who have or are considering booking one of the available Middle East cruises, it would be prudent of RCC and RCI to consider canceling, deviating, or substituting the *Brilliance of the Seas’* itinerary because of the threat of a pirate attack.

RCC and RCI have reserved the right to take this course of action. Section 6 of the *Brilliance of the Seas*’ Passenger Ticket describes the circumstances and conditions upon which RCC and RCI may utilize one or more of these options. 

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159. Doe v. Celebrity Cruises, Inc. 394 F.3d 891, 900-01 (11th Cir. 2004).


161. Royal Caribbean Int’l, [http://www.royalcaribbean.com/findacruise/cruiseDetails/shoreExcursions.do?sessionid=00002XDuQ6RUyVfPHWsTk0tV5N:12hdhua36?packageCode=BR14U048&shipCode=&Day=&Month=&Year=&sailDate=&ActivityTypeId=LocationCode=&Submit222.x=16&Submit222.y=9&Submit222=Submit=&SortBy=Price](http://www.royalcaribbean.com/findacruise/cruiseDetails/shoreExcursions.do?sessionid=00002XDuQ6RUyVfPHWsTk0tV5N:12hdhua36?packageCode=BR14U048&shipCode=&Day=&Month=&Year=&sailDate=&ActivityTypeId=LocationCode=&Submit222.x=16&Submit222.y=9&Submit222=Submit=&SortBy=Price) (last visited Oct. 9, 2010).

162. Royal Caribbean Int’l, Cruise/CruiseTour Ticket Contract – Royal Brilliance of the Seas CTC Effective To Those Who Booked On Or After 4/20/08, [http://www.royalcaribbean.com/content/en_US/pdf/CTC_BR_Only.pdf](http://www.royalcaribbean.com/content/en_US/pdf/CTC_BR_Only.pdf) (last visited Jun. 27, 2010) (“Carrier may for any reason at any time and without prior notice, cancel, advance, postpone or deviate from any scheduled sailing, port of call, destination, lodging or any activity on or off the Vessel, or substitute another vessel or port of call, destination, lodging or activity. Carrier shall not be liable for any claim whatsoever by Passenger, including but not limited to loss, compensation or refund, by reason of such cancellation, advancement, postponement, substitution or deviation False By way of example, and not limitation, Carrier may, without liability, deviate from any scheduled sailing and may otherwise land Passenger and her property at any port if Carrier believes that the voyage or any Passenger or property may be hindered or adversely affected as a result of hostilities, blockages, prevailing weather conditions, labor conflicts, strikes onboard or ashore, breakdown of Vessel, congestion, docking difficulties, medical or life saving emergencies or any other cause whatsoever. Carrier shall have the right to comply with any orders, recommendations, or directions whatsoever given by any governmental entity or by persons purporting to act with such authority and such compliance shall not be deemed a breach of this Agreement entitling the Passenger to assert any claim for liability, compensation or refund.”).
rity Cruises, which is another brand of RCC, have opted to cancel or adjust the itinerary of certain cruises. For example, in September of 2004, RCI announced that it would modify the itineraries of its ships destined for the Caribbean first due to the threat of, and then due to the destruction caused by Hurricane Frances. Celebrity Cruises has also canceled cruises because of urgently needed vessel repair and maintenance.

Certainly the most effective way to prevent the Brilliance of the Seas, its crew, and its passengers from harm due to pirate attacks would be to cancel all cruises scheduled to voyage through the Gulf of Aden. At the very least RCC and RCI should assess current risks and determine the level of risk of passenger injury or death they are willing to accept. When the conditions in the Gulf of Aden exceed that acceptable threshold, RCC and RCI should modify their cruise itineraries. Likewise, the Captain of the Brilliance of the Seas should be granted the freedom to exercise such authority if the need should arise.

C. RCC AND RCI CAN CONTRACT FOR SECURITY ESCORT AND/OR SECURITY PRESENCE ON THE BRILLIANCE OF THE SEAS

It would be sensible for RCC and RCI to consider implementing counter-pirate measures in the event they decided to continue to offer cruises that include sailings through the Gulf of Aden. RCC and RCI may, for instance, hire security personnel to ride aboard the Brilliance of the Seas from the point the cruise ship passes through the Suez Canal until it reaches its destination point at the United Arab Emirates. Onboard security personnel proved to be invaluable to the MSC Melody when it was attacked by Somali pirates. When pirates opened fire and tried to board the Italian cruise ship, its on-board security forces re-


165. Italian Cruise Ship Fires on Somali Pirates, supra note 136.
The head of MSC Cruises stated, after an attack was made on the MSC Melody, that “MSC Cruises hired the Israelis because they were the best trained security agents.”

Additionally, RCC and RCI may consider contracting with a security escort provider to accompany the Brilliance of the Seas when it sails from the Suez Canal to the United Arab Emirates. “Ordinarily, cruise ships travel at the speed of 21 to 24 knots per hour, but a high-speed cruise ship can go as fast as 30 knots or more.” There was an instance where “pirates opened fire on a U.S.-operated ship carrying hundreds of tourists on a month long [sic] cruise from Rome to Singapore, but the cruise liner was able to outrun the pirates.”

Cruise ships that are not able to maneuver as easily or reach a high rate of speed could greatly benefit from traveling in a convoy or being escorted by a vessel capable of fending off pirates. There are a number of reputable security firms offering such services.

RCC and RCI should not rely solely on the presence of navy flotillas presently patrolling the Gulf of Aden and surrounding waters. Piracy remains a significant problem even with the international effort to combat it because it is nearly impossible to provide complete protection “over the 1.1 million square miles of ocean.” As such, RCC and RCI should be proactive in their efforts to manage the threat of a pirate attack against the Brilliance of the Seas.

CONCLUSION: RCC AND RCI SHOULD REASSESS THEIR CURRENT CRUISE OFFERINGS

A cruise is an attractive, and often affordable, option for those looking for a hassle-free escape. A cruise ship is literally a floating resort that can offer a variety of services while sailing to various ports of call. Along with the overall experience, cruise lines tailor their vacations to be fam-

166. Id.
167. Id.
169. Italian Cruise Ship Fires on Somali Pirates, supra note 136.
ily-friendly as well as capable of meeting the demands of the most discriminating traveler.

While aboard, passengers place their trust in the cruise line and their staff. It is unlikely that passengers question the safety of their itinerary or suspect the threat of a pirate attack because it is expected that they will be protected from such foreseen dangers. Given the recent events in the Middle East waterways, passengers need to take some responsibility to research the areas they desire to visit and to gain an understanding of the risks they may face.

RCC and RCI are taking a huge gamble by continuing to offer cruises that sail through the Gulf of Aden. As they should be aware of the dangers vessels face when voyaging in the Middle East, RCC and RCI would likely be held accountable and required to compensate passengers for injuries, or death, that occur due to a pirate attack. RCC and RCI should be promoted by the statistics on pirate attacks and the current state of affairs to reassess the Brilliance of the Seas itinerary. They, however, have declined to cancel or modify the Brilliance of the Seas' current schedule. So perhaps the next time the Brilliance of the Seas embarks on a Middle East cruise, instead of shouting “Bon Voyage,” there should be shouts of “Bonne Chance!”
Article

"Double Marginalization" and the Counter-Revolution Against Liberal Airline Competition

Hubert Horan*

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* The author is a thirty-year industry veteran, currently working as an independent consultant based in Phoenix, with substantial experience in all of the network, alliance, merger and competitive issues raised by these cases. A full list of publications and detailed biographical information is available at http://www.horanaviation.com. He has worked in the management of Northwest, America West, Swissair and Sabena airlines, and has consulted for over thirty other carriers, but has no current economic or business interests in or with any of the parties to the cases discussed here.
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SUMMARY/ABSTRACT:

In the last decade, the U.S Department of Transportation (DOT) has abandoned its previously liberal, market-oriented policies towards international airline competition. While the policies of the 1980s and 1990s were designed to maximize industry competitive dynamics so consumers could benefit from ongoing improvements in price and efficiency levels, recent DOT policies have sought to reduce competition and entrench the position of the largest carriers. These policies have already led to the consolidation of twenty-six previously independent transatlantic airlines into three collusive alliances that would be virtually immune from future competitive challenges; in 2009, the DOT initiated a process that could see twenty-three previously independent transpacific airlines consolidated into those three same collusive alliances. While the DOT proactively used “Open Skies” treaty negotiations in the 1990s to undermine the ability of governments to reduce consumer welfare through artificial competitive barriers, recent “Open Skies” negotiations with the EU and Japan reestablished that private, bilateral discussions between large legacy airlines and government officials could dramatically restructure international airline competition in favor of those established legacy carriers. While the DOT used antitrust immunity in the 1990s as a tool that allowed small competitors such as KLM and Northwest to offer consumers improved schedules and lower prices in previously underserved niche markets, since 2003 the DOT has used antitrust immunity to enhance the market power of the largest incumbents, leading to pricing shifts that appear to have created multi-billion dollar annual consumer welfare losses.

The abandonment of consumer welfare-based airline antitrust policies and the sudden shift to unprecedented levels of international airline concentration was made possible by the DOT’s evisceration of traditional antitrust immunity evidentiary standards. The DOT’s recent immunity grants to members of the Star, Skyteam and Oneworld alliances were based on willful non-enforcement of the Clayton Act market power test and the Horizontal Merger Guidelines' requirement that applicants present verifiable, case-specific evidence of public benefits in order to meet
the 49 U.S.C. § 41308(b) stipulation that immunity be required by the public interest. The DOT has supplanted the need for verifiable, case-specific evidence with a series of arbitrary "rules" that ensure that almost any antitrust immunity proposal will be found to automatically produce public benefits without any risks of creating market power. The most important of these is "double marginalization," a rule which asserts that every time an immunity grant reduces international competition, consumer prices in certain connecting markets automatically fall fifteen to twenty-five percent, regardless of actual market or competitive conditions.

This paper describes the process by which the DOT has used rules such as "double marginalization" to eviscerate traditional antitrust evidentiary standards, and argues that none of the post-2003 consolidation of international aviation would have been possible if the traditional public benefits or market power tests and the traditional evidentiary standards had been enforced. The dispute over evidentiary standards surfaced in late 2009 when the Antitrust Division of the U.S. Department of Justice (DOJ) objected to the DOT having rubber-stamped the Star/Continental applicants' unsubstantiated benefit claims. The DOT emphatically rejected the DOJ's objections as an inappropriate interference with the DOT's aviation policy and bilateral negotiation prerogatives, a position that was more fully articulated in a recent Dean and Shane Air and Space Lawyer commentary, which claimed that all recent DOT decisions were fully consistent with longstanding pro-consumer, pro-competitive policies, and attacked the DOJ and Congressional critics of the DOT's antitrust approach as hostile to the interests of the US airline industry. This paper argues that the policies favoring extreme concentration and the effort to render the public benefits and Clayton Act tests meaningless reflect a major policy shift towards more active governmental management of airline industry structure, and represent a counter-revolution against the liberal airline competition policies of the 1990s.

I. Evidence Justifying ATI Grants: "Copy/Paste" as Antitrust Jurisprudence

Airlines applying to the DOT for antitrust immunity (ATI) must meet the strict section 41308 "required by the public interest" standard and prove that immunity "is necessary . . . to achieve important public benefits" that "cannot be achieved by reasonably available alternatives that are materially less anticompetitive."¹ The burden of proof for public benefits rests with the applicants,² and the Horizontal Merger Guidelines

defines the evidentiary standards that efficiency claims used to meet the public benefits test must meet:

[The applicants must] substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific. Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.3

Since ATI eliminates competition in the same manner that a full merger would, immunity cannot be granted unless the DOT conducts a Clayton Act test of whether ATI would create or increase market power.4 The Antitrust Guidelines and the Horizontal Merger Guidelines define these standards, including the need for evidence demonstrating the absence of risk that it could "harm[] competition by increasing the ability or incentive . . . to raise price or reduce output" in any relevant market5 and evidence that markets are fully contestable, so that "entry would be timely, likely, and sufficient in its magnitude and scope to deter and counteract the competitive effects of concern."6

ATI evidentiary standards became a public controversy in mid-2009 when the DOJ identified numerous instances where the DOT's Show Cause Order in the Star/Continental Application for antitrust immunity failed to support its findings with the "detailed and fact-intensive analysis" demanded by these evidentiary standards, including:

- "[T]he Applicants . . . made no showing that such entry [that could curb any anti-competitive abuse] would be timely, likely, or sufficient . . .;"7
- "[t]he [DOT] Order contains no analysis of the competitive effects of

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6. HORIZONTAL MERGER GUIDELINES, supra note 4, at 28.

immunizing the non-transatlantic international operations of Continental and United;”

- “[t]he Applicants have failed to show that nonstop entry would prevent fare increases by Continental and its immunized Star ATI partners in overlap transatlantic markets;”

- “DOT cites the Applicants’ assertion that the A++ ‘integrated’ venture will enable its participants to ‘pool resources to achieve substantial efficiencies and cost savings.’ . . . In DOJ’s view, it is not sufficient, however, merely to point towards claimed benefits; rather the Applicants need to demonstrate that immunity is necessary to achieve them. In this regard, the Applicants fall short;”

- “[t]he Applicants present no evidence however, that customers will receive quantitatively or qualitatively different service if Continental receives antitrust immunity . . . compared to what would be provided if Continental merely interacted with the level of cooperation expected of any member of the broader, non-immunized Star Alliance;”

- “[t]he Applicants also suggest, without evidentiary support, that consumers benefit from competition between alliances, particularly immunized alliances;”

- “[t]he Applicants overemphasize the likelihood that immunity for the proposed alliance will substantially reduce double marginalization [extra markups imposed on joint fares]. . . . In fact using 2005-2008 data, DOJ has found that connecting fares offered by non-immunized alliances for transatlantic routes are no more expensive than fares offered by immunized alliances;”

- “[t]he analysis underlying DOT’s conclusions on carve outs is unclear. The Order declines to carve out the overlap transborder routes in which Continental and the Star ATI members currently compete on a nonstop basis, without citing evidence from the record describing the public benefits likely to result from coordination on these routes. . . . [T]he Order cites no evidence to support revoking the [Frankfurt-Chicago/Washington] carve outs beyond the Applicants own self-serving statements. The Applicants do not provide specific evidence or quantification of diminished efficiencies or consumer value, even though Star members have long operated carve outs imposed as part of prior immunity grants;”

- “DOT dismisses concerns about the scope of the immunity on the grounds that the other Star partners have had global immunity with each other for many years. Therefore DOT concludes that it ‘has enough information to analyze the alliance plans’ and that restricting the scope here would unfairly disadvantage Continental. . . . DOT does not cite the ‘other information’ it relies upon to analyze the alliance plans, nor does it

8. Id. at 18.
9. Id. at 25.
10. Id. at 29-30.
11. Id. at 30.
12. Id. at 33.
13. Id. at 35-36.
14. Id. at 37, 39.
explain how Continental, or more significantly, consumers, would be harmed by the lack of global immunity.\textsuperscript{15}

The Star/Continental cases brought to light an irreconcilable gap between the DOT and DOJ approaches to airline antitrust jurisprudence.\textsuperscript{16} In Star/Continental, the DOT had not required the applicants to present verifiable, case-specific evidence, and did not undertake an independent, objective evaluation of the applicant's claims.\textsuperscript{17} In fact the DOT Show Cause "finding" that immunity would create public benefits consisted of nothing more than a verbatim repetition of the claims in the application.\textsuperscript{18} The DOT's public benefits methodology was literally nothing more than "copy and paste." The DOT's approach had been no more rigorous on the other major ATI cases of the past decade. But until the Star/Continental\textsuperscript{19} and Oneworld cases\textsuperscript{20} in 2009, no outside parties had ever commented as to whether these approaches were consistent with the law or established review standards.

The DOT attacked the DOJ evidentiary concerns in its Final Order as an inappropriate attempt to undermine its international aviation policies:

Were we to suddenly change our antitrust immunity and public interest approach, as DOJ suggests, the credibility of the U.S. government with its international aviation partners would be significantly compromised and our ability not only to reach new Open-Skies agreements but also to maintain those agreements that we have already achieved would be undermined.\textsuperscript{21}

\textsuperscript{15} Id. at 41 n.109.
\textsuperscript{16} See generally The Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703, 1703-1705 (1984). The Act divided airline antitrust responsibilities between the DOT and the DOJ, giving the CAB's authority to exempt international airlines from the antitrust laws (under certain conditions) to the DOT, but giving the DOJ authority over all mergers between US airlines. While the DOT has final authority, the DOJ is required to comment on all airline ATI cases, just as the DOJ is required to solicit DOT input on airline merger cases.
\textsuperscript{18} Id. at 15-16.
\textsuperscript{19} See id. at 6 (summarizing comments made by outside parties).
\textsuperscript{20} See Oneworld Show Cause Order, supra note 3, at 7-8 (summarizing comments made by outside parties).
\textsuperscript{21} Star/Continental Final Order, supra note 18, at 11.
The DOT made no attempt to justify or explain the evidentiary approaches that the DOJ criticized, and only made minor concessions to the separate DOJ argument that overlapping, nonstop routes which would lose competition should be carved out of the final immunity grant.\textsuperscript{22} Press reports suggested a heated dispute between the two departments that echoed these competing “antitrust evidentiary standards” versus “international aviation competition policy” positions, a debate that required mediation from President Obama’s chief economic adviser, Lawrence H. Summers.\textsuperscript{23} Filings in the Oneworld case use more measured language but the gap between the underlying antitrust approaches has not diminished.\textsuperscript{24}

II. “\textit{Antitrust Evidentiary Standards}” Versus “The Future of Global Aviation”

In a recent commentary in the American Bar Association’s \textit{Air and Space Lawyer}, Warren Dean and Jeff Shane presented a fuller articulation of the “aviation policy” side of this dispute.\textsuperscript{25} The Dean and Shane commentary directly echoes the DOT’s response to the DOJ’s Star/Continental criticism, claiming an unbreakable link between the DOT’s role in negotiating aviation treaties with foreign countries and its role in enforcing US antitrust laws, and defending the DOT’s jurisdiction over airline ATI cases.\textsuperscript{26} Dean and Shane point out that the current jurisdictional arrangements this linkage facilitated were the negotiations of the 1990s treaties: “If the U.S. government was to attempt through diplomacy to move its aviation trading partners coherently toward a more market-based and pro-competitive regime, it was essential that the antitrust exemption authority be vested in the agency primarily responsible for the development of U.S. international aviation policy.”\textsuperscript{27} They portray the dispute as a rearguard action led by the DOJ and certain Members of Congress against the liberal regime initiated by the original 1990s “Open Skies” treaties.\textsuperscript{28} In Dean and Shane’s view the DOJ and others

\textsuperscript{22. See id. at 18-21.}
\textsuperscript{24. See Oneworld Show Cause Order, supra note 3, at 8-9.}
\textsuperscript{25. See Warren L. Dean, Jr. & Jeffrey N. Shane, Alliances, Immunity and the Future of Aviation, 22 AIR & SPACE LAW. 1, 1 (2010) [hereinafter Dean & Shane].}
\textsuperscript{26. See id. at 18.}
\textsuperscript{27. Id. The question is whether the DOT is still using its international ATI authority to create a “more market-based and pro-competitive regime” as it did in the 1990’s.}
\textsuperscript{28. See id. at 17; Defining Open Skies, Docket No. 48130, Order 92-8-13 at 1 (Dep’t of Transp. Aug. 5, 1992) [hereinafter Defining Open Skies]. A full list of Open Skies aviation treaties is available on the Department of State website at http://www.state.gov/e/eeb/rls/othr/ata/114805.htm.
critical of recent ATI decisions were undermining what has been "a major aviation policy success story" because of their "outright hostility" to the interests of the US airline industry which had blinded them to the many "benefits" created by immunized alliances.29

Dean and Shane reframe the discussion away from the lax versus rigorous evidentiary standards question posed by the DOJ by claiming that the DOT's pro-alliance agenda is critical to the future of aviation.30 They describe the 1992 U.S.-Netherlands "Open Skies" Agreement and the resulting Northwest/KLM alliance31 as "the template for a major transformation of international aviation" and claim that the resulting "confluence of Open Skies agreements, alliances and ATI has spawned a fundamental reinvention of the global air transport industry," and even assert that "the emergence of alliances—and particularly immunized alliances—arguably has represented the most important development in the industry since the introduction of jet aircraft."32 Even though the DOJ's comments were strictly limited to evidentiary standards and said absolutely nothing about any of the DOT policies Dean and Shane favor, they feel that the DOJ's comments threaten this "more efficient and competitive global aviation system" and the outcome of the DOT-DOJ dispute "will have profound implications for the future of commercial aviation."33

Dean and Shane do not directly acknowledge any of the DOJ's specific Star/Continental evidentiary concerns, but they assert that whatever objections the DOJ might have had are wrong because the DOT findings fully satisfied both the public benefits and the Clayton Act market power tests.34 Thus, the two parties have used the same legal requirements and the same case evidence to reach exactly opposite conclusions— the DOJ said that the DOT's findings were hopelessly deficient while Dean and Shane say that the DOT's findings in Star/Continental were completely consistent with the law, and ATI could not have been granted in these cases unless these tests had been properly administered.35 In order to

29. See Dean & Shane, supra note 26, at 1, 17.
30. See id. at 18-19.
32. Dean & Shane, supra note 26, at 17-18.
33. Id. at 17.
34. See id. at 19-20.
35. Star/Continental DOJ Comments, supra note 8, at 29-30; Dean & Shane, supra note 26, at 19 ("ATI will be awarded only where the applicants can demonstrate that the public benefits likely to flow from the alliance will be significant - in keeping with the positive effects DOT described in its 1999 and 2000 reports - and that those benefits would not materialize without a grant of ATI").
make sense of the competing views about industry consolidation and the future of global aviation, it is necessary to explain these opposite and incompatible views about the case evidence required to show significant public benefits and the market power needed to sustain anti-competitive pricing.

III. “AVIATION POLICY DRIVEN BILATERALS” VERSUS “BILATERAL DRIVEN AVIATION POLICY”

Dean and Shane’s paper does not define the DOT’s specific international aviation policy objectives that are being threatened by the DOJ and others, aside from these general references to the promotion of immunized alliances. There are no references to post-1999 DOT policy analysis of the virtues of increasing the size and market share of immunized alliances beyond their 1999 levels as these do not exist. They argue that the DOT’s policies and its ATI decisions “have been a major public policy success story for consumers, global airline competition, and the airline industry itself;” although the article does not cite any post-1999 evidence of consumer/competitive benefits, or any significant industry service or productivity gains.\footnote{36. Dean & Shane, supra note 26, at 21. The only objective (but pre-1999) evidence cited by Dean and Shane are DOT reviews of the mid 90’s impacts of the original ATI grants. Id. at 19 n.27.}

The DOT policy objective at stake is the use of ATI to consolidate previously independent international airlines into three collusive alliances, a policy radically different from what the DOT was pursuing when it approved Northwest/KLM in the mid 1990s. Dean and Shane cite “DOT’s savvy administration of its power to confer ATI”\footnote{37. Id. at 21.} as a major policy accomplishment, but are unwilling to openly admit that current ATI policy is designed to reduce competition, or to openly defend the new policy on the basis of evidence that the risks of reduced competition are fully offset by tangible consumer benefits. In fact, Dean and Shane are unwilling to admit that there has been any change in the DOT’s international aviation competition policy despite the obvious contradiction between the DOT’s current policy of active government intervention (via ATI) to massively reduce the number of international competitors, and the 1990s “market-based and pro-competitive regime” that they used as justification for an “aviation policy” driven approach to antitrust enforcement.\footnote{38. Id. at 18. The impacts of recent ATI decisions on concentration will be documented in section 5.}

Dean and Shane’s defense of the linkage between the DOT’s antitrust and bilateral negotiation authorities attempts to reverse the horse
and the cart. In the 1990s, the DOT’s bilateral negotiations were a means of implementing its “market-based” competition policies, policies that were grounded in traditional antitrust logic based on consumer welfare and industry efficiency, and closely aligned with the domestic competition policies enshrined in the Airline Deregulation Act.\textsuperscript{39} Today, the DOT is conducting bilateral negotiations about the future structure of the international airline industry with other governments and the large incumbent carriers, and then tailoring antitrust findings to support those agreements.\textsuperscript{40} Dean and Shane argue that competition (antitrust) decisions should be totally deferential to industry structure decisions reached during those private negotiations, even when those “policies” are not market-based, are not aligned with the consumer welfare/industry efficiency logic that is the basis of the Airline Deregulation Act, and cannot be justified on the basis of the objectives and benefits of 1990s aviation competition policies.\textsuperscript{41}

Dean and Shane are advocating a fundamental shift from the mid-1990s approach - what could be termed “aviation competition policy driven bilaterals” - to “bilateral driven aviation competition policies,” the opposite of the mid-1990s approach.\textsuperscript{42} The large intercontinental alliance carriers such as United or Air France would naturally favor “bilateral driven competition policies” since they are ideally positioned to influence the officials responsible for these bilaterals and often participate directly in the bilateral negotiation process. The “aviation competition policy driven bilaterals” approach of the 1990s made the interests of the large intercontinental carriers subsidiary to broader issues of consumer welfare and overall industry efficiency.

IV. “BILATERAL DRIVEN ANTITRUST ENFORCEMENT” VERSUS “EVIDENCE DRIVEN ANTITRUST ENFORCEMENT”

The “antitrust evidentiary standards” counterargument that will be presented in the balance of this paper is that the DOT has radically redefined the traditional evidentiary standards, hollowing them out to the extent that almost any ATI/consolidation proposal being discussed by the

\textsuperscript{39} See U.S. Dep’t of Transp., Office of Hearings Competitive Mktg. of Air Transp., Docket No. 36595, Order 82-12-85 at 131 (Dep’t of Transp. Dec. 16, 1982) (“In enacting the Airline Deregulation Act, Congress directed that control of the air transportation system be returned to the marketplace. We have consistently held that a part of the return to market control is exposure of participants to the antitrust laws, as that exposure exists in unregulated industries.”).

\textsuperscript{40} This was the approach that the liberal Open Skies regimes were designed to eliminate. See Clifford Winston & Steven Morrison, Evolution of the Airline Industry 147-50 (1995); Jeffrey N. Shane, Under Sec’y for Policy, U.S. Dep’t of Transp., Air Transport Liberalization: Ideal and Ordeal 11-12 (Dec. 8, 2005).

\textsuperscript{41} See Dean & Shane supra note 26, at 19.

\textsuperscript{42} See id. at 21.
industry will automatically be found to produce significant public benefits and to pose no risk of anti-competitive pricing. Just as Dean and Shane have no post-1999 evidence supporting their policy preferences, none of the recent ATI applicants have presented any post-1999 evidence of actual public benefits, or the actual absence of market power.43

The traditional need for verifiable, case-specific evidence of public benefits has been nullified by a DOT position that ATI applications automatically create approximately fifteen to twenty-five percent in price reductions in connecting markets, in each and every case irrespective of market or competitive conditions.44 This position is based on a theory of structural barriers to efficient pricing known as “double marginalization,” a theory supported by a single study prepared by a paid advocate for one of the ATI applicants, and based solely (like Dean and Shane’s policy arguments) on pre-1999 data.45 The DOT has based all public benefits findings on this position, has simply ignored evidence that the logic and evidence underlying the rule is deeply flawed, and has ignored all recent evidence contradicting the rule.46 The DOT also based its public benefit findings on a second rule establishing that claims the applicants will benefit from a grant of ATI can be accepted as proof of significant “public” benefits, even when the applicants have not documented or quantified the claims, and even where there is no evidence that overall consumer welfare or industry efficiency actually improved.47 The DOT has abandoned the traditional need for pricing, entry barrier, and market contest-


47. See OneWorld Show Cause Order supra note 3, at 30-31.
ability evidence showing that ATI grants meet the Clayton Act market power test, because of a third arbitrary rule that market power cannot exist in any broadly defined market that has three competitors and an “Open Skies” treaty.48

By gutting, but not formally eliminating, the public benefit test of 49 U.S.C. § 41308(b) and the market power test of the Clayton Act, the DOT maintains the superficial appearance of following the law, while establishing a process whereby ATI and consolidation proposals can be approved much more rapidly. Because applicants no longer need to present verifiable, case/market-specific evidence, almost any plausible ATI proposal would automatically meet the redefined standards, and opponents cannot challenge applications based on case/market-specific evidence. As a result, both the DOJ and Dean and Shane can cite the same public benefits and market power requirements and reach completely opposite conclusions about the legitimacy of the DOT’s recent ATI findings. Dean and Shane favor the DOT rules gutting these evidentiary standards because they favor much greater consolidation among international airlines, and recognize that the “aviation policy” objective of vastly increased consolidation could not be implemented under traditional standards.49 However, Dean and Shane are unwilling to openly acknowledge that the DOT’s pro-consolidation decisions depend on these new rules or that the DOJ and the other parties they attack in their article might have reasonable legal objections to the DOT’s rules independent of any opinions about aviation policies or specific consolidation proposals.50

While “double marginalization” may seem like an arcane rule, it has already had a bigger impact on airline competition than anything that has occurred since the 1944 Chicago Convention established today’s legal framework for international aviation. A brief review of the historical development of collusive (immunized) alliances and their impact on North Atlantic competition will provide some useful context for the subsequent discussion of how the DOT’s recent ATI evidentiary rules were critical to the recent increases in industry concentration.

V. THE ECONOMICS OF INTERCONTINENTAL ALLIANCES

The economics and competitive dynamics of intercontinental airline markets are markedly different from shorter-haul domestic and regional

48. See Star/Continental Show Cause Order, supra note 18, at 2; Oneworld Show Cause Order supra note 3, at 3.
49. See Dean & Shane, supra note 26, at 20-21.
50. See Star/Continental DOJ Comments, supra note 8, at 8. As discussed in section 1, the DOJ’s comments in the Star/Continental case were strictly focused on the DOT’s failure to support its findings with evidence that met Horizontal Merger Guidelines standards; the DOJ did not offer any comments about the general merits of alliances or any DOT aviation policies.
markets. All of the “aviation competition policy” and antitrust issues in these cases strictly apply to the intercontinental sector, which accounts for over half of the entire global aviation business. Any discussion of those issues must recognize that because of both natural and artificial barriers, it is much more difficult for “market forces” to discipline competitors and spur productivity in intercontinental markets.

Domestic/regional (narrow-body) carriers focus on much smaller market segments, and the “low cost” (LCC) models that dominate those markets are highly flexible, require relatively little startup capital, and can operate small networks efficiently. Intercontinental carriers have huge initial startup costs and require very large scale operations, including large fleets of wide-bodies, global marketing capabilities, and a very large hub-based route network in order to feed passengers onto and between those wide-body aircraft. Since these hubs must be in very large cities with a strong local demand for intercontinental travel, new entry into this sector has been entirely limited in recent decades to airlines based in newly developing economies in East Asia and the Persian Gulf. These natural barriers are augmented by other totally artificial entry barriers established by governments in order to protect incumbent intercontinental airlines. Most governments around the world have established highly liberal entry and pricing rules for domestic and regional markets, but actively intervene to rig market rules to protect the airline(s) serving as their “national champion” in intercontinental markets.

51. Intercontinental markets are defined as city pairs more than 3000 miles apart. In almost all cases, intercontinental service involves the use of long-haul, wide-body aircraft, although passengers often connect to these aircraft from short-haul, narrow-body aircraft that also carry domestic/regional passengers. Domestic/regional markets include “international” (cross-border) service operated on the same basis as domestic services (for example intra-EU, USA to Canada/Caribbean).

52. Only four of the traditional network airlines currently operating intercontinental services entered long-haul markets within the last fifteen years (Qatar, Ethiad (UAE), Jet Airways (India) and BMI (UK)), while only two large network carriers exited intercontinental markets in that period (TWA, Canadian). The handful of today’s small, non-network carriers that first entered intercontinental markets in the last fifteen years (mostly leisure carriers such as Blue Panorama (Italy), Monarch (UK), and Air Tahiti Nui) was offset by the exit of other small non-network carriers (mostly flag carriers of small countries such as Olympic (Greece), JAT (Yugoslavia), and Tarom (Romania)). In several other cases there was a one-for-one replacement of national carriers providing longhaul service (Swiss for Swissair, TAM for Varig (Brazil), Aerosvit for Air Ukraine, and Conviviasa for VIASA (Venezuela)) that had no impact on the overall competitiveness of intercontinental markets.


<table>
<thead>
<tr>
<th>Aviation Sector</th>
<th>% of RPMs/Revenue</th>
<th>% of Enplanements</th>
<th>Business Models</th>
<th>Entry Barriers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercontinental (long-haul/wide-body)</td>
<td>55%</td>
<td>30%</td>
<td>Strictly via mega-hubs (JFK, ORD, FRA, CDG, HKG, SIN, etc.)</td>
<td>Huge - need large fleet of wide-bodies plus hubs with short-haul feed, plus many government restrictions.</td>
</tr>
<tr>
<td>Domestic/Regional (short-haul/narrow-body)</td>
<td>45%</td>
<td>70%</td>
<td>Various models possible, mostly “low cost” and point-to-point.</td>
<td>Generally very low - vast majority of markets have open entry/pricing.</td>
</tr>
</tbody>
</table>

Table 1.55

Because of these natural and artificial barriers, intercontinental markets are not contestable. As shown in figure 1, there has been no growth in the number of intercontinental competitors in thirty years, even though this is the most profitable and fastest growing part of global aviation; all of the dynamic industry growth and increased competition observed in recent decades has been strictly limited to domestic and regional (narrow-body) markets.56 All of the recent merger and immunity cases since 2003 are designed to increase consolidation within these already non-contestable intercontinental markets, and would have no impact on the over 700 airlines serving the forty-five percent of global demand in short-haul markets.57 “Industry consolidation” advocates, following a process described in the balance of this section, are attempting to rationalize most of the 100 airlines serving the fifty-five percent of global demand in intercontinental markets into just three global alliance groups.


56. See Hubert Horan, If Consolidation Occurs, it Would Reverse Decades of Airline History, AIRLINES INT’L, Jan. 2009, at 58. See also William Swan, Misunderstandings About Airline Growth, 13 J. OF AIR TRANSP. MGMT. 3, 3-4 (2007). Swan reached a similar “industry consolidation is a myth” conclusion based on data showing growth in aggregate market demand and service levels had been achieved without any major increases in Herfindahl market concentration indexes. However, this analysis did not look at competitive entry/exit data, and thus would not have captured the enormous differences shown in figure 1 between the competitive dynamics of long-haul markets (where both entry and exit is extremely rare, and the net growth in the number of competitors is close to zero) and short-haul markets (with high levels of both entry and exit, and strong net growth in the number of competitors). See infra note 59.

57. See WORLD AIR TRANSP. STATISTICS (2008), supra note 56.
The two types of alliances between intercontinental airlines have totally different economic and competitive characteristics, although Dean and Shane and most other observers discuss the benefits of “alliances” as if these distinctions did not exist. Non-immunized “Branded Alliances” operate globally and emphasize products such as frequent flyer reciprocity, codesharing, common terminal and lounge facilities, and other forms of mutually beneficial interline cooperation that existed long before the current alliance structures were developed. “Collusive Alliances” were first introduced in 1992, and are currently only found on the North Atlantic. Since their members have antitrust immunity to collude on pricing

58. Data in the graph is from a proprietary database of all historical passenger airlines operating under unique aircraft operator certificates. Data includes all airlines operating aircraft with at least 50 seats and all airlines operating at least 15 smaller aircraft. The data does not reflect any reduced competition due to ATI; for example United and Lufthansa are counted as fully independent airlines (on file with author).

59. See Dean & Shane, supra note 26, at 17-18.

60. Star/Continental DOJ Comments, supra note 8, at 3-5.

61. The comments in this section are based on my experience developing the original Northwest/KLM alliance network that has served as the template for all subsequent North Atlantic alliances. This includes various internal market studies conducted that were used to better understand the competitive impacts of the initial alliance schedules and to justify further expansion of alliance operations. I also worked on the Swissair-Sabena-Delta alliance from the Euro-
and capacity, the Collusive Alliances require careful antitrust scrutiny while the Branded Alliances do not.

<table>
<thead>
<tr>
<th>Branded Alliances</th>
<th>Start Date</th>
<th>Collusive Alliances</th>
<th>Start Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Global Excellence (Delta)</td>
<td>1990 (x)</td>
<td>KL-led alliance (Northwest)</td>
<td>1992 (x)</td>
</tr>
<tr>
<td>Star (United, USAirways, Continental)</td>
<td>1997</td>
<td>SR-led alliance (Delta, later American)</td>
<td>1995 (x)</td>
</tr>
<tr>
<td>One World (American)</td>
<td>1998</td>
<td>LH-led alliance (United, USAirways, Continental)</td>
<td>1997</td>
</tr>
<tr>
<td>Skyteam (Delta, Northwest)</td>
<td>2000</td>
<td>AF-led alliance (Delta, Northwest)</td>
<td>2000</td>
</tr>
<tr>
<td>(x) defunct</td>
<td></td>
<td>BA-led alliance (American) (U.S. members listed in parentheses)</td>
<td>2010</td>
</tr>
</tbody>
</table>

Table 2

The original Collusive Alliances developed in response to unique North Atlantic market conditions that are not found in any other intercontinental market. In the early 1990s, seventy percent of the traffic on the North Atlantic was in city pairs that had good single-carrier schedules and a full range of discount fares. This included not only the nonstop service operated in large “gateway” markets, but one-stop online service via large hubs on both sides of the Atlantic.

The original three mid-1990s Collusive Alliances (Northwest/KLM, Delta/Swissair/Sabena and United/Lufthansa) succeeded by providing a

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62. See Horan Oneworld Comments, supra note 62.
63. See id.
64. Id.
65. Id.
66. Id.
high-quality online-equivalent service to the other thirty percent of the market, which had poor service and much higher fares—hundreds of city pairs linking U.S. Interior Cities to European Interior Cities such as St. Louis-Brussels or Milwaukee-Munich. The initial growth and profitability of the original three Collusive Alliances was based on a clear competitive advantage over traditional interline services in this important “double connect” market segment, just as other airlines had clear competitive advantage because of superior schedules in other nonstop and “single connect” market segments. The benefits derived from these competitive advantages had been fully exhausted by the end of the 1990s as they had fully captured the traffic previously served by interline connections. The volume of passengers using alliance “double connect” services also began to shrink because of the dramatic growth of superior nonstop and single connect services that resulted from normal industry capacity growth.

Despite the clear success of the original mid-1990s Collusive Alliances, airlines made no attempt to introduce them to transpacific markets or elsewhere in the following fifteen years because the underlying “double connect” competitive advantage versus interline service in San Diego-Stuttgart type markets did not exist elsewhere. North American and European traffic is highly dispersed among dozens of large secondary cities, but Asian, South Pacific and South American traffic is not, so “double connect” alliance services are of little value to consumers. Transpacific airlines cannot justify alliance development and management expenses on the basis of increased revenues from Cleveland-Chiang Mai or Baltimore-Busan type markets.

It should be emphasized that the central antitrust and industry structure question here is consolidation, not alliances. The original growth of immunized alliances occurred in the 1990s under highly competitive market conditions. The original Northwest/KLM alliance combined two carriers with four percent shares of the transatlantic market into a single competitor with an eight percent share. In 2001, after the alliance net-

67. Id.
68. Id. at 9.
69. DOT Form 41 schedule T100 data compiled by the author show that the number of transatlantic nonstop flights doubled between the summer of 1991 and the summer of 2001, increasing from 168 to 323 per day, a seven percent compound annual growth rate (on file with author).
70. DOT DB1A data compiled by the author show that less than two percent of all transpacific traffic is in O&D markets that do not have online (single carrier) service, compared to the thirty percent of transatlantic traffic when immunized alliances were first introduced in the 1990s (on file with author).
71. Percentages based on DOT Form 41 schedule T100 seat capacity data compiled by the author (on file with author).
works were fully mature, the largest collusive alliance had only eighteen percent of the market, and the three collusive alliances combined had only a forty-two percent market share. Upon approval of the Oneworld ATI application the market share of the three collusive alliances will have risen from forty-two to ninety-two percent, and can be expected to increase further since it is unlikely that carriers with market shares of five percent or less could survive independently.

<table>
<thead>
<tr>
<th>Year</th>
<th>1993</th>
<th>1995</th>
<th>1997</th>
<th>1999</th>
<th>2001</th>
<th>2003</th>
<th>2005</th>
<th>2007</th>
<th>2009</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Continental Europe market (40 million annual pax)</td>
<td>41%</td>
<td>47%</td>
<td>55%</td>
<td>56%</td>
<td>61%</td>
<td>67%</td>
<td>85%</td>
<td>88%</td>
<td>98%</td>
<td>98%</td>
</tr>
<tr>
<td>North Atlantic market (55 million annual pax)</td>
<td>42%</td>
<td>42%</td>
<td>45%</td>
<td>47%</td>
<td>47%</td>
<td>54%</td>
<td>68%</td>
<td>66%</td>
<td>92%</td>
<td>98%</td>
</tr>
<tr>
<td>Number of North Atlantic competitors with minimum departure share of 2%</td>
<td>15</td>
<td>13</td>
<td>13</td>
<td>11</td>
<td>11</td>
<td>9</td>
<td>7</td>
<td>6</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

Figure 3

Thus alliance development and industry consolidation on the North Atlantic must be broken into distinct pre-and post 2003 phases. The high levels of concentration that could potentially help sustain anti-competitive behavior have only arisen in the last couple years, although the movement towards radical consolidation began in 2003, when Air France bid to acquire KLM. This eliminated the major source of price competition between European intercontinental hubs, eliminated the possibility that Northwest Airlines could survive independently, and reduced the

72. Percentages based on DOT Form 41 schedule T100 seat capacity data compiled by the author (on file with author).
73. Seat share using DOT Form 41 Schedule T100 data compiled by the author (on file with author); 2009 shares assumes approval of Oneworld application; 2011 shares assumes other small network airlines cannot survive independently and are absorbed into the three large collusive groups. USAirways became a full member of the Star Alliance in 2004, and codeshares actively with other Star members. Although it has not applied for antitrust immunity, USAirways is not considered independent of the other immunized Star members as they have strong incentives not to undercut prices on overlapping routes, and DOT would readily grant full immunity if they applied for it. Similarly, the Northwest/KLM alliance is not considered independent of the Delta/ Air France alliance in the four years between the Air France/KLM merger and the DOT’s formal approval of combined Skyteam immunity.
74. See DOT Form 41 Schedule T100 data, supra note 74 (on file with author).
76. The contract governing Northwest’s alliance with KLM would not have been renewed past its 2012 expiration, as Delta had exclusive rights to be Air France’s US alliance partner. The separate Northwest/KLM and Delta/Air France alliances continued to operate until 2009 but were not independent price competitors. Delta was able to acquire Northwest without any cash
number of meaningful competitors serving the forty million annual passengers in the US-Continental Europe market from three to two. The formal DOT ATI applications that formalized the increase to a ninety-two percent concentration were filed between 2004 and 2008. As will be discussed in section 10, those same airlines have already begun petitioning governments to permit the consolidation of twenty-three previously independent transpacific competitors into those same three collusive alliance groups.

VI. GUTTING THE PUBLIC BENEFITS TEST (I): ESTABLISH A RULE THAT PRICES FALL WHENEVER COMPETITION IS REDUCED

The biggest and most important claim in the recent Oneworld case was that immediately following a grant of immunity, prices would immediately fall $257 per ticket in all connecting markets currently served on an interline basis by the applicants, creating an annual $92 million consumer benefit. This is from the “elimination of double markups on codeshare segments” that Dean and Shane cite, or “double marginalization” as it is called in the ATI cases. This is the biggest single factor behind the DOT’s antitrust jurisprudence, and the biggest single economic justification for intercontinental airline consolidation. If the DOT payments to Northwest’s shareholders; the stock swap implicitly valued Northwest at roughly the value of its cash and liquid assets on hand at the time of the merger agreement.

77. Number of annual passengers in the U.S.-Continental Europe market based on DOT Form 41 Schedule T100 data compiled by the author (on file with author).


79. Oneworld ATI Application supra note 44, at 7, 24, Ex. JA-13, Ex. JA-17, Ex. JA-19 (on file with the author). The ticket amounts are redacted from the public version of the application.

80. Dean & Shane, supra note 26, at 19.

81. Oneworld Show Cause Order, supra note 3, at 5, 5 n.14, 30.
could not accept Oneworld’s claim that ATI would eliminate $92 million in “double marginalization” burdens on consumers, the applicants would not have been able to demonstrate the significant public benefits needed to meet “required by the public interest” standard of 49 U.S.C. § 41308(b). The entire question of whether recent ATI grants have actually generated significant public benefits, hinges on whether you believe, as Dean and Shane and the DOT do, that “double marginalization” automatically drives $200-$300 fare reductions for connecting traffic, regardless of market conditions. The alleged efficiency gain from eliminating the “double marginalization” on connecting tickets is comparable to eliminating all of the airline wage and salary costs associated with those tickets.

The entire “double marginalization” claim is based on a single 2000 journal article by Brueckner and Whalen; Brueckner (the principal author) was at the time and throughout the past decade served as a paid advocate for United Airlines. ATI applicants and consolidation advocates claim that “double marginalization” has been documented in the economic literature, but this literature is nothing more than follow-up pieces by Brueckner and Whalen making the exact same points as the references below.

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83. See Dean & Shane, supra note 26, at 19; Oneworld Show Cause Order, supra note 3, at 5, n.14, 30.
86. See Oneworld Show Cause Order, supra note 3, at 5, n.14, 30; See Daniel M. Kasper & Darin Lee, Why Antitrust Immunity Benefits Consumers, CPI ANTITRUST CHRONICLE, Sept. 2009, at 1, available at https://www.competitionpolicyinternational.com/sep-091 (A piece written by paid advocates for American Airlines claiming that "virtually every peer-reviewed academic study of immunized international alliances has concluded that, as a result of eliminating carriers' incentives to impose successive markups on fares for connecting tickets (the so called 'double marginalization' problem), alliances have led to lower fares and expanded output."). However,
original article;87 no other published original research has ever documented the existence of “double marginalization.”88 The original 2000 paper describes a cross-section regression of 1997 transatlantic fares in alliance and non-alliance markets.89 Brueckner (2003) repeated the original regression using 1999 data, which better identified the actual operator of codeshared flights; Whalen (2007) estimated slightly smaller impacts using a regression of eleven year (1990-2000) panel data instead of cross-section data from a single point in time.90 These three regressions found fifteen to twenty-five percent lower fares in markets served by immunized alliances compared to markets served by traditional interline service or non-immunized codesharing.91

It is not surprising that a statistical analysis of the 1990’s transatlantic

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88. See Morrish, supra note 76 (summarizing the pre-Brueckner/Whalen academic literature on airline alliance impacts). None of this academic literature found evidence of any alliance benefits from the elimination of “double marginalization” or any other “structural negative externalities.” See also A. Jorge Padilla et al., An Economic Analysis of the Efficiencies from the Creation of the Proposed Pacific Joint Venture, Docket No. OST-2010-0059, at App. A (Dep’t of Transp. 2010). The Padilla paper is a paid advocacy work supporting a United Airlines ATI application, prepared by the consulting firm LECG. Padilla reprints the Morrish-Hamilton list of alliance studies, adding the Brueckner/Whalen papers and papers by five other authors, none of which had found independent evidence of any alliance benefits from the elimination of “double marginalization” or any other “structural negative externalities.” Four of these studies examine only non-immunized domestic U.S. or intra-E.U. alliances and are thus irrelevant to the Brueckner/Whalen thesis about immunized intercontinental alliances. The fifth is a paid advocacy study commissioned by American Airlines in support of the Oneworld application that focuses on pricing impacts from reduced competition in nonstop markets. The Padilla/LEOC survey excludes the recent research cited infra at note 106, which finds evidence that post-1999 alliances had harmed consumers.


91. The results of the three statistical analysis are summarized at Horan Oneworld comments, supra note 62, at 6. Smaller (about fifteen percent) price reductions are alleged to occur when airlines that codeshare without immunity are granted ATI, whereas larger (about twenty-five percent) price reductions are alleged to occur when non-codeshared interline itineraries are converted to immunized codeshares. Oneworld could not identify codeshare versus non-codeshare distinctions among its actual 2008 interline passengers, and thus its $92 million annual public benefit claim assumed the smaller (fifteen percent) codeshare to ATI price reduction.
market identified consumer benefits; fares fell eight percent in the 1990s while capacity grew fifty-four percent. But Brueckner and Whalen made no attempt to isolate the impacts ATI might have on fares from the impacts of favorable supply/demand conditions or other important competitive and productivity factors, and improperly attributed all of the observed variation to "cooperative pricing" among alliance partners. Brueckner’s and Whalen’s papers do not mention any other factors that might have influenced pricing, and fail to demonstrate that their statistical analysis had isolated alliance impacts from other possible causes.

The consumer benefits directly attributable to the original 1990s alliances were only found in the thirty percent of the market previously limited to traditional interline service and had been fully exhausted by the end of the decade. This was the “double connect” market impact described earlier, which was called the “Alliance Network Effect” in the 1999/2000 DOT studies that Dean and Shane quote, but this was not huge compared to the overall benefits transatlantic consumers realized in the 1990s. When DOT and ATI applicants use the Brueckner and Whalen regression coefficients to calculate alliance public benefits, they are assuming that none of the observed mid-1990s consumer benefits were due to market liberalization, supply/demand conditions, or carrier

92. Data from Schedules P12 and T100 of DOT Form 41, as compiled by the author for the same time period covered by the Brueckner and Whalen regressions, supra notes 90, 91 (on file with author).

93. These factors include market liberalization in Europe, increased transatlantic competition following the original “Open Skies” treaties, and major carrier productivity gains from a variety of sources including the privatization of British Airways, the recently integrated Air France-UTA-Air Inter hub in Paris, and the widespread introduction of 767 and A330 aircraft.

94. Brueckner & Whalen, supra note 90, at 504-06.


96. See Horan Oneworld Comments, supra note 62, at 7-9.

97. Dean and Shane, supra note 26, at 19. The 1999/2000 DOT studies correctly focus on the specific competitive network advantage created by the original mid-1990s alliances, but overstate the consumer benefits by failing to clearly distinguish between benefits created by capacity growth and other general factors, and benefits specifically attributable to alliance schedule and pricing coordination. See generally Jong-Hun Park & Anming Zhang, An Empirical Analysis of Global Airline Alliances: Cases in North Atlantic Markets, 16 REV. OF INDUS. ORG. 367, 382-83 (2000) (estimating smaller alliance consumer benefits but failing to clearly distinguish between immunized and non-immunized alliances).
productivity; they are assuming that 2010 market conditions are identical in every respect to 1995 market conditions.

As problematic as the regressions may be, the central antitrust problem is the "double marginalization" theory that Brueckner and Whalen put forward to explain the observed 1990s pricing/alliance correlations. Under this "double marginalization" theory, none of the benefits created by alliances have anything to do with the superior service Northwest/KLM offered in double connect markets or their competitive advantage versus poorly coordinated interline connections. They attribute all consumer benefits to a "structural negative externality" that forces carriers to set interline prices that are suboptimal from the standpoint of both joint efficiency and market competitiveness. "Double marginalization" theory claims that if American and Iberia currently offer a joint fare from Madrid to Seattle, they will do so by separately "marking up" the separate Madrid-Chicago and Chicago-Seattle segment prorates without ever consulting one another as to what the resulting fare will be or considering whether that fare would be competitive against the Madrid-Seattle fares charged by others. "Double marginalization" is defined as a market failure, an insurmountable physical barrier to efficiency found in every airline's interline pricing function resulting in interline fares that are approximately fifteen to twenty five percent higher than ATI (or single carrier) fares in each and every case, regardless of market or competitive conditions or carrier productivity. Under this theory, the only ways to reduce the structurally higher costs of interline pricing are merger or full immunity to collude on prices. Thus, granting ATI automatically and immediately reduces these fares approximately fifteen to twenty five percent every time competition is reduced. Not under certain market conditions or if specific productivity gains were achieved, but huge consumer benefits follow automatically from each and every ATI grant organized along Northwest/KLM lines, just as night automatically follows day.

This theory is completely indefensible. "Double marginalization" does not exist, never existed, and has absolutely nothing to do with the


99. See Brueckner & Whalen papers, supra note 99.

100. See Brueckner & Whalen papers, supra note 99. The regression results showing smaller impacts in codeshare markets contradicts the theory; if carriers actually set interline fares in this manner the "double markups" should be identical in codeshare and non-codeshare cases.
actual legitimate benefits of immunized alliances. The “double marginalization” theory was created out of whole cloth—nothing in Brueckner and Whalen’s statistical analysis supports this theory of interline pricing behavior, nor had they conducted any research on how airline interline pricing actually functions.\footnote{See Brueckner and Whalen, \textit{supra} note 86.} The theory not only ignores the possibility that favorable supply/demand and efficiency conditions influenced 1990s transatlantic prices but denies the existence of competitive network advantages and disadvantages, and explicitly assumes interline prices cannot be set at rational, revenue-maximizing levels. There are no insurmountable structural barriers to rational, efficient interline pricing; carriers can readily optimize interline pricing and traffic using “fare buckets” within revenue management system.\footnote{Horan Oneworld Comments, \textit{supra} note 62, at 12-15. Brueckner and Whalen incorrectly assume that airlines set interline fares with respect to the marginal operating costs of the flight legs involved; “double marginalization” is assumed to be the pricing “markups” above marginal cost. These costs are entirely “fixed” in the very-short-term time frame in which airline pricing decisions are actually taken; if airline prices were set with respect to marginal costs one would have seen enormous pricing volatility tracking fuel cost volatility in recent years. Id. at 15-16. Short-haul domestic/regional carriers will rationally refuse interline fare arrangements with long-haul carriers unless their share of the joint fare reflects the much higher per-mile cost of short-haul flights, and exceeds what they could earn from the lowest discount fares in the local market. Long-haul carriers will rationally refuse interline fare arrangements if the fare split with the short-haul carriers reduces their portion of the joint fare below a level they could earn from alternate discount long-haul fares. The “structural negative externality” that is the heart of the Bruckner and Whalen paper is, in fact, the rational behavior of airlines refusing tickets with lower revenue yields in favor of tickets with higher revenue yields.} All of the observed limitations to interline pricing that Brueckner and Whalen improperly attribute to structural pricing barriers can be readily explained by rational, profit-maximizing behavior.\footnote{The claim that interline fares are artificially set fifteen to twenty-five percent above rational, joint-profit-maximizing levels because of double marginalization was first published in 2000. Brueckner \& Whalen, \textit{supra} note 86. If this claim were credible, there would be evidence of airlines seeking to find ways to minimize or eliminate the fifteen to twenty-five percent double marginalization penalty (via less complex means than immunized global alliances) in the past decade, because according to the theory any reductions in interline fares would increase profits. The double marginalization claim not only assumes that undocumented “structural negative externalities” led to irrational interline pricing practices, but assumes that carriers irrationally did nothing to mitigate unprofitable pricing practices once the “problem” had been identified in research commissioned by a major international airline.} Even though interline fares are widely used by hundreds of airlines across the globe, none of these airlines has ever made any effort to correct the irrational pricing behavior that allegedly increases all interline prices fifteen to twenty-five percent above efficiency-maximizing levels.\footnote{No one independent of the DOT or the ATI applicants has ever claimed that “double marginalization” exists, and no other research ever produced findings supporting the Brueckner and Whalen theories. A number of researchers have found that ATI is no longer generating any}
consumer price benefits (much less the fifteen to twenty-five percent benefits claimed here), there is no evidence that any of the recent Star and Skyteam ATI grants generated any “double marginalization” consumer benefits in any connecting markets, and several studies have found evidence that consumers now pay higher fares in ATI markets than non-ATI markets.105

The DOT has converted “double marginalization” from a theory in one isolated paper, to an established antitrust rule that cannot be challenged on the basis of facts or logic. In the OneWorld case, the DOT explicitly rejected a detailed challenge to “double marginalization,” even though it acknowledged DOJ comments that the link between “double marginalization” benefits and ATI had never been proven, did not dispute any of the observed flaws in the theory, and was unwilling to openly defend any of the logic or analysis on which the theory is based.106 It nonetheless accepted the OneWorld applicants’ $92 million annual consumer benefit claim solely on the basis of the Brueckner and Whalen theory.107 Unquestioning acceptance of “double marginalization” is critical to Dean and Shane and other industry consolidation advocates because it establishes the automatic rule that each and every ATI application between network airlines will generate large public benefits and thus nullifies the Horizontal Merger Guidelines requirement for verifiable, case-specific evidence. If ATI automatically generates fifteen to twenty-five percent price reductions in any alliance structured along Northwest/KLM lines, regardless of market/competitive conditions or carrier productivity, then there is no need to produce case-specific evidence regarding the current marketplace or the actual pricing behavior or efficiency of the applicants. The DOT even rejected the claim that the OneWorld applicants had failed to demonstrate that the traffic base that they claimed would benefit from the $92 million savings were actually paying, as they claimed, fares $257 higher than comparable alliance or online traffic, or that these markets had any of the characteristics of the ones where


106. OneWorld Show Cause Order, supra note 3, at 30-32.

107. OneWorld ATI Application, supra note 44, at 24, Ex. JA-17; Id. at 9, 32.
Brueckner and Whalen allegedly found the original 1990s "double marginalization" impacts. By establishing "double marginalization" as a settled antitrust rule, the DOT creates the superficial appearance that it is conducting a public benefits evaluation, when they have actually rendered the public benefits standard completely meaningless. "Double marginalization" - a rule that implicitly says that consumers benefit whenever competition is eliminated regardless of marketplace conditions - is inconsistent with any marketplace/economics-focused antitrust approach. But this approach is fully compatible with the "bilateral driven aviation policy" approach that Dean and Shane favor, where the antitrust regulator has extremely broad discretion over rules and evidentiary requirements.

VII. GUTTING THE PUBLIC BENEFITS TEST (II)—ELIMINATE THE "PUBLIC" PART OF PUBLIC BENEFITS

Dean and Shane's central claim is that ATI has only been awarded once it has been objectively demonstrated that the public benefits will be of significant magnitude. But they fail to provide any evidence that DOT benefit findings have been objectively demonstrated and further undermine their credibility by citing the exact list of public benefits that DOT "copy/pasted" from the Star/Continental application. The listed claims are more reflective of a marketing press release than a serious analysis of competitive economics but can nonetheless help illustrate other steps DOT has taken to render the public benefits test meaningless:

- an expanded network serving many new cities;
- new online service, including both new routes and expanded capacity on existing routes;
- enhanced service options such as more routings, reduced travel times, expanded nonstop service in selected markets, new fare products, and integrated corporate contracting and travel agency incentives;
- enhanced competition due to the addition of a major new gateway, the elimination of multiple markups on code-share segments, and more vigorous competition between alliances;
- cost efficiencies;
- strengthened financial positions for the participating carriers; and
- substantial economic benefits to communities

Dean and Shane acknowledge that public benefits must be demon-

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108. See Oneworld Show Cause Order, supra note 3 at 9, 30-32; Oneworld ATI Application, supra note 44 at 24, Ex. JA-17 (data on file with author). The ticket amounts are redacted in the public version of the application.
109. Dean and Shane, supra note 26, at 19-20.
110. Id. at 19.
111. Id. at 19 (quoting Star/Continental Show Cause Order, supra note 18, at 18-19).
strably “significant,” but without quantitative data there is no way to demonstrate “significance.”112 “Significant” public benefits in an airline ATI case would naturally occur in the form of observable price or capacity benefits. Northwest/KLM and the other original 1990s alliances clearly led to lower prices in certain markets and some increased transatlantic capacity.113 If “improved schedule timings” or “increased efficiency” are actually significant, they would translate into price and capacity benefits. “Increased efficiency” is not a legitimate public benefit unless the gains allow the carrier to profitably expand or reduce prices, or to sustain capacity that would have been liquidated absent the efficiency gains. Despite abundant sources of industry data, none of the Star and Skyteam cases quantify any of the alleged benefits, and Oneworld only quantified two benefits and only did so because of the DOJ’s evidentiary criticisms in the Continental/Star Alliance case.114 Those two claims were the $92 million pricing benefit discussed above, based on the Brueckner and Whalen theory, and a $45 million benefit claim from increased nonstop service.115

In accepting the Oneworld $45 million nonstop benefit claim and the “network expansion” claims in prior cases, DOT willfully violated the Horizontal Merger Guidelines requirement that it must have evidence that the public benefits are highly likely to be realized and that it cannot accept claims that are “vague or speculative or otherwise cannot be verified by reasonable means” or are not clearly based on the grant of immunity.116 The Oneworld applicants did not agree to actually operate increased service—they merely suggested the possibility that they might add flights.117 Since approval of ATI does not obligate them to actually do so, these claims (or certainly some large portion of them) are purely speculative. The claim included new service on the Dallas-Fort Worth-Madrid route, which has been operated in the past without immunity, and was withdrawn when the recent economic recession began.118 The DOT rejected Virgin Atlantic and DOJ arguments that this public benefit claim was illegitimate because restoration of this flight would have likely occurred without ATI.119 There is no evidence on the record that any of the prior Star and Skyteam ATI approvals were directly responsible for net increases in transatlantic service that actually created material benefits

112. Id. at 19.
115. Oneworld ATI Application, supra note 44, at 24, Ex. JA-17.
117. Oneworld ATI Application, supra note 44, at 24-25.
118. Id. at 24.
119. Oneworld Show Cause Order, supra note 3, at 31.
for consumers. Network expansion is one of the easiest benefit claims to document and quantify, and the ongoing lack of evidence that meets *Horizontal Merger Guidelines* standards suggests that the claims are fundamentally deficient.

As with "double marginalization," the list of alleged Continental/Star benefits that Dean and Shane quote\(^ {120}\) reflect DOT's desire to render the public benefit standard of 49 U.S.C. § 41308(b) completely meaningless by establishing an arbitrary rule that each any and every ATI application would meet. This DOT rule establishes that an applicant's assertion that it will benefit from a grant of ATI fully satisfies the "public benefits" standard of 49 U.S.C. § 41308(b), without requiring any evidence that consumers in general did not suffer because of offsetting detriments in other markets. The fact that platinum status members of United's frequent flyer program can now occasionally get first class upgrades on Continental flights does not mean that ATI created a benefit for the overall public in the form of more generous frequent flyer awards, but under the DOT's rule ATI has created "public benefits" as long as one United frequent flyer benefits. When Continental joined Star Alliance it created an expanded (Star) network with increased (Star) gateways, increased online (Star) service, expanded (Star) routing options, expanded (Star) corporate and frequent flyer programs, created some (intra-Star) cost efficiencies, and strengthened (Star) financial performance, even though all of these "benefits" were merely shifts to Star markets from other markets.\(^ {121}\) Every ATI application between network airlines with some degree of network overlap could claim the exact same "public benefits" (even the implausible merger of the Star, Skyteam and OneWorld alliances into a monopoly transatlantic collusive group) and is contrary to the notion that antitrust decisions should maximize consumer or overall economic welfare. As with "double marginalization" this automatically met rule eliminates the need for applicants to present any verifiable evidence about actual market, competitive or productivity impacts specific to their case, and thus eliminates the possibility that consolidation applications can be challenged on the basis of case/market specific evidence.

120. See generally Dean & Shane, *supra* note 26, at 19 (discussing public benefits produced by the award of antitrust immunity to the Star alliance).

121. *Id.*
VIII. GUTTING THE CLAYTON ACT MARKET POWER TEST—EVALUATE ANTI-COMPETITIVE PRICING RISKS WITHOUT ANY EVIDENCE ABOUT PRICING OR ENTRY BARRIERS OR MARKET CONTESTABILITY

Dean and Shane correctly note that ATI cannot be granted unless they meet the Clayton Act test\(^\text{122}\) showing that the application would not increase market power. As the DOT explained in the original Northwest/KLM case, the Clayton Act test requires the Department to consider whether the alliance agreements are likely to substantively reduce competition so that any of the applicants would be able to charge supra-competitive prices or reduce service below competitive levels.\(^\text{123}\) To determine whether an alliance or comparable transaction is likely to violate the Clayton Act standard the department considers whether the transaction is likely to create or enhance “market power,” which is defined as the ability to profitably maintain prices above competitive levels for a significant period of time or to reduce output and service quality below competitive levels:\(^\text{124}\)

“To determine whether a proposed alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase concentration in relevant markets, whether the alliance raises concern about potential competitive effects in light of other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed alliance’s potential for harm.”\(^\text{125}\)

Dean and Shane defend recent ATI grants on the basis that the DOT found no threat of market power but ignore the fact that none of the DOT’s ATI decisions in the past decade included a Clayton Act test that actually presented or analyzed any pricing data or any evidence of the

\(^{122}\) Dean & Shane, supra note 26, at 19 (citing to Clayton Act, supra note 5).

\(^{123}\) Joint Application of Northwest Airlines and KLM Royal Dutch Airlines for Approval and Antitrust Immunity of an Agreement Pursuant to Sections 412 and 414 of the Federal Aviation Act, as Amended, Docket No. 48342, Order 92-11-27 at 13 (Dep’t of Transp. Nov. 16, 1992) (“In determining whether the proposed transaction would violate the antitrust laws, we will apply the standard Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market. The . . . test requires us to consider whether the Agreement will substantially reduce competition by eliminating actual or potential competition between Northwest and KLM so that they would be able to raise prices above competitive levels or reduce service below competitive levels.”).

\(^{124}\) Joint Application of American Airlines, Inc., Lan Airlines, S.A., and Lan Peru, S.A. for Antitrust Immunity, Docket No. OST-2004-19964, Order 2005-10-8 at 8 (Dep’t of Transp. Oct. 13, 2005) (“To determine whether an alliance or comparable transaction is likely to violate the Clayton Act standard, the Department considers whether the transaction is likely to create or enhance “market power,” defined as the ability to profitably maintain prices above competitive levels for a significant period of time or to reduce output and service quality below competitive levels”).

\(^{125}\) Id.
future market contestability needed to eliminate the risk of supra-competitive prices.\textsuperscript{126} A complete Clayton Act test cannot be laid out here, but several simple data points can illustrate the serious possibility that anti-competitive “market power” has already emerged on the North Atlantic, and that the DOT’s failure to conduct legitimate Clayton Act tests is a serious abdication of its legal responsibility.\textsuperscript{127}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{North Atlantic Passenger Fares Have Risen 3X Faster Than Domestic Fares since radical consolidation began in 2003}
\end{figure}

Increased North Atlantic concentration has already increased prices towards supra-competitive levels. From deregulation until 2003, North Atlantic price trends closely tracked domestic price trends.\textsuperscript{129} From 2003 onward, a totally new pattern emerged, with North Atlantic fares rising three times faster than domestic fares.\textsuperscript{130} This fundamental shift in pricing behavior exactly tracks the move towards extreme North Atlantic concentration, which started when Air France bought KLM, previously

\textsuperscript{126} See, e.g, Oneworld Show Cause Order, supra note 3, at 18-20 (considering only briefly airport slot barriers on a handful of large nonstop routes at London Heathrow airport, the only time the DOT analyzed any evidence of entry barriers in any ATI case.)


\textsuperscript{128} Data in the graph is total Domestic and Atlantic entity totals for all US carriers are from DOT Form 41 as compiled by the author. Passenger revenue data are from Schedule P12, and the segment passengers data are from Schedule T100. Transatlantic revenue figures for non-US carriers are not publicly available, but since US flag carriers serve the identical markets with comparable schedules and capacity, the aggregate US carrier Atlantic unit revenue data shown in the graph should very closely track aggregate market levels. Capacity comparison is total Domestic and Atlantic entity seat capacity for all US and non-US carriers from Schedule T100 (on file with author).

\textsuperscript{129} Proposed United-Continental Merger Comments, supra note 128.

\textsuperscript{130} Id. at 3;
the largest single driver of price competition in European long-haul network markets. The market power already created by consolidation is much worse than the simple Atlantic/Domestic fare comparison suggests. Under normal, healthy competitive conditions, airline fares are highly responsive to changes in capacity. Domestic fares increased fifteen percent since 2003 because the industry did not add capacity.\(^{131}\) When Atlantic capacity spiked in the late 1990s, average fares fell, even though this was the peak of the dot-com era.\(^{132}\) But the market power created on the Atlantic in recent years meant normal supply/demand relationships would not work. Atlantic fares increased forty-six percent since 2003, even through capacity also increased forty-five percent.\(^{133}\)

If 2008 capacity levels were operated under pre-2003 competition levels, 2008 Atlantic unit revenues might well been thirty to forty percent lower than observed, suggesting an annual consumer welfare loss due to increased market power of $9 to $12 billion.\(^{134}\) Counterfactual historical analyses such as this are a bit complicated;\(^{135}\) but even if one arbitrarily assumes that only half or less of the observed pricing shift is due to market power, consumer welfare losses have already been staggeringly large:

<table>
<thead>
<tr>
<th>2008 Consumer Welfare Loss if increased</th>
<th>5%</th>
<th>$1.5 billion</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Atlantic Market Power increased fares by:</td>
<td>10%</td>
<td>$3.0 billion</td>
</tr>
<tr>
<td></td>
<td>15%</td>
<td>$4.5 billion</td>
</tr>
<tr>
<td></td>
<td>20%</td>
<td>$6.0 billion</td>
</tr>
<tr>
<td></td>
<td>20%</td>
<td>$7.5 billion</td>
</tr>
</tbody>
</table>

A legitimate Clayton Act “market power/market contestability” analysis would also note that

—There are serious risks that the observed anti-competitive pricing trend will worsen after independent competition from Continental,

\(^{131}\) Id. at 2-3.

\(^{132}\) Id. at 2.

\(^{133}\) Id.

\(^{134}\) The total 2008 North Atlantic revenue base is conservatively assumed to be $30 billion, based on DOT Form 41 data compiled by the author, U.S. carrier Atlantic passenger revenue of $15,058 million, and a forty-six percent U.S. carrier share of combined total available seat miles. This estimate does not include non-passenger revenue or the portion of transatlantic ticket revenue flown on domestic U.S. or intra-EU connecting flights that would not be categorized as Atlantic revenue in Form 41 (on file with author).

\(^{135}\) A more detailed analysis would likely show relatively large consumer welfare losses in the connecting U.S.-Continental Europe markets where the duopoly of the Lufthansa and Air France-led collusive alliances have had an eighty-five percent share for over five years, and smaller welfare losses in other market categories. Some marginal, higher-cost capacity would have been withdrawn in a more competitive environment, although the increased competition may have driven industry productivity improvements, and share shifts favoring more efficient carriers. Lower fares would have also stimulated demand growth.
Iberia, Finnair and American is eliminated and concentration increases from sixty-five to eighty percent to ninety to ninety-five percent. Price competition in isolated large nonstop O&Ds must be evaluated separately, but figure 3 reasonably reflects the concentration in Continental Europe connecting markets, which account for the vast majority of North Atlantic traffic.

—As discussed in section 5, North Atlantic markets are not contestable. There is no possibility that future entry would be “timely, likely and sufficient either to deter or to counteract” anti-competitive behavior by the three dominant Collusive Alliances. A new entrant would require a major hub, tens of billions of dollars in new fleet investment and expensive access to highly constrained airports. The last successful entry on the North Atlantic was twenty three years ago.136

—Basic network airline economics create serious risks of cartel conditions in these markets—the three dominant Collusive Alliances would rationally match oligopoly capacity cuts and price increases because more aggressive competition could never displace existing hubs or capture significant market share.

—None of the increased concentration since 2003 is due to efficient airlines displacing inefficient ones or other “market forces;” it is strictly due to the artificial process of large airlines petitioning governments for reduced competition.137

Instead of Clayton Act tests based on case specific evidence of pricing behavior and market contestability, the DOT’s findings are based on an arbitrary rule that assumes that consumer welfare in international airline markets is not threatened as long as at least three competitors operate under an “Open Skies” treaty, which is presumed to automatically protect consumers from the threat of market power.138 Even though the EU-US Open Skies has facilitated increased concentration in a market that has not seen successful new entry in twenty-three years, the DOT simply asserts that the treaty “enhances competition and promotes new entry” and there is “no basis upon which the Joint Applicants could, as a result of this transaction, impose and sustain supra-competitive prices or

136. The last new entrant on the North Atlantic to successfully sustain a market position with at least one percent market share was Piedmont Airlines (now USAirways) which began Charlotte-London Gatwick service in 1987. See 2 New Air Routes to Britain Approved, LEXINGTON HERALD-LEADER, Apr. 24, 1987, at B2 (discussing federal approval of Piedmont Airlines to commence service between Charlotte, N.C. and London).

137. See generally Dean & Shane, supra note 26, at 19.

138. See Oneworld Show Cause Order, supra note 3, at 3 (“Under our established policy, the existence of an “open-skies” framework is a necessary predicate to our consideration of requests for antitrust immunity”), Star/Continental Show Cause Order, supra note 18 at 2 (“Under the Department’s established policy, the existence of an “open-skies” regulatory framework is a necessary predicate to our consideration of requests for antitrust immunity”).
reduce service levels below competitive levels."\textsuperscript{139} Since collusive alliances automatically create consumer benefits, the DOT claims reducing competition via ATI actually benefits consumers by enhancing "inter-alliance competition."\textsuperscript{140} Since the protection of airline consumer welfare only requires three serious competitors, the DOT's competitive "analysis" has been wholly limited to simple market share snapshots showing that no highly aggregated market groups (i.e. U.S. - Germany, the overall North Atlantic) are currently dominated by any one of these three competitors.\textsuperscript{141} Despite the huge increases in market concentration shown in Figure 3, the DOT has approved ATI on the basis that it will "not materially alter the current competitive landscape or increase overall market share to any significant degree."\textsuperscript{142}

As with the rules establishing public benefits on the basis of "double marginalization" and undocumented private carrier benefits, these rules render the Clayton Act test completely meaningless, since no ATI application (other than a merger between the three collusive alliances) would ever be found to create risks of supra-competitive pricing or otherwise threaten consumer welfare. Under these rules, ATI applicants would have no need to present verifiable, case-specific evidence that immunity would not create market power, and other interested parties would be unable to challenge applications on the basis of case/market-specific evidence of entry barriers, non-contestable markets or the supra-competitive prices.

\section*{IX. Breaking the link between "Open Skies" and liberal market competition.}

As Dean and Shane note, the 1990s "Open Skies" treaties were designed to supplant mercantilist bilateral treaties such as the U.S.-U.K. "Bermuda II" treaty,\textsuperscript{143} whereby international airline markets were manipulated through backroom negotiations between the large incumbent carriers and government bureaucrats, with results heavily biased in favor of the short-term interests of those incumbent airlines. By eliminating many of the entry and pricing barriers that the bilateral negotiators

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{139} Star/Continental Show Cause Order, \textit{supra} note 18, at 17.
\item\textsuperscript{140} Oneworld Show Cause Order, \textit{supra} note 3, at 28 ("The enhanced inter-alliance competition is beneficial for consumers across many markets, in particular the hundreds of transatlantic markets in which the applicants become more competitive as a direct result of the alliance").
\item\textsuperscript{141} See \textit{Id.} at 13-17; Star/Continental Show Cause Order, \textit{supra} note 18, at 8 tbl.1.
\item\textsuperscript{142} Star/Continental Show Cause Order, \textit{supra} note 18, at 7-8 ("The transaction does not materially alter the current competitive landscape or increase overall market share to any significant degree").
\end{itemize}
\end{footnotesize}
had previously used to distort or rig market outcomes, the U.S. Government’s 1990s “Open Skies” policy and the European Union’s 1990s market liberalization policies established maximization of aggregate consumer welfare and industry efficiency as the central objectives of international aviation policy. They sought to establish the policy that airline winners and losers should be determined by consumers and investors, and the role of government should be limited to ensuring a level and fully competitive playing field. While one can criticize the shortcomings of specific regulatory and policy decisions, the overall benefits of these liberal policies can be measured using objective evidence of increased service, lower prices, carrier productivity and the like.

The reversal of this liberal “hands-off” approach began when the E.U. shifted to a more interventionist, pro-consolidation policy a decade ago, favoring the interests of the large E.U. “national champions,” Lufthansa, Air France and British Airways, the leaders of the three Collusive Alliances that the EU expected to dominate a consolidated industry. The E.U. proactively supported the Air France/KLM merger that reduced the number of intercontinental network competitors in Continental Europe from three to two, but blocked a Ryanair-Aer Lingus merger that would have exposed the transatlantic routes of three “national champions” to aggressive price competition from Europe’s lowest-cost operator. The E.U. openly advocated “industry consolidation” and proactively supported combinations such as Air France-Alitalia, Lufthansa-Austrian and British Airways-Iberia. The E.U. delayed a U.S. “Open Skies” treaty for five years with demands that the U.S. change its national ownership laws so that the three E.U. carriers could fully control their U.S. alliance partners, and this was a major E.U. demand during the recent Phase II treaty negotiations.

144. See Defining Open Skies, supra note 29, at 3.
146. Id.
147. See Hubert Horan, The EU-US Open Access Area: How to Realise the Radical Vision, 70 AVIATION STRATEGY 1 (2003) (a detailed assessment of the prospects for major international aeropolitical liberalization); Hubert Horan, Airline Consolidation: Myth and Reality, 109 AVIATION STRATEGY 2 (2006) (an evaluation of airline mergers in the US, Europe and China, and the general trend towards consolidation); Hubert Horan, The New EU-US Treaty and the Intercontinental Airline Consolidation Battle, 113 AVIATION STRATEGY 1, 4-6 (2007); Allan I. Mendelsohn, The USA and the EU - Aviation Relations: An Impasse or an Opportunity, 29 AIR & SPACE LAW. 263, 264 (Nov. 2004). While the US and EU shared similar views about the use of ATI in industry consolidation, the EU took a more aggressive position on allowing direct foreign ownership and control. In the phase I negotiations, the EU argued that allowing full financial and management mergers between E.U. and U.S. carriers would generate €15bn in incremental revenue (more than the combined revenue of Northwest and Southwest) and 80,000 new jobs (more than the combined employment of Delta and Continental). The current twenty-five percent limit on foreign ownership of US airlines cannot be amended by treaty, only by an Act of Congress. The failure of the Phase II negotiations to produce major concessions on foreign ownership of US
While the DOT never became an open, public advocate of intercontinental consolidation, by 2003 it had clearly abandoned the 1990s "hands-off" policies and shifted to an internal view that international airline industry structure should be proactively managed through bilateral discussions between government officials and the large Legacy airlines. As noted earlier, the DOT has not produced any policy statements or analysis supporting either the general merits of vastly increased market concentration, or the specific merits of supporting claims such as "double marginalization" or "inter-alliance competition." However this anti-liberal shift can be reasonably inferred from the ATI findings discussed above, and from recent bilateral treaty results. While the State Department achieved several pro-consumer gains in the final treaty, E.U.-U.S. "Open Skies" is a major departure from the 1990s treaties as it is designed to facilitate increased consolidation, not increased competition, and it is designed to increase governmental influence over industry structure, not to increase the influence of consumers and investors. Carriers have publicly claimed that DOT informally promised approval of the current ATI applications during the treaty negotiations as a *quid pro quo* for E.U. approval of open entry in the U.K. and Spanish markets without the ownership and control provisions the E.U. had demanded. In the treaty the DOT agreed to align its airline antitrust rules and procedures, a requirement fully consistent with the "bilateral driven antitrust enforcement" approach advocated by Dean and Shane, and completely inconsistent with the view that the DOT is a neutral antitrust regulator obligated to follow the *Horizontal Merger Guidelines* and other traditional evidentiary requirements in deciding ATI cases.

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150. See Joint Application to Amend Order 2007-2-16, Docket No. OST-2008-0234, Response of the Joint Applicants to Comments of the Dept' of Justice at 8 (Dept' of Transp. July 6, 2009) ("Our nation's trading partners, both present and future, have relied on, and will rely on, the continued availability of ATI as the cornerstone of U.S. aviation policy. For example, the U.S.-EU Agreement negotiations included a Memorandum of Consultations that specifically promised prompt action on applications for expanded immunity such as that sought by the Joint Applicants here . . . . Thus the Memorandum of Consultations is an acknowledgement of the aeropolitical reality that open skies and ATI are integrally linked and essentially refutes the DOJ's position that the Joint Application is not linked to open skies benefits. DOJ would have the Department renege on that promise.") (footnote omitted).

151. See U.S.-E.U. Open Skies Treaty, supra note 151; Dean & Shane, supra note 26, at 18; Button, supra note 150, at 64; *Horizontal Merger Guidelines*, supra note 4.
X. The new U.S.-Japan bilateral—further corrupting “Open Skies” and further entrenching “bilateral driven antitrust enforcement”

The new U.S.-Japan treaty completes the breakdown of the historical link between “Open Skies” and liberal market competition. While all past “Open Skies” treaties required fully open and equal market access for all carriers, the new treaty maintains strict Japanese government control over slots at Tokyo’s airports, including a provision that U.S. carrier access to the new runway capacity at Haneda Airport should be strictly limited to four flights that must depart between midnight and 6:45 am. Instead of reducing governmental ability to distort airline competition or dictate industry structure, the new treaty was specifically designed to facilitate massive taxpayer subsidies to Japan Air Lines (JAL), and the consolidation of the four transpacific carriers with large Tokyo operations into two larger collusive groups that would threaten the survival of smaller competitors. The 1990s treaties clearly weakened the ability of European governments to distort and rig aviation markets, but the new Japan treaty does absolutely nothing to weaken the Japanese government’s control over aviation competition—control far greater than any European government ever had. The large carriers and the DOT clearly intend to pursue the same consolidation of transpacific aviation into the same three Collusive Alliances that now control the North Atlantic. While the early “Open Skies” treaties with the Netherlands and Switzerland were designed to pressure countries like Germany and France to liberalize aviation markets, the Japan “Open Skies” treaty is designed to


153. At the time the U.S.-Japan treaty was signed, multiple press reports in Japan and the U.S. indicated that JAL management and the Japanese Ministry of Transport strongly favored combining (via ATI) the large JAL and Delta/Northwest Tokyo hub operations. See, e.g., JAL Likely to Choose Delta Over American, REUTERS, Dec. 18, 2009; U.S., Japan Eye ‘Open Skies’ but Competition Between American and Delta for JAL Could Derail Negotiations, USA TODAY, Dec. 8, 2009, at 4B; American, Partners Offer $1.1 Billion to JAL, ASSOCIATED PRESS, Dec. 3, 2009. This move (along with ATI for United, Continental and ANA) would have established a top two concentration level of ninety percent in the US-Japan market and made it extraordinarily difficult for American Airlines to remain a viable competitor. Shane served as a paid advocate on behalf of Delta’s efforts to achieve immunity with JAL. American, Partners Offer $1.1 Billion to JAL, ASSOCIATED PRESS, Dec. 3, 2009. Although this plan was not implemented after subsequent management changes at JAL, DOT would have been fully aware when they signed the treaty that it could directly lead to a massive increase in market concentration. See American Flies High as JAL Stays Put, DALLAS MORNING NEWS, Feb. 10, 2010, at D1 (describing JAL decision to reject Delta merger after changes in management). Earlier in my career, I was responsible for Northwest’s international network, including its large hub at Tokyo Narita, and am highly familiar with the economics of transpacific operations, and competition in the U.S.-Japan market.
pressure other Asian countries to eliminate competition from their hubs and carriers, and consolidate into groups led by the collusive alliance networks based at Tokyo.

Just as the words "double marginalization" automatically establish the "fact" of significant public benefits, the Japan treaty demonstrates the DOT rule that a treaty including the words "Open Skies" automatically establishes the "fact" of market contestability, which eliminates the need to examine any verifiable, case-specific evidence about market power. This rule will speed the process of industry consolidation on the Pacific since ATI applicants will not need to produce evidence, and applications cannot be challenged on the basis of evidence that huge artificial barriers to competition actually exist in the Japanese market.

More importantly for this discussion, the DOT agreed to provisions in the new Japan treaty that were specifically designed to entrench its evisceration of ATI evidentiary standards, and to thwart the ability of the DOJ or other parties to demand reviews of Pacific ATI applications based on market-specific data.\textsuperscript{154} JAL entered bankruptcy protection on January 19th and filed for ATI with American Airlines on February 12th.\textsuperscript{155} Under traditional evidentiary standards, ATI could not be granted without data as to the exact routes and capacity the alliance would operate, since there is no way to evaluate competitive issues or public benefits without knowledge of capacity levels and other specific changes that would occur as a result of ATI. It would also be impossible to evaluate ATI applications without hard data about public subsidies for JAL that could seriously distort competition.\textsuperscript{156} But none of these things can be known with any certainty until a JAL reorganization plan is financed and approved, a process that could take several years.\textsuperscript{157}


\textsuperscript{156} Press reports at the time the U.S.-Japan treaty was signed suggested the possibility of taxpayer subsidies to JAL as large as JPY800 billion ($8.8 billion). See, e.g., Anthony Rowley, Possible Lifeline Boosts JAL Shares; Airline Seeking Funds from Government-Backed Turnaround Agency, \textit{The Business Times Singapore}, Oct. 30, 2009 (Asian Pacific News).

\textsuperscript{157} The United Air Lines' reorganization required three years under a well established and highly transparent U.S. airline bankruptcy process, with which creditors were highly familiar, and was free of any direct political interference. \textit{See Friendlier skies: Airline’s Leaving Bankruptcy with Less Baggage, Brighter Future, CEO Tilton Says}, \textit{Chicago Sun-Times}, Feb. 1, 2006, at 67. No Japanese company the size of JAL has ever undergone this type of bankruptcy restructuring. JAL's indebtedness is far greater than United Air Lines' indebtedness was, and the JAL bankruptcy is a major political issue in Japan. \textit{United Delays Debt Repayments; Desperate Airline Offers Mechanics Revised Wage Concession Package}, \textit{San Francisco Chronicle}, Dec. 3, 2002, at B1 (noting United debts of $920 million at bankruptcy filing); \textit{JAL Heads for Bankruptcy with
Nonetheless, the DOT specifically promised that ATI approvals and all other treaty implementation requirements would be in place by October 2010. The Oneworld ATI application will have required nineteen months of review, even though the DOT has nearly twenty years of experience analyzing the impact of antitrust immunity on North Atlantic competitive issues. Even though it has never considered Japan/transpacific industry structure issues before, and the Japanese market includes a range of problematic competitive issues not found in any European markets, the DOT is clearly confident that it can fully review both the JAL/American Airlines and the parallel United/Continental/All Nippon ATI application in six months. This clearly signals that DOT has no intention of conducting an objective antitrust evaluation, and merely intends to rubber-stamp the two applications, a signal reinforced by the fact that neither application includes any substantive evidence regarding public benefits or market power risks. With the artificial six month deadline, if DOJ or other parties demand a more rigorous evaluation, DOT can blame them for creating a major diplomatic row with the Japanese.

XI. THE COUNTER-REVOLUTION AGAINST LIBERAL AIRLINE COMPETITION

Dean and Shane’s article recites the successes of the DOT’s highly liberal aviation policies in the 1990s in order to incorrectly imply that their ATI agenda is driven by the same market-oriented, consumer-welfare maximizing thinking as was behind domestic deregulation and the original “Open Skies” treaties. The extreme consolidation of the North Atlantic and the impending consolidation of the Pacific are not only totally inconsistent with those past policy, but represents a counter-revolution against the liberal competitive policies of the 1980s and 1990s, and Dean and Shane are acting as advocates for the counter-revolutionaries. The post-2000 consolidation movement is not trying to update competi-

$16 Billion in Debt, Reuters, Jan. 13, 2010 (noting JAL debts of $16.3 billion at bankruptcy filing and that JAL bankruptcy is one of the largest corporate failures in Japan).


159. The first North Atlantic ATI application (Northwest-KLM) was filed in 1992. See NW/KLM Show Cause Order supra note 124, at 1.


162. Dean & Shane, supra note 26, at 17, 19.
tion policy in light of observable marketplace or economic changes, but they are trying to reestablish the pre-deregulation world of governmentally managed competition, where international aviation was exempt from normal antitrust rules, and where the large incumbent carriers could privately lobby bureaucrats to rig markets so they could exploit market power that reduced both consumer welfare and long-term industry efficiency. If Dean and Shane seriously believe that consolidation around just three global competitors is the “future of aviation” and beneficial to consumers, they should argue their case openly, and they should be arguing for the repeal of the Airline Deregulation Act so that domestic consumers may enjoy the same benefits. If the DOT believes that recent alliances proposed in ATI applications really create significant public benefits without unduly increasing market power, they should be willing to accept the DOJ’s challenge, and provide evidence that meets Horizontal Merger Guidelines standards.

<table>
<thead>
<tr>
<th>Transatlantic competition: Consolidation of twenty-six independent competitors into three collusive alliances almost complete</th>
<th>Transpacific competition: Consolidation of twenty-seven independent competitors into three collusive alliances began in 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Three surviving competitors</strong></td>
<td><strong>Independent competitors in 2008:</strong></td>
</tr>
<tr>
<td>Lufthansa-led collusive alliance</td>
<td>Hainan</td>
</tr>
<tr>
<td>Air France-led collusive alliance</td>
<td>Cathay Pacific</td>
</tr>
<tr>
<td>British Airways-led collusive alliance</td>
<td>China</td>
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<tr>
<td><strong>Twenty-one competitors eliminated by governmental approval of ATI or merger</strong></td>
<td>United</td>
</tr>
<tr>
<td>Northwest (1993)</td>
<td>American</td>
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<tr>
<td>Sabena (1995)</td>
<td>Continental (a)</td>
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<td>Delta (1995)</td>
<td>Northwest (a)</td>
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<td>Austrian (1995)</td>
<td>Delta</td>
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<td>United (1997)</td>
<td>Hawaiian</td>
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<td>Air Canada (a)</td>
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<td>British Midland (2001)</td>
<td>Japan (b)</td>
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<td>KLM (2004)</td>
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<td>(a) competition</td>
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<td>Swissair/Swiss (2005)</td>
<td>already eliminated</td>
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<td>LOT Polish (2005)</td>
<td>(b) application</td>
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<tr>
<td>TAP Air Portugal (2005)</td>
<td>pending to eliminate competition</td>
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<td>Turkish (2008)</td>
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<td>Continental (2009)</td>
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<td>Aer Lingus</td>
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<th>Independent competitors not viable as independent competitors</th>
<th>Hainan</th>
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<td>Hainan</td>
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<td>Japan (b)</td>
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Table 4

The DOT’s “aviation policy” - the consolidation of all of the major international carriers into three collusive groups - is driving an extraordinary transformation of the industry’s structure, one that will dwarf all of the competitive changes since deregulation. Radical consolidation is a

163. Horan, supra note 128, Ex. 5 at 7.
fundamentally anti-market agenda, as the resulting changes are not based on returns to capital from efficiency/productivity gains. The consolidation that began in 1993 and accelerated dramatically after 2003 resulted from large carriers petitioning governments for reduced competition; not from efficient carriers displacing inefficient ones or similar "market forces." The E.U.'s "national champion" policy explicitly uses alliances to prop up unprofitable flag carriers such as Alitalia, Austrian, SAS and LOT, and the Japanese government clearly believes that ATI-facilitated reductions in competition would help JAL survive.\textsuperscript{164} Despite aggressive pro-consolidation publicity campaigns, private investors have been totally unwilling to risk their capital on any of the major airline combinations of the last five years,\textsuperscript{165} since the capital markets know that there are no significant economic synergies to be exploited, and that the vast majority of airline mergers have been financial and competitive disasters.\textsuperscript{166} This type of artificial consolidation entrenches old-line legacy companies, could distort domestic competition,\textsuperscript{167} and reduces pressures to innovate and improve productivity.

This counter-revolution depends on "double marginalization" and the other arbitrary rules that the DOT has used to render the public benefits and market power test meaningless, and the counter-revolution would collapse if ATI applicants were required to use verifiable, case-specific evidence. As the original 1990s alliances demonstrated, traditional evidentiary standards are not an obstacle to consolidation proposals that generate legitimate economic synergies and consumer benefits without creating undo market power. But the post-2003 radical consoli-
dation around three globally collusive alliances rests on a foundation of the willfully false claims embedded in “double marginalization.” All recent consolidation totally depends on the DOT’s insistence that fares automatically fall fifteen to twenty-five percent whenever ATI grants reduce competition regardless of market/competitive conditions, that 100% of transatlantic consumer welfare gains in the 1990s were due to ATI (and none of the gains were due to carrier productivity or favorable supply/demand conditions), and that a single study of 1990s transatlantic price changes sponsored by ATI applicants can be used to predict price changes twenty years later in any market anywhere on the globe. By ruling that “double marginalization” and the other arbitrary rules are settled, unchallengeable fact, DOT expects to accelerate approval of the Japan and subsequent ATI cases and gives airlines an extremely low cost way to create market power and supra-competitive profits worldwide.

Aside from the impact on airline industry structure and consumer welfare, the counter-revolution replaces the concept of the DOT as an impartial enforcer of the antitrust laws with airline antitrust enforcement based on private, negotiations between the DOT, the large incumbent airlines, and other governments. Replacing “evidence driven antitrust enforcement” with “bilateral (or policy) driven antitrust enforcement” gives the DOT much more regulatory power and discretion than Congress ever intended, and greatly increases the risk of regulatory capture by the parties the DOT is supposed to be regulating. In the 1990s the DOT creatively used its combined antitrust and bilateral negotiation roles to significantly liberalize international airline markets. If the DOT is unwilling to abandon “double marginalization” and the counter-revolution against liberal competition, then perhaps Congress should consider shifting international antitrust authority to the DOJ, as it did for domestic aviation.

168. See Horan, supra note 128, at 12.