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Dear Reader:

Volume 38 number 1 features one article and two student notes. The first piece, by Pieter M. O'Leary, addresses the current issues with federal construction projects and the Miller Act. Given the hardships of the current economy, this article discusses the avenues for potential recovery of material suppliers in federal construction projects as set forth by the Miller Act.

The second piece is a student note by Corry Kendall. Mr. Kendall's note revolves around the constitutionality of state tolling practices. Currently, 4,894.2 miles of America's roads are subject to tolls. Florida alone contributes 657 miles of toll roads, followed closely by Oklahoma at 596.7 miles and New York at 574.6 miles. Mr. Kendall's article addresses the constitutionality of these state tolling practices with respect to the dormant Commerce Clause.

Finally, the last piece is a note by Moshe Zvi Marvit. Mr. Marvit analyzes the Railway Labor Act and the National Railroad Adjustment Board. In his article, he discusses the history of the RLA, NRAB, case law, and the need for clarity.

This issue marks the first of our 2011 publications. I would like to give special thanks and gratitude to Matthew Clark, Chris Eby, and Alex Wenzel for their continued contributions and dedication to the Journal. These members have continually gone above and beyond in their roles, ensuring a level excellence in all of our publications.

Thank you for subscribing to our Journal and I hope you enjoy reading Issue 38.1.

All the best,

Nicoal Chae Miller
2010-2011 Editor in Chief
Article

Bullies in the Sandbox: Federal Construction Projects, the Miller Act, and a Material Supplier’s Right to Recover Attorney’s Fees and Other “Sums Justly Due” Under a General Contractor’s Payment Bond

N. Pieter M. O’Leary*

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I. INTRODUCTION

The United States’ economy is slowly recovering from the “Great Recession,” the worst financial crisis since the Great Depression.\(^1\) While some parts of the economy fare better than others, the construction industry shows little, if any, sign of recovery.\(^2\) Private construction, particularly home building, has collapsed and there is little chance of significant and consistent recovery until sometime in 2012.\(^3\)

Federal stimulus money, however, is flowing to federal public works construction projects across the country.\(^4\) From courthouses\(^5\) to border infrastructure\(^6\) and interstate highway construction,\(^7\) federal projects are

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1. Editorial, *A Tailspin of Spending*, THE AUGUSTA CHRONICLE (Georgia), Jul. 8, 2010, at A06 (quoting the Pew Research Center as saying that unemployment figures “don’t fully convey the scope of the employment crisis that has unfolded during the recession” and that of the 13 recessions since the Great Depression, “none has presented a more punishing combination of length, breadth and depth than this one.”), available at http://chronicle.augusta.com/opinion/editorials/2010-07-08/tailspin-spending.


7. Edward Colimore, *Loads of Traffic to Bear: A Record Number of Projects Clog Roads*
currently the primary source of work in the construction industry. For example, in California the first portions of the state's long awaited high-speed rail system are being funded with federal stimulus money. The federal government awarded $2.25 billion in stimulus funds in January 2010 followed by another $715 million in October to begin construction of sections of the rail line. In South Carolina, portions of I-385 near Greenville are being widened from four lanes to six lanes, sections of asphalt will be replaced with stronger, longer lasting concrete, and highway entrance and exit ramps will be remodeled and brought up to code using nearly $36 million in federal funding. Finally, in Ohio, one of the more than 380 stimulus-funded transportation construction initiatives in that state pertains to the Regional Intelligent Transportation System in the region around Cleveland and Akron where $21 million will be spent on a system which will include traffic cameras and the informative, real-time highway message boards for motorists. The purpose of the system is to "provide the information for the boards and Web platforms that will give drivers an idea of congestion before they leave home or work." The poor economy and the increase in federal funding for construction projects, however, have created intense competition for work. This

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8. Martin Crutsinger, *June Construction Activity Rises 0.1 Percent*, Associated Press Financial Wire, Aug. 2, 2010 (noting that total private construction on both residential and nonresidential was down 0.8 percent to a seasonally adjusted annual rate of $527.6 billion).


11. Nathaniel Cary, *Drivers Face Two-Year Construction Project to Widen I-385*, Greenville News (South Carolina) Nov. 5, 2010. Currently there are approximately 60,000 drivers using a portion of I-385 in Greenville. *Id.* The number of drivers is expected to increase to 80,000 by 2028. *Id.*


13. *Id.*

competition for work has resulted in an increase in federal litigation among the parties engaged in federal construction projects: the general contractor, the subcontractor(s), material suppliers, and other third parties. This imbalance in financial resources and power creates the opportunity for larger, more sophisticated and financially secure general contractors to pressure smaller and financially susceptible subcontractors and material suppliers not to file claims and/or settle for pennies on the dollar. Consequently, there is a need for a slight revision to the current federal legislation governing federal construction projects, the Miller Act, which is already designed to protect those supplying labor and materials to a federal project. Based on the number of transportation projects around the country and the amount of taxpayer money funding these federal projects, the Miller Act is an extremely relevant piece of legislation likely to have a prominent role in any litigation stemming from these numerous infrastructure projects.

This article identifies the provisions of the Miller Act enabling a material supplier to recover for the labor and/or materials supplied to a federal construction project when a subcontractor using the labor and materials fails to pay for these resources. Typically, subcontractors either go bankrupt and are unable to complete the project or are unable to complete the project or the general contractor removes the subcontractor from the project for various reasons. Regardless of the circumstances of nonpayment, a material supplier is forced to look to the general contractor and its surety for payment. The intent and purpose of the Miller Act is clear: protection of those supplying labor and materials; however, Com-


16. The Miller Act, 40 U.S.C. §§ 3131 – 3133 (2006) (formerly 40 U.S.C. §§ 270a-270e). A Miller Act claimant must prove the following four elements: (1) The claimant supplied labor or materials in the prosecution of the work; (2) the claimant has not been paid; (3) The claimant had a good-faith belief that the materials were intended for the specific work; and (4) the claimant has timely complied with the notice and filing requirements. H. Bruce Shreves, Payment Bonds, in CONSTRUCTION LAW HANDBOOK 1353, 1380 (Richard K. Allen & Stanley A. Martin ed., 2009).

gress has failed to clearly lay out the full scope of recovery.\textsuperscript{18}

When litigation ensues, the material supplier is left to fight for its unpaid invoices, service charges, repair costs, attorneys’ fees, and other related costs. However, service charges and attorneys’ fees, unlike “labor” and “materials,” are not specifically addressed in the language of the Miller Act. While Congress and courts have deemed these costs as “sums justly due,”\textsuperscript{19} the absence of clear, unequivocal statutory language gives large general contractors and their sureties the opportunity to prolong litigation, drive up costs for the claimant, and generally tip the scale in favor of denying, for example, the material supplier full recovery under its contract with the defaulting subcontractor.

This article identifies the problems encountered by material suppliers in recovering costs for not only the labor and materials they supply to federal works projects, but also their attorneys’ fees and other “sums justly due.” Part one highlights the key aspects of the Miller Act supporting a material supplier’s right to recovery and addresses, among other things, the important distinction between a material supplier and a subcontractor, what sums are justly due under the payment bond, and, for counsel representing materials suppliers, whether attorneys’ fees are recoverable under the Miller Act. Part two highlights recommendations for Congress to consider in slightly modifying the language of the Miller Act in order to eliminate the ambiguity, even the playing field, and ensure material suppliers are rightly and properly compensated for the risk they take in supplying labor and materials to federal works projects.

II. \textbf{The Miller Act}

Since a lien cannot attach to federal property such as a highway, Congress enacted the Miller Act to provide subcontractors and material suppliers on federal public works\textsuperscript{20} projects with an alternate remedy to the mechanics’ lien ordinarily available on private construction projects.\textsuperscript{21}

The purpose of the Miller Act is “to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the con-

\textsuperscript{19} Former Miller Act section 40 U.S.C. § 270 (b). While the “sums justly due” language was replaced with the phrase “judgment for the amount due” in the latest revision to the Miller Act, the intent and purpose remains the same; compensating those who furnish labor and materials to a federal project and go uncompensated. 40 U.S.C. § 3133(b)(1) (2006).
\textsuperscript{20} Generally speaking, “public work” is broadly defined as any project undertaken with federal aid “to serve the interests of the general public.” See United States \textit{ex rel.} Noland Co. v. Irwin, 316 U.S. 23, 24 (1942).
struction of nonfederal buildings.”22 The Act is “highly remedial” and entitled to a “liberal construction” by the Courts.23

The Act requires a person (i.e. a general contractor) performing a contract valued at over $100,000 on any public construction project to obtain both a performance bond and a payment bond.24 The performance bond protects the federal government by ensuring that there is money to complete the job.25 The payment bond is “for the protection of all persons supplying labor and material in carrying out the work provided for in the contract.”26 More importantly, for the purpose of this article, the Miller Act provides that “[a] person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action.”27 According to section 3133(b)(1) of the Act, “[e]very person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . and that has not been paid in full within 90 days after . . .” last furnishing the labor or materials, may sue on the payment bond for the outstanding amount “and may prosecute the action to final execution and judgment for the amount due.”28 The provisions of the statute leave the question of what is the proper calculation “for the amount due?”

1. The Legislative History and Purpose of the Miller Act

In 1894, Congress passed the Heard Act based on complaints from subcontractors and material suppliers working on government construction projects.29 These subcontractors and material suppliers were unable to collect outstanding debts from contractors because the subcontractors and material suppliers could not assert liens against government property.30 The Heard Act “mandated the provision of a [single] bond by all persons who entered into public works contracts with the United

States."\(^{31}\)

Congress repealed the Heard Act in 1935 and enacted the Miller Act.\(^{32}\) Problems with the Heard Act encountered by claimants, as noted by the Miller Act House report, were the "undue delay, with resultant hardships, in the collection of moneys due them by suits on bonds."\(^{33}\) Additionally, the federal government "had priority in making a claim under the bond."\(^{34}\) The Miller Act of 1935 "remedied these problems by requiring two separate bonds: one covering the performance obligation and one covering the payment obligation."\(^{35}\) Consequently, "subcontractors and suppliers with claims for nonpayment are no longer forced to compete with the United States' performance claims."\(^{36}\)

In 1978 and again in 1994, the Miller Act was amended to raise the threshold amount of the federal construction project in question. In 1978 the amount was raised from $2,000 to $25,000\(^{37}\) and in 1994 the amount was raised from $25,000 to the current requirement of $100,000.\(^{38}\) In August 1999, the Miller Act was revised to require a penal sum on all payment bonds equal to the sum of the prime contract between the general contractor and the federal government, rather than a mere percentage of the prime contract.\(^{39}\) Finally, in 2002 the Miller Act was recodified to

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32. Sponer, supra note 24, at 697; see also Lynn M. Schubert, Why Obligees Buy Bonds, in THE LAW OF SURETYSHIP 41 (Edward G. Gallagher ed., 2d ed. 2000) (implying the Miller Act was named after John E. Miller, the Chairman of the U.S. House of Representatives Committee of the Judiciary).


34. Id. (citing the MILLER ACT HOUSE REPORT, H.R. REP. NO. 74-1263, at 2 (1935)).

35. Id.

36. Id.


39. Scott D. Baron et al., Recent Developments in Fidelity and Surety Law, 36 TORT & INS. L.J. 335, 350 (2001) ("[T]he Construction Industry Payment Protection Act of 1999 ("CIPP") revised Federal Acquisition Regulation ("FAR") 28.102[102] and the clauses at FAR 52.228-13, 52.228-15, and 52.228-16 to implement the CIPP Act and to enhance payment protection for contracts on government projects not subject to the Miller Act. The rule provides that the amount of the payment bond must equal the amount of the original contract, unless the contracting officer makes a written determination that this amount is impractical, in which case such officer shall set a different amount that cannot be less than the amount of the performance bond.").
“enact without substantive change certain general and permanent laws, related to public buildings, property, and works.”

2. The Material Supplier – Subcontractor Distinction and Why it Matters

Distinguishing material suppliers (a.k.a. materialmen) from subcontractors is very important because one of the primary defenses used by general contractors and their sureties in defending Miller Act claims is that the claimant is too remote to make a claim under the general contractor's payment bond. Only first-tier and second-tier Miller Act claimants may recover under the payment bond. First-tier claimants are those parties, either subcontractors or material suppliers, having contractual privity with the general contractor. Second-tier claimants are those parties having contractual privity with a subcontractor, who has contractual privity with a general contractor. Those more remote parties having a contract with a material supplier are not covered by the payment bond and cannot recover under the Miller Act. As the Supreme Court noted in 1944, “[m]any such materialmen are usually involved in large projects; they deal in turn with innumerable sub-materialmen and laborers. To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety.”

For example, general contractor A has a contract with subcontractor B to renovate a military barracks. Subcontractor B contracts with sub-subcontractor C for electrical work and with material supplier D for the supply of concrete. Material supplier D then contracts with material supplier E to provide equipment to mix the concrete on site. In this scenario, Subcontractor B is a first-tier claimant while sub-subcontractor C and material supplier D are second-tier claimants based on their contract with subcontractor B. Material supplier E, is outside the scope of the payment bond because it is a material supplier having a contract with a material supplier. If, on the other hand, material supplier E had a contractual relationship with sub-subcontractor B, it would be covered by the payment bond.

42. Id. at 149.
43. Id. at 150.
44. Id. at 151.
In light of this chain of claimants, the United States Supreme Court has declared that in distinguishing subcontractors and material suppliers:

[the Miller Act itself makes no attempt to define the word 'subcontractor.' We are thus forced to utilize ordinary judicial tools of definition. Whether the word includes laborers and materialmen is not subject to easy solution, for the word has no single, exact meaning. In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor . . . A subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen.]

Subsequent case law illustrates the fact that the determination of whether a party is a subcontractor or a material supplier must be determined based on the facts of the case. For example, in United States ex rel. Bryant v. Lembke Construction Co., the plaintiff supplied sand and gravel needed for mixing concrete for a government project pursuant to an oral agreement with Adams Concrete Company. Adams had entered into a written contract with the general contractor to supply all of the concrete necessary for the project. The Tenth Circuit Court of Appeals affirmed the district court’s finding that Adams, the concrete supplier to the government, was a materialman rather than a subcontractor because the concrete supplied was neither customized nor represented a specialized job. “All Adams did was deliver concrete.” Consequently, the plaintiff supplier furnishing sand and gravel was unable to recover under the payment bond because plaintiff was a material supplier which had contracted with another material supplier and was, therefore, too remote to make a

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49. *Id.* at 294.
50. *Id.* at 296.
51. *Id.* at 295.
In a later Tenth Circuit case, a supplier of kitchen cabinets was deemed a subcontractor because the cabinets had to be furnished in accordance with the plans and specifications of the project, and the subcontractor had to verify room dimensions at the job site to insure correct cabinet sizes and furnish shop drawings for approval. As such, the plaintiff company that supplied steel to the kitchen cabinet company was permitted to recover under the Miller Act because it had a contract with a subcontractor.

Each case, however, is unique and courts balance a series of factors to determine whether a party is a material supplier or a contractor.

**A. Factors Favoring Material Suppliers**

After the two Tenth Circuit Court of Appeals cases noted above, the Ninth Circuit Court of Appeals, in *United States ex rel. Conveyor Rental & Sales Co. v. Aetna Casualty & Surety Co.*, discussed the factors now generally used throughout the country to determine whether a party is a material supplier or a subcontractor. In *Conveyor Rental & Sales*, the Court summarized five general factors weighing in favor of determining the entity is a materialman.

The first factor is simply whether a purchase order form was used by the parties. The Ninth Circuit looked to two cases in support of this factor where the plaintiff's right to recover depended upon the status of the entity, whether a subcontractor or material supplier, which had contracted with the general contractor. In *Miller Equipment Co. v. Colonial Steel & Iron Co.*, plaintiff material supplier Miller Equipment sought the balance of its contract from subcontractor Colonial Steel & Iron re-

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52. *Id.* at 294-97.
53. Cooper Constr. Co. v. Pub. Hous. Admin. *ex rel.* Rio Grande Steel Products Co., Inc., 390 F.2d 175, 176 (10th Cir. 1968); see also Miller Equip. Co. v. Colonial Steel & Iron Co., 383 F.2d 669, 674 (4th Cir. 1967) (recognizing the requirement for special fabrication and the substantial price of the steel girders involved (fifteen percent) in relation to the total prime contract price made the party agreeing to supply the steel girders a subcontractor); Travelers Indemn. Corp. v. United States *ex rel.* W. Steel Corp., 362 F.2d 896, 898 (9th Cir. 1966) (holding the supplier of materials for two separate contracts was a subcontract under both contracts, one for the supply of steel cut to exact dimensions and specially fabricated and the second contract to erect a radar tower).
54. *Id.*
56. *Id.* at 452.
57. *Id.*
58. The second case is *United States ex rel. Potomac Rigging Co. v. Wright Contracting Co.*, 194 F. Supp. 444, 447 (D. Md. 1961) (explaining that the purchase order at issue was merely descriptive of what was to be transported rather than what was to be fabricated).
lated to the fabrication and delivery of structural steel to be incorporated in a federal bridge project in Virginia.\textsuperscript{59} Miller Equipment was obligated to supply fifteen structural steel girders, each approximately 110 feet in length and weighing between seventeen to twenty tons and fabricated according to shop drawings furnished by Colonial Steel & Iron.\textsuperscript{60} The \textit{Miller Equipment} court ruled the contract between the general contractor and subcontractor Colonial Steel & Iron "called not for the mere supply of materials but for the custom fabrication of massive girders and their accessories, key and integral components of the bridge, designed and fabricated to mesh precisely in their final assembly on the job-site."

The fact that the general contractor designated its contract with Colonial Steel & Iron as simply a "Purchase Order" was not controlling in the final determination of whether Colonial Steel & Iron was a material supplier or a subcontractor and thus whether material supplier Miller Equipment could recover under the payment bond.\textsuperscript{62}

The second factor is whether the materials come from a preexisting inventory.\textsuperscript{63} An entity which maintains no inventory and must contract for certain supplies tends to be a factor supporting an argument that the entity is a subcontractor.\textsuperscript{64} An entity that maintains a preexisting inventory is more likely to be deemed a material supplier.\textsuperscript{65}

The third factor the Ninth Circuit used in weighing in favor of an entity being deemed a material supplier is based on whether the item supplied is relatively simple in nature.\textsuperscript{66} In \textit{Aetna Casualty & Surety Co. v. United States ex rel. Gibson Steel Co.}, for example, none of the items supplied were "complex, integrated system[s]."\textsuperscript{67} Rather, "[t]he most complex items were prefabricated stairs and ladders."\textsuperscript{68} The other items included "trench covers and frames; hand, guard, and wall rails; pipe sleeves; door lintels; soffit frames; floor expansion joint covers; and"

\begin{footnotesize}
\begin{itemize}
  \item Id. at 670.
  \item Id. at 674.
  \item Id.
  \item United States \textit{ex rel.} Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co., 981 F.2d 448, 452 (9th Cir. 1992).
  \item Id. at 454.
  \item See Aetna Cas. & Sur. Co. \textit{v. United States \textit{ex rel.}} Gibson Steel Co., 382 F.2d 615, 618 (5th Cir. 1967) (explaining that an entity did not maintain an inventory and thus constituted a material supplier); United States \textit{ex rel.} Clark \textit{v. Lloyd T. Moon, Inc.}, 698 F. Supp. 665, 667 (S.D. Miss. 1988) (deeming that a material supplier "maintained at least an inventory of 'raw steel used for fabrication'.")
  \item Conveyor Rental \& Sales Co., 981 F.2d at 452 & n.17 (citing Gibson Steel Co., 382 F.2d at 618; Lloyd T. Moon, Inc., 698 F. Supp. at 668).
  \item Gibson Steel Co., 382 F.2d at 618.
  \item Id.
\end{itemize}
\end{footnotesize}
frames for fire extinguisher cabinet recesses." 

In finding the company that had furnished these items was a material supplier, the court noted that "[b]oth the variety and the relative simplicity of the items supplied weigh heavily against finding that [the supplier] took over a significant and definable part of the construction project." 

A 2007 Fifth Circuit case, however, criticizes Gibson Steel Co., noting that the Miller Act "does not make distinctions based on characteristics such as whether the material supplied was customized or unique." The court explained that "[a]lthough furnishing customized or complex material may in some cases be a helpful indication of the strength of the supplier's relationship with the [general] contractor, it does not follow that the absence of such characteristics in the material supplied establishes a lack of 'subcontractor' status." In light of this case and in consideration of other cases such as F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., the complex or unique nature of the materials supplied may not be as significant a factor in the subcontractor – material supplier analysis as it has in the past. 

The fourth factor weighing in favor of an entity being deemed a material supplier is whether the contract was a small percentage of the total construction cost. The smaller the percentage of the total construction cost, the greater the likelihood that an entity will be deemed a material supplier. 

Finally, the fifth factor weighing in favor of a determination that the entity is a material supplier is whether sales tax was included in the con-

69. Id.
70. Id.
71. United States ex rel. E & H Steel Corp. v. C. Pyramid Enters., Inc., 509 F.3d 184, 189 (3d Cir. 2007) (pertaining to the supply of fabricated steel to the general contractor for use in constructing the framework of "a large C-17 Maintenance Hangar and Shops facility at the McGuire Air Force Base in New Jersey.").
72. Id. at 189.
73. See F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 123-24 (1974) superseded in part by statute, Prompt Payment Act Amendments of 1988, ch. 39, sec. 3905(j), § 9(a)(2)(j), 102 Stat. 2455 (involving lumber supplier for federal housing projects, the court stated to "[l]ook at the total relationship between [supplier] and [general contractor] ... to determine whether [supplier] [is] a subcontractor," in determining that supplier was a subcontractor court noted as additional support that the "management and financial structures of the two companies were closely interrelated ... .").
75. Id. at 454 (noting that the percentage of the prime contract supporting a finding of a materialman relationship has ranged from 2% in Gibson Steel Co., 382 F.2d at 618, through 5.15% in United States ex rel. Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 668 (S.D. Miss. 1988), to 9% in Pioneer Steel Co., 398 F. Supp. at 721).
tract price.\textsuperscript{76} Where a party includes sales tax, the belief is that materials are being sold or supplied.\textsuperscript{77}

B. Factors Favoring Subcontractors

In the same seminal 1992 Ninth Circuit case, \textit{Conveyor Rental \& Sales}, the court also looked to a series of earlier cases and enumerated thirteen factors used to determine whether or not a party was a subcontractor.\textsuperscript{78} Several of these factors are the mirror opposite of the factors used to determine whether an entity is a material supplier, but still bear mention here. The first factor likely to render an entity a subcontractor is whether the product supplied is custom fabricated.\textsuperscript{79} In making its determination, the Ninth Circuit again looked to the case of \textit{Miller Equipment}.\textsuperscript{80} The court in \textit{Miller Equipment}, which involved a bridge construction project in Virginia, held that “the custom fabrication of massive girders and their accessories, key and integral components of the bridge, designed and fabricated to mesh precisely in their final assembly on the job-site” made the entity which contracted with the general contractor, Colonial Steel \& Iron, a subcontractor rather than a material supplier.\textsuperscript{81} Consequently, the plaintiff material supplier, Miller Equipment was permitted to recover based on its contract with the subcontractor, Colonial Steel.\textsuperscript{82} However, had Colonial Steel \& Iron been a material supplier rather than a subcontractor, then plaintiff Miller Equipment would have been precluded from recovery under the Miller Act because it would have been a third-tier claimant and too remote in the chain to recover.\textsuperscript{83}

The second fact favoring weighing in favor of a subcontractor rather than a material supplier is whether the product supplied is a complex integrated system.\textsuperscript{84} As noted above in the case of \textit{Gibson Steel Co.}, the prefabricated stairs and ladders furnished by the supplier were the most complex items supplied.\textsuperscript{85} Most of the other items were construction items such as “trench covers and frames; hand, guard, and wall rails; pipe

\begin{thebibliography}{9}
\bibitem{76} \textit{Id.} at 452 \& n.19 (citing \textit{Gibson Steel Co.}, 382 F.2d at 618; \textit{Pioneer Steel Co.}, 398 F. Supp. at 721; \textit{United States ex rel. Potomac Rigging Co. v. Wright Contracting Co.}, 194 F. Supp. 444, 447 (D.C. Md. 1961)).
\bibitem{77} \textit{Id.}
\bibitem{78} \textit{Id.} at 451-52 (internal footnotes omitted).
\bibitem{79} \textit{Id.} at 451 (internal footnote omitted).
\bibitem{80} \textit{Id.} at 453 (citing \textit{Miller Equip. Co. v. Colonial Steel \& Iron Co.}, 383 F.2d 669, 674 (4th Cir. 1967)).
\bibitem{81} \textit{Miller Equip. Co.}, 383 F.2d at 674.
\bibitem{82} \textit{Id.}
\bibitem{83} \textit{Id.} at 673.
\bibitem{84} \textit{Conveyor Rental \& Sales Co.}, 981 F.2d at 451, 452 n.2 (citing \textit{Aetna Cas. \& Sur. Co. v. United States ex rel. Gibson Steel Co.}, 382 F.2d 615, 618 (5th Cir. 1967)).
\bibitem{85} \textit{Gibson Steel Co.}, 382 F.2d at 618.
\end{thebibliography}
sleeves; door lintels; soffit frames; floor expansion joint covers; and frames for fire extinguisher cabinet recesses." The simple nature of these items weighed against finding that the supplier was in fact a subcontractor.

The third factor is whether there is a close financial interrelationship between the companies. In *F.D. Rich*, the court found that the subcontractor "Cerpac . . . was closely intertwined with [F.D.] Rich." Specifically, F.D. Rich received "much if not all of the plywood and millwork" it required between 1963 and 1966 for its numerous federal housing projects from Cerpac. The court noted that the principals of F.D. Rich "held a substantial voting interest in Cerpac stock, supplied a major share of its working capital, and were thoroughly familiar with its operations and financial condition." Consequently, "[i]t would have been easy for [F.D.] Rich to secure itself from loss as a result of a default by Cerpac" and meant that Cerpac was not a material supplier, but instead a subcontractor.

The fourth of the thirteen factors is whether "a continuing relationship exists with the [general] contractor as evidenced by the requirement of shop drawing approval by the [general] contractor [and/or] the requirement that the supplier’s representative be on the job site." As support for this factor, the Ninth Circuit looked to *United States ex rel. Consolidated Pipe & Supply Co. v. Morrison-Knudson Co.*, wherein a pipe fabricator contracted with the general contractor for the supply of pipe necessary for the construction of the Aero Propulsion Test Facility at the Arnold Engineering Development Center, Tullahoma, Tennessee. The pipe fabricator in turn contracted with other entities for the supply of wrapped pipe. When the pipe fabricator failed to pay one of the suppli-

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86. *Id.*
87. *Id.*
88. *Conveyor Rental & Sales Co.*, 981 F.2d at 451 (internal footnote omitted).
90. *Id.*
91. *Id.*
92. *Id.*
94. *Id.* at 453 & nn.22-23 (citing *Consol. Pipe*, 687 F.2d at 135; *Clark*, 698 F. Supp. at 667; *Pioneer Steel Co.*, 398 F. Supp. at 721).
95. *Consol. Pipe*, 687 F.2d at 130.
96. *Id.*
ers, the supplier sought payment from the general contractor. In the ensuing litigation, the Consolidated Pipe court held that the pipe fabricator was in fact a subcontractor based on, among other thing, the fact that it “drafted isometric drawings (three dimensional drawings) which were utilized in preparing shop drawings” for the project and that the “shop drawings gave a more detailed picture of segments of the iso-

metric drawings and were used for actual fabrication of the pipe.” The court noted that the “[p]reparation of these drawings by [the pipe fabricator] involved no design work, but did require engineering expertise on behalf of [the pipe fabricator] that [the general contractor] did not have.” Additionally, the pipe fabricator “sent a draftsman to the project site when the drawings were first submitted to participate in the interpretation of the drawings.” As a result of this close relationship and the fact that the pipe fabricator had representative on site to interpret its drawings, the Consolidated Pipe court held that the pipe fabricator was a subcontractor and that the material supplier was entitled, therefore, to collect from the general contractor and its surety.

The fifth factor is whether the supplier is required to perform on site. When a party does not perform work on site, it is more likely that it will be deemed a material supplier rather than a subcontractor.

The sixth factor enumerated by the Ninth Circuit in Conveyor Rental & Sales is whether there is a contract for labor in addition to materials. The case of Travelers Indemnity Co. v. United States ex rel. Western Steel Co., cited by the Ninth Circuit, involved two separate contracts: one for materials and one apparently for labor needed to erect the project. This first contract called for the supply steel to construct a radar tower.

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97. Id.
99. Consol. Pipe, 687 F.2d at 133.
100. Id.
101. Id.
102. Id. at 135-36.
104. Gibson Steel Co., 382 F.2d at 618.
105. Conveyor Rental & Sales Co., 981 F.2d at 451, 452 n.7 (citing Travelers Indem. Co. v. United States ex rel. W. Steel Co., 362 F.2d 896, 898 (9th Cir. 1966)).
107. Id. at 897.
The subsequent, second contract called for the construction of the radar tower itself. As the Court noted, the "subcontract for erection of the radar tower so beclouds the issue as to suggest the fruitlessness of attempting a definition of a subcontract concerned solely with the requirements of the" first contract which called only for the supply of the materials. The party in question was held to be a subcontractor.

The seventh factor is simply whether the term "subcontractor" is used in the agreement.

The eighth factor weighing in favor of deeming an entity a subcontractor is whether the materials supplied come from existing inventory. In Consolidated Pipe, the pipe fabricator or middle party simply did not maintain an inventory of pipe and had to purchase it from various suppliers. As the Court noted, the pipe supplied to the project were not inventory items, "a factor denominative for a subcontractor relationship" with a general contractor.

The ninth of the thirteen factors enumerated by the Ninth Circuit in Conveyor Rental & Sales is whether the supplier's contract constitutes a substantial portion of the prime contract. In discussing this factor, the Ninth Circuit again looked to Consolidated Pipe in which the pipe fabricator or middle party was required to provide a total of nearly forty percent of the pipe used on the total project. In a subsequent case from the United States District Court for the Southern District of Mississippi, the court held that supplying a mere fifteen percent of the steel for a portion of the project was not, in conjunction with other factors, enough to support the argument that the steel supplier was a subcontractor.

The tenth factor is whether the supplier is required to furnish all the material of a particular type. Here, the Ninth Circuit looked to Basich Brothers Construction Co. v. United States ex rel. Turner, a 1946 case which, almost as a side note, lists the materials provided as gravel, rock, and sand. The Basich Brothers court does not explain how or why

108. Id. at 898.
109. Id.
112. Consol. Pipe, 687 F.2d at 133.
113. Id. at 134.
115. Consol. Pipe, 687 F.2d at 135.
119. Id. at 182.
“furnishing all the material of a particular type” makes one a subcontractor rather than a material supplier.

The eleventh factor is whether the supplier is required to post a performance bond.\textsuperscript{120} \textit{Consolidated Pipe} again served to guide the Ninth Circuit in that the facts reveal that that the pipe fabricator or middle man, to the surprise of many of the general contractor’s personnel, was not required to obtain a performance bond and thus weighed in favor of a determination the pipe fabricator was a subcontractor.\textsuperscript{121}

The twelfth and thirteenth factors both come from \textit{Gibson Steel Co.}\textsuperscript{122} The twelfth factor is whether there is a back charge for the cost of correcting the supplier’s mistakes. The thirteenth and final factor is whether there is a system of progressive or proportionate fee payment.\textsuperscript{123}

Consequently, a party providing, for example, a fixed amount of concrete or pieces of heavy construction equipment to a subcontractor will be deemed a material supplier using the factors enumerated above. Thus, despite the lack of privity with the general contractor, the material supplier shall be able to recover all “sums justly due” pursuant to the payment bond obtained by the general contractor.

3. \textit{How are “Sums Justly Due” Defined by the Courts?}

The Miller Act “is highly remedial in nature. . . . [and] is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects.”\textsuperscript{124} Given the “highly remedial” nature of the Miller Act, courts are given broad leeway in interpreting the statutory phrase permitting a prevailing Miller Act claimant to recovery all “sums justly due.”\textsuperscript{125}

Under a prior version of the Miller Act, a Miller Act claimant on a federal construction project was entitled to the “sums justly due” for providing labor and materials.\textsuperscript{126} The 2002 amendments to the Miller Act were not intended to change the substance of the Act which revised the phrase from all “sums justly due” to “for the amount due.”\textsuperscript{127} Courts have interpreted the all “sums justly due” terminology to mean that the

\textsuperscript{120} Conveyor Rental & Sales Co., 981 F.2d at 451-52.
\textsuperscript{121} Consol. Pipe, 687 F.2d at 135-36.
\textsuperscript{122} Aetna Cas. & Sur. Co. v. United States ex rel. Gibson Steel Co., 382 F.2d 615, 618 (5th Cir. 1967).
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co., 322 U.S. 102, 107 (1944).
\textsuperscript{126} See Sponer, supra note 25, at 714.
\textsuperscript{127} See 40 U.S.C. § 270(b)(1) (2000); see also infra § II(1).
scope of the recovery is only as broad as that permitted by the contract between the subcontractor and the material supplier. As one court recently noted, "it is self-evident that the subcontract must be examined to ascertain what amount is due a subcontractor, for it is the subcontract that defines the subcontractor’s scope of work and the measure of payment for that work, i.e., whether by fixed price, time and materials, profits, or some other appropriate means." \(^{128}\)

Consequently, courts look to the contract between the material supplier and the subcontractor to determine the “sums justly due.” If, for example, the underlying contract contains an attorneys’ fees provision, but not a service charge provision, the “sums justly due” include attorneys’ fees, but not service charges. It is the surety’s obligation “to pay the compensation to which the parties have agreed, although this amount [may] exceed the cost of labor, materials, and overhead." \(^{129}\)

4. Attorneys' Fees As “Sums Justly Due”

Provided one of the exceptions to the “American Rule” \(^ {130}\) applies, such as a statute or contractual provision permitting recovery, attorneys’ fees are generally recoverable. \(^ {131}\) In Miller Act cases, where a contract between a material supplier and a subcontractor does not provide for fees, the material supplier is not entitled to attorneys’ fees as “sums justly due” from either the general contractor or its surety. The United States Supreme Court’s decision in *F. D. Rich Co. v. United States ex rel. Indus-

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128. United States *ex rel. Acoustical Concepts, Inc. v. Travelers Cas. and Sur. Co. of America*, 635 F. Supp. 2d 434, 439 (E.D. Va. 2009); *see also* United States *ex rel. Woodington Elec. Co. v. United Pac. Ins.*, 545 F.2d 1381, 1383 (4th Cir. 1976) (looking to the underlying contract, not to analyze the contractual liability, but to determine whether “sums justly due” could be measured in terms of profits as opposed to the cost of labor and materials).

129. *Woodington Elec.*, 545 F.2d at 1383.

130. Traditionally, a prevailing party was not entitled to collect its attorneys’ fees from the losing party. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975). The theory behind having each side bear its own costs was that because of the uncertainties of litigation, a party should not be penalized “merely for defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.” *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), *superseded by statute on other grounds*.

131. Although on rare occasions a court will award attorneys’ fees under the Miller Act based on the bad faith of the unsuccessful party, such instances are rare and not addressed in this article. The bad faith exception holds that fees may be awarded where a party has acted “in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Hall v. Cole*, 412 U.S. 1, 5 (1973); *United States v. RB Constructors, LLC*, No. 07-01949, 2009 U.S. Dist. LEXIS 95329, at *4 (Miller Act case noting that “the bad-faith exception may apply in cases of bad faith occurring during the course of litigation that is abusive of the judicial process, or where a party institutes an unfounded action wantonly or for oppressive reasons, or necessitates an action be filed or defends an action through the assertion of a colorless defense, but will not apply to bad faith in the acts giving rise to the substantive claim.”) (internal quotations omitted).
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trial Lumber Co. serves as the starting point for consideration of attorneys' fees in Miller Act cases. As the Miller Act itself does not specifically authorize courts to award attorneys' fees to a successful plaintiff, the matter of fees is left to federal law. According to the "American Rule," each side is to bear its own legal fees unless there is a contractual provision or statute permitting fee-shifting. When attorneys' fees are provided for by contract, "the fees are routinely awarded and the contract is enforced according to its terms." However, the Court must determine if the claimed fees are inequitable or unreasonable and has discretion to completely deny or reduce the fee award.

In accordance with the exception to the "American Rule," federal courts have upheld fee awards in Miller Act cases where the relevant contract, in this case a material supplier – subcontractor contract, provided for attorneys’ fees. For example, in the 2002 case of United States ex rel. Casa Redimix Concrete Corp. and Casa Building Materials, Inc. v. Luvin Construction, Corp., the Court rejected the general contractor and surety’s argument that plaintiff material supplier should be precluded from recovering attorneys’ fees based on a lack of contractual privity. The facts of Casa Redimix are straightforward and involved claims by Casa Redimix against the general contractor and its surety for the contract price of concrete used in the construction of a Post Office and the claims of Casa Building Materials for the price of various other materials delivered to the same project. The claims of both entities were granted and it was also found that Casa Redimix was entitled, under its contract, to recover from the general contractor, the attorneys’ fees it incurred in

133. See id. at 126-27.
134. Id. at 126.
136. Noyes, 43 Fed. App’x. at 288 (affirming that general contractor was liable for chemical supplier’s debt, including attorneys’ fees based on contract with subcontractor).
138. Id. at **13-15.
139. Id. at **2-3.
collecting the price of the concrete. The Casa Redimix court, however, apparently based its decision on New York state law which provided that a contract provision that one party to a contract pay the other party’s attorneys’ fees in the event of breach is enforceable in an amount that is “reasonable.” Other federal circuits simply look to the contract between the parties to determine whether attorneys’ fees are recoverable.

In the 1977 Fifth Circuit case of United States ex rel. Carter Equipment Co. v. H.R. Morgan, Inc., an equipment supplier was awarded attorneys’ fees against the general contractor and its surety based on an attorneys’ fees provision in the contract between supplier and subcontractor. The equipment rental contractual provision specifically noted in part that “[s]hould it become necessary that Lessor employ an attorney to enforce any of the provosions (sic) of this Agreement . . . Lessor shall be entitled to recover such reasonable attorney’s fees and expenses as shall be incurred in connection therewith.” Looking to the specific language of the payment bond, which noted that “if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, . . .” the Carter Equipment court found in favor of the equipment supplier, followed the precedent set by F.D. Rich, and reversed the district court denial of attorneys’ fees.

In rendering its decision, the Carter Equipment court cited two earlier cases, the 1964 Eighth Circuit case of D & L Construction Co. v. Triangle Electric Supply Co. and the 1966 Ninth Circuit case of Travelers Indemnity Co. v. United States ex rel. Western Steel, Co. which both had awarded attorneys’ fees to material suppliers as “sums justly due” based on their respective contracts with the subcontractor working on the project. In Travelers Indemnity Co., the court specifically noted that under federal law, it is “settled that such a contractual obligation for attorney fees becomes part of the compensation ‘justly due.’”

In the 1989 Eleventh Circuit case United States ex rel. Southeastern Municipal Supply Co., v. National Union Fire Insurance Co., the con-
tract between the material supplier and the subcontractor contained a provision permitting the recovery of attorneys’ fees. The court held the provision was enforceable against the general contractor and its surety, and distinguished another Eleventh Circuit Court of Appeals case, *United States ex rel. Krupp Steel Products, Inc. v. Aetna Insurance Co.*, which had held that despite the contractual terms found on the back of the delivery tickets and on all of the invoices which stated that the supplier could recover attorneys’ fees in case of nonpayment for the goods, that the Miller Act did not provide for attorneys’ fees.

In the 1992 District of Colorado Court case of *United States ex rel. Trustees of Colorado Laborers Health & Welfare Trust Fund v. Expert Environmental Control, Inc.*, the central issue was whether “a general contractor and its Miller Act surety [were] liable to a third-party for attorney[s’] fees . . . when the terms of the subcontractor’s agreement with the third-party provide for such fees.” The third-party in the case, however, was not a material supplier, but rather trustees of a state employee benefit fund. In awarding attorneys’ fees, the *Trustees of Colorado* Court cited the “majority rule” that “attorney[s’] fees in a Miller Act case can be awarded to [a] third party based on a contractual agreement between that party and a subcontractor.” The court explained that the Eleventh Circuit had “adopted the rule that a general contractor

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149. *Nat’l Union Fire*, 876 F.2d at 93.
151. *Id.* at 983-84. *Krupp* (1987) was reversed and remanded in 1991 by *United States ex rel. Krupp Steel Prods., Inc. v. Aetna Insurance Co.*, 923 F.2d 1521 (11th Cir. 1991), which noted “the remedial nature of the Miller Act requires that a general contractor do everything that it reasonably can to protect itself ‘from possible misapplication of funds with which it parted in order to allow a subcontractor to continue work.’” 923 F.2d at 1526 (citing *Graybar Elec. Co. v. John A. Volpe Constr. Co.*, 387 F.2d 55, 59-60 (5th Cir. 1967)).
153. *Id.*
154. See *id.*
155. *Id.* at 898 n.1.
and its surety must pay attorney[s'] fees when there is an agreement be-
tween a subcontractor and the claimant providing for such fees."

In the 1996 Fourth Circuit case of United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Insurance Co., the Court of Appeals for the Fourth Circuit affirmed a material suppliers' recovery of attorneys' fees and interest against the general contractor and surety based on a contract between a material supplier and subcontractor. The material supplier in Maddux Supply provided materials to subcontractor Chapman Electric pursuant to a credit application which had been in place for several years and predated the federal construction project which formed the subject of Maddux's Miller Act claim. Pursuant to the language of the credit application, Maddux as was entitled to "a 1 1/2% monthly service charge" on "all accounts not paid within 30 days" and all costs associated with collecting any outstanding balance, including attorneys' fees. The appellate court upheld the district court's finding that the credit application was part of the contract between Maddux and Chapman Electric and disregarded the general contractor and the surety's argument that the attorneys' fees provision was unenforceable because it was entered into prior to the project.

In conclusion, assuming that the rental agreement, invoice, bill of lading, delivery ticket, credit application or the like contains a contractual provision awarding attorneys' fees, it is established law that a material supplier that does not have contractual privity with the general contractor may recovery attorneys' fees as the prevailing party. Such an outcome was intended by those who drafted the Miller Act and courts enforce the Act to protect material suppliers and other third-parties from aggressive general contractors and their sureties which pressure settlement.

Despite clear court interpretation, however, general contractors and their sureties frequently defend claims by arguing that a party is unable to collect its attorneys' fees. Often, this defense raises concerns for the material supplier and is a significant factor in resolving the case for less than what was originally owed, including attorneys' fees.

5. Contractual Interest Charges or Late Fees As "Sums Justly Due"

As noted above, courts treat recovery of contractually agreed to attorneys' fees as "sums justly due" pursuant to the Miller Act. Where there is a valid contract between a material supplier and a subcontractor

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156. Id. at 897.
158. Id. at 334.
159. Id.
160. Id. at 336.
permitting the recovery of a reasonable service charges or finance charges, the courts also appear to permit recovery. However, awarding non-contractual interest is matter of court discretion and, as some courts have determined, a matter of state law. Where there is a contractual provision permitting a reasonable “interest” charge, courts award such fees as “sums justly due.”

In *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, the Supreme Court addressed remedies available to plaintiffs under the Miller Act. In refusing to apply California law to plaintiff's claim for attorneys’ fees, the Court stated: “The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law.” Even though *F.D. Rich* dealt with attorneys’ fees, courts have used the above noted language to craft a federal remedy to the issue of contractual service charges or finance charges at a prescribed amount for all unpaid amounts.

For example, in the 1996 Ninth Circuit Court case of *Hawaiian Rock Products Corp. v. A.E. Lopez Enterprises, Ltd.*, the court noted that “the terms of the contract were clearly stated on the invoices; those terms stated that failure to pay would result in incurring a 1 % monthly charge simple interest charge.” Additionally, in another California case, *United States ex rel. Big 4 Rents, Inc. v. Briggs O. Ogamba*, the Northern District of California found that plaintiff’s late fee charge of 1 1/2 percent per month (eighteen percent per annum) on overdue principal was not interest and that “[a] finance charge ... encourages payment and compensates for ... delay in payment.” Specifically, the general contractor in *Big 4 Rents, Inc.* rented construction equipment directly from Big 4 Rents, to be used in connection with the general contractor’s contract with the federal government for the “removal and remediation of underground storage tanks at the United States Coast Guard Training Center in Petaluma, California.” The rental agreement between the two par-

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161. Courts tend to use these terms interchangeably.
162. See Maddux Supply, 86 F.3d at 334, 336.
165. Hawaiian Rock Prods. Corp. v. A.E. Lopez Enters., Ltd., 74 F.3d 972, 976 (9th Cir. 1996) (the Court labels 1 % monthly charge on the unpaid invoices as “pre-judgment interest”).
167. Id. at *2.
ties stated that the general contractor "would pay within 30 days of the invoice date, and would be charged 1 1/2% of the overdue amount per month (18% annually)." Thus, based strictly on the contractual language involved, plaintiff equipment supplier was entitled to its late fee charge.

Both Hawaiian Rock and Big 4 Rents, Inc., however, involve direct contracts between the general contractor and a supplier. Consequently, there is contractual privity between the two parties. In the following cases, however, there is no such privity, yet the courts award late fees or finance charges based on the premise such fees were "sums justly due."

In Maddux Supply, discussed above, the Fourth Circuit clearly noted that while the "Miller Act does not, by its own terms, provide for . . . interest. Several circuits have held . . . that interest" is recoverable if "part of the contract between the subcontractor and supplier." Again, in Maddux Supply, the equipment supplier's credit application, signed by the subcontractor, contained a provision whereby a 1 1/2% monthly service charge was added to all accounts more than thirty days overdue. The trial court held that the service charges (interest) were "sums justly due" under the Miller Act and that general contractors and their sureties were "obligated to pay amounts owed by their subcontractors to suppliers."

Under the Tenth Circuit case of United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc., the federal court, relying on the F.D. Rich case, also found that "a fair reading of the Court's language" in F.D. Rich included an award of interest. However, because no federal law existed with respect to awarding interest, the Western States court applied New Mexico law which stated "where the amount of indebtedness under the contract is ascertainable by breaching party, the injured party is entitled to interest as a matter of right on those monies at the legal rate."

168. Id. at *2. See also the California Supreme Court case of Sw. Concrete Prods. v. Gosh Constr. Corp., 51 Cal. 3d 701, 709 (Cal. 1990), which noted that "delivery tickets and invoices . . . constituted a contract which included the provision for 1 1/2 percent interest per month on late payments" and the late charge was not subject to usury law.

169. It should be noted that the issue of whether the party contracting with the general contractor was a subcontractor or a material supplier was irrelevant to the outcome of either case.


171. Id. at 334.

172. Id. at 336.


174. Id. at 1541-42 (quoting Grynberg v. Roberts, 698 P.2d 430, 432 (N.M. 1985).
Consequently, despite being labeled service charges, finance charges, or interest, so long as a contractual provision exists between a material supplier and a subcontractor, the general contractor and its surety are liable for the unpaid amounts owed by the subcontractor to the supplier.

6. Other Construction Costs Also Constitute “Sums Justly Due”

While the Miller Act explicitly notes that “labor” and “materials” may be recovered by a claimant, it is far less explicit about other items which may be recovered. As such, claimants must look to the case law for an interpretation.175

A. Equipment Re-Rentals

In the 2010 case of United States ex rel. Ramona Equipment Rentals, Inc. v. Carolina Casualty Insurance Co.,176 the United States District Court for the Southern District of California noted for the first time that a material supplier was also entitled to collect for equipment that it did not own, but had rented from another material supplier and then re-rented to the subcontractor for use on a federal project.177 The practice of re-renting equipment is common in the construction industry.178 Re-rental occurs when a source rental equipment company rents equipment to a second rental equipment company, which in turn re-rents the same piece of equipment for use on a construction project.179 Re-rents occur for various reasons such as the need for unique pieces of equipment, the need for more equipment than first envisioned, or simply because the rental company supplying equipment to the construction project does not have certain pieces of equipment the subcontractor or general contractor require. Rather than procuring equipment from various sources, the subcontractor or general contractor task the equipment supplier with locating and supplying the equipment.180

175. Katzman, supra note 41, at 155-56.
177. The practice of equipment suppliers renting equipment from another supplier and then re-renting it to subcontractors involved in federal construction projects is a common practice.
178. E-Mail from Don Cruikshank, President of the American Rental Association (“ARA”), to author (Oct. 26, 2010) (on file with author). According to Don Cruikshank of A-V Equipment Rentals, Inc. in Newhall, California, “[e]very rental company that I know of, to some degree, re-rent to augment their fleet or rents to other rental companies.” Id. Mr. Cruikshank is an active member of the American Rental Association (“ARA”) of California. Id.
179. Id. “Equipment re-rental is merely a temporary addition to a company’s fleet for the purpose of meeting a customer’s short term requirement for material that you are either out of or don’t carry.” Id.
180. Id. “The primary reason to re-rent is customer retention. Conveying the message of ‘call us, we can handle everything you need’ is important in our sales effort. The usual reason to re-
In the case of *Ramona Equipment*, the subcontractor entered into a contract with the equipment supplier.181 The equipment supplier, however, was required to obtain several pieces of equipment from other sources and then re-rent the equipment to the subcontractor.182 Despite the removal of the subcontractor from the project and the lack of contractual privity between the equipment supplier and the general contractor or its surety, the district court rejected defendants' argument that the plaintiff's equipment supplier must own the equipment in order to recover under the Miller Act.183 The equipment supplier, the District Court noted, could seek to recover the costs related to re-rented equipment based on its contract with the subcontractor.184

**B. Project Delays**

The premier case on the issue of recovering damages associated with project delays comes from the Eleventh Circuit. *United States use of Pertun Construction Co. v. Harvesters Group, Inc.*185 dealt with a contract between a general contractor and a subcontractor and addressed the issue of whether the subcontractor could recover from the general contractor and its Miller Act surety for project delays and increase labor and material costs caused by the general contractor.186 The Eleventh Circuit held that such increased costs were “sums justly due” and “consistent with both the language and the purpose of the Miller Act.”187

In the Ninth Circuit case of *Mai Steel Service, Inc. v. Blake Construction Co.*,188 a plaintiff sub-subcontractor sued to recover out-of-pocket delay damages stemming from the subcontractor's tardy and defective steel shipments that resulted in cost over-runs and prevented timely completion of portions of the project.189 At trial, the sub-subcontractor recovered against the subcontractor, but the subcontractor later filed for bankruptcy forcing the sub-subcontractor to appeal and seek recovery from the general contractor and its surety under the Miller Act.190 The Ninth Circuit Court of Appeals ruled that “increased out-of-pocket costs

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182. *Id.* at *2-3.
183. *Id.* at *7-13.
184. *Id.* at *11-13.
186. *Id.* at 916.
187. *Id.* at 918.
188. *Mai Steel Serv., Inc. v. Blake Constr. Co.*, 981 F.2d 414 (9th Cir. 1996).
189. *Id.* at 416.
190. *Id.* at 415.
caused by construction delays fall within the intended coverage of the Miller Act” and that a subcontractor may recover these costs from a Miller Act surety. However, lost profits caused by the delay were not recoverable from the surety.

Where a material supplier – subcontractor contract precludes recovery of delay damages, however, courts will not award them. In a 2006 District of Columbia case, a marble supplier contracted with a subcontractor for the supply of marble to be used in renovating the National Archives in Washington D.C. The contract provided that “[Sub]contractor shall not be independently liable to Supplier for any unforeseeable delay or interference occurring beyond the [Sub]contractor’s control or for delay or interference caused by Owner or other contractors or suppliers.” Despite plaintiff supplier’s efforts to label its losses as “impact damages,” the court deemed them delay damages and in light of the contractual provision in the supplier-subcontractor’s agreement, neither the general contractor nor the surety were liable for the delay related damages.

C. Rental Equipment Repairs & Parts

An equipment supplier’s recovery of costs associated with repairs and/or parts is a complex matter. “Repair parts, appliances, and accessories which add materially to the value of the equipment and render it available for other work are not within the coverage” of a Miller Act payment bond. However, equipment and parts “wholly consumed in the performance” of a project and “current repairs of an incidental and comparatively inexpensive character which do not add substantially to the value of the equipment and compensate only for ordinary wear and tear, are within the coverage of the payment bond.”

In the Tenth Circuit case of Rent It Co. v. Aetna Casualty & Surety Co., the court held that plaintiff equipment supplier’s claim for recovery...
of its equipment repair expenses under the Miller Act bond "plainly cannot stand. The repairs were not for ordinary wear and tear—they were for damage caused by [subcontractor's] negligent use of the equipment."\textsuperscript{199} The court found the repairs "were not current repairs, i.e. repairs done to allow the continued use of the equipment on the project. They were performed after the equipment was returned to the plaintiff and in order to render it available for other work."\textsuperscript{200}

III. Recent Miller Act Case Law Regarding Attorneys' Fees

Since January 2008, there have been nearly 200 published federal cases related to Miller Act litigation. Of these, approximately twenty address the issue of recovering attorneys' fees. One of the most recent of these twenty cases (September 2010) is \textit{United States ex rel. Ramona Equipment Rentals, Inc. v. Carolina Casualty Insurance Co.}, discussed above, in which the court denied the defendant's Motion for Partial Summary Judgment and held that a general contractor and its surety could be liable for attorneys' fees based on a contractual provision between the material supplier and subcontractor.\textsuperscript{201} In \textit{Ramona Equipment}, the defendants argued that the plaintiff, a small equipment supplier from San Diego County, was not entitled to recover its attorneys' fees despite a contractual provision between the supplier and the subcontractor.\textsuperscript{202} The court agreed with the plaintiff, Ramona Equipment, that the rental agreement and its contractual provision for attorneys' fees were enforceable against the defendants.\textsuperscript{203}

In the July 2009 case of \textit{United States ex rel. Renegade Equipment v. Western Surety Company} from the District of Alaska,\textsuperscript{204} the plaintiff equipment supplier brought suit under the Miller Act.\textsuperscript{205} The District Court granted the Surety's Motion for Summary Judgment, but denied the surety's claim that as the prevailing party, it was entitled to attorneys' fees.\textsuperscript{206} The surety argued that it was entitled to attorneys' fees based on the language of the subcontract between the equipment supplier and the general contractor.\textsuperscript{207} While the subcontract contained an attorneys' fee

\begin{itemize}
  \item \textsuperscript{199} \textit{Id.}
  \item \textsuperscript{200} \textit{Id.}
  \item \textit{Id.} at *13.
  \item \textit{Id.}
  \item \textit{Id.} at *1.
  \item \textit{Id.} at *4.
  \item \textit{Id.} at *2.
\end{itemize}
provision, the subcontract also noted that it was "solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties." Therefore, the surety, not being a signatory to the subcontract, was unable to collect its attorneys' fees.

In a September 2009 case from the Western District of New York, the District Court denied the plaintiff subcontractor's claim for attorneys' fees. In *Empire Enters. JKB v. Union City Contractors, Inc.*, the subcontract in question failed to contain an attorneys' fees provision, so the plaintiff subcontractor pursued an alternate exception to the American Rule permitting recovery of fees where the unsuccessful party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." While the District Court refused to find the unsuccessful defendant had acted in bad faith and therefore refused to award attorneys' fees, it did award prejudgment interest as sums justly due. However, the court based the award of prejudgment interest not on a provision of the subcontract, but upon state law awarding prejudgment interest to compensate the subcontractor for lack of timely payment.

**IV. RECOMMENDATIONS**

Despite numerous circuit court decisions permitting recovery of attorneys' fees where the contract between the material supplier and subcontractor contains a valid fee-shifting provision, general contractors and their sureties continue to vigorously challenge not only a party's status as a valid Miller Act claimant, but also the claimant's right to recover reasonable attorneys' fees when they are deemed the prevailing party. In so doing, general contractors and their sureties may prolong litigation and exhaust the financial resources of small, more susceptible material suppliers. Such tactics are contrary to the stated purpose of the Miller Act and are clearly outside the liberal construction applied by the courts. In these dire economic times, where material suppliers are struggling to keep their doors open, the fear of not being able to recover attorneys' fees for a valid claim may force them to either not bring their claims in the first place or simply settle prematurely.

208. *Id.* at *4.
209. *Id.*
211. *Id.*
212. *Id.* at 511.
213. *Id.*
214. Anderson v. AB Painting & Sandblasting, Inc., 578 F.3d 542, 545 (7th Cir. 2009) (noting that "[f]ee -shifting provisions signal Congress' intent that violations of particular laws be punished, and not just large violations that would already be checked through the incentives of the American Rule."); City of Riverside v. Rivera, 477 U.S. 561, 578 (1986) ("[t]he function of an
Congress must act to clarify the right of a material supplier to recover sums justly due, primarily attorneys' fees. One way Congress can rectify the situation is to amend the Act to clearly state that an attorneys' fees provision contained in a contract between a material supplier and a subcontractor in contractual privity with the general contractor on a federal construction project shall be entitled to its attorneys' fees, presuming the material supplier is deemed the prevailing party. Clearer statutory language works to deprive the general contractor and its surety of a powerful bullying tactic.

Alternatively, rather than amend the language of the Miller Act itself, Congress can include a clear statement of congressional intent to protect material suppliers and their “sums justly due.” One way to do this would be to clearly enumerate what constitute “sums justly due” (i.e. attorneys’ fees).

Finally, Congress should eliminate the discretion of the court and make the award of attorneys’ fees mandatory. Such a policy would work to lessen spurious claims from material suppliers while eliminating the confusion or speculation about what a trial court may do if the court deems the material supplier as the prevailing party. If a general contractor or its surety believes that the material supplier’s claims have merit and that the material supplier – subcontractor contract contains an attorneys’ fee provision, meritless defenses fall by the wayside and/or settlement becomes more likely if a general contractor or its surety face the possibility of having to pay attorneys’ fees.

Without greater clarification, however, large, established, general contractors with the resources to prolong litigation and wear down smaller material suppliers without the legal or financial resources to compete, will be driven out of business or face bankruptcy.

V. Conclusion

With federal stimulus money still being spent on federal construction projects such as highways, bridges, airports, and rail lines, among other things, and the likelihood of increased Miller Act litigation, Congress should act to amend or clarify the intent of the Miller Act in terms of

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award of attorney’s fees is to encourage the bringing of meritorious . . . claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.”) (quoting Kerry v. Quinn, 692 F.2d 875, 877 (2d Cir. 1982)).

215. See EchoStar Satellite Corp. v. NDS Grp. PLC, 390 Fed. App’x. 764, 767 (9th Cir. 2010) (noting that under federal law, a prevailing party is one that succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit and whether there was a “material alteration of the legal relationship of the parties.”).

216. Barrow v. Falck, 977 F.2d 1100, 1103 (7th Cir. 1992) (stating fee-shifting “helps to discourage petty tyranny”).

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awarding attorneys’ fees and other “sums justly due.” Like other federal statutes with clear attorneys’ fees provisions, Congress should amend the Miller Act to include similar language thereby eliminating any ambiguity regarding the recovery of fees. With economic conditions not likely to improve in the near future and in light of the financial susceptibility of small material suppliers, Congress should do more to protect these business owners from the bullying tactics of large general contractors and their sureties.

217. See generally Kenny A. ex rel. Winn v. Perdue, 547 F.3d 1319, 1337-39 (11th Cir. 2008) (giving a partial list of Federal statutes providing for the prevailing party to recover a reasonable attorney’s fee).
Note:

State Tolling Practices: The Future of Highway Finance or an Unconstitutional State Practice?

Corry Kendall*

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I. INTRODUCTION

Interstate commerce consists of the commercial intercourses among the states.1 “Commercial intercourse” includes the buying, selling, and transporting of goods.2 Interstate highways are the main conduit used to ship goods across the United States,3 and almost all goods have to travel along highways before reaching their final destination.4 In 1998, interstate highways “account[ed] for 71 percent of total freight transportation by weight and 80 percent by value” of all goods shipped.5 America’s economy “depends on . . . interstate[ ] [highways] to move various goods.”6 So much wealth is generated as a result of interstate highways that Tom McDonald, former Chief of U.S. Bureau of Public Roads, declared, “[I]t was not our wealth that made our highways possible; rather, it was our highways that made our Nation’s wealth possible.”7

Interstate commerce includes transporting goods. Highways transport a disproportionately high amount of goods across the United States. Today, commercial intercourses among the States are dependent on highways and they are the most important channel of interstate commerce. Congress has plenary authority to ensure that the “channels” of com-

2. Id.
4. Id. at 19 (testimony of John Gifford, Professor, George Mason University).
5. Id. at 32 (testimony of Richard J. Capka, Acting Adm’r, Federal Highway Admin.).
6. Id. at 2 (statement of William Pascrell, Congressional Representative, Member, H. Comm. on Trans. & Infrastructure).
7. Id. at 5 (testimony of Richard J. Capka, Acting Adm’r, Federal Highway Admin. (quot- ing Thomas McDonald, former Chief, U.S. Bureau of Public Roads)).
commerce, which include highways, stay unhindered. Thus, States are prohibited from passing laws that would significantly hinder highway travel. However, what if a State forces all interstate travelers to stop at its borders to pay a toll before they can travel through the State? Or, what if a city forces commuters to pay a “cover charge” before allowing passage through its boundaries? This Note will seek to address these issues. More specifically, this Note will examine the constitutionality of states’ tolling practices through the lens of the dormant Commerce Clause. First, this Note will discuss recent developments in this area justifying a closer examination of toll roads in light of the dormant Commerce Clause. Next, it will analyze whether the purported purpose behind toll roads survives dormant Commerce Clause scrutiny. Finally, it will conclude by emphasizing the need for further judicial action.

II. The Supreme Court and State Tolling Practices

1. Recognizing Toll Roads as Interstate Commerce

Traditionally, toll roads were considered an instrumentality of intrastate commerce, not interstate commerce. In *Gibbons v. Ogden*, the Supreme Court, per Chief Justice Marshall, stated that Congress has “[n]o direct general power over [toll roads] . . . and . . . they remain subject to State legislation.” The Court considered toll roads to be part of the “immense mass of legislation” not surrendered by the States to the Federal government. The “immense mass of legislation” included areas that were intrastate in nature. Thus, *Gibbons* supports the idea that toll roads were originally considered part of intrastate commerce.

The *Gibbons* Court, relying on the intrastate nature of toll roads, found toll roads outside the scope of Federal legislation under the Commerce Clause. Toll roads are products of state legislation and exist only

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9. See id. (providing that the authority to “regulate the use of the channels of interstate commerce” resides with Congress).
10. Toll roads are roads in which “the public has the right to travel upon payment of toll.” *Black’s Law Dictionary* 1659 (4th ed. 1968).
12. Id.
13. Id. The court also included “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect . . . [ferries].” *Id.*
14. See id. (”[T]he] immense mass of legislation . . . embraces every thing [sic] within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.”).
15. See id. at 65 (“Internal commerce must be that which is wholly carried on within the limits of a State . . . . This branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges . . . .”).
within the territorial boundaries of the State that created the road. In addition, tolls are collected only along roadways travelling in the State. The revenue raised as a result of state tolling finances highway improvements and construction within the State. Also, in 1824 (the year Gibbons was decided), tolling primarily affected local traffic. However, since Gibbons was decided, several advances in transportation demand reexamination of the intrastate nature of toll roads. Thus, Gibbons cannot be relied on to constitutionally validate modern tolling practices as being an intrastate activity. Even the Gibbons Court recognized that state tolling practices may become the subject of the Commerce Clause if "it...[is] for national purposes [and]... the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." 

Though Gibbons was not about a toll road's relationship with interstate commerce, the Supreme Court addressed that issue directly in Overstreet v. North Shore Corp. The precise issue presented in Overstreet was "whether petitioners who are engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons are 'engaged in commerce' within the meaning of [the Fair Labor Standards Act ("FLSA")]". The FLSA applied to all businesses that engaged in interstate commerce. However, it did not apply to occupations that only affected intrastate commerce.

To determine whether toll road operators were subject to the FLSA, the court first had to determine if they were "engaged in commerce." The court construed "engaged in commerce" to "extend... throughout the farthest reaches of the channels of interstate commerce."

Note that Overstreet was decided in 1943, six years after the "switch in time that saved nine" that changed commerce clause analysis. See 21 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 5002, n.222 (2d ed. 2010) (discussing the "switch in time that saved nine").
20. Id. at 128.
21. Id.
22. Id.
23. Id. (quoting Walling v. Jacksonville Paper Co., 317 U.S. 564, 567 (1943)).
Court determined that “engaged in commerce” included activities that were “closely related” to the instrumentalities of interstate commerce. The Court also concluded “persons who are engaged in maintaining[,] repairing[, and operating toll] facilities should be considered as engaged in commerce.”

First, the court found that roads and bridges are “indispensable to the interstate movement of persons and goods.” However, in order for the FLSA to apply, the roads have to be instrumentalities of interstate commerce. For a road or bridge to be “an instrumentalit[y] of interstate commerce,” it must be used primarily “by persons and goods passing between the various States.” The Court found that the toll road at issue in Overstreet was an “instrumentalit[y] of interstate commerce” and that maintainers, repairers, and operators of the road are engaged in commerce “because without their services these instrumentalities would not be open to the passage of goods and persons across state lines.”

Overstreet is important in the dormant Commerce Clause context for two reasons. First, the Supreme Court directly held that toll roads were part of interstate commerce, thus making the FLSA applicable to tolling companies. More importantly, Overstreet’s conclusion is somewhat contrary to Gibbons. Gibbons included toll roads as part of the “immense mass of legislation” left to the states. More specifically, Gibbons likely relied on the inherent intrastate nature of toll roads when it lumped them into the “immense mass of legislation.” Contrarily, Overstreet saw toll roads as an instrumentality of interstate commerce as long as they primarily supported interstate traffic. Nevertheless, Overstreet did not completely foreclose the idea that a toll road which served only intrastate traffic would be exempt from the FLSA because it did not transport people or goods across state lines.

The second important purpose Overstreet furthers is the changing at-
titude towards interstate transportation. The 1824 Gibbons decision considered toll roads as intrastate instrumentalities because, primarily, the roads would serve intrastate travel. The means of transportation, i.e. walking or horseback, limited how far a traveler could stray from his home or how far a manufacturer could ship his goods. Though some interstate travel still took place, local toll roads were used by local traffic. On the other hand, in 1943, the mode of traveling inter-state was growing exponentially. Motor vehicles and airplanes made travelling further distances possible. Roads that traditionally only served intrastate traffic could now serve a higher volume of interstate traffic. Thus, Overstreet included toll roads as part of the instrumentalities of interstate commerce.

2. State Tolling Practices and the Three Bears: The Three Tests Used by the Supreme Court to Determine the Constitutionality of State Tolling Practices

The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the States.” Though the Commerce Clause does not speak to a State’s authority to regulate interstate commerce, the Supreme Court has “interpreted the Commerce Clause as an implicit restraint on state authority.” This implicit restraint on state authority is commonly referred to as the dormant Commerce Clause because the commerce power can either be exercised by Congress, or in the absence of Congressional action, lie dormant. The Supreme Court has, over the years, adopted three tests used to determine whether a State’s tolling practice violates the dormant Commerce Clause. This section will discuss the three tests in turn and determine which test is best in assessing the constitutionality of state tolling practices.

35. See Gibbons, 22 U.S. at 65 (“Internal commerce must be that which is wholly carried on within the limits of a State . . . . This branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges . . . .”).
37. See Overstreet, 318 U.S. at 129-30.
38. U.S. Const. art. I § 8, cl. 3.
40. Gibbons, 22 U.S. at 189.
A. The Baltimore Presumption of Validity: The Supreme Court's Recognition of the Unlimited Tolling Power of the State

*Overstreet* merely decided that toll roads could be an instrumentality of interstate commerce.\(^{41}\) *Overstreet* did not stand for the proposition that state tolling practices were a violation of the Commerce Clause. The Supreme Court addressed that issue in *Baltimore & Ohio Railroad v. Maryland*.\(^{42}\) *Baltimore* was decided in 1874, seventy years prior to *Overstreet*'s declaration that toll roads can be an instrumentality of interstate commerce. Therefore, *Baltimore*'s reasoning is more akin to *Gibbons*’ “immense mass of legislation” approach.\(^{43}\)

*Baltimore* gave the States an almost limitless tolling power. The Court concluded that the Commerce Clause was originally intended to only cover water commerce, not land commerce.\(^{44}\) Nevertheless, the Court recognized “[t]hat the road is one of the principal thoroughfares in the country for interstate travel.”\(^{45}\) Still, the Court did not consider roads as an instrumentality of interstate commerce. Rather, the Court found that roads were constructed by the States and, thus, the property of the State.\(^{46}\) The Court relied on the fact that, unlike waterways, no artificial roads existed until the States financed the construction, maintenance, and repair of the roads.\(^{47}\) To that end, the Court created a presumption that state tolling practices were valid and declared that States had an “unlimited right” to impose tolls along roads that it created.\(^{48}\) The Court characterized this “unlimited right” as a “sovereign-discretion” of the State and the only check for excessive tolls was the political process.\(^{49}\) The only limit to the State’s “tolling right” that the Court recognized was that the toll imposed by the State cannot amount to a tax on goods or persons travelling in interstate commerce.\(^{50}\) The Court does not devise any tests

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41. See *Overstreet*, 318 U.S. at 129-30.
43. Id. at 471; *Gibbons*, 22 U.S. at 203.
*Baltimore* neither cites nor relies on *Gibbons* for its analysis. Nevertheless, both cases come to the same conclusion: toll roads are the product of state law, thus they are intrastate and do not, on their face, pose a constitutional issue. *Baltimore*, 88 U.S. at 470-71; *Gibbons*, 22 U.S. at 203.
44. *Baltimore*, 88 U.S. at 470.
45. Id. at 469.
46. Id. at 470.
47. Id.
48. Id. at 471 (“This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority.”).
49. Id.
50. Id. at 472 (citing *Crandall v. Nevada*, 73 U.S. 35, 46 (1867)).
In *Crandall*, the Court struck down as unconstitutional a Nevada law that charged a fee of one dollar to everyone travelling through the State by stage coach or train. *Crandall*, 73 U.S. at 46-
to distinguish between a “tax” and a “toll;” instead, the Court presumed that the State’s toll was constitutional.51

Almost twenty-five years after *Baltimore*, the Supreme Court continued to recognize the unlimited tolling right of States.52 However, the Court has never reexamined *Baltimore’s* presumption since *Overstreet* was decided. *Baltimore* relied on the intrastate character of toll roads when it adopted a presumption of validity for state tolling practices.53 However, *Overstreet* relied on the interstate nature of roads in general when it concluded that toll road operators were subject to the FLSA.54 *Baltimore’s* presumption is no longer valid in light of *Overstreet*. Where *Baltimore* presumes that state toll roads are not subject to the Commerce Clause because the roads were created, maintained, and operated by the State, *Overstreet* found the Commerce Clause applicable to toll roads because the roads were “instrumentalities of interstate commerce.”55 Thus, in light of *Overstreet*, *Baltimore’s* presumption must be abandoned.

B. The Evansville Analysis

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, the Supreme Court adopted a three-part test to determine whether State tolling practices violated the dormant Commerce Clause.56 Under the *Evansville* Test, a toll will be upheld as valid as long as it is reasonable.57 A toll is reasonable “if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.”58

The *Evansville* Test has been cited with approval in subsequent cases

47. The dissenting opinion in *Baltimore* found the tolling scheme in *Baltimore* to be indistinguishable from *Crandall*. *Baltimore*, 88 U.S. at 475 (Miller, J. dissenting). Justice Miller provided in *Crandall* that:

[If] the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.

*Crandall*, 73 U.S. at 46.


55. *Id.* at 130.


57. *Id.* at 714-15 (stating that a state toll is constitutional as long as it is “uniform, fair, and practical”).

dealing with user fees.\textsuperscript{59} Furthermore, it was a restatement of rules devised in state tolling cases.\textsuperscript{60} Therefore, some courts have relied exclusively on the \textit{Evansville} Test to determine the constitutionality of state tolling practices. However, if a State tolling practice survives \textit{Evansville}, it only means that the tolling practice is reasonable, not constitutional. A closer examination of the three factors makes apparent that the \textit{Evansville} Test cannot be an exclusive test for determining whether a State's tolling practice violates the dormant Commerce Clause. First, only the third prong relates to interstate commerce.\textsuperscript{61} The other two prongs determine if the user fee is related to the "use" a user receives.\textsuperscript{62} In \textit{American Trucking Ass'n v. Scheiner}, the Supreme Court struck down a Pennsylvania user fee because the fee charged was excessive to the benefit received.\textsuperscript{63} The Court reasoned:

\begin{quote}
[T]he amount of Pennsylvania's marker and axle taxes owed by a trucker does not vary directly with miles traveled or with some other proxy for value obtained from the State. '[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude . . . that the State is imposing an undue burden on interstate commerce.'\textsuperscript{64}
\end{quote}

Thus, under the first two prongs, the Court will look at the relationship a fee has with the use and the benefit derived from that use in order to determine whether that fee was reasonable, not the user fee's relationship with interstate commerce.

Second, the \textit{Evansville} Test does not examine neutral user fees' relationship with interstate commerce.\textsuperscript{65} In fact, the \textit{Evansville} Test may strike down a neutral user fee under the first two prongs because local motorists receive a greater benefit than out-of-state motorists, thereby receiving a disproportionate use for the fee charged.\textsuperscript{66} Toll roads in urban centers are used primarily by local traffic. Local motorists would use the local toll roads almost every day in order to travel to work, go shop-

\textsuperscript{59} See, e.g., Or. Waste Sys. Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 103 n.6 (1994) (stating that \textit{Evansville} would apply if the defendant's scheme amounted to a user fee); American Trucking Ass'n v. Scheiner, 483 U.S. 266, 289-92 (1987) (applying the \textit{Evansville} Test to determine that Pennsylvania's flat tax scheme violated the dormant Commerce Clause).

\textsuperscript{60} See \textit{Evansville}, 405 U.S. at 715, 717 (citing several rules announced in previous cases addressing highway tolling).

\textsuperscript{61} \textit{Id.} at 717.

\textsuperscript{62} \textit{Id.} at 715-17.

\textsuperscript{63} \textit{American Trucking Ass'n}, 483 U.S. at 290.

\textsuperscript{64} \textit{Id.} at 291 (quoting Commonwealth Edison Co. v. Montana 453 U.S. 609, 629 (1981)).

\textsuperscript{65} See generally \textit{Evansville}, 405 U.S. at 707 (failing to address the impact of a neutral user's fee on interstate commerce).

\textsuperscript{66} \textit{See id.} (because the first two prongs of the \textit{Evansville} test address the relationship of the use derived and the fee charged, a neutral fee could fail under the first two prongs though not affecting interstate commerce).
ping, and return home. Local motorists may use the toll road several times a day. However, out-of-state motorists may use the local toll road only once to travel through the community. If out-of-state motorists and local motorists were charged the same toll for use of the highway, the toll may fail the first two prongs of the Evansville Test. The out-of-state motorist had a disproportionally small benefit compared to local motorists. Furthermore, out-of-state motorists may only use a hotel, a gas station, or a restaurant near the toll road. However, local motorists will use multiple shops, restaurants, gas stations, and businesses. In addition, the wearing down of the roadway would be caused primarily by local traffic. Thus, a neutral toll would be found invalid under the first two prongs of the Evansville Test. If anything, local traffic, under the Evansville Test, should be charged a higher user fee than out-of-state traffic.

Last, the Evansville Test’s three prongs can really be reduced to one inquiry: whether the user fee discriminates against out-of-state users. The third prong asks this question outright. However, the first two prongs implicitly ask this question. The first prong determines if the fee is “fair” while the second prong determines if the fee is “excessive.” Fairness, by the very word, implies discrimination. If two groups are treated unfairly, one group is being discriminated against. Likewise, excessive fees are invalid only when related to the benefit received. As the above example illustrates, a casual user that is charged the same or greater fee as a daily user of a highway is always paying an excessive fee in relation to the benefit he receives. Therefore, the “excessive” fee standard is inherently discriminatory. Local traffic will always receive a greater benefit than out-of-state travelers.

However, the Supreme Court has consistently held the Evansville Test to be valid. Still, the test only determines if the fee is reasonable. As illustrated above, it is inefficient to determine whether the dormant Commerce Clause was violated. Only one prong analyzes a fee’s relationship with interstate commerce and the first two prongs only determine if the “fee” is related to the “use.” The modern dormant

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67. See id. (due to local traffic deriving the most use out of highways, a toll road charging a uniform fee to local and out-of-state motorists could fail under Evansville because the benefits would primarily accrue to local users, though local users pay the same rate as out-of-state users).

68. See id. (a uniform fee against local and out-of-state highway users would fail under Evansville because more benefits of use would be conferred upon local users, thus, the benefits derived exceed the fee imposed).

69. Id. at 716-17.

70. Id.

71. Id.


73. Evansville, 405 U.S. at 713.
Commerce Clause analysis is better equipped to determine the constitutionality of fees than the *Evansville* Test. Therefore, the *Evansville* Test should be abandoned in the context of State tolling practices and replaced with the modern dormant Commerce Clause analysis.

C. The Modern Dormant Commerce Clause Analysis

The modern dormant Commerce Clause analysis is a three step inquiry. First, the court must determine whether a State is acting as a market regulator or a market participant. The dormant Commerce Clause is concerned only with state laws that attempt to regulate the market. Hence, the Supreme Court has:

> [A]dhered strictly to the principle ‘that the right to engage in interstate commerce is not the gift of a state, and that a state cannot *regulate* or restrain it’ . . . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from *participating* in the market and exercising the right to favor its own citizens over others.

To determine whether state actions are participation or regulation, the court must answer “a single inquiry: whether the challenged program constituted direct state participation in the market.” If the inquiry is answered in the affirmative, state action qualifies as participation and the dormant Commerce Clause does not apply. Requisite “state participation in the market” is satisfied when the State “buys or sells goods or services” in interstate commerce, manufactures goods to be used in interstate commerce, or provides public funds to finance public projects. On the other hand, a State is a market regulator, and the dormant Commerce Clause applies if it “impose[s] conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of the particular market [in which it is participating].” In addition, a State is a market regulator when it exercises its police powers to foreclose private competition in a particular market. Hence, a State is acting as a regul-

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74. See White v. Mass. Council of Constr. Emp’rs, Inc., 460 U.S. 204, 210 (1983) (stating that disparate impacts on out-of-state businesses only factor in the dormant Commerce Clause equation after it is decided that the state is acting as a market regulator).
76. Id. at 808, 810 (emphasis added) (quoting *H.P. Hood & Sons*, 336 U.S. at 535).
77. White, 460 U.S. at 208 (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 436 n.7 (1980)).
78. Id. at 210.
83. See Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 56 (2d Cir. 1998),
tor if it exerts control over a private business or forecloses a private business from participating in a market.

Second, if the court finds that the State is acting as a market regulator, it must then determine if the State regulation discriminates against interstate commerce. State laws that discriminate against interstate commerce are subjected to the "strictest scrutiny." As a result, all discriminatory laws are "virtually per se invalid." A State regulation can be discriminatory in two ways. First, the State law can be facially discriminatory. A facially discriminatory law places a burden on out-of-state businesses while providing some sort of benefit for in-state businesses. State laws are also discriminatory if they are designed to promote economic protectionism. Protectionist laws may appear facially neutral. However, protectionist laws are inherently "designed to benefit in-state economic interests by burdening out-of-state competitors."

If a law is either facially discriminatory or promotes economic protectionism, it can survive the "strictest scrutiny" if the State "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." In addition, a discriminatory law will be upheld as valid if it favors a government entity that treats in-state and out-of-state businesses equally, furthering a "traditional government

cert. denied, 525 U.S. 923 (1998) ("A state or local government's actions constitute market participation only if a private party could have engaged in the same activity."); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1282 (2d Cir. 1995), cert. denied, 517 U.S. 923 (1998) (arguing that when a state exercises its governmental powers to restrict private entry into a market, the state is no longer acting as a market participant, but a market regulator).

84. White, 460 U.S. at 210; United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).
87. Id. at 99 (citing Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342 (1992)).
88. Id.
90. See Dean Milk, Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951) ("It is immaterial that [in-state] milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.").
93. A government entity is a business that is owned and operated by the government. See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007) ("[T]he laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant."). See also id. at 339-42 (finding that the determination of the waste disposal facility as being a government entity was crucial in deciding that the State law requiring all haulers to bring waste to that facility was not discriminatory).
94. See id. at 345 ("We hold that [when a State law] treat[s] in-state private business inter-
function," and can be repealed or amended through traditional political channels.

Third, if the court determines that the State regulation does not discriminate against interstate commerce, the regulation will be upheld as valid "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." The third prong is often referred to as the *Pike Balancing Test*. Pike balancing is not applied unless the State law promotes a legitimate local purpose. "If a legitimate local purpose is found . . . the extent of the burden [on interstate commerce] that will be tolerated . . . will depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Unlike discriminatory laws, the *Pike* analysis is a minimal analysis, meaning most facially neutral laws will survive its scrutiny.

The modern dormant Commerce Clause analysis, like the *Evansville* Test, is a three part test. Unlike the *Evansville* Test, the modern dormant Commerce Clause analysis is able to account for both discriminatory laws and neutral laws. The *Evansville* Test only determines when a law expressly discriminates against interstate commerce, whereas the modern dormant Commerce Clause analysis determines whether a State regulation discriminates against interstate commerce. For a regulation to be upheld as a valid exercise of State power, the State must demonstrate that the regulation serves a legitimate local purpose and that the burden imposed on interstate commerce is not clearly excessive in relation to the putative local benefits.

95. *Id.* at 334. "Traditional government functions" include "protect[ing] the lives, limbs, comfort, and quiet of all persons." *Id.* at 334, 342-43 (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)). In *United Haulers*, the Supreme Court was hesitant to interfere with who the state citizens decided should carry-out traditional government functions: "It is not the office of the Commerce Clause to control the decision of the [citizens] on whether [the] government or the private sector should [carry-out these traditional government functions]." *Id.* at 344.

96. *Id.* at 344-45. "[D]ormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States . . . ." *Id.* at 345. When the "costs of regulation" are shifted to other States, the parties most burdened by the State law are out-of-state businesses. *Id.* Out-of-State businesses do not have access to the political process to change the discriminatory law, therefore, the "costs of regulation" cannot be remedied through the political process. *Id.* (citing S. Pac. Co. v. Arizona, 325 U.S. 761, 767-68, n.2 (1945)). Instead, the dormant Commerce Clause serves as a substitute of the political process. *Id.* at 345. However, when the people who created the government entity are most burdened by it, they have the ability to challenge the law and change it through the dormant Commerce Clause. *Id.* Therefore, if the impacted group has access to the political process, the courts will not "step in and hand [them] a victory." *Id.*

97. *Id.* at 346 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).


100. *Id.*


law is not discriminatory. Since discriminatory laws are invalidated on their face or in their application in the modern dormant Commerce Clause analysis, the Evansville Test may be applied at the "discriminatory" inquiry. After all, the Evansville test is well equipped to determine whether a user fee discriminates against interstate commerce. In addition, the modern analysis does not employ any specific test to determine whether a State law is discriminatory. The only guidance the Supreme Court has given lower courts is that the law cannot favor in-state businesses and place a burden on out-of-state businesses.

The Evansville Test's three prongs determine if user fees are discriminatory. If Evansville is satisfied, the user fee is struck down as unconstitutional because it discriminates against interstate commerce. The Evansville Test, like the modern dormant Commerce Clause analysis, uses the same standard for finding discriminatory laws. Therefore, the Evansville Test can be used in the scheme of the modern analysis in order to satisfy the "discriminatory prong." Thus, the Evansville Test is still a part of the analysis. It just isn't a determinative part. If the Evansville Test is satisfied, the Court must then apply the Pike Balancing Test to address whether the law's neutrality has an excessive burden on interstate commerce. Thus, the modern dormant Commerce Clause analysis is best suited to address state tolling practices because it can incorporate the Evansville Test and address neutral laws that satisfy the Evansville Test.

3. Three Different Circuits, Three Different Tests?

In Doran v. Massachusetts Turnpike Authority, the First Circuit affirmed a district court ruling that a Massachusetts' tolling scheme did not violate the dormant Commerce Clause. The scheme charged motorists using a FAST LANE device a lesser fee than motorists using an E-Z Pass transponder. The FAST LANE transponder was used almost exclusively by Massachusetts' residents. The court upheld the scheme because, in its view, it treated in-state and out-of-state motorists the same

106. Pike, 397 U.S. at 142.
108. Originally, the scheme, known as the "Resident Only Discount Program," only applied to Massachusetts' residents. Id. at 317. However, the State amended the scheme to include nonresidents that used a FAST LANE transponder for fear of violating the dormant Commerce Clause. Id.
109. Id.
110. See id. (noting that only a "few thousand out-of-state FAST LANE subscribers" would be eligible for the in-state discount).
and did not place an undue burden on interstate commerce.\textsuperscript{111} \textit{Doran} relied on the modern dormant Commerce Clause analysis.\textsuperscript{112}

Likewise, in \textit{Wallach v. Brezenoff}, the Third Circuit upheld a cooperative tolling scheme employed by New York and New Jersey.\textsuperscript{113} In a three-page opinion, the circuit court found that the plaintiffs’ claim did not even trigger the dormant Commerce Clause analysis.\textsuperscript{114} The tolling scheme raised the tolls of the main bridges that connected New Jersey with New York.\textsuperscript{115} The plaintiffs argued that the toll amounted to a tax on interstate commerce.\textsuperscript{116} The court asserted, with little analysis in support, that the plaintiffs’ claim did not violate the dormant Commerce Clause.\textsuperscript{117} \textit{Wallach} dismissed the complaint without using either the modern dormant Commerce Clause analysis or the \textit{Evansville} Test.\textsuperscript{118}

In \textit{Selevan v. New York Thruway Authority}, the Second Circuit found that the plaintiffs had stated a valid dormant Commerce Clause claim.\textsuperscript{119} The New York Thruway Authority ("NYTA") operated a toll road that travelled through Grand Island, NY, along Interstate-190.\textsuperscript{120} The NYTA adopted a tolling practice that charged Grand Island residents as little as nine cents to travel on the toll road, but non-Grand Island residents had to pay seventy-five cents to travel along the same stretch of highway.\textsuperscript{121} The plaintiff challenged the tolling practice as a violation of the dormant Commerce Clause.\textsuperscript{122} The district court dismissed the claim, at the defendant’s request, for lack of standing and failure to state a claim.\textsuperscript{123}

After the Second Circuit found that the plaintiff had standing,\textsuperscript{124} it considered whether the plaintiff stated a valid dormant Commerce Clause claim.\textsuperscript{125} The circuit court rejected that the tolling scheme was \textit{per}

\begin{tabular}{l}
\textsuperscript{111}. \textit{Id.} at 322-23. \\
\textsuperscript{112}. \textit{Id.} \\
\textsuperscript{114}. \textit{See id.} at 1072 ("[P]laintiffs have failed to provide any basis to support their claim that [the dormant Commerce Clause analysis] has not been satisfied."). \\
\textsuperscript{115}. \textit{Id.} at 1071. \\
\textsuperscript{116}. \textit{Id.} at 1071-72. \\
\textsuperscript{117}. \textit{Id.} at 1072-73. \\
\textsuperscript{118}. \textit{See id.} ("[P]laintiffs have failed to present any basis to support their claim that the Port Authority’s 1987 toll increase offended either a constitutionally protected right to travel or the Commerce Clause . . . ."). \\
\textsuperscript{119}. \textit{Selevan v. N.Y. Thruway Auth.}, 584 F.3d 84, 96 (2d Cir. 2009). \\
\textsuperscript{120}. \textit{Id.} at 87. \\
\textsuperscript{121}. \textit{Id.} \\
\textsuperscript{122}. \textit{Id.} at 86-87. \textit{Along with the dormant Commerce Clause claim, the plaintiff also alleged a violation of Article IV and the Fourteenth Amendment’s Privileges and Immunities Clause and a violation of Equal Protection. \textit{Id.}} \\
\textsuperscript{123}. \textit{Id.} at 87-88. \\
\textsuperscript{124}. \textit{Id.} at 89. \\
\textsuperscript{125}. \textit{Id} at 89-90.
\end{tabular}
se invalid because the plaintiff failed to “identify an[] in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors.”

However, the court remanded the case because the district court failed to apply the *Evansville* Test. The circuit court found the significantly higher toll nonresidents had to pay may place a disproportionate burden on interstate commerce.

Thus, the plaintiff’s claim survived a motion to dismiss.

The First Circuit relied on the modern dormant Commerce Clause analysis to dismiss a claim. The Second Circuit relied on *Evansville* in order to find that a claim may violate the dormant Commerce Clause. The Third Circuit, without any analysis upheld the State tolling practice (perhaps resurrecting the *Baltimore* Presumption). Therefore, three separate courts of appeals are possibly using three different standards to determine if State tolling practices violate the dormant Commerce Clause.

4. Selevan & Suprenant: A Changing Attitude towards State Tolling Practices

In *Surprenant v. Massachusetts Turnpike Authority*, the District Court of Massachusetts denied a motion to dismiss in a case with similar facts as *Doran*. Like *Doran*, the tolling scheme at issue in *Surprenant* offered discounted toll rates to persons who purchased a FAST LANE transponder. The FAST LANE program is sponsored by the Massachusetts Turnpike Authority (“MTA”) and is available to both residents and nonresidents. However, unlike the discount program at issue in

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126. *Id.* at 95 (quoting Grand River Enter. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 169 (2d Cir. 2005)).

127. *Id.* at 95-96. Though remanding for application of the *Evansville* test, the circuit court instructs the district court to apply the “Northwest Airlines test” on remand. *Id.* at 96; see *Northwest Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 369 (1994) (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972)).

128. See Selevan, 584 F.3d at 95-96.

129. *Id.*


131. *Surprenant*, 2010 WL 785306, at *2 (“Those eligible to participate [in the resident discount program] are required to join the MTA’s Fast Lane Program.”); see also *Doran* v. Mass. Tpk. Auth., 348 F.3d 315, 317 (2003) (stating that to be eligible for toll discounts on Massachusetts’ roads, motorists are required to purchase a Fast Lane transponder).

132. See *Surprenant*, 2010 WL 785306, at *2 (“The Fast Lane Program enrolls Massachusetts and out-of-state drivers on equal footing.”); see also *Doran*, 348 F.3d at 317 (stating that the Fast Lane Program is for everyone who wishes to participate, not just residents).
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Doran, Surprenant's discount program had a residency requirement. Namely, participants had to be residents of certain Massachusetts communities in order to receive toll discounts at particular tolling stations. A Rhode Island resident that frequently used the Massachusetts toll roads for business and tourism brought suit claiming that the residency requirement violated the dormant Commerce Clause. The court denied the defendant's motion to dismiss, because the record needed more facts in order to properly apply the dormant Commerce Clause analysis. Due to the factual similarities between Doran and Surprenant, the First Circuit would likely endorse Surprenant's holding.

Surprenant is important for two reasons. First, Surprenant found a plausible violation of the dormant Commerce Clause. Until Selevan,


134. Id. at *2 (“The MTA implemented its Tunnel Communities Resident Discount Program in 1995 . . . . Residents of East Boston, South Boston, and the North End, as well as residents of Chelsea and Charlestown, receive discounted tolls when using the Sumner and Ted Williams Tunnels.”). Recall that in Doran, residents and nonresidents were both eligible for the discount program being challenged – the Fast Lane Discount Program. Doran, 348 F.3d at 317. However, originally, the MTA intended only residents be eligible for the Fast Lane Discount Program. See id. (“In response to public opposition [to a toll increase], MTA . . . . proposed to implement a Resident Only Discount Program [that would allow] state residents . . . [to] . . . receive toll discounts . . . .”). In the end, the MTA decided to allow residents and nonresidents alike to participate in the discount program after “a newspaper article questioned whether [a resident only program] violated the dormant Commerce Clause of the Constitution.” Id.


136. Id. at *7-8.

137. The Doran court seemed to focus on the fact that the Fast Lane Discount Program was available to both residents and nonresidents on an equal footing. See Doran, 348 F.3d at 319 (stating that plaintiff’s argument that the Fast Lane Discount Program violated the dormant Commerce Clause is flawed because the program “is available on identical terms to drivers without regard to their residence.”).

138. In 2007, the U.S. Supreme Court, in Bell Atlantic Corporation v. Twombly, raised the pleading standard needed to sufficiently state a claim to survive a 12(b)(6) motion to dismiss. 550 U.S. 544, 555-56 (2007). Previously, a plaintiff needed only to state ‘‘a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . [sic] claim is and the grounds upon which it rests[.]’’ Id. at 555 (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Now, under Twombly, the plaintiff's complaint must state “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the defendant’s wrongdoing].” Twombly, 550 U.S. at 556. In other words, a plaintiff must include sufficient facts to “state a claim to relief that is plausible on its face.”’ Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “A claim [is facially plausible] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 1940 (citing Twombly, 550 U.S. at 556). A complaint lacks plausibility if the facts pled “are ‘merely consistent with’ a defendant’s liability.” Id. at 1940 (quoting Twombly, 550 U.S. at 557). Given this higher factual inquiry, the District of Massachusetts believed that enough facts existed warranting a denial of a motion to dismiss the dormant Commerce Clause claim. See Surprenant, 2010 WL 785306, at *8 (“defendants’ motion to dismiss is . . . DENIED as to the dormant Commerce Clause claim.”).
virtually every dormant Commerce Clause challenge to a State’s tolling practice ended with a dismissal.\(^\text{139}\) Therefore, combined, \textit{Surprenant} and \textit{Selevan} may indicate a changing attitude towards state tolling practices as they relate to interstate commerce. Second, \textit{Surprenant} found a \textit{plausible} violation based on a separate analysis than \textit{Selevan}. In fact, \textit{Surprenant} expressly rejected \textit{Selevan}’s application of the \textit{Evansville Test}.\(^\text{140}\) Instead, \textit{Surprenant} followed \textit{Doran} and found that the \textit{Pike Balancing Test} (a component of the modern dormant Commerce Clause analysis) applied.\(^\text{141}\)

\textit{Surprenant} and \textit{Selevan} both found sufficient facts that state tolling practices \textit{may} violate the dormant Commerce Clause.\(^\text{142}\) However, each used different tests. \textit{Surprenant} followed \textit{Doran} and applied the modern dormant Commerce Clause analysis. On the other hand, \textit{Selevan} believed that the \textit{Evansville Test}, alone, is sufficient to decide the constitutionality of state tolling practices. Due to the similarities between \textit{Doran} and \textit{Surprenant}, the First Circuit would likely uphold \textit{Surprenant}’s reasoning.\(^\text{143}\) Therefore, a circuit split exists as to which test is to be used, the \textit{Evansville Test} or the modern dormant Commerce Clause analysis.

### III. Toll Road’s Purpose v. the Dormant Commerce Clause

The outcome of \textit{Surprenant} and \textit{Selevan} may prompt further lawsuits attacking the constitutionality of State tolling practices. Furthermore, the Supreme Court has included toll roads as part of the “instrumentalities of interstate commerce.”\(^\text{144}\) As such, Congress has the authority to exercise

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139. See John Schwartz, \textit{Toll Discounts for In-State Residents Draw Constitutional Challenge}, \textit{N.Y. Times} (April 2, 2009), http://www.nytimes.com/2009/04/02/us/02ezpass.html (commenting that James Crawford, executive director for the E-Z Pass Interagency Group, “has seen no similar suits in which discounts were challenged on state discrimination grounds . . . aside from a 2007 case in Massachusetts that was dismissed.”). \textit{Selevan} was decided in October 2009, six months after Schwartz’s article. \textit{Selevan v. N.Y. Thruway Auth.}, 584 F.3d 82 (2009).


141. \textit{Id.} at *6.

142. \textit{See id.} at *7-8; \textit{see also Selevan}, 584 F.3d at 103 (holding that “plaintiffs have stated a claim under the dormant Commerce Clause”).

143. The First Circuit will never get an opportunity to examine \textit{Surprenant}’s dormant Commerce Clause claim. On February 4, 2011, the District of Massachusetts granted the defendant’s motion for judgment on the pleadings and ordered the case closed. \textit{Surprenant v. Mass. Tpk. Auth.}, No. 09-CV-10428-RGS, 2011 WL 339217, *5 (D. Mass. Feb. 4, 2011). However, the case was not dismissed on dormant Commerce Clause grounds. Rather, the court dismissed the case under the Eleventh Amendment. \textit{Id.} at *4-5. On November 1, 2009, Massachusetts dissolved the MTA and reassigned its duties to the Massachusetts Department of Transportation (“MDOT”). \textit{Id.} at *1. MDOT is a state agency. \textit{Id.} at *3. On April 5, 2010, the plaintiff amended her complaint, dismissing the MTA and naming MDOT as the defendant. \textit{Id.} at *1. Since MDOT is a state agency, the Eleventh Amendment divested the federal court of jurisdiction, thus dismissing the action. \textit{Id.} at *4-5.

144. \textit{See supra} discussion Part I.A.
its commerce power over toll roads, and States do not have the authority under the dormant Commerce Clause to hinder the “instrumentalities of interstate commerce.” However, the courts of appeals cannot agree on which test to employ. The Supreme Court has recognized three tests used to determine whether state tolling practices are constitutionally valid. However, the Baltimore Presumption is most likely abrogated. On the other hand, the Second Circuit believes the Evansville Test, alone, is a sufficient test to determine the constitutionality of state tolling practices. However, the First Circuit has adopted the modern dormant Commerce Clause analysis. Furthermore, at least one district in the First Circuit expressly rejected the use of the Evansville Test. After comparing the rules, the First Circuit is correct to use the dormant Commerce Clause analysis.145

1. The Modern Day Purpose of Toll Roads

In order to apply the modern dormant Commerce Clause analysis, the court must look to the purpose behind the State law.146 Therefore, the analysis will begin by determining if state tolling practices further a “legitimate local purpose.”147 Modern tolling practices of highways began in England in 1650.148 The English Crown authorized private companies to finance the construction and maintenance of a State highway system in order to accommodate the demands of the English Industrial Revolution.149 The United States would soon follow suit and begin employing toll roads of its own.150

Originally, States created toll roads to further three main objectives. First, toll roads were created to promote commerce.151 Most toll roads that support interstate commerce are designed after the Pennsylvania Turnpike Model (“Model”).152 The Model was specifically designed “to

145. See supra discussion Part I.B.3.
146. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (requiring the court to identify a legitimate local purpose before applying the Pike Balancing Test); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) (stating that a discriminatory law must advance a “legitimate local purpose.”).
147. See Pike, 397 U.S. at 142.
148. See Harmen E. Davis et al., Toll-Road Developments and Their Significance in the Provision of Expressways 6 (1953).
149. Id.
150. In 1772, Virginia chartered the first toll road. Id. The year 1800 marked the beginning of America’s toll road revolution. Id. The revolution ended abruptly in 1837. Id. at 7. Most toll roads were converted to taken over by their respective state and converted to free roads. Id.
152. The Pennsylvania Turnpike Model is named after the Pennsylvania Turnpike. The Turnpike was financed in part by the federal government. See Davis et al., supra note 148, at 8 (the Federal-Aid Act of 1937 provided a federal grant of $29,250,000 and revenue bonds totaling
meet the needs of high-speed high-density traffic.\textsuperscript{153} The Model called for four-lanes of traffic, divided by a median with easy grades.\textsuperscript{154} Therefore, the Model could carry more motorists compared to adjacent free roads and motorists travelling along the Model could reach their destination faster and more efficiently.\textsuperscript{155} In addition, despite the toll, traveling along the Model was a cheaper alternative than travelling on adjacent free roads.\textsuperscript{156} Thus, toll roads were a better alternative to shipping goods in interstate commerce.

However, the advent of the modern Interstate Highway System has made toll roads a less viable means of shipping goods in interstate commerce. The Interstate Highway System consists of over 46,000 miles of road.\textsuperscript{157} Over ninety-three percent of the Interstate Highway System is made up of free roads.\textsuperscript{158} When the Interstate Highway System was built, it modeled its construction after the Model.\textsuperscript{159} Hence, it could carry people and goods just as quickly and efficiently as Model toll roads. In fact, the Interstate Highway System doubled the distance a person could travel

\textsuperscript{153} Owen & Dearing, supra note 151, at 8-9.

\textsuperscript{154} Id. at 8.

\textsuperscript{155} Id. at 8-9. A study conducted in 1950 over a twenty-five mile stretch of the Pennsylvania Turnpike found:

[A] test truck, with gross weight of 50,000 pounds, consumed . . . 6.3 gallons of fuel on the Turnpike and 9.8 gallons on [the nearest adjacent free road]. And more than twice as much time was required to travel the 25-mile section of the [free road] – 1 hour 33 minutes compared to 41 minutes on the Turnpike.

\textsuperscript{156} See id. at 9-10 (noting that motorists travelling along the Pennsylvania Turnpike did not mind paying the toll because they were saving money on vehicle maintenance costs).


\textsuperscript{158} See Ask the Rambler, supra note 152 (noting that the interstate system has incorporated 2,900 miles of toll roads).

\textsuperscript{159} See generally id. (providing that the Model, and other Turnpikes based upon the Model's structure, were incorporated into the Interstate Highway System).
in a day from 300 miles to 600 miles. Therefore, the free Interstate Highway System is a more viable option to ship goods in interstate commerce. Goods travel just as fast as if they were on toll roads. However, the goods can be shipped without the added expense of tolls. Thus, modern toll roads no longer serve the purpose of promoting commerce. The Interstate Highway System has supplanted that purpose.

Second, toll roads were created to promote highway safety. The Model was specifically designed with safety in mind. The Interstate Highway System has implemented the Model. In 1956, before the Interstate Highway System was constructed, the highway fatality rate was 6.05. In 2004, the Interstate Highway System’s highway fatality rate was 0.8, while all other roads, including toll roads not part of the interstate system, was 1.44. The free Interstate Highway System’s highway fatality rate is almost a whole unit lower than non-interstate roads. Based on the numbers alone, the Interstate Highway System is just as safe, if not safer, than toll roads. Therefore, free interstate highways better promote highway safety. Thus, modern toll roads no longer serve the purpose of promoting highway safety.

Last, toll roads were implemented in order to finance the construction and maintenance of the road itself. Toll roads raise revenue through motorists using the road. Therefore, the road must have a sufficient volume of traffic to generate the necessary level of funds to make toll roads economically feasible. Generally, a toll road must balance two competing interests in order to be financially stable and self-sufficient. First, the benefit a motorist receives from using the road must be great enough to induce the motorist to pay a toll to travel along the road. Second, the price of the toll must be sufficient to offset the operation, construction, and maintenance costs of the road. In other words, the price of the toll must be high enough to finance the operation of the road but low enough to induce a sufficient quantity of motorists to pay

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161. See OWEN & DEARING, supra note 151, at 44.
162. See id. at 8-9.
163. See generally Ask the Rambler, supra note 152 (providing that the Model, and other Turnpikes based upon the Model's structure, were incorporated into the Interstate Highway System).
164. The fatality rate of a highway is the number of “[F]atalities per 100 million miles traveled.” Celebrating 50 Years, supra note 3, at 32 (testimony of Richard J. Capka).
165. Id.
166. Id.
167. See OWEN & DEARING, supra note 151, at 44.
168. DAVIS ET AL., supra note 148, at 54.
169. Id.
170. Id.
the toll. Generally speaking, most toll roads find the right balance of toll rates. However, the threat of a toll road failing due to under-financing is still a real concern. In such an event, the State must step in to attempt to resurrect the failed road by expending public funds.

The alternative to tolling as a means to finance and maintain highways is financing roads through federal and state funds. As of 2001, the federal government had spent $370 billion to finance the Interstate Highway System. Annually, the government must pay roughly $15 billion to maintain the Interstate Highway System as it exists today. The Federal Government imposes an 18.4 cents per gallon gas tax in order to finance the Interstate Highway System. However, the rising costs of material and labor will require the States to spend more money to maintain the roads or force the government to increase the gas tax. Legislatures could raise the gas tax in order to meet the rising costs; however, legislatures would have to face the public outcry of higher prices at the pump. Currently, rising gas prices threaten to weaken the economic recovery. Therefore, legislatures would likely be hesitant to raising prices beyond what they already are. Yet, if legislatures fail to act, they risk running out of money to maintain the current highway structure.

Toll roads have traditionally advanced three purposes: promote interstate commerce, promote highway safety, and economic self-sufficiency. However, free roads can fulfill the first two purposes. Free roads are just as safe and efficient as toll roads at moving goods in inter-

171. See id. at 56-58 (analyzing the economics of various Turnpikes around the nation); see also OWEN & DEARING, supra note 151, at 105.
172. OWEN & DEARING, supra note 151, at 105 (noting that where “factors reduce the diversion of traffic from existing public ways,” there is a concern that the toll road will be able to fund itself).
173. See id. at 105-06 (arguing that a State would not allow a toll road to fail, and would fund the road with the State’s highway fund).
174. See Celebrating 50 Years, supra note 3, at 20 (testimony of Jonathan Gifford, Professor, George Mason University) (discussing the amount of federal and state funding the Interstate Highway System has received).
175. Id.
176. Id. at 22-23 (testimony of Eugene McCormick, Chairman, American Road and Transp. Builders Ass’n).
177. See id. at 24.
178. Id. at 22-24.
180. See OWEN & DEARING, supra note 151, at 44.
state commerce. However, toll roads can become economically self-sufficient whereas free roads rely on public funding. Current economic conditions and rising costs make a higher gas tax an unlikely candidate to financing highway construction and maintenance. On the other hand, toll roads are financed by travelers. As long as toll roads continue to balance the price of the toll with the benefit users receive by paying the toll, toll roads will continue to be economically sufficient. Thus, toll roads serve only one legitimate purpose: offer the government a means other than a higher gas tax as a way of financing and maintaining highways. Hence, economic self-sufficiency will be the purpose scrutinized in the dormant Commerce Clause analysis.

2. Economic Self-Sufficiency Scrutinized under the Dormant Commerce Clause Analysis

A. Market Participant v. Market Regulator

When a State enacts a toll, it is acting as a market regulator, not a market participant. State tolling practices do not constitute “direct state participation” in a market. As already stated, a State is a market participant if it “buys or sells goods or services” in interstate commerce,\textsuperscript{181} manufactures goods to be used in interstate commerce,\textsuperscript{182} or provides public funds to finance public projects.\textsuperscript{183} State tolling practices likely fall within any one of these categories. First, States must hire tolling companies and crews to operate the toll roads. \textit{Overstreet} included such jobs as instrumentalities of interstate commerce.\textsuperscript{184} Therefore, when a State “buys” the tolling company’s services, it is buying services in interstate commerce. Second, roads must be constructed and maintained by the State. Asphalt, tar, concrete, and other highway building materials must be manufactured, moved, and finally assembled in order to construct, maintain, and repair toll roads. Again, \textit{Overstreet} recognized that toll roads that primarily move goods and people in interstate commerce are instrumentalities of interstate commerce.\textsuperscript{185} Therefore, when a State manufactures materials to construct highways, the State is manufacturing goods to be used in interstate commerce. Finally, States provide public funds to finance toll roads.\textsuperscript{186} In addition, under certain circumstances, federal funds may be used to construct and maintain \textit{publicly} owned toll

\begin{footnotes}
\item[181.] Bogen, \textit{supra} note 79, at 543.
\item[185.] Id.
\item[186.] See \textit{Owen} & \textit{Dearing}, \textit{supra} note 151, at 19-20 (stating that typically, revenue bonds issued by the State are secured for the construction and maintenance of toll roads).
\end{footnotes}
roads.\textsuperscript{187}

State tolling practices can satisfy all three categories of market participation. However, a State is a market regulator if it exercises its police powers to foreclose private competition in the toll road market.\textsuperscript{188} In order for a business to toll a highway, it must first have the State’s permission.\textsuperscript{189} Furthermore, most state tolling practices are carried out by state-created tolling agencies.\textsuperscript{190} The state-created tolling agencies are considered an arm of the State government. As such, the tolling agencies can exercise the State’s police powers. The agencies have the power to impose criminal sanctions for failure to pay a toll and acquire land for highway construction through eminent domain. Private companies cannot exercise eminent domain and cannot employ criminal sanctions for failure to pay. In addition, a State has to give a private company the authority to impose tolls. Therefore, private competition is dependent on the State to open the market. Since private tolling companies cannot compete with the State on equal footing, the State is acting as a market regulator.

B. Per se Invalid: Discriminatory Statutes and Protectionist Purpose

States employ two separate tolling schemes. The first scheme charges every motorist similarly situated the same regardless of residency.\textsuperscript{191} The second scheme charges in-state motorists a lower fee than

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\textsuperscript{188} USA Recycling, Inc. \textit{v.} Town of Babylon, 66 F.3d 1272, 1282 (2d Cir. 1995), \textit{cert. denied}, 517 U.S. 923 (1998) (arguing that when a state exercises its governmental powers to restrict private entry into a market, the State is no longer acting as a market participant, but a market regulator).
\textsuperscript{189} \textit{See, e.g.}, El Dorado Cnty. \textit{v.} Davison, 30 Cal. 520, 523-24 (1866) (requiring an “[a]ct of the Legislature of [the] State which invests the [tolling company] with [the] authority to convert a public highway into a toll road, and to grant to an individual the right to collect tolls of persons travelling the highway.”); Application of Okla. Turnpike Auth., 359 P.2d 680, 697 (Okla. 1961) (“It should be noted that by law the [Oklahoma Turnpike] Authority may not construct any Turnpike without legislative approval and action.”).
\textsuperscript{191} \textit{See} Wallach \textit{v.} Brezenoff, 930 F.2d 1070, 1072 (3d Cir. 1991).
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out-of-state motorists. The touchstone for a discriminatory law requires in-state businesses to benefit while out-of-state businesses suffer. State tolling schemes that charge all motorists the same fee bestows equal burdens on in-state and out-of-state businesses. Therefore, such laws cannot be discriminatory. On the other hand, when in-state motorists are charged a lower fee than out-of-state motorists, the potential for discrimination is more readily apparent.

The Evansville Test was the product of the Supreme Court’s toll road cases. Therefore, the Evansville Test will be applied to determine if State tolling schemes that charge out-of-state motorists a higher fee than in-state motorists are discriminatory. The first prong of the Evansville Test examines whether the user fee is a fair approximation of the facilities’ use. In American Trucking, the Supreme Court found that an imposition of a flat tax on vehicles traveling through Pennsylvania was not related to the facilities’ used. The Court found that the flat tax did not relate to the motorist’s highway use. Toll roads are distinguishable from the flat tax employed in American Trucking. Tolls are intended to charge motorists based on the distance travelled along the road. Therefore, motorists travelling along toll roads are only charged based on the facilities used. However, the toll must represent a “fair approximation.” Local motorists are more likely to use an in-state toll road than out-of-state motorists. A local motorist may use the toll road several times a day to travel to work, home, restaurants, or stores. Out-of-state motorists may use the toll road rarely or as often as in-state motorists. Normally, out-of-state motorists will use the roads primarily to travel through a state. Therefore, in-state motorists will use tolling facilities more often and on a regular basis. On the other hand, out-of-state motorists will use tolling facilities sporadically. Charging out-of-state motorists a higher fee to use fewer facilities than in-state motorists is not a “fair approximation.”

However, the difference in fees may be attributable to local traffic using the local toll roads on a regular basis. The lower fees may induce local traffic to use the toll roads instead of adjacent free roads. The frequency of use would mean that local traffic, using the road several times a day, may contribute the same, if not more, as the occasional out-of-state motorist over time. If so, state tolling schemes may offer a reduced rate for in-state motorists. Thus, disparate fees can be a “fair approximation” of the facilities used.

192. See Selevan v. N.Y. Thruway Auth., 584 F.3d 84, 87 (2d Cir. 2009).
195. Id. at 290-91.
The second prong of the Evansville Test requires that the fee is not excessive in relation to the benefits conferred. The benefit conferred is the use of the road that includes higher speed limits, controlled access points, reduced traffic, roadside facilities, and well-maintained roads. Since out-of-state motorists will travel along the roadway less frequently than in-state motorists, out-of-state motorists must be reasonably charged for these facilities. On the other hand, in-state motorists may travel on the road several times a day. Therefore, an in-state motorist receives more of a benefit from the toll road and should be charged a fee proportional to that benefit. A reduced fee for in-state motorists means that they are receiving the majority of the benefit at a fraction of the cost. However, the standard requires the fee to be “excessive” to the benefit conferred. Thus, if out-of-state motorists are charged a reasonable fee that is proportional to the benefits received by travelling along the toll road, the fee satisfies the second prong even though in-state motorists pay a discounted rate.

The last Evansville prong requires that the toll not discriminate against interstate commerce. A law that burdens out-of-state businesses and benefits in-state businesses is discriminatory. State tolling schemes can be facially discriminatory. If States are allowed to charge out-of-state motorists a higher fee to use their highways, then a pricing war could erupt between States. Granted, a small difference between the tolls is insufficient to create a burden on interstate commerce. However, if local toll rates are discounted to the point of nullity and out-of-state toll rates are raised to a disproportionate level (i.e., seven times as much as the local rate), the tolling scheme may become discriminatory. Or, if the tolling scheme only charged motorists entering the State, the scheme could be found discriminatory. Therefore, some state tolling practices can be facially discriminatory. Such tolling schemes are per se invalid.

If a law is either facially discriminatory or promotes economic protectionism, it will be upheld if the State “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Facially discriminatory laws will also be upheld where such laws favor a government entity that treats in-state and out-of-

197. Id.
198. Id.
200. See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007) ("[T]he laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant."). See also id. at 339-42 (finding that the determination of the waste disposal facility as being a government entity was crucial in deciding that the state law requiring all haulers to bring waste to that facility was not discriminatory).
state businesses equally,201 furthers a “traditional government function,”202 and can be repealed or amended through traditional political channels.203 The legitimate local purpose toll roads serve is an alternative to highway financing through taxing. Because of the current economic conditions, raising taxes to finance road construction is not a viable solution for legislatures. Raising a gas tax may hamper the economic recovery of the nation. There may be a day in which the nation has recovered and taxes may be increased in order to finance roads. If that day comes, tolling may no longer survive strict scrutiny. Until that day, state tolling practices that finance the construction and maintenance of roads is a legitimate local purpose. Therefore, toll roads must maintain economic viability. If the toll road fails, States would be forced to “flip the bill.” Thus, tolling companies must set rates low enough to attract motorists yet high enough to ensure economic stability.

Toll roads primarily rely on local traffic for financing. Thus, tolls must be tailored to attract local motorists. Therefore, tolls must be low enough to induce local traffic to use the toll road. Reducing toll rates for local traffic ensures a steady stream of financing. The fees accumulate as to each in-state motorist. In other words, if a single motorist uses the toll road twice a day to travel to and from work, five days a week, each individual toll, insignificant to the motorist, eventually results in a steady, rapidly accumulating source of revenue. On the other hand, out-of-state motorists cannot be relied on for steady financing. Since an out-of-state motorist may use the toll road sporadically, the State could justify charging him a higher fee. Each out-state-motorist will contribute an insignifi-

201. See id. at 345 (“We hold that [when a state law treat[s] in-state private business interests exactly the same as out-of-state ones, [it] do[es] not discriminate against interstate commerce for purposes of the dormant Commerce Clause.” (internal quotation omitted)).

202. Id. at 334. “Traditional government functions” include “protect[ing] the lives, limbs, comfort, and quiet of all persons.” Id. at 334, 342-43 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)). In United Haulers, the Supreme Court was hesitant to interfere with who the state citizens decided should carry-out traditional government functions: “It is not the office of the Commerce Clause to control the decision of the [citizens] on whether the government or the private sector should [carry-out these traditional government functions].” Id. at 344.

203. Id. at 344-45. “[D]ormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States. . . .” Id. at 345. When the “costs of regulation” are shifted to other States, the parties most burdened by the State law are out-of-state businesses. Id. Out-of-state businesses do not have access to the political process to change the discriminatory law, therefore, the “costs of regulation” cannot be remedied through the political process. Id. (citing S. Pac. Co. v. Arizona, 325 U.S. 761, 767-68, n.2 (1945)). Instead, the dormant Commerce Clause serves as a substitute of the political process. Id. However, when the people who created the government entity are most burdened by it, they have the ability to challenge the law and change it through the dormant Commerce Clause. Id. Therefore, if the impacted group has access to the political process, the courts will not “step in and hand [them] a victory.” Id.
cant amount compared to in-state motorists even if the in-state motorists pay a reduced fee.

However, the amount of out-of-state motorists is insignificant compared to local motorists. A State primarily relies on local traffic to finance its toll roads. Hence, States tailor tolls to local traffic. As long as the road receives a steady flow of local traffic, the toll road will succeed. Therefore, a State should not depend on out-of-state motorists to fund its highways. A State could charge in-state and out-of-state motorists the same fee and not undermine the sufficiency of its toll roads. Therefore, nondiscriminatory alternatives exist and discriminatory tolling schemes do not survive strict scrutiny.

In addition, discriminatory tolling schemes are not made valid because they favor a government entity carrying out a traditional government function. First, the scheme does not treat in-state and out-of-state businesses equally. Second, the tolling scheme cannot be challenged through traditional political channels. Even though the group most affected by a State’s tolling scheme is local motorists, local toll rates cannot be discounted so low as to make out-of-state motorists the primary financers of the toll road. To do so would allow one state to impose a quasi-highway tax on residents of another state that happens to be traveling through that state. Since the out-of-state motorists have no way to challenge the toll through the political process, the dormant Commerce Clause must be invoked to protect their interests. Therefore, toll roads that charge in-state motorists a discounted fee compared to out-of-state motorists may be discriminatory, and thus per se invalid. However, if the tolling schemes charge in-state residents and out-of-state residents the same fee, the scheme is facially neutral and must survive the Pike Balancing Test in order to be valid.

C. Pike Balancing Test

Since the Pike Balancing Test is a minimal scrutiny test, most state laws survive. Pike applies when the burden imposed on interstate commerce is proportional to the putative local benefit. If the burden is excessive, the law will be invalid. Again, toll roads serve a legitimate local purpose. Toll roads are an alternative to taxing and, if tolls are correctly set, a viable way to save money during this economic recession. Therefore, the state tolling practice will be upheld as long as it does not excessively burden interstate commerce.

204. See, e.g., Murray v. Milford, 380 F.2d 468, 470 (2d Cir. 1967) (stating that “[t]he construction and maintenance of roads is a governmental function” (internal quotations omitted)).
206. Id.
If a State tolling scheme regulates evenhandedly, interstate commerce is not burdened at all. In all actuality, local motorists would be more burdened due to the frequency that they use local toll roads. The minimal use of the toll road by out-of-state motorists is insignificant to the number of times local motorists will travel through the toll plazas. This factor alone indicates that intrastate commerce suffers greater at the hands of state tolling schemes than interstate commerce. In addition, toll roads are sparse in interstate travel. Toll roads make up less than one percent of the entire network of roads in the United States. Hence, motorists travelling in interstate commerce are likely to find alternate routes that are not tolled. Taking these two factors alone, toll roads do not violate the Pike Balancing Test.

IV. Conclusion

The purpose of this Note was to analyze the constitutionality of state tolling practices in light of the dormant Commerce Clause. The Supreme Court has enunciated three rules when determining whether a State’s tolling practice violates the dormant Commerce Clause. First, the Court announced the Baltimore Presumption during the day when toll roads were still considered a part of intrastate commerce. Second, the Court adopted the Evansville Test to assess the constitutionality of user fees after toll roads became an instrumentality of interstate commerce. Finally, the Court has adopted a general analysis that is employed in all dormant Commerce Clause cases.

In addition to the three tests, three separate circuits seem to be applying different tests. Most notably, the Second Circuit believes that the Evansville Test is sufficient. On the other hand, the First Circuit believes that even if the Evansville Test is used, courts must still employ the Pike Balancing Test. Because of the different tests and a split in the circuits, the Supreme Court should grant certiorari to clarify the proper

211. See White, 460 U.S. at 208-10 (citing Reeves, Inc. v. Stake, 447 U.S. 429 (1980).
212. Selevan v. N.Y. Thruway Auth., 584 F.3d 84, 98 (2d Cir. 2009).
standard. I have examined the approaches and believe that the First Circuit is correct. Therefore, this Note analyzed state tolling practices in light of the modern dormant Commerce Clause analysis. Though the analysis is meant to be applied to concrete facts, the analysis found that some state tolling schemes may violate the dormant Commerce Clause. Conversely, state tolling schemes that are not discriminatory do not violate the dormant Commerce Clause. Whether one loves toll roads or hates them, toll roads have been around since the dawn of human history[^14] and are likely not to go away.

[^14]: See Davis et al., supra note 148, at 6.
Note:

An Incompletely Conceptualized Statute: The Railway Labor Act’s Quasi-Federal Agency and its Quasi-Constitutional Problems

Moshe Zvi Marvit*

I. Introduction

One of the most significant and longest lasting pieces of labor legislation has at its core a highly uncertain body. The Railway Labor Act of 1926 (RLA),¹ which covers railroads and airlines, is in part effectuated by The National Railroad Adjustment Board (NRAB),² an agency whose

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2. Id. §§ 151, 153.
core identity has largely been unexamined. The RLA was passed 9 years prior to the National Labor Relations Act (NLRA) and has served as a model for subsequent labor legislation. The RLA provides a mechanism through which labor disputes between railroads, and currently airlines as well, could be handled in a peaceful, non-disruptive manner.4

The Act conceives a separation between “minor” and “major” disputes, and allows different courses of resolution for each.5 Major disputes are those relating to the formation of, or changes to, an agreement between the carriers and unions.6 When a major dispute is at issue, employees remain free to take job actions and bring other economic weapons to bear upon the carrier. Minor disputes are employee grievances,7 and the RLA sought to find a better way to deal with the debilitating effects of unaddressed and poorly addressed minor disputes. Before the RLA, “[d]eadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute.”8 Therefore, the RLA requires the NRAB, a body whose identity is uncertain, to conduct compulsory arbitration for minor disputes that cannot be resolved by the parties.9

The NRAB was formed in 1934, a year before the passage of the NLRA, and was one of the earliest federal agencies to be established and yet has remained one of the least considered federal agencies.10 The NRAB functions similarly to private arbitration, but is identified as a federal agency. It was designed to keep the peace in the world of railroads, aptly described by Lloyd Garrison as “a state within a state,” with “its

4. Railway Labor Act of 1926, § 151(a) (The five purposes of the Act are: “(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.”).
5. The terms “major” and “minor” were first used in the seminal case of Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 723-24 (1945).
6. Id. at 723.
7. Id. at 724.
8. Id. at 726.
own economy, language, and culture." The NRAB has a simple but arcane set of procedures, promulgated during its one-time rulemaking of 1934, and is constituted by the very parties for which it is intended to serve as referee. The uncertain identity of the NRAB, whether public or private, has nowhere caused more confusion than in the question of constitutional protections.

This paper addresses the various dimensions, issues, and problems associated with the NRAB and its identity. It attempts to examine the NRAB's identity through the lens of due process and state action, and tries to take up a question that the Supreme Court left open this term in *Union Pacific Railroad v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region, (UP v. BLET).*

This inquiry is important because it attempts to better identify a unique federal agency at the heart of American transportation and provides another lens through which to examine the complicated state action doctrine.

1. 1979: Sheehan v. Union Pacific

After 30 years of confusion and a near balanced circuit split, the Supreme Court had the opportunity to provide resolution on a vexing problem in labor law, a problem that the Court had a hand in creating. The *UP v. BLET* case presented the question of whether a party is entitled to due process judicial review of arbitration compelled by the RLA and conducted by the NRAB. The question of due process review of NRAB awards had never been a controversial issue until the Supreme Court ostensibly tried to address the question in 1979 in *Union Pacific R.R. v. Sheehan.* The *Sheehan* decision was short, per curium, and passed without the benefit of briefs or oral arguments. The issue in *Sheehan* was whether the Tenth Circuit had erred in vacating an NRAB award on due process grounds because the NRAB refused to toll the arbitration. The Supreme Court reversed, holding:

If the Court of Appeals' remand was based on its view that the Adjustment Board had failed to consider respondent's equitable tolling argument, the

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13. *Id.* at 588.
15. *Id.* at 92-93.
court was simply mistaken. The record shows that respondent tendered the tolling claim to the Adjustment Board, which considered it and explicitly rejected it. If, on the other hand, the Court of Appeals intended to reverse the Adjustment Board's rejection of respondent's equitable tolling argument, the court exceeded the scope of its jurisdiction to review decisions of the Adjustment Board.16

Sheehan did not hold that there was no due process review under the NRAB; it simply held that the Tenth Circuit erred in applying due process review in the case at issue.17 The decision seemed to simply reiterate the fact that there are few grounds for review of an arbitration decision by the NRAB, and that the particular facts in the Sheehan case did not fit neatly into one of those circumscribed exceptions. Sheehan affirmed the proposition that "the scope of judicial review of Adjustment Board decisions is 'among the narrowest known to the law.'"18 The Sheehan decision also unhelpfully proclaimed the seemingly simple proposition that "[the RLA] statutory language means just what it says."19 The problem with such statements, when not followed by a description of how to interpret the statute, is that it gives fodder for both sides in a situation where the statute is arguably ambiguous.

Following Sheehan, the circuits split five to four on whether there is due process judicial review under the (RLA), with the five circuits that allow it focusing on the text and history of the RLA, and the four circuits that preclude it focusing on their reading of Sheehan.20 The 2009 case of UP v. BLETF21 presented a unique set of facts that seemed ripe for the Supreme Court to finally resolve the matter. Furthermore, in the Seventh Circuit's refusal to hear the case en banc, Judges Easterbrook and Posner wrote a concurrence where they threw up their hands over the matter, saying that though they disagreed with the circuit's rule on due process, the Seventh Circuit would not rehear the case en banc because "[t]here is little to be gained from making the conflict 5-4 one way rather than 5-4 the other way. Only Congress or the Supreme Court can bring harmony, and neither institution seems much interested in doing so. (This conflict is 23 years old.)."22

16. Id.
17. Id. at 93-95
18. Id. at 91.
19. Id. at 93.
2. 2009: Union Pacific v. Brotherhood of Locomotive Engineers

*UP v. BLET* involved five engineers who had their claims dismissed by the NRAB for failure to include evidence of conferencing with the carrier in their “on-property” submission. Conferencing, which is required by the RLA, is merely an informal process through which the parties try to resolve the grievance before submitting it for arbitration. The union offered to submit evidence that conferencing occurred, but the neutral arbitrator on the panel refused to consider the evidence because it had not been included in the “on-property record.” The carrier did not deny that conferencing took place and later in the litigation admitted that two of the grievances were conferenced, but held the position that evidence could not be submitted at this stage of the arbitration. Conferencing between the parties, which is intended to be a final effort to try to resolve the matter internally before resorting to arbitration, is a requirement of the RLA. But nowhere in the RLA, or the procedures prescribed by the NRAB, is there an evidentiary rule of when and how submissions concerning evidence of conferencing should occur. Indeed, conferencing is often an informal affair, consisting of a brief telephone exchange between the parties, and it is usually assumed to have occurred. In the NRAB Instruction Sheet, the Board states that parties should “omit documents that are unimportant and/or irrelevant to the disposition of the dispute;” and in this case the issue of conferencing was not originally in dispute. The engineers argued that they were prejudiced by a new evidentiary rule and sought to set aside the arbitration on three grounds, two of which are explicitly articulated in the


27. Railway Labor Act of 1926, 45 U.S.C. § 152 (2006) (“All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.”).


The RLA articulates three grounds upon which an arbitration may be set aside: "for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." Prior to the 1966 Amendments to the RLA, which added these three grounds for setting aside an arbitration award, the Supreme Court read the additional implied ground of due process into the Act. Between 1966 and 1979, when the Sheehan case was decided, the courts continued to assume that due process was available to carriers and employees, reading no change on this front in the 1966 Amendments. Sheehan's glib and sloppy simplicity created a problem, with employees and carriers each staking out a position: the carriers maintained that Sheehan illustrated how the 1966 Amendments to the RLA wrote out of the Act any sort of due process review, while the employees maintained that Sheehan and the 1966 Amendments did nothing to change the longstanding presumption that parties who suffer a violation of due process are entitled to judicial review.

In UP v. BLET, the BLET engineers argued that the arbitrator created a new rule in the middle of their case and that rule substantially prejudiced them. Therefore, they argued that there were three grounds for vacating the arbitration: failure to comply with the RLA, failure to conform to NRAB jurisdiction, and violation of due process. On the carrier's motion for summary judgment, the district court held that due process review is available under the RLA, but there was no such violation in this instance because the NRAB precedent put BLET on notice of the requirement to submit evidence of conferencing in the on-property submission.

36. Id. at 749-50.
38. Id. at 775-76.
The Seventh Circuit reversed the district court's decision, holding that the NRAB panel made up a new jurisdictional rule that violated the employees' due process rights. The appeal was brought on both constitutional and statutory grounds, and though the Seventh Circuit acknowledged the "fundamental rule of judicial restraint" of addressing statutory issues before constitutional ones, it said that in this instance "once we answer the key question at issue in this case, adjudication of the due process claim is unavoidable." The Seventh Circuit answered the key question of whether proof of conferencing is a pre-requisite to NRAB jurisdiction in the negative and therefore found that there was a violation of due process. The carrier objected to due process review, arguing that the only grounds for judicial review were articulated in the RLA. The Supreme Court accepted certiorari in the UP v. BLET case ostensibly to resolve the circuit split over the open question of whether the RLA permits due process review of NRAB awards. The question raises serious issues that have not been sufficiently addressed by the circuits, including an answer to what exactly is the NRAB and whether the state action requirement for constitutional claims is satisfied. The answer to this inquiry is at the center of the constitutional issues surrounding the NRAB, because only state action is subject to due process constraints. The circuits that permit due process review under the RLA typically look to the development and presumptions of the Act and the general rule that there is presumed constitutional review, absent "clear and convincing evidence" that Congress intended to foreclose judicial review. The circuits that deny due process review perform no analysis of the Act or its history, but simply defer to their interpretations of *Sheehan*.

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40. *Id.* at 750.
41. *Id.*
42. *Id.* at 751.
43. *Id.*
45. See *Edelman v. Western Airlines*, 892 F.2d 839 (9th Cir. 1989); *Shafii v. PLC British Airways*, 22 F.3d 59 (2nd Cir. 1994); *Armstrong Lodge No. 762 v. Union Pacific R.R.*, 783 F.2d 131 (8th Cir. 1986).
47. See *United Steelworkers of Am. Local 1913 v. Union R.R.*, 648 F.2d 905, 911 (3d Cir. 1981) ("However, even if Godich’s characterization of his claim is correct, we note that there is no language in Sheehan to justify such a procedural/substantive distinction. To the contrary, the Court in Sheehan was quite specific in rejecting nonstatutory grounds for review."). See also *Jones v. St. Louis-S.F. Ry. Co.*, 728 F.2d 257, 261-62 (6th Cir. 1984) ("While the appellant characterizes this error as constituting a due process violation, we recognize that such a claim cannot serve as a basis for judicial review in this context (citations omitted). The gravamen of this
The Supreme Court affirmed the Seventh Circuit, but held that the ruling should have been under a statutory rather than a constitutional rubric.48 In a unanimous decision written by Justice Ginsburg, the Court held that the NRAB panel failed “to conform, or confine itself,” to matters within the scope of the division’s jurisdiction when it dismissed the engineers’ charges for lack of jurisdiction.49 Congress did not grant the NRAB panel authority to define its own jurisdiction, and therefore the NRAB arbitration could be vacated and remanded on a statutory exception provided in the RLA rather than through a violation of due process.50 The Supreme Court left the circuit split that followed Sheehan intact and left the constitutional question for another day.51

The issue that the Court decided to leave unanswered involves a series of difficult questions that hit at the core of the NRAB’s identity and constitution, and at the very purposes of the RLA and the 1966 Amendments to the Act. It is what Judge Posner has referred to as “a bundle of delicious uncertainties.”52 In order to begin to determine whether one can bring a constitutional claim concerning an NRAB proceeding, it must first be determined what exactly the NRAB is.53 This examination of the NRAB should be performed with the background of the state action inquiry in order to better understand if its actions can be fairly attributable to the government.

3. The State Action Omission in the Courts

In discussing the question of whether due process review is permitted under the RLA, both Congress and the judiciary consistently fail to address the important preliminary question of whether the NRAB fulfills the state action requirement. The NRAB is a quasi-administrative agency and is not controlled by the Administrative Procedure Act of 1946 (APA), which governs the procedures of federal agencies.54 If the NRAB were under the APA, there would be no question of whether constitutional review would be available, as it is one of the six forms of review portion of the appellant’s complaint, however, is that he attacks the award as being improper because the Board failed to comply with the requirements of the Railway Labor Act, namely 45 U.S.C. 1st(j) and (n).”); Kinross v. Utah Ry. Co., 362 F.3d 658, 662 (10th Cir. 2004); Henry v. Delta Air Lines, 759 F.2d 870, 873 (11th Cir. 1985) (per curiam).
49. Id. at 599.
50. Id. at 595-96.
51. Id. at 596.
53. For a contemporaneous history of the NRAB, see Garrison, supra note 11.
that the APA prescribes.\textsuperscript{55} But the NRAB is not covered because it is "composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them."\textsuperscript{56} As a basic matter, it is not clear that the state action requirement for constitutional review has been satisfied when the NRAB decides a case. There have been 69 cases where a party has attempted to get an arbitration award under the RLA vacated on due process grounds.\textsuperscript{57} Of these, six have


\textsuperscript{56} Id. § 551(1)(E).

been brought by the carrier, and two have been successful.\textsuperscript{58} Sixty-four of the cases were brought by the employee or union, and three were successful.\textsuperscript{59} These figures are relevant in part because, though due process review usually benefits the weaker party in a dispute, in this instance both parties have brought due process arguments with similar levels of success. This is in line with the purpose of the 1966 Amendments, where Congress attempted to create a balance of power between the unions and the carriers.\textsuperscript{60} It is further relevant because none of these decisions have ever reasoned through the state action question.\textsuperscript{61} The only place that the argument has ever been made one way or the other is in the AFL-CIO’s amicus brief in support of BLET; and curiously they made the argument that the state action requirement was not satisfied and therefore due process review should not be available.\textsuperscript{62}

The AFL-CIO correctly stated that Judge Posner’s brief dicta on state action in \textit{Elmore v. Chicago & Illinois Midland Railway Co.}, represents the entirety of the judiciary’s wrestling with the state action issue in regards to the NRAB.\textsuperscript{63} In \textit{Elmore}, the Seventh Circuit stated:

The tribunal, although grandly styled the National Railroad Adjustment Board, in fact consists of private individuals chosen by the railroad industry and the railroad unions. The standard of judicial review of these arbitrators’ decision is similar-perhaps, as we recently suggested in \textit{Brotherhood of Lo-
comotive Engineers v. Atchison, Topeka & Santa Fe Railway, identical to the standard for judicial review of commercial and labor arbitration in general. Errors, even clear ones, are not grounds for setting aside the decision. If the decision is a bona fide effort to interpret and apply the parties' contract (the collective bargaining agreement), it is conclusive.

Private arbitration, however, really is private; and since constitutional rights are in general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term "due process of law" cannot give rise to a constitutional complaint. The National Railroad Adjustment Board, however, while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law.64

Aside from this description of the public nature of the NRAB, there seem to be no other direct statements about an arbitrator's award constituting state action.65 Several plaintiffs have attempted to bring due process cases stemming from the employer's conduct rather than the NRAB's conduct, but the courts have consistently rejected this argument.66 Edwards v. St. Louis-San Francisco Railroad 67 was an interesting hybrid case decided in the same term that the 1966 Amendments were passed, where the employee made two distinct due process arguments.68 The first was that the employee's constitutional rights had been violated by the railroad's failure to allow him to confront the main wit-


The courts that considered the question of whether one could bring a constitutional challenge to emergency board procedures held that state action existed and due process review was available. See e.g., Bhd. of R.R. Trainmen v. Chi., Milwaukee, St. Paul & Pac. R.R. (Lines East), 237 F. Supp. 404, 418 (D.D.C. 1964). ("In concretizing, through binding adjudications in compulsory proceedings, a function initiated by the Joint Resolution, they act under the aegis of Congress. The organization asserts here a claim of deprivation of the due process right to a full and fair hearing. The actions of the Special Board thus placed under attack bear vividly the imprimatur of government, and must withstand the test of the Fifth Amendment.").


68. Id. at 951-56. The AFL-CIO significantly misread in its UP v. BLET amicus brief that argued that the NRAB's conduct did not constitute state action. See AFL-CIO Brief, supra note 62, at *18-19.
The Seventh Circuit made the distinction between the employee’s right to due process before the company investigator and before the NRAB, stating that in the former instance due process does not attach. The Seventh Circuit held that even if the collective bargaining agreement resulted in unfair results and contained unfair procedures, it is still a private contract.

The plaintiff in Edwards made a second due process argument based on Shelley v. Kraemer, that “[T]he Adjustment Board - ‘an administrative arm of the federal government’ - cannot enforce a decision or action taken prior to its own finding where that decision or action would itself be unconstitutional in the first instance.” The Seventh Circuit rejected this argument because the NRAB is a unique arm of the federal government that does not simply give its imprimatur to the controversies it handles.

The Court laid out the unique nature of the NRAB and why it was not amenable to a Shelley analysis:

Furthermore, appellant’s characterization of the Adjustment Board as an ‘arm of the federal government’ is an imprecise over-simplification of the issue as he presents it. While there is no doubt that the National Railroad Adjustment Board has responsibilities which ultimately flow to the public, it is equally evident that the Board is not of the conventional species of governmental agency as they are generally envisaged. Rather, this Board is part of a framework for peaceful settlement of labor disputes between carriers and their employees, consisting of bipartisan representatives selected and paid by the respective parties, the purpose of which is to provide ‘a mandatory, exclusive, and comprehensive system for resolving grievance disputes,’ in the nature of ‘compulsory arbitration in this limited field.’ Looking to the nature of the Board itself, therefore, it is clear that the action it took in this case, the procedural aspects of which were those contemplated by the statute, cannot be said to be of that category of ‘governmental action’ prohibited by the constitutional demands of Shelley v. Kraemer.

The Edwards court concludes that it does not know what the NRAB is, but it knows what it is not; that is, it is not analogous to the judiciary.

4. The NRAB and the State Action Inquiry

The state action inquiry should focus on the several tests that the Supreme Court has articulated, with particular attention to the unique facts surrounding the NRAB. These tests are the “traditional state function” test, the “nexus” test, the “symbiotic” test, the “compulsion” test,
and the "agency of the state" test. The "traditional state function" test finds state action in private conduct when the private party is performing a traditional state function, such as the operation of a company town.\textsuperscript{75} The "government involvement" or "nexus" test looks at "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."\textsuperscript{76} The "interdependence" or "symbiotic" test looks at whether the "State has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the [Constitution]."\textsuperscript{77} The "compulsion" test finds state action where the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."\textsuperscript{78} The "agency of the state" test finds state action where the private party is controlled by an agency of the State.\textsuperscript{79} Ultimately, all the tests try to answer the same difficult question: in what instances should the government take responsibility for conduct of private actors? The examination of the NRAB must look at the language of the RLA, Congressional intent as found in the legislative history, and the functioning of the Board.

The compelled nature of NRAB arbitration, the procedures prescribed by the government, and the compensation of neutrals applied to the tests above indicates that NRAB arbitration constitutes state action. Carriers and employees covered by the RLA have no choice but to proceed with NRAB arbitration (or NRAB type arbitration through a PLB or SBA)\textsuperscript{80} if they cannot resolve problems on their own. NRAB arbitrations must be distinguished from private arbitrations, which are contractual arrangements between the parties.\textsuperscript{81} The mandatory nature of NRAB arbitration is analogous to the mandatory administrative adjudication that parties under the jurisdiction of other federal agencies must follow.\textsuperscript{82} The exclusive judicial nature of the NRAB may not be what the Supreme Court anticipated in its "traditional state function" test, but on its face it seems to satisfy the test.

The National Mediation Board (NMB) staffs and pays for the opera-
tions of the NRAB. The NMB also determines which persons may serve as possible referees. It sets their rate of pay and determines the propriety of the Referee’s expenses, which are also paid by government funds. The NRAB is administered by federal employees operating out of government offices in Chicago and Washington D.C. The United States Attorneys represents NRAB panels in any federal or state courts in which they may be sued. Furthermore, the procedures of the NRAB, contained at Circular One have the status of federal regulations and are codified in the Code of Federal Regulations. This involvement with the private arbitrators meets the court’s “symbiotic” test requirements.

When the RLA was passed in 1926, it did not have a provision calling for mandatory arbitration through a federal adjustment board. The RLA merely allowed for temporary local voluntary boards of adjustments to be created by contract between the carriers and the employees, and set the procedures of these boards and the parameters for what these boards would handle. The Act made it clear that there was no obligation to submit matters to arbitration, but in an unremarkable move, simply articulated the possibility of doing so. The Act creates a purely voluntary mechanism that the parties may contract to follow if they choose. The 1926 bill itself reads as a contract, perhaps unsurprisingly as it was a compromise between the carriers and the unions, ratified by Congress with an expectation that the courts would interpret it functionally. By 1934, the carriers, the unions and Congress recognized that the

84. 29 C.F.R. § 1202.10 (2010).
85. Railway Labor Act of 1926, § 153(u).
86. Id. § 153(s).
88. 29 C.F.R. § 301.5 (2010).
89. Railway Labor Act of 1926, Pub. L. No. 69-257, § 3(d), 44 Stat. 577, 578 (“In case of a dispute between a carrier and its employees, arising out of grievances . . . it shall be the duty of the designated representative or representatives of such carrier and of such employees . . . to confer in respect to such dispute.”).
90. Id. § 3, 44 Stat. at 578.
91. Id. § 7, 44 Stat. at 582 (“Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board . . . such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three . . . persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.”).
92. CSX Transp. Inc. v. Marquar, 980 F.2d 359, 379-80 (6th Cir. 1992) (The Sixth Circuit noted “[t]he legislative history of the RLA demonstrates that Congress intended for the courts to develop private remedies on a case-by-case basis. That is, Congress expected the courts to develop a body of law, analogous to the common law, for the enforcement of the RLA.”); see 1 THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY 283 (Michael H. Campbell &
Railway Labor Act

RLA needed to be amended “[t]o relieve the existing emergency in relation to interstate railroad transportation [and] to provide for the prompt disposition of disputes between carriers and their employees.”\(^{93}\) The Report of Congressman Dill, from the Committee on Interstate Commerce, discussed the experience of the unions and carriers under the 1926 version of the RLA:

They have tried this act for nearly 8 years. It has served a most useful purpose and brought about many good results, but both representatives of the railroads and employees agree that it needs improvement. The most important change in the bill is the creation of what is termed the “National Adjustment Board.”\(^{94}\)

The 1934 Amendments to the RLA established a National Railroad Adjustment Board (NRAB), composed of 36 members (18 selected by the carriers and 18 selected by unions) that is divided into four divisions, each with a different area of jurisdiction.\(^{95}\) These individual divisions were empowered to create arbitration panels composed of one carrier and one union representative, with a neutral referee chosen and compensated by the NMB.\(^{96}\) Congress authorized the full NRAB panel to engage in a one-time rulemaking “as it deems necessary to control proceedings before the respective divisions,”\(^{97}\) which resulted in the promulgation of Circular One. This has remained the primary instructions for proceeding with NRAB arbitration.\(^{98}\)

All “minor disputes” between employees and the carrier, disputes “growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions,” must be submitted to compulsory arbitration conducted by the NRAB,\(^{99}\) or by a Public Law Board or Special Board of Adjustment.\(^{100}\) NRAB awards

Edward C. Brewer III eds., 1988) (“The law for enforcement would be developed in the courts.”).

96. 3, 48 Stat. at 1190.
98. 29 C.F.R. § 301.1 (2010).
100. Id. § 153 (The RLA permits the parties to form a Public Law Board (PLB) or Special Board of Adjustment (SBA), where the neutral is chosen by the NMB, in lieu of proceeding through the NRAB. The SBA is created by mutual agreement of the parties to decide specifically designated grievances between a single union and carrier. The PLB is similar, but may be established upon the written request of either party. If either party becomes dissatisfied with the
are intended to interpret contract language drafted by the parties, and they are often not well-reasoned.101

The NRAB as a whole, the individual divisions, and the panels empowered to hear cases are each unique bodies whose actions must be considered individually. The panels that actually hear the cases are composed of two representatives from the carrier and two representatives from the union, each of which is paid by the body they represent, and one neutral member.102 The neutral member is compensated through the NMB, which is the federal agency that funds and staffs the NRAB as a whole.103 The NMB’s relationship to the NRAB is not entirely clear, as evidenced by the comments received when the NMB attempted to promulgate a rule for the NRAB in 2005.104 During that process, many of the comments, including a letter written by 125 members of Congress, argued that the NMB did not have statutory authority to promulgate rules.105 The Fourth Circuit tried to describe the tenuous relationship between the NMB and the NRAB:

The Board’s relationship to the NRAB is very limited and does not trench upon the substantive responsibilities of the NRAB. The most important link between the two bodies is that the Board holds the pursestrings for expenditures by the NRAB and its regional boards. In their substantive areas of operation, however, the two bodies are totally separate and distinct. The NRAB has exclusive and mandatory jurisdiction to adjudicate minor disputes, including discharge grievances, and the Board has no power to review the work of the NRAB. Rather, review of NRAB awards is in the appropriate district court.106

Between 1934 and 1966 an imbalance had developed with regards to enforcement of NRAB awards, with carriers in a far stronger position than unions. Prior to the 1966 amendments, a carrier who had an adverse NRAB money award could simply choose not to comply.107 The employee or union had two courses of action in such a scenario: either petition a federal district court and have the matter reviewed de novo, or

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101. Garrison, supra note 11, at 584 (explaining the NRAB’s early awards “The evidence indicates that the movements made did not constitute switching under Article I-R.”).
102. Railway Labor Act of 1926, §153(f)-(g).
103. ld. § 153(g).
105. ld.
107. Garrison, supra note 11, at 591 (noting that “[t]he board has no power of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance”).
bring economic pressures to bear upon the railroad.\textsuperscript{108} Either because of the strength of the unions or because of the perceived unfairness of the federal judiciary, the latter course was far more often taken by employees and unions.\textsuperscript{109} The employee, on the other hand, had no statutory recourse if the NRAB ruled against him.\textsuperscript{110} Due process was used on occasion, with the courts generally assuming that such review was available under the RLA.\textsuperscript{111}

In 1959, the Supreme Court explicitly stated in two cases that even if the RLA did not provide statutory grounds for judicial review, due process review was available to aggrieved parties.\textsuperscript{112} \textit{Union Pacific v. Price} held that when an employee lost a NRAB arbitration, he could not file the same claim in state court.\textsuperscript{113} The court also clearly held that the RLA, as conceived, allowed for review of awards on due process grounds.\textsuperscript{114}

In \textit{Pennsylvania Railroad v. Day}, the majority did not discuss the issue of due process, but Justice Black, joined by Chief Justice Warren and Justice Douglas, brought up the issue in dissent.\textsuperscript{115} Justice Black’s comments on due process review constitute the part of the dissent that the majority would likely agree. He states:

\begin{quote}
I would affirm the judgment of the Court of Appeals for two reasons: I do not agree that the Railway Labor Act requires retired railroad employees to submit their back-wage claims to the National Railroad Adjustment Board; I believe that Act, as here construed to grant railroads court trials of wage claims against them while compelling the employees to submit their claims to the Board for final determination, denies employees equal protection of the law in violation of the Due Process Clause of the Fifth Amendment.\textsuperscript{116}
\end{quote}

\begin{enumerate}
\item[108.] \textit{Id.}
\item[109.] \textit{Id} at 591-92 (Noting that between 1934 and 1936, there were 1,616 awards, approximately half of which were in favor of the union. Only one of these awards was petitioned for enforcement in federal court, either because the carriers voluntarily complied or because the unions effectively threatened job actions. The author presumes that the latter was the true reason for the dearth of judicial involvement. The one case that was petitioned to the district court involved a violation of due process, where the court held that an employee had been deprived of due process by being deprived of seniority rights and having an NRAB hearing without notice. \textit{See Griffin v. Chi. Union Station Co., 13 F. Supp. 722 (N.D. Ill. 1936)).}
\item[110.] Garrison, \textit{supra} note 11, at 591 (stating that “[t]he statute gives no right of appeal to either carriers or unions from an adverse decision of the Hoard [sic]”).
\item[111.] \textit{See Griffin, 13 F. Supp. at 724.}
\item[113.] \textit{Price, 360 U.S. at 617.}
\item[114.] \textit{Id} at 616 (“Congress did not purpose to foreclose litigation in the courts over . . . the review sought of an award claimed to result from a denial of due process of law.”).
\item[115.] \textit{Day, 360 U.S. at 554.}
\item[116.] \textit{Id.}
\end{enumerate}
Justice Black later mentions in a footnote that “[c]ourts have intimated, however, that review of Board rulings adverse to the employee is permissible to the extent of insuring that the employee was not deprived of procedural rights protected by due process.” He cites to both *Ellerd v. Southern Pacific Railroad* and *Barnett v. Pennsylvania-Reading Seashore Lines*, which the *Price* decision also cited to for this proposition.

The 1966 Amendments to the NRAB set out to abate the inequity that had developed under the RLA in favor of the carriers. Congressman Staggers’ Report to the Committee of the Whole House stated that the employee “has no means by which judicial review may be obtained.” One of the explicit purposes of the amendments was to provide the employee statutory means of judicial review. “The constitutionality of permitting judicial review to be obtained by carriers while such review is prohibited to employees was upheld in 1959 in two decisions of the Supreme Court, *Union Pacific v. Price*, and *Pennsylvania Railroad v. Day*.” Quoting these two decisions with general approval is relevant in understanding Congressional intent with regards to due process because both *Price* and *Day*, decided in the same term, state that there is judicial review for due process violations by the NRAB.

The legislators’ approval of *Price* and *Day*, juxtaposed beside their statements that previous to the 1966 amendments an employee had no judicial review, shows that the legislators accepted the constitutional review articulated by the Supreme Court in several 1959 cases as a given. When legislators stated that under the pre-1966 scheme, an employee who “loses his case before the National Railroad Adjustment Board . . . has no judicial remedy at all—he cannot sue the railroad on his claim, and he cannot obtain judicial review of the decision of the Board,” they did so

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117. *Id.* at 558 n.7.
118. *Ellerd v. S. Pac. R.R. Co.*, 241 F.2d 541 (7th Cir. 1957) (holding that due process review is available if employee had been denied due process by having unauthorized union represent him before the NRAB).
119. *Barnett v. Pa. Reading Seashore Lines*, 245 F.2d 579, 581 (3rd Cir. 1957) (stating that if there was an allegation of a violation of due process then the employee may have received review).
120. *Day*, 360 U.S. at 558 n.7.
122. *S. Rep. No. 89-1201*, at 1, (1966), *reprinted in The Railway Labor Act of 1926: A Legislative History, supra* note 92, at 1337 (noting that “[t]he principal purpose of the bill is to . . . provide equal opportunity for limited judicial review of awards to employees and employers”).
in the shadow of *Price*. The "no judicial review" meant "no statutory judicial review." The legislators accepted the Supreme Court's interpretation of the RLA to allow for due process judicial review, and based much of their constitutional arguments on the Court's 1959 interpretation of the RLA.

The 1966 amendments to the RLA only expanded judicial review; they did not limit them. The purpose of the amendments was to make the RLA fair by expanding employees' access to judicial review following an NRAB decision. Congressman Staggers remarked that "the one-sidedness of existing law is extremely unfair to employees." In the Senate, Senator Morse remarked of the pre-1966 law, where an employer could get statutory judicial review while an employee could not, that "the committee believes that this result is unfair to employees and that an equal opportunity for judicial review should be provided under the act." It would be inconsistent with this purpose to insert an implied preclusion of review for a constitutional principle that is synonymous with fairness. Nowhere in the legislative history do any legislators decry the Supreme Court's decision in *Price*. Quite the opposite: legislators use *Price* to state that the additional statutory grounds for judicial review are constitutional. It would be a strange reading of the legislative history to find implicit preclusion of due process review in a statute that was intended to bring fairness to the RLA and expand employees' access to the courts when they can show fundamental unfairness in an NRAB proceeding.

Though these factors speak to the public nature of the NRAB, there are significant private qualities of the NRAB that speak against NRAB arbitration being treated as state action. Though the NMB pays the salary of the neutral member of the NRAB panel, the other representatives are chosen and compensated by their respective organizations. Therefore a full 80% of the NRAB panel is essentially constituted by private arbitrators who are chosen and paid for by purely private parties. The

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126. See *The Railway Labor Act of 1926: A Legislative History*, supra note 92.


131. Railway Labor Act of 1926, §153(b), (c), (g) (2006).

132. Union Pac. R.R. v. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjust-
arbitrators have no power to set law or policy, but rather only interpret private contracts.\textsuperscript{133} Judicial review of NRAB arbitration is extraordinarily narrow, much like the review available, or perhaps, unavailable, under private labor arbitration.\textsuperscript{134} And though there are commentators who argue that private arbitration should be considered state action, arbitration currently receives no such classification.\textsuperscript{135}

The problem with these arguments against finding state action for NRAB arbitration is that they rest almost entirely on the fact that there are private aspects to the NRAB. The Supreme Court's tests comprehend instances where wholly private parties are treated as state actors because of their associations with or direction by the government.\textsuperscript{136} Therefore, finding private aspects of the NRAB does not preclude the finding of state action. Pointing out the ways in which the NRAB is not fully governmental merely means that one must find significant governmental involvement such that it meets one of the Supreme Court's tests.

\section*{II. Conclusion}

The state action and due process issues under the RLA have remained unanswered for 75 years. Now is an ideal time to finally tackle these issues. Resolving these issues is important not only for the purpose of better understanding the RLA, but also because the issues may soon become relevant to the NLRA. Congress is currently considering amending the NLRA through the Employee Free Choice Act (EFCA).\textsuperscript{137} Under the EFCA, parties may have to submit to mandatory arbitration in certain circumstances.\textsuperscript{138} It is uncertain what this arbitration will ultimately look like, but it is almost certain that courts will eventually be presented with the state action and due process issues under NLRA arbitration. Under the NLRA, this question will certainly be far more complicated and difficult to address because it will involve a much larger

\begin{footnotesize}
\begin{enumerate}
\item[133.] Radin v. United States, 699 F.2d 681, 686 (4th Cir. 1983).
\item[134.] See United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigating Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) (the "Steelworks' Trilogy", in which the Supreme Court held that a court must give broad deference to a labor arbitration and could only overturn an arbitration if it does not draw its essence from the collective bargaining agreement).
\item[136.] See Evans v. Newton, 382 U.S. 296, 299 (1966) (noting that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action").
\item[138.] ld. § 3.
\end{enumerate}
\end{footnotesize}
sector of the American economy, and the arbitration will probably not be performed under the aegis of a federal agency. A well-reasoned inquiry into the particularities of the RLA will once again serve as an important model for other labor legislation faced with similar questions.
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Community Benefits Agreements with Transit Agencies: Neighborhood Change Along Boston's Rail Lines and a Legal Strategy for Addressing Gentrification

Brian D. Feinstein* and Ashley Allen†

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Residents of Greater Boston located along the proposed Green Line rail extension have expressed concerns about potential gentrification and the resulting displacement of low-income residents. To assess these concerns, we examine the effects of the earlier Red Line extension on neighborhood demographics and housing costs. Based on our conclusion that gentrification occurred following the extension of the Red Line, we propose a Community Benefits Agreement (CBA) as a tool for mitigating these effects following expansion of the Green Line. We provide a short summary of CBAs in general and then outline the bargaining structure and major provision for our proposed CBA.

I. INTRODUCTION

In Fall 2009, the Massachusetts Department of Transportation released its proposal for extending the Massachusetts Bay Transportation Authority’s (“MBTA”) Green Line rail service into Somerville and Medford, Massachusetts.1 The project promises improved mobility for residents and visitors to Cambridge, Somerville, and Medford, as well as better regional air quality due to decreased automobile use.2 Yet some residents of these communities are concerned about the changes the transit line extension will bring.3 In the spring of 2009, Boston Globe reporter Scott Helman interviewed residents of Somerville’s Union Square and the neighborhoods near Mystic Valley, areas that would be

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1. See Green Line Extension Project, MASS. DEP’T OF TRANSP. (2009), http://greenlineextension.eot.state.ma.us/documents/about/FactSheets/GreenLineFactSheet_F_lowRes.pdf (summarizing a proposal involving an expansion of the Green Line northward to College Avenue in Medford and creating a branch to Union Square in Somerville; the project is scheduled for completion by the end of 2014 and will include seven new stations and approximately four miles of new subway service; the project will also require building a new facility for storage and maintenance of Green Line vehicles. Total costs are currently estimated at $932.4 million).

2. Id.

served by the proposed expansion. Younger residents, many of whom had recently relocated from more expensive areas of Cambridge and Somerville, expressed optimism about the expansion and increased access to other areas in Boston. More established residents, on the other hand, expressed concern about a loss of community identity and increased noise, and worried that gentrification would raise rent levels and cost of living.

There has been considerable speculation that the Green Line expansion will lead to the displacement of long-term residents by more affluent newcomers. However, aside from two recent articles, there is remarkably little research on the extent to which transit projects may lead to such gentrification, which we define, for purposes of this article, as the transition of a neighborhood’s composition from relatively lower-income to relatively higher-income residents and businesses. The literature on the effects of transit expansion on neighborhood composition is similarly underdeveloped.

Since gentrification involves not just an increase in housing costs, but also a change in a neighborhood’s demographic profile, this lack of research on whether transit projects lead to demographic changes represents a significant gap in the literature. In order for scholars to understand the effects of mass transit expansion on gentrification, additional work is needed concerning both changes to housing costs and neighborhood demographic changes. Similarly, if policymakers are to address the issue of gentrification, they must first have a better understanding of the actual effects that transit projects have on housing costs and neighborhood composition. Currently, because of this lack of research, policymakers must rely largely on anecdotal evidence and speculation when considering the impact of extending the Green Line on residents within the affected neighborhoods.

Section II provides an examination of demographic changes following the expansion of the Red Line during the 1980s. Based on these analyses, it is determined that significant gentrification, including the likely uprooting of established residents, occurred following the completion of this transit project. Section III introduces Community Benefits Agreements as a potential legal strategy to reduce the prospective similar harms following the future Green Line extension. This section includes descrip-

4. Id.
5. Id.
6. Id.
tions of community organizations’ past uses of these agreements and explanations of how these agreements can be applied for use in major transit projects, in which one signatory is a public authority. Section IV contains a methodological appendix, providing an overview of the statistical method and research design used in the aforementioned analyses.

II. PAST AS PROLOGUE: GENTRIFICATION ON THE RED LINE

This section seeks to determine whether neighborhoods along the planned Green Line expansion will undergo gentrification. In addressing this concern, demographic changes following the similar extension of the Red Line into Porter Square, Davis Square and the Alewife Brook Parkway areas approximately twenty-five years ago may prove instructive. Thus, a comparison follows of neighborhoods affected by the Red Line expansion with those that were not affected, based on a variety of demographic characteristics.

Data

Data in this section were obtained from the Urban Institute’s Neighborhood Change Database, which includes census track-level data from the Census Bureau’s American Housing Survey and from the 1970-2000 decennial Census (with some variables available only for 1980-2000). Because the unit of the analysis in this dataset is the census tract (i.e., each datum is measured at the census tract level), the fact that the Census Bureau occasionally alters tract boundaries between surveys presents problems for any time-series geospatial analysis. Fortunately, the Urban Institute’s Neighborhood Change Database places census data collected during the 1970-1990 period within the 2000 census tract lines. By using these normalized data, it is possible to compare census data across time within the exact same geographical borders.

We divided the 1,282 census tracts in the Neighborhood Change Database into two groups: the 31 tracts located within a 1.4 mile radius of the Porter Square, Davis Square or Alewife subway stations (labeled “Red Line Expansion” in the graphs to follow) and the other 1,251 tracts (labeled “rest of Boston MSA”). Distances between census tracts and new Red Line stations were determined via the Census Bureau’s “Ameri-

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9. See Normalized Data Products, GEOLYRICS, INC., http://www.geolytics.com/USCensus, Normalized-Data, Categories.asp (describing the Neighborhood Change Database in greater detail). In addition, the Neighborhood Change Database converts all dollar figures into 1999 dollars, which allows for more meaningful longitudinal analysis.
can FactFinder” website.10

Subway Expansion and Demographic Change

As a first-cut analysis, this article compares the areas along the Red Line extension with the rest of metro Boston in terms of the influx of new residents. Gentrification is understood to involve not only an influx of new residents, but also an influx of more affluent and, relatedly, better-educated residents. Thus, we examine residents’ education levels, mean income, and residents receiving public assistance. Disproportionate changes in these demographic variables in the Red Line-affected areas (compared to the rest of metro Boston) would provide at least suggestive evidence of gentrification. Sudden jumps in these factors between 1980 and 1990 (pre- and post-Red Line expansion) would further buttress this inference.

First, this article examines a fundamental component of gentrification: the percentage of new residents moving into a given area (where “new” residents are defined as individuals over the age of five who moved to their current county less than five years ago). Since the influx of new residents is a fundamental component of gentrification, examining whether there was a greater influx of new residents into the Red Line expansion areas is a natural place to start. As Figure 1 shows, the entire Boston metropolitan area saw an increase in new residents (as a proportion of the total population) between 1980 and 1990.11 However, the areas benefiting from the Red Line extension saw a particularly large increase in new residents between 1980 and 1990 — over twice the size of the growth in new residents in the rest of metro Boston.12 Moreover, this influx of new residents accelerated between 1990 and 2000, a decade when the proportion of new residents in the rest of the metro area stabilized.13

12. Id.
13. Id.
Second, this article compares residents' education levels between 1970 and 2000. Specifically, it compares the areas of Red Line expansion to the rest of metro Boston with respect to the proportion of residents over the age of twenty-five who hold a bachelor's and/or graduate or professional degree. Figure 2 shows that, while the proportion of residents with bachelor's degrees or higher increased across metro Boston during the period under study, the rate of increase appears somewhat higher in areas impacted by the extension of the Red Line. The ten-year span with the greatest increase in education levels appears to be the 1980-1990 period in the Red Line-affected areas.

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14. Id.
15. Id.
Third, this article charts mean family income over the study period. As with a greater proportion of highly educated residents, a rapid increase in the average income in a neighborhood may be a sign that the neighborhood is gentrifying, with more affluent residents replacing less affluent ones. Figure 3 shows the inflation-adjusted mean family income in the two areas (in 1999 dollars). This figure suggests that an increase in resident income occurred in the areas surrounding the Red Line extension. Mean family income in the two areas is approximately identical during the 1970s, and increases during the 1980s and 90s. The increase in income is noticeably steeper in the Red Line-affected areas. By 2000, those families residing in the Red Line areas earned approximately $10,000 more than other metro Boston residents. This income gap increased the most between 1980 and 1990. During this decade, mean family income in the Red Line areas increased at a rate of 11.4 percentage points greater than outside of these areas.

16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
Fourth, this article examines the proportion of households receiving some form of public assistance. Residents' mean income and receipt of public assistance may represent two sides of the same coin: a rise in mean income coupled with a decrease in the number of households receiving public assistance could indicate that poorer residents are being priced out of a gentrifying neighborhood. Information concerning public assistance may be useful in determining the extent of gentrification, because examining mean income alone may not capture changes in the highest and lowest parts of an area's income distribution. A finding of differential changes between the two areas in the proportion of residents receiving public assistance would further suggest that subway expansion leads to gentrification. Figure 4 provides this additional evidence.22 As Figure 4 shows, while the proportion of households receiving public assistance decreased in both areas between 1980 and 1990, this decrease was much more substantial in the areas near the Red Line expansion.23

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22. Id.
23. Id.
Figures 1-4 provide evidence that neighborhoods closest to newly opened Red Line subway stations changed markedly in the years around the expansion of the Red Line. Compared to the rest of the Boston metro area as a whole, these areas saw a greater influx of new residents, greater increase in education levels, greater increase in mean family income, and greater decrease in the households receiving some form of public assistance. Taken together, these four findings strongly suggest not only that the area around these new Red Line stations underwent gentrification around the time when these new stations opened, but also that this gentrification was more pronounced in these neighborhoods than elsewhere in metro Boston, where new stations did not open.  

24. Superficially, it may not seem obvious why increased education and income levels and decreased use of the social safety net are taken to be negative developments. After all, rather than less affluent people being pushed out by more affluent people during gentrification, the prospect that individuals are remaining in their neighborhoods but are themselves becoming more affluent is within the realm of possibility. While acknowledging that this alternative hypothesis lies within the realm of possibility, it is unlikely for two reasons. First, Figure 2 shows a larger-than-average influx of new residents into Red Line neighborhoods. See GEOLYTICS CD-ROM, supra note 8 and accompanying text. The fact that many new people are moving into these areas casts doubt on the alternative hypothesis that Figures 3-5 can be explained as showing that the fortunes of existing neighborhood residents are improving, as opposed to showing gentrification. See GEOLYTICS CD-ROM, supra note 8 and accompanying text. Second, given that Boston and surrounding areas have an integrated economy, it would seem odd for people in one area to have a similar income level as the rest of metro Boston in 1970, but for these same people to have incomes that are approximately 12.5% higher than those in the rest of metro Boston in 2000. See Figure 3; GEOLYTICS CD-ROM, supra note 8 and accompanying text. Thus,
Subway Expansion and Housing Costs

The preceding section demonstrated that the extension of the Red Line led to demographic changes in the affected neighborhoods, and argued that these demographic changes are typically associated with gentrification. However, this demographic change is almost epiphenomenal: the likely reason why the demographic mix changed is because housing costs in the affected areas increased following the extension of the Red Line, compelling less affluent, longer-established residents in rental housing to move.

This section examines the impact of Red Line expansion on housing costs. More specifically, the following analysis tests the hypothesis that transportation improvements lead to gentrification by comparing average rents and housing prices in those areas that were affected by the 1984-1985 Red Line expansion to otherwise similar areas that were not impacted. This analysis employs a statistical technique known as “genetic matching,” which pairs “treated” observations (i.e., areas impacted by the expansion of the Red), with “control” observations that are most similar to the treated group in every respect other than the fact that they are not situated on the Red Line expansion. In this way, genetic matching creates a quasi-experimental research design, allowing for one to accurately estimate the average treatment effect. Unlike conventional regression analysis, this ability to gauge the effect of “assignment” to the “treatment group” means that it is possible to make causal claims.

Using a matching algorithm to pair census tracts that are located nearby the Porter Square, Davis Square and Alewife Red Line stations it seems much more likely that the results in Figures 2-5 can be traced to an influx of new, more affluent residents during a period of gentrification, as opposed to old residents remaining in the neighborhood and becoming wealthier. See supra note 8 and accompanying text. Still, it is important to acknowledge that the above analyses cannot distinguish between the gentrification hypothesis, which believe is more sensible, and this alternative hypothesis. (This inability to distinguish between these two hypotheses is rooted in what econometricians refer to as an ecological fallacy: the problems encountered when one attempts to make individual-level inferences from aggregate-level data.)

25. SIDNEY VERBA ET AL., VOICE AND EQUALITY CIVIC VOLUNTARISM IN AMERICAN POLITICS 455 (President and Fellows of Harvard College 4th ed. 2002); see also Kahn, supra note 7; McMillen & McDonald, supra note 7 (defining gentrification in terms of neighborhood income levels).


with similar census tracts located elsewhere in metro Boston, it becomes possible to estimate the effect of a new subway station on the rate of change during the 1980-1990 period in mean monthly rent for rental units, housing prices for owner-occupied units, and mean family income for all residents. The following table reports the estimated effect of Red Line expansion on these three outcome variables.

Table 1: Effects of the Red Line Expansion on Housing Costs & Neighborhood Economic Composition

<table>
<thead>
<tr>
<th>Outcome Variable</th>
<th>Difference in 1980-90 Rate of Growth for Census Tracts in the Treatment vs. Control Groups</th>
<th>Standard Error (p-value)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rate of Change in Avg. Rent</td>
<td>0.102</td>
<td>0.048 (0.033)</td>
</tr>
<tr>
<td>Rate of Change in the Aggregate Value of Owner-Occ. Homes</td>
<td>0.422</td>
<td>0.289 (0.144)</td>
</tr>
</tbody>
</table>

Table 1 indicates, first, that rents in those areas near the Red Line expansion increased at a 10.2% greater rate than did rents in similar areas of metro Boston. This result is statistically significant at the conventionally accepted p < 0.05 level. Second, the table shows that the value of owner-occupied housing stock in those areas near the Red Line expansion may have increased at a 42.2% greater rate than did owner-occupied home prices in similar areas of metro Boston. Although this estimate does not achieve conventionally accepted levels of statistical significance, the estimate is suggestive of an increase in property values for owner-occupied homes near the Red Line expansion.

Overall, this analysis indicates that displacement of low-income residents likely occurred following expansion of the Red Line. While no individual finding is on its own determinative, when taken together, the

29. The two sets of census tracts are similar in terms a variety of demographic and geographic characteristics: (i) distance to Boston’s central business district; (ii) population density; the proportion of the census tract’s residents who are (iii) Hispanic, (iv) African American, and (v) white; (vi) rental housing as a proportion of the tract’s housing stock; (vii) owner-occupied housing as a proportion of the tract’s housing stock; and (viii) municipality. Please see the appendix for more information. See infra p. 34.

30. See infra pp. 32-35.

31. GEOLYTICS CD-ROM, supra note 8.


33. GEOLYTICS CD-ROM, supra note 8.

34. KING, supra note 32 at 34.
combined evidence showing demographic changes and increased housing costs suggests that lower-income residents were pushed out of the affected areas.

Communities' concerns about the potential effects of Green Line expansion therefore appear to be well-founded.\textsuperscript{35} If gentrification in the wake of expansion depletes the affordable housing stock, renters—particularly low-income renters—are likely to be displaced from their neighborhoods. In addition, while existing homeowners are likely to benefit from increased price, long-term neighborhood residents looking to transition from renting to home ownership will find doing so more difficult.

III. LOOKING FORWARD: THE GREEN LINE AND CBAS

In recent years, several low-income communities throughout the country have used Community Benefits Agreements (CBAs) as tools to ensure that development projects benefit local residents.\textsuperscript{36} A CBA is a contract negotiated between community groups and a prospective developer, in which the developer agrees to provide particular community benefits related to the project in exchange for the community's support.\textsuperscript{37} Unlike most CBAs, which involve agreements between community groups and private developers,\textsuperscript{38} our proposed agreement would take the form of a contract between community groups and a government entity, the Massachusetts Bay Transportation Authority. Despite this departure from the typical formulation, we argue that subway expansion projects are particularly good candidates for implementing successful, legally enforceable CBAs. We suggest that the MBTA's use of eminent domain to expand rail lines and build new stations provides a unique "hook" for community groups, giving them bargaining power and thereby improving

\textsuperscript{35} Helman, supra note 3.

\textsuperscript{36} See, e.g., Patricia Salkin & Amy Lavine, Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 113 (2008) (providing a survey and discussion of CBAs around the nation). Examples discussed include the CBAs relating to the Staples Center in Los Angeles, CA (1998), Gates Rubber Company in Denver, CO (2006), and Atlantic Yards complex in New York, NY (2005), among others. See also Community Benefits Agreements, BLOGGER, http://communitybenefits.blogspot.com (last visited Apr. 14, 2011).

\textsuperscript{37} Benjamin Beach, Strategies and Lessons from the Los Angeles Community Benefits Experience, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 77, 97 (2008); Salkin & Lavine, supra note 36, at 114. As Julian Gross notes, however, "[v]arious players in the development process . . . have used the term CBA to mean different things in different contexts." Julian Gross, Community Benefits Agreements: Definitions, Values, and Legal Enforceability, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 35, 37 (2008). Gross, for example, would limit the term to those agreements that are "legally binding." Id. While we limit the term to formal agreements, we leave open the possibility (explored below) that some such agreements may be found void for want of consideration.

\textsuperscript{38} Beach, supra note 37, at 97.
the chance for a meaningful agreement in which the community secures real gains.

This section begins with an outline of the general structure of CBAs and the legal issues that surround their creation and enforcement. A detailed exploration of how local community groups might use CBAs to combat displacement of low-income residents as a result of Green Line expansion follows.

Overview of Community Benefits Agreements

The Staples Center CBA, created in Los Angeles in 2001, is widely considered the prototypical community benefits agreement. Negotiations for this CBA surrounded the expansion of the Staples Center, a multi-purpose arena. The proposed four million square foot mixed-use expansion encountered significant opposition from community groups concerned about the development's impact on surrounding low-income communities like the Figueroa Corridor. Many community groups banded together to form a powerful coalition, and ultimately, coalition members and the developer signed a contract in which the developer agreed to modify the project to include a certain amount of open space and affordable housing, living-wage jobs, and local hiring programs. In exchange, the community coalition delivered union support for the expansion, which expedited city council approval of the project.

Today, the Staples Center agreement remains the model on which most CBAs are developed. This success can explain the elements required for a CBA's successful negotiation. Like all contracts, a CBA is feasible only when all parties are willing to come to the bargaining table. Thus, in assessing whether a CBA is a valuable tool for securing community gains in a context like the Boston subway expansion, it is crucial to understand how each party stands to benefit from such an agreement. For community coalitions, the answer is fairly straightforward. Like the coalition organized around the Staples Center expansion, these groups typically seek assurances that the purported benefits of the proposed pro-

40. Tina Daunt, Staples Center Rezoned to Further Builders' Grand Plan, L.A. TIMES, Sept. 5, 2001, at 3. The proposed expansion included boutique hotels, a theater, an apartment complex, and retail space. Id.
41. Id, supra note 39, at 20.
42. Id.
43. Id.
44. Id.
A CBA's potential benefit to developers is less tangible. As in the Staples Center CBA, a bargaining coalition of community groups often offers some form of support for the proposed project as its primary bargaining chip. Where a project has overwhelming community and governmental support, a coalition's promise to protest the project if demands go unmet—or to deliver additional support if they are met—will likely have little sway with developers. It is unlikely that a CBA will be formed under such circumstances, and if one is, it is doubtful that developers will be adequately incentivized to offer substantial benefits to community coalitions.

Community groups are more likely to extract substantial gains from developers when their support for the project is instrumental to its success, as it was in the Staples Center case. Patricia Salkin and Amy Lavine have identified several circumstances that contribute to greater bargaining power for community groups attempting to form CBAs. They note that a developer's need to locate the project in a particular place or to obtain public subsidies can provide community groups with substantial leverage. In addition, broad-based coalitions representing a large number of individuals and interests arguably will have more negotiating power than more narrowly-focused subgroups. Moreover, where a developer's reputation is important to the success of the project, the prospect of opposition and public protest likely will be more motivating than in situations where reputation costs are low.

Such circumstances may not only make a developer's participation in a CBA more likely, they may also improve the chances that a court will regard the resulting CBA as legally enforceable. A central question surrounding the enforceability of CBAs is whether they constitute valid contracts. A valid bilateral contract requires consideration on both sides, and some scholars have questioned whether community coalitions provide any actual consideration in these agreements. This issue has

45. See, e.g., Salkin & Lavine, supra note 39, at 294 (asserting that “[m]any CBA provisions are inspired by social justice concerns” and that common CBA provisions include “living-wage requirements, ‘first source’ (i.e. local) hiring and job training programs, minority hiring minimums, [and] guarantees that developments will include low-income and affordable housing”).
46. Id. at 293-94; see also Ho, supra note 39, at 21.
47. See, e.g., Salkin & Lavine, supra note 39, at 321 (arguing that a “fair and effective” CBA requires that the negotiating community have “adequate leverage to obtain meaningful promises from a developer”).
48. Id.
49. Id.
50. See id. at 322-23.
52. Id. at 324-25.
53. Id. at 324.
not yet been tested in courts. Nonetheless, it seems clear that the more significant a community group's support is to a project's success, the more likely it is that this support will be regarded as actual consideration. Community coalitions are thus best positioned to harness the potential power of CBAs when their support is highly valued, both because this encourages a private developer to actually negotiate with community groups and because it strengthens the coalition's legal claims under the resulting agreement.

Certain types of CBAs present the additional legal difficulty of which actors have standing to enforce them. When community groups are included as signatories to a CBA, they are parties to the contract and hence have standing to enforce the agreement in court if necessary. CBAs to which community groups are signatories are often referred to as "private CBAs." Public CBAs, on the other hand, are agreements between developers and government entities such as redevelopment agencies. Community groups play an important role in campaigning for these agreements, but they are not signatories to the final contract. Because only contract signatories have standing to enforce agreements, community groups cannot themselves seek a legal remedy if the agreement is violated. Rather, they must rely on the government entity for enforcement.

Redevelopment agencies and other government entities have limited budgets, numerous priorities, and arguably less direct incentive to pursue legal action in the case of breach. It is thus in the interest of community groups to push for private CBAs wherever possible and to thereby keep enforcement power in their own hands. However, precisely because private CBAs give community groups standing, private developers may insist on public CBAs with the idea that government entities will be less likely to pursue legal action in the event of a breach. As a result, private CBAs—while preferable for community groups—may be more difficult to obtain.

54. Id.
55. Id. at 325.
56. Gross, supra note 37, at 46.
57. Id. at 45.
58. Id. at 47.
59. Id. at 47-48.
60. Id.
61. See generally Paul E. Peterson, City Limits (1981) (for the constraints affecting local government entities).
62. See, e.g., Gross, supra note 37, at 48 (stating that in light of enforcement issues, "a public CBA is clearly not as good a result for community-based organizations as a private CBA").
63. See id. (noting that "difficult political environments" may limit community groups' abilities to secure private CBAs).
Proposal for Green Line CBA

CBAs have the most potential for success when community groups can offer developers strong incentives to bargain, when both parties stand to benefit significantly from the agreement, and when community groups are parties to the resulting contract. In light of these considerations, we believe that a CBA between community groups and the MBTA would be a useful tool for mitigating resident displacement resulting from gentrification following the extension of the Green Line. In this proposed agreement, community groups would commit to not protesting the government's use of eminent domain to acquire property for subway expansion. In exchange, the MBTA would ensure that a certain portion of the property acquired via eminent domain would be devoted to the development of low-income housing units, among other measures.

One unusual feature of this proposed CBA is that, rather than an agreement between community groups and a private developer, this agreement would be between community groups and a government entity. However, there is nothing inherent in the structure of CBAs requiring that they be restricted to private development projects, provided that a government entity, like the MBTA, can be adequately incentivized to bargain with community groups. Before turning to the question of bargaining power, we note that while our proposed agreement includes the MBTA as a party, it is not thereby a "public CBA" in the sense described above. Under this proposal, the MBTA takes the place of the private developer and community groups function as the other signatories to the agreement. Provided that community groups are able to secure their place as signatories, the problems of standing that arise in relation to public CBAs would not apply in this context, since the community groups, as signatories, would have standing to enforce the agreement against the MBTA if necessary.

The crucial question for this proposal is whether community groups have sufficient bargaining power to negotiate with the MBTA. A community group's support need not be absolutely essential to a project's success in order to provide the other side with an incentive to negotiate. In the past, CBAs have been successfully formed when a community coalition has the power to decrease the project's expense or minimize delays to its completion, or even simply to secure a sense of community approval for a project that would benefit from such an endorsement. With re-

64. As noted previously, community groups seeking private CBAs often encounter resistance from developers who would favor public CBAs. However, this preference may be less strong for the MBTA, since the MBTA is itself somewhat politically responsive and therefore more likely than a private developer to weigh the concerns of community groups.

65. See, e.g., Ho, supra note 39, at 21 (noting that developers of the Staples Center expansion were motivated to cooperate with community groups by a desire to secure a permit for the
Boston Rail Line Expansion

In regard to the Green Line extension, community groups have a unique source of bargaining power: to acquire the land for expansion, the MBTA will sometimes need to invoke the government's highly unpopular ability to acquire private land by eminent domain. During this often controversial process, community groups have discretion over whether to protest the takings or remain silent, and this ability to use the political and judicial processes to delay or block takings may give community groups leverage at the bargaining table.

The acquisition of land via eminent domain for public transit can be costly, which gives community groups a valuable card in the bargaining game: the ability to offer not to protest takings, thereby expediting the takings process for the MBTA. On several occasions, the MBTA's use of eminent domain has proven substantially more expensive than predicted. As part of the Greenbush commuter rail project connecting the South Shore to Boston, the MBTA acquired twenty-six square feet of land from the Glastonbury Abbey, a monastery. The MBTA initially spent $1,700 to acquire the land, but subsequently spent $123,000 on sound mitigation devices in an effort to soothe relations with the monastery's residents, who complained that the noise of the nearby railway disturbed its quiet environment. Unsatisfied, the abbey brought suit against the MBTA, forcing the agency to incur substantial litigation costs. Local opposition to the Greenbush railway was widespread, and the MBTA "spend[ed] millions . . . in mitigation for several South Shore towns and property owners," which sent the total cost of the line soaring. Courts ordered the MBTA to pay $820,000 for a commercial property that it initially purchased for $270,000, and to pay $700,000 for another parcel that it initially acquired for $350,000. When the MBTA acquired a gravel company by eminent domain during expansion of the project before the next city election, which was likely to produce a mayor and council less sympathetic to the expansion efforts; Id. at 22 (noting that community groups secured gains from the developer of Denver's Gates Rubber factory when the developer needed community support for a rezoning of the site); Salkin & Levine, supra note 36, at 119 (suggesting that by agreeing to various community benefits, the developer of a mixed-use development in North Hollywood, California secured an additional $13 million in subsidies).


68. See Carroll, supra note 67.

69. Id.

70. Id.

71. Id.

72. Collins, supra note 67.
Wilmington line, a jury awarded an additional $3 million in compensation over the MBTA’s initial $2.95 million payment.\textsuperscript{73} 

Opposition to the use of eminent domain can have a profound impact on a project’s budget and timeline. While compensating the owners of taken property is an expected expense, the actual cost of compensation and related litigation is dependent on the level of resistance that the MBTA encounters. This resistance and its associated costs are likely to be particularly high with respect to the Green Line expansion, given its urban location and the fact that MBTA has explicitly considered taking property by eminent domain.\textsuperscript{74} To the extent that community groups have the ability to affect the level of public resistance in response to takings, this degree of power over the process may give the MBTA good reason to consider bargaining with these groups.

Community groups may influence the impact of eminent domain in a variety of ways. Most straightforwardly, they can engage in campaigns and protests of the MBTA’s use of eminent domain. When public opposition is high, property owners may feel more emboldened to pursue individual claims against the MBTA, which would likely increase overall costs. Community groups can also engage in legal action by filing *amicus* briefs in support of individual claims, as community groups did in *Kelo v. City of New London*.\textsuperscript{75} These groups may also have the power to influence the posture that unions and other local organizations take towards the project, as in the negotiations surrounding the Staples Center CBA.\textsuperscript{76} Insofar as the MBTA believes that these efforts have some impact, a community group’s agreement to suspend protests and encourage the support of other groups in exchange for community benefits may provide a powerful inducement.

For private developers, community support is arguably valuable only to the extent that it contributes to the success of a project. For politically responsive bodies like the MBTA, however, community support may have additional value over and above its ability to influence a project’s success. A community’s support for a project confers a greater sense of legitimacy on both the agency and the project itself. Thus, for organizations subject to political accountability, the support of community groups

\textsuperscript{73} Walsh, *supra* note 67.

\textsuperscript{74} In February 2009, Massachusetts Director of Transit Planning Steve Woelfel informed residents of a neighborhood slated for Green Line expansion that the project could require taking property by eminent domain. Megan Woolhouse, *State Backs Green Line Extension into Medford*, *Boston Globe*, Feb. 4, 2009, at B3.


\textsuperscript{76} See Hu, *supra* note 39, at 21 (discussing a Los Angeles community group’s role in persuading the L.A. County Labor Federation to support the Staples Center expansion in exchange for various assurances).
may function as a powerful incentive, even when this support is not central to the project’s success.

Moreover, because the MBTA is a publicly accountable body, community groups can exercise influence over it through a number of political channels. For instance, in exchange for community benefits, groups may agree to lobby a zoning board in support of a zoning variance necessary to the project. They may also, as in the Staples Center case, agree to deliver the support that the MBTA board may believe it needs to approve a development project.\textsuperscript{77}

In the specific context of an agreement with the MBTA, the opportunity for political influence is more pronounced. Because state and local governments exercise significant control over the MBTA’s budget,\textsuperscript{78} community groups may gain significant ground by lobbying these political bodies directly. State and local government funding, which allows the perennially cash-strapped MBTA to balance its budget, arguably may be an important way in which political institutions can influence MBTA decision-making. State and local governments’ financial support of the MBTA is substantial. For instance, the Massachusetts Transportation Improvement Loan Act of 2008 allocated $700 million to the MBTA to fund the Green Line expansion.\textsuperscript{79} In addition, the MBTA receives approximately 10.2% of its total funding from municipalities within the transit authority’s service area.\textsuperscript{80} Although it is not clear under what circumstances, if any, municipalities can withhold funding from the MBTA, the fact that the MBTA is to some extent dependent on municipalities for its funding may give municipalities some power over the authority’s decisions. Furthermore, Massachusetts currently allocates 20% of its state sales tax revenue to support the MBTA.\textsuperscript{81} In 2010, this state support amounted to 53.7% of the MBTA’s total funding.\textsuperscript{82} In light of these significant outlays, it is likely that state and municipal elected officials have some fiscal, and therefore political, leverage over the MBTA’s decision-making process. In addition, the MBTA’s seven board members are all appointed by the governor and hence likely are subject to political pressure.\textsuperscript{83} Since significant pressure from community groups is likely to in-

\textsuperscript{77} See id.
\textsuperscript{79} Transportation Improvement Loan Act, ch. 86, § 2D, 2008 Mass. Legis. Serv. (West).
\textsuperscript{80} Kane, supra note 78, at 4.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 4-5.
\textsuperscript{83} Id. at 11.
fluence political entities responsive to their constituencies, assurances that these groups will support the MBTA's plans may improve the probability that the Green Line expansion will be successful.84

Given the controversial nature of eminent domain takings, the numerous political mechanisms through which community groups can influence the MBTA, and the significant concerns about resident displacement, the Green Line extension project is well suited to the formation of a CBA. Community groups have the opportunity to amass significant bargaining power both by direct action favoring or opposing the expansion, and by interfacing with political bodies in support of or in opposition to the proposed project. Ensuring community support may thus constitute a considerable gain for the MBTA and hence motivate the authority to secure this support by agreeing to community groups' terms. Such an agreement would provide substantial benefits to both parties, making it likely that courts will uphold the agreement based on a finding of mutual consideration.

**Using the CBA to Compel Construction of Affordable Housing**

Having demonstrated that the extension of the Red Line led to gentrification and argued that a community benefits agreement could be a useful tool for mitigating the negative effects of similar gentrification in the context of the Green Line expansion, we now turn to specific sections of the proposed CBA.

The CBA proposed in this article is focused primarily on enabling lower-income residents to remain in their neighborhoods in the years following the opening of the Green Line extension. The natural inference from our analysis of the Red Line extension is that less affluent residents were displaced following the opening of the extension. Specifically, the findings that Red Line-affected areas had a large influx of newcomers (relative to the average census tract in the rest of metro Boston), and that average rents and owner-occupied home prices increased (relative to otherwise similar census tracts in the rest of metro Boston), lead us to conclude that resident displacement is likely to be a major issue following the

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84. Community groups in areas slated for Green Line expansion also have a more direct method for influencing the political process. Massachusetts' Executive Office for Transportation and Public Works has created an advisory committee to develop recommendations regarding the expansion project. This committee includes thirteen members representing mayoral offices and city councils and seven members of community organizations, including the Welcome Project (a Somerville-based advocacy organization focused on issues related to new immigrants); the Somerville Transportation Equity Partnership; and Conversation Law Foundation (an environmental advocacy group). See MASS. EXEC. OFFICE OF TRANSP., Green Line Extension, Beyond Lechmere Public Involvement Summary and Advisory Group Members, available at http://www.greenlineextension.org/documents/beyondLechmere/BeyondLechmereSummary.pdf (last visited Apr. 21, 2011).
extension of the Green Line.\textsuperscript{85} Therefore, any agreement between community groups and the MBTA ought to emphasize mitigating displacement of existing residents.

We argue that the most effective way to use CBAs to protect existing neighborhood residents during post-Green Line gentrification is to include a provision requiring the MBTA to use its eminent domain powers to transfer land to a public housing authority or private developer to construct affordable housing. Since expansion of the Green Line will already involve significant takings,\textsuperscript{86} in some cases it may be possible to locate new affordable housing adjacent to rail facilities, without additional use of eminent domain. For instance, if a building must be taken via eminent domain so that half of the site may be used for Green Line purposes, it may be possible to build housing on the other half of the building's former footprint without added acquisitions costs to the MBTA or hardships to property owners. Even when additional takings are needed, however, we believe that the opportunity to mitigate the negative effects of gentrification by providing more affordable housing far offsets the costs associated with greater use of eminent domain.

Two concerns may be raised in response to this provision requiring the MBTA to use its eminent domain powers to transfer property to other entities to construct affordable housing. First, one may question whether the construction of housing units serves a "public" purpose. Second, given the history of eminent domain in urban areas, one might be skeptical of the claim that the practice could be used to directly benefit lower-income residents; both concerns are unwarranted.

\textit{The Constitutionality of Takings to Construct Affordable Housing}

Despite the fact that housing units are in a sense inherently private (in that their use is restricted to current occupants), the construction of affordable housing arguably meets both the narrower and more expansive definitions of "public use" that the Supreme Court has employed in its Takings Clause jurisprudence.\textsuperscript{87} According to Matthew Parlow, under the Court's broad view of "public use," any taking of private property for public purposes is acceptable, "even if the public cannot actively access or

\textsuperscript{85} See Helman, \textit{supra} note 3.

\textsuperscript{86} Despite the fact that most of the line will be sited along the former Lowell commuter rail tracks, eminent domain will likely be necessary for widening these tracts, building stations and a maintenance yard, and constructing a spur to Union Square. See Rob Barry, \textit{Medford Still Split on the Merits of a Green Line Extension}, \textit{Somerville Journal} (Jan. 29, 2008), http://www.wickedlocal.com/somerville/news/business/x1059369091.

use the property.” This principle was affirmed in *Hawaii Housing Authority v. Midkiff*, in which the Court upheld a statute that authorized the eminent domain taking of property from a landowning oligopoly and transferring it to the property’s former long-term lessees. Under this broad view, the court adopts a rational basis test for whether a given taking serves the public — a standard that grants governments wide latitude in their use of eminent domain.

By contrast, under the narrow view of “public use,” the government’s eminent domain powers are limited to those cases where the public has direct access to the property. At first glance, it may seem that affordable housing does not meet this narrow definition. Unlike, for instance, the post office in the seminal eminent domain case *Kohl v. United States*, multiple members of the general public cannot simultaneously use a given apartment. This interpretation of the narrow view is misguided, however. According to Parlow, the narrow view of “public purpose” is properly understood as meaning that members of the public can use the premises if they meet certain objective criteria. For example, despite the fact that public schools and hospitals are not open to every member of the public, these buildings satisfy the narrow definition of “public purpose” because individuals meeting specific criteria (e.g., school age children living in the municipality, persons needing medical care at a hospital with unused beds) can access it. Therefore, the use of eminent domain to construct these buildings is constitutionally permissible under the narrow view. In light of this standard, affordable housing units that are allocated to tenants on a set of need-based criteria arguably serve a sufficiently “public” objective to pass constitutional muster even under the narrow view.

88. *Id.*
90. *See Kelo*, 545 U.S. at 477-478 (stating that the Takings Clause of the Constitution requires that takings for the purpose of economic development satisfy a public use requirement); *Midkiff*, 467 U.S. at 242-43 (asserting that if “the legislature’s purpose is legitimate and its means are not irrational, . . . debates over the wisdom of takings . . . are not to be carried out in the federal courts”); Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 520 (2009) (noting that the broad definitions of public use adopted in *Midkiff, Kelo*, and other cases represents an “effective evisceration of the constitutional requirement that takings be made for a ‘public use.’”).
95. *Id.*
Furthermore, state courts in Massachusetts and elsewhere have held that the use of eminent domain for the purpose of constructing affordable housing is constitutionally permissible. Massachusetts requires a showing that the area is "sub-standard" in order to use eminent domain to build new units of affordable housing. Massachusetts courts are silent as to whether this means that every building in an entire area must be substandard, or – as in other jurisdictions that at least some buildings must be substandard in order to classify the area as blighted and use eminent domain to acquire all buildings in the areas, including buildings not classified as substandard. If Massachusetts courts are willing to clarify that the latter standard applies (in keeping with the Supreme Court's position in Kelo), this clarification would provide a firm assurance that such a claim in a CBA would pass constitutional muster.

The Historical Use of Takings for Affordable Housing

Addressing the second concern, skepticism regarding the use of eminent domain to help lower-income individuals, there is some history of using eminent domain to improve the quality of life for residents of lower-income areas. Before delving into this history, it is important to acknowledge that skepticism in this context is justified. After all, there is a long history of the government using eminent domain to place property in the hands of wealthy interests at the expense of less affluent residents. In recent years, debates over eminent domain have been framed largely in the context of Kelo, potentially reinforcing the notion that takings via eminent domain must come at the expense of lower-income residents.


97. Allydonna Realty Corp., 23 N.E.2d at 666.


101. See Transcript of Oral Argument at 50, Kelo v. City of New London Conn., 545 U.S. 469 (No. 04-108) (2005), 2005 WL 529436 (rebuttal argument by Scott G. Bullock on behalf of petitioners) (arguing that "the one thing that all poor neighborhoods share in common is that they
This focus, however, ignores the possibility that the government can use eminent domain to directly help the types of people that *Kelo* forced out of their homes. Most prominently, federal public housing programs during the Second New Deal deliberately placed eminent domain as one tool in housing authorities’ toolkit.\(^{102}\) When the courts found that the federal government could not use eminent domain to construct public housing,\(^{103}\) Congress responded by passing the Wagner-Steagall Housing Act of 1937.\(^{104}\) Under the Act, local housing authorities were given responsibility for constructing public housing.\(^{105}\) Because some state courts held that public housing construction is a public purpose, this transfer of responsibility allowed for the construction of public housing using eminent domain (bypassing the federal appellate court’s ban on the federal government using eminent domain to build public housing).\(^{106}\) While there is much debate over whether slum clearance programs provide a net detriment to the very groups that the programs were supposed to benefit,\(^{107}\) one may presume that at least *some* nontrivial number of uses of eminent domain to construct public housing benefitted the poor.

For these reasons, we believe that a CBA provision requiring the MBTA to use its eminent domain powers to set aside a parcel of land of affordable housing, as part of the authority’s broader overall use of eminent domain in constructing the Green Line extension, is both constitutional and feasible. We recognize that some residents in affected areas will choose to relocate to new neighborhoods rather than occupy affordable housing projects in their area. Nonetheless, development of affordable housing opportunities along the Green Line will help to ensure that these areas remain more diverse overall. A CBA in which the MBTA agrees to give over land to a private developer rather than a public agency may be more appealing to Green Line-affected communities, since private affordable housing is often regarded as more desirable than public housing projects. Community groups should thus consider the segment of the affected population they are intending to protect when deciding whether to pursue the public housing or private development option.

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105. Id.
In addition to the affordable housing portion of the proposed CBA, community groups might consider advocating for subsidized residents' subway passes for a specified time period as well as dedicated community space located near new subway stations.

IV. Conclusion

Expanding mass transit to underserved neighborhoods involves a double bind: lack of transportation options impedes residents' ability to access opportunities beyond their immediate communities, but expanding transit may lead to gentrification, pricing residents out of their homes. As a first step for policymakers to adequately assess these tradeoffs, accurate information is needed regarding the likely effects of gentrification. To these ends, we merged datasets concerning demographics and housing costs with information on the locations of stations along the 1984-85 Red Line extension, and used genetic matching methods to compare areas near the expansion to similar areas throughout the Boston metro area. Overall, this analysis strongly indicated that the areas around the Red Line extension had experienced gentrification: these neighborhoods saw an influx of new residents, and average incomes and education levels increased – along with rents and home values. Therefore, this analysis serves to confirm fears that an extended Green Line may increase housing costs in Somerville and Medford and price some renters out of their homes.

With this predicted outcome in mind, an examination of ways in which community groups can mitigate the likely effects of future gentrification along the Green Line extension followed. It was posited that community benefits agreements may prove an effective method for mitigating these effects, based both on CBAs' traditional advantages and on the fact that community groups' bargaining with a public authority may offer additional advantages in this particular case. It was argued that a clause mandating that the MBTA use its eminent domain powers to provide new affordable housing ought to be at the center of any such CBA. This clause would, at least in part, blunt the harsh consequences of gentrification following subway expansion for existing lower-income neighborhood residents. While additional parameters of the proposed CBA remain under-defined, this discussion could provide a framework for community groups to assess potential agreements going forward.
V. APPENDIX

This appendix provides greater detail about the research design and statistical method employed in this paper's quantitative section.

Statistical Method

Genetic matching, a statistical method that allows for the evaluation of causal claims, was used to test this paper's central hypothesis. Since matching has only recently becoming popular in policy studies, this appendix provides a short explanation of the method.

Stated briefly, matching allows the analyst to identify a control observation that is as similar as possible to a given treated observation with respect to a set of observable pre-treatment factors, called covariates. By pairing treated observations with as closely-matched control units as possible, matching allows for the estimation of the average treatment effect, in a similar way as randomized studies, e.g., FDA drug trials, randomly divide participants into treatment and control groups in order to determine the effect of treatment.

Here, the need for matching arises out of the fact that one cannot simply compare the observations in the treatment group to all other observations, for the simple reasons that areas not along the Red Line expansion are likely to differ from areas near the expansion in multiple ways that could affect their likelihood of gentrification. For instance, distance from the city center, quality of public schools and other municipal services, and many other factors may lead to differential increases in rents, home prices, and neighborhood wealth within the Boston metropolitan area. Therefore, it is necessary to identify a suitable set of control units to compare to the treated units, so that the distribution of pre-treatment control covariates in the treatment and control groups is better balanced (i.e., more similar) than previously. For each treated unit, the matching algorithm identifies a control unit that is comparable in terms of a variety of analyst-specified confounding factors. Thus, control group units were used, all having the same or very similar observed characteristics as a means of estimating the counterfactual result for a treated unit under no treatment.108

108. The specific matching technique used in this analysis is known as genetic matching. Genetic matching compares favorably to the two other widely accepted matching techniques (propensity score matching and Mahalanobis distance matching) in terms of bias and mean squared error reduction. Genetic matching also does not require any parametric assumptions. See Jasjeet Sekhon, Opiates for the Matches: Matching Methods for Causal Inference, 12 ANN. REV. OF POL. SCI. 487 (2009).
Defining the Treatment Regime

The unit of observation is each of the 1,282 census tracts within the Boston metropolitan statistical area. Those census tracts that are located sufficiently close to a new Red Line subway station are considered "treated" observations, while all other tracts are potential candidates for inclusion in the control group. Here, census tracts are defined as those tracts that are in part or entirely located within a 1.4 mile radius of the Porter Square, Davis Square or Alewife subway stations as having been affected by the openings of these stations. Although this 1.4 mile cutoff is admittedly subjective, it is argued that a 1.4-mile boundary includes those housing units that would most benefit from a new subway station, as this can be considered a reasonable distance to walk, bike or take a short bus ride to access. To determine which census tract lie within these bounds, an interactive map, available on the Census Bureau’s website, was used. Of the 1,282 census tracts in metro Boston, 31 were at least partly located within 1.4 miles of these three stations.

Achieving Balance on Key Covariates

As previously detailed, it is necessary to balance on covariates that capture the process by which units are assigned to treatment. In other words, one must ensure that the control observations are as similar as possible to the treated observations concerning those factors that could lead to gentrification in a given area, but are orthogonal to the decision to locate a new subway station in the area. There are eight covariates in the Neighborhood Change Database that may be associated with gentrification. These variables are: (i) distance to Boston central business district; (ii) population density; the proportion of the census tract’s residents who are (iii) Hispanic, (iv) African American, and (v) white; (vi) rental housing as a proportion of the tract’s housing stock; (vii) owner-occupied housing as a proportion of the tract’s housing stock; and (viii) municipality name. The values for these eight covariates are all taken from the 1970 cross-section of the Neighborhood Change Database. Since serious, well-publicized plans to expand the Red Line

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110. See GEOlytics CD-ROM, supra note 8.

111. The inclusion of “density” as a covariate serves to capture any changes in residents’ preferences for living in suburban versus urban areas during the period under study.

112. The inclusion of this “municipality” covariate serves to capture any potential gentrification consequences stemming from differences among municipalities. For instance, an increase in the quality of a city’s public school system could be expected to trigger a rise in property values.

presumably occurred mostly after 1970, all of these covariates can be considered pre-treatment.\textsuperscript{114}

The following table shows the extent to which the genetic matching algorithm is able to identify a sample of control observations that resembles the treated units on these covariates. The first column of data in this table reports the standardized mean differences between the treatment and control groups concerning these eight covariates before matching;\textsuperscript{115} the second column of data reports the standardized mean differences between the two groups after matching;\textsuperscript{116} and the third column of data reports the percent balance improvement for the pre- and post-matching samples.

\textbf{Table 2: Comparison of Covariate Balance Pre- and Post-Matching}

<table>
<thead>
<tr>
<th>Covariate</th>
<th>Pre-Matching Standardized Mean Difference</th>
<th>Post-Matching Standardized Mean Difference</th>
<th>Percent Balance Improvement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distance to Boston Central Bus. Dist.</td>
<td>-2.987</td>
<td>-0.259</td>
<td>91.35%</td>
</tr>
<tr>
<td>Pop. Density</td>
<td>-17.348</td>
<td>0.029</td>
<td>99.84%</td>
</tr>
<tr>
<td>Hispanic Pop. Pct.</td>
<td>-0.313</td>
<td>-0.165</td>
<td>47.17%</td>
</tr>
<tr>
<td>African Amer. Pop. Pct.</td>
<td>0.162</td>
<td>0.058</td>
<td>64.11%</td>
</tr>
<tr>
<td>White Pop. Pct.</td>
<td>-0.291</td>
<td>-0.020</td>
<td>92.98%</td>
</tr>
<tr>
<td>Rental Housing Pct.</td>
<td>0.606</td>
<td>0.115</td>
<td>81.02%</td>
</tr>
<tr>
<td>Owner-Occ. Housing Pct.</td>
<td>-0.696</td>
<td>-0.049</td>
<td>92.96%</td>
</tr>
<tr>
<td>Municipality\textsuperscript{117}</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

\textsuperscript{114} Of course, these eight covariates do not represent a complete list of factors that may affect housing costs or influence a neighborhood’s gentrification. For instance, the age of an urban area’s housing stock has been shown to be negatively correlated with the propensity of high-income individuals to move to that area. Jan K. Brueckner & Stuart S. Rosenthal, \textit{Gentrification and Neighborhood Housing Cycles: Will America’s Future Downtowns Be Rich?}, \textit{91 Rev. of Econ. & Stat.} 725, 741-42 (2009). The inclusion of additional covariates, therefore, would be an important improvement to this research design.

\textsuperscript{115} In other words, the first column of data shows the difference in (i) distance to downtown Boston, (ii) population density, (iii) … etc. for those census tracts located near the Red Line expansion versus for all other census tracts.

\textsuperscript{116} That is, the second column of data shows the difference in (i)-(viii) for those census tracts located near the Red Line expansion versus for \textit{similar} census tracts not located near the Red Line.

\textsuperscript{117} “Municipality” was coded as a nominal variable, making the reporting of pre- and post-matching balance for this covariate less informative.
As this table shows, the balance between the treatment and control groups markedly improves post-matching. In particular, the two samples are nearly identical in terms of their distance to the Boston central business district, population density, proportion of the population identified as non-Hispanic white, and proportion of the housing stock that is owner-occupied. The other four covariates are also well balanced.\footnote{As an additional assessment of post-matching covariate balance, we conducted a series of paired-sample $t$-tests. These tests examine whether statistically significant differences in means exist between the treatment and control groups on each covariate. Across these eight $t$-tests, the lowest $p$-value reported is 0.22, which suggests that, under a strict $p > 0.10$ standard, the matched groups can be considered balanced on these eight covariates. The fact that such close balance was achieved on these covariates presents a convincing case for unconfoundedness (i.e., that conditional on the observed covariates, observations were assigned to the treated group independent of outcomes).}
Is the Policy Window Open for High-Speed Rail in the United States: A Perspective from the Multiple Streams Model of Policymaking

Zhenhua Chen*

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ABSTRACT

With the election of a new government, intercity passenger rail transportation, for which interest had “faded” for years, is now back on President Obama’s agenda. Technological innovation has brought focus to high-speed intercity passenger rail transportation. This new focus has revealed too many people who are tired of modern transportation problems, such as airline delays and highway congestion, and also revealed a new hope for future travel. This paper will begin with a chronological introduction of the intercity passenger rail policy in the United States. John Kingdon’s Multiple Streams model (“MS”) is adopted to explore the roles of political streams in the processes of shaping the national strategic plan for high-speed rail development. Three main questions will be answered through the analysis: (1) Why is High Speed Rail (“HSR”) on President Obama’s agenda now? (2) What role does HSR play in the US? (3) What can be done in order to have such a large infrastructure project implemented both efficiently and effectively over the long term and without facing the hurdles of a shift in the political tide?

I. INTRODUCTION

High-Speed Rail (“HSR”), also known as an intercity passenger transport, can run at top speeds of at least 150 mph.1 Traditionally, rail-dominated countries such as Japan, Germany, and France use HSR to connect metropolitan areas and have achieved impressive social and economic successes due to their use of HSR.2 Countries such as Spain, Ko-


High-Speed Rail – Express: Frequent, express service between major population centers 200–600 miles (320–965 km) apart, with few intermediate stops. Top speeds of at least 150 mph (240 km/h) on completely grade-separated, dedicated rights-of-way (with the possible exception of some shared track in terminal areas). Intended to relieve air and highway capacity constraints.

High-Speed Rail – Regional: Relatively frequent service between major and moderate population centers 100–500 miles (160–800 km) apart, with some intermediate stops. Top speeds of 110–150 mph (177–240 km/h), grade-separated, with some dedicated and some shared track (using positive train control technology). Intended to relieve highway and, to some extent, air capacity constraints.

Emerging High – Speed Rail: Developing corridors of 100–500 miles (160–800 km), with strong potential for future HSR Regional and/or Express service. Top speeds of up to 90–110 mph (145–177 km/h) on primarily shared track (eventually using positive train control technology), with advanced grade crossing protection or separation. Intended to develop the passenger rail market, and provide some relief to other modes).

2. Yong, Sang Lee, A Study of the Development and Issues Concerning High Speed Rail
rea, and China have introduced HSR into their transportation systems and are also beginning to see the results of HSR after years of projects. As a result of the Intermodal Surface Transportation Equity Act ("I-TEA") of 1991, America has initiated the creation of a concrete HSR plan. The High-Speed Rail Development Act ("HSRDA") of 1994 took further clear steps to bring HSR to the United States. However, during previous administrations HSR had "faded" out of the governmental agenda.

In recent years, under the backdrop of soaring gasoline prices and increasing concerns about environmental protection, it has become clear that HSR is an ideal alternative for future transportation. HSR has gained new attention in the United States. Furthermore, because of the 2008 economic recession, job creation is the first priority of the Obama Administration. The Obama Administration has given HSR a new task—creating jobs. In February 2009, just a few days after his inauguration, the American Recovery and Reinvestment Act ("ARRA") was passed, which apportioned eight billion dollars designated for a national high-speed rail investment. In April 2009, the United State Department of Transportation (USDOT) announced the national strategic high-speed rail plan, Version for High Speed Rail in America, which includes eleven high-speed corridors designed to accommodate maximum speeds of over 120 mph. On January 28, 2010, President Obama unveiled the High-Speed Intercity Passenger Rail Program, which included several initial


3. Yong, supra note 3 (The Japanese Shikansen, French TGV, and German ICE are thought to be the most successful high-speed rail worldwide. After the maturity of the high-speed rail technology, other countries also started to build their own high-speed rails through technology introduction. Currently, the Spanish AVE high-speed rail and Korean KTX high-speed rail is directly derived from the French Alstom's technology. The Chinese CRH high-speed rail system is based on the high-speed rail technology from the Japanese Shikansen, French TGV and German ICE all together).


9. Id.; FRA supra note 2 (The ARRA requires within 60 days of the enactment of this Act, the Secretary shall submit to the House and Senate Committees on Appropriations a strategic plan that describes how the Secretary will use the funding provided under this heading to improve and deploy high speed passenger rail systems).
selected projects that would be awarded federal funds.\textsuperscript{10}

These changes in policy and funding show that unlike other countries, the idea of HSR in the United States has been on and off public and presidential agendas because of different economic situations and political tides. Now supported by an innovative and ambitious president, the “faded” HSR seems on the verge of a comeback and ready to get on the right track. Yet, the answers to several fundamental questions are still unclear. Why is President Obama now pushing HSR instead of other alternative modes? What are the situational differences between the related HSR Acts that have passed during Obama’s administration and that in Clinton’s and George W. Bush’s administrations? What role does HSR play in the United States, and what can be done to implement these long-term infrastructure projects efficiently and effectively?

To answer these questions it is necessary to understand the internal mechanism of agenda-setting in the policy making process by following paths of public policy theory and then find a rational explanation for the policy outcomes. Many public policy theories have addressed the policy making process in different approaches, including: the Pluralism Theory, Public Choice Theory, Critical Theory and Rationalism Theory.\textsuperscript{11} Another classic theory, also known as the Multiple Streams (MS) model, developed by John Kingdon in his book \textit{Agenda, Alternatives and Public Policies}, has been widely used for a variety of policy analyses.\textsuperscript{12} Kingdon posits three relatively independent, but intermittently “coupled” streams that constitute the policy process: “political,” “problem,” and “policy.”\textsuperscript{13}

The “political” stream is constituted by political developments as conventionally understood as: public moods, pressure group campaigns, election results, partisan or ideological distribution in Congress, and changes of administration.\textsuperscript{14} The “problem” stream is composed of external events that impress themselves on the decision-makers’ attention, whether through mechanisms of indicators, focusing events, or feed-

\textsuperscript{10} Federal Railroad Administration, High-Speed Intercity Passenger Rail (HSIPR) Program (Sept. 2010), http://www.fra.dot.gov/downloads/hsiprapplist.pdf [hereinafter HSIPR] (The Federal Railroad Administration (FRA) received 259 grant applications from 37 States and the District of Columbia requesting nearly $57 billion in funding, far exceeding the initial $8 billion available under the American Recovery and Reinvestment Act of 2009. In total, 79 applications from 31 States were selected for funding).

\textsuperscript{11} See Anne Larason Schneider & Helen Ingram, Policy Design for Democracy (Univ. Press of Kan. et al. eds., 1997).


\textsuperscript{14} Kingdon, supra note 13, at 145.
back. The policy stream is constituted by the accumulation of competing proposals put forth by various “policy communities.” This stream comes to compose a “policy primeval soup,” in which politicians and their advisors cast about for responses to events thrown up by the other two streams. The soup is stirred by “policy entrepreneurs” who are continually looking for connections between politics and policy making. They are persistent and are constantly looking for a “policy window” to take action. This paper concentrates on the MS model to analyze how these different streams interact with each other in the HSR policy-making process. The reason for adopting the MS model instead of other theories is because the MS model provides a better framework to investigate how policy outcome is shaped by different political factors. Additionally, a case study of the Florida HSR is introduced specifically to explain how coupled activities of policy entrepreneurs influence the policy outcome when the policy window opens.

II. MULTIPLE STREAM MODEL

Policy making is a complicated process because many actors are involved, and their propositions and influences can have impacts on the policy making process. The involvement of many actors inexorably makes the policy outcome difficult to predict. Through a drastic oversimplification, public policy-making can be considered to be a set of processes including: (1) the setting of the agenda, (2) the specification of alternatives from which a choice is made, (3) an authoritative choice among those specified alternatives, and (4) the implementation of the decision. For the past forty-four years, the concept of HSR has been ad-

16. Kingdon, supra note 13, at 117 (Policy communities indicate specialists in a given policy that are scattered both through and outside of government. They include committee staffs in Congress, staffs in Congressional staff agencies such as the Congressional Budget Office or the Office of Technology Assessment, and academic scholars, consultants, or analysts for interest groups).
17. Id. (Policy primeval soup, as pointed out by Kingdon, refers to the formation process of policy ideas, alternatives, and proposals in the policy community because this resembles a process of biological natural selection where molecules floated around in what biologists call the “primeval soup” before life came into being).
18. Kingdon, supra note 13, at 122 (Kingdon defines the policy entrepreneur as advocates for proposals or for the prominence of an idea).
19. Kingdon, supra note 13, at 165 (The policy window refers to an opportunity for advocates of proposals to push their political ideas or to push attention to their special problems).
20. Kingdon, supra note 13 at 21 (Policy actors are divided into two groups: participants on the inside of government, including the Administration, civil servants and Capitol Hill; Outside of government, which includes interest groups, academics, researchers, consultant, the media, election-related participant, and public opinion).
21. Id.
dressed and discussed among policymakers only at the agenda-setting and alternative stages, and the concept has never reached the authoritative or implementation stages. However, this situation has changed since Barack Obama became the President of United States. Through two acts, the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") and ARRA, HSR has been pushed onto the national agenda and has begun to enter the authoritative and implementation stages. There must be a powerful strength behind this change for success. In order to understand the inherent driving force for this change, we will follow John Kingdon’s MS model to explore different streams behind HSR policy.

A. Problems Stream

What does the problems stream consist of in the HSR policymaking process? Why is HSR raised? How do problems attain the attention of policymakers? According to Kingdon’s model, various mechanisms—indicators, focusing events, and feedback—bring problems to governmental officials’ attention. In the actual HSR policy-making process, all these mechanisms have played roles in pushing HSR forward.

Generally, HSR is addressed to solve contemporary transportation issues. As a new transportation mode, HSR is different from conventional passenger rail because of higher speed, better amenities, and higher reliability for on-time performance. Also, in terms of energy efficiency and social and economic impacts, HSR has a unique advantage over other transportation modes in medium-distance travel. From 1990-2009, seventy-three bills have been proposed in the House or Senate related to HSR, and only eight of the HSR related bills have been passed. The problems addressed by these bills vary in terms of the

23. Lyndon B. Johnson, President of the U.S., Annual Message to the Congress on the State of the Union (Jan. 4, 1965), available at http://www.lbjlib.utexas.edu/node/johnson/archives/online/speeches/1965/650104.htm (From January 4, 1965 in the Annual Message to the Congress on the State of the Union by President Lyndon Baines Johnson (LBJ) publicly supporting high-speed rail development to February 17, 2009 when ARRA passed; the period is forty-four years).


27. See Yoav Hagler, Where High-Speed Rail Works Best, AMERICA 2050, http://www.america2050.org/pdf/Where-HSR-Works-Best.pdf (Normally, HSR is thought to serve distances between 100-500 miles, higher than 500 miles is serviced by air, and lower than 100 miles is serviced by automobiles).

High-Speed Rail

different time period of passage. Generally, three major problems that HSR aims to correct are: (1) improving the national intermodal transportation network, (2) providing transportation alternatives for energy savings and environmental concerns, and (3) creating jobs and stimulating economy prosperity.29

The first problem that HSR aims to correct is to improve the national intermodal transportation network.30 As a new dimension of transportation infrastructure created to meet passenger transportation demand, HSR has been addressed as a way to enhance the national transportation system. Many indicators were used to reveal this problem. In 1965, in his remarks signing the High-Speed Ground Transportation Act, President Lyndon B. Johnson quoted socioeconomic statistics to point out the need for HSR development:

In the past 15 years, travel between our cities has more than doubled. By 1985—only 20 years away—we will have 75 million more Americans in this country. And those 75 million will be doing a great deal more traveling...we must find ways to move more people, to move these people faster, and to move them with greater comfort and with more safety.31

Later in the 1990s, highway and airport congestion became a more apparent issue for policymakers to tackle.32 A study was conducted to assess the feasibility of implementing a HSR system as an alternative mode of transportation in the United States.33 At the request of the US-DOT, the National Research Council, operating through the Transportation Research Board, assembled a committee to assess the applicability of HSR technologies to meet the demand for passenger transportation service in high-density travel markets and corridors.34 The study results


29. U.S. High Speed Rail Ass’n, supra note 27.
showed that HSR could be an effective alternative to auto and air travel in corridors where travel demands are increasing, but where increasing the capacity of highways and airports is difficult.\textsuperscript{35} Studies have also shown that building a HSR system can help improve the national intermodal network, and thus, strengthen national competitiveness through alleviating congestion and fostering economic development.\textsuperscript{36} For many years, this was the issue that HSR bills addressed.

The second problem that HSR development addressed was accounting for environmental concerns by providing an energy efficient alternative form of transportation.\textsuperscript{37} This is especially true when the economy is under certain energy and environmental pressures. During 2007 and 2008, high gasoline prices demonstrated a weakness in the current American intermodal transportation system and illustrated how PRIIA developed HSR could provide a feasible alternative.\textsuperscript{38} The main objective of PRIIA focused on increasing support for intercity passenger rail travel, including Amtrak’s long-distance passenger line along the Northeast Corridor ("NEC"), an HSR corridor.\textsuperscript{39}

Before PRIIA was submitted to Congress, two notable studies had been conducted to examine HSR’s impact on energy and on the environment. The first study named "High Speed Rail and Greenhouse Gas Emissions in the U.S." concluded that the implementation of proposed federally designated HSR corridors could result in an annual reduction of 6 billion pounds of carbon dioxide emissions.\textsuperscript{40} The second study conducted by the congressionally created National Surface Transportation Policy and Revenue Study Commission, indicated that intercity passenger rail consumes seventeen percent less energy per passenger mile than air travel and twenty one percent less energy per passenger mile than passenger automobile travel.\textsuperscript{41} These statistical indicators underscored a need for sustainable, clean, and efficient transportation alternatives. The
Obama Administration capitalized on this in need promoting HSR.\textsuperscript{42} These statistical indicators, combined with high profile, presidential support have helped a greater number of policymakers to become aware of the problem and have stimulated them to take the issue seriously.\textsuperscript{43}

The third problem addressed by HSR is high unemployment resulting from the economic recession of 2008 and 2009. Creating jobs and stimulating the economy demonstrates important objectives and benefits of the HSR.\textsuperscript{44} Creating jobs through HSR projects has been previously addressed, but the impact of the economic recession of 2008 and 2009 increased focus on the job creation potential of HSR. On April 28, 1993 Secretary of Transportation, Federico Peña introduced the Clinton Administration’s proposal for a major new initiative to advance high-speed ground transportation.\textsuperscript{45} This proposal reflected a new dimension of HSR development, the use of HSR projects to spur economic development and create jobs.\textsuperscript{46} Despite this new approach, progress on this proposal was impeded by a powerful opponent, transportation unions motivated by the perception that HSR projects would result in layoffs and wage cuts for existing transportation workers.\textsuperscript{47}

Compared to the recession damaged economy of 2009, the American economy in 1993 was healthy. A healthy economy and job security can explain why earlier HSR proposals failed to gain traction. Simply put, when jobs are threatened any measure securing or creating jobs is considered. For this reason, during the 2009 recession the HSR plan proposed by President Obama aimed at creating jobs and sought to capitalize on unemployment concerns to gain national support.\textsuperscript{48} Reframing HSR as a job creation mechanism helped support the HSR initiative by creating a distinct, employment-oriented argument in favor of HSR.\textsuperscript{49} The economic recession, and resulting passage of the ARRA of 2009, facilitated

\textsuperscript{42} See Barack H. Obama, President of the U.S., Remarks at Hudson Valley Community College (Sep. 21, 2009) (transcript available from CQ Transcriptions, LLC).
\textsuperscript{43} See Press Release, Governor Arnold Schwarzenegger, Senator Barbara Boxer, Senator Diane Feinstein, Feinstein Boxer and Schwarzenegger Join in Support of High-Speed Rail Funding (Nov. 23, 2009) (available from CQ Transcriptions, LLC).
\textsuperscript{44} CALIFORNIA HIGH SPEED RAIL AUTHORITY, supra, note 34.
\textsuperscript{45} See Krumm, supra, note 35.
\textsuperscript{46} Krumm, supra, note 35.
\textsuperscript{47} Id.
support for HSR by dedicating an eight billion dollar investment to create jobs in HSR.50

Kingdon’s theory posits that problems are not often self-evident from certain indicators.51 “Problems need a little push to get the attention of people in and around government.”52 This “push” can be provided by a focusing event, like a crisis or disaster that calls attention to the problem; in turn the personal experience and perception of policymakers is changed. Broad-based, systemic indicators of the problem’s existence often generate policymaker awareness.53 A triggering event serves to accelerate and exacerbate the effects of the problem, speeding and intensifying policymaker awareness and response.54 As a result, government and has found HSR as an attractive solution to the current problems faced by the nation.55

B. Policy Stream

In Kingdon’s theory, the policy stream represents a short list of proposals.56 This short list does not gain consensus from the policy community because one proposal does not meet their criteria to solve a problem; rather, the availability of multiple potential solutions drives policymakers.57 When considering a policy stream or a short list of proposals, concrete ideas are favored by governmental policymakers because of their technical feasibility and capacity for actual implementation.58 A detailed development plan and a clear project purpose can be very helpful for policymakers to make decisions. In order to gain legislative supports, HSR proposals were submitted with a variety of contents and focuses (See Table 1).

51. Kingdon, supra, note 13 at 94-95.
52. Id.
53. Kingdon, supra, note 13 at 90-98.
54. Id.
56. Id.
57. Id.
58. See Kingdon, supra note 13 at 144.
Table 1 Proposed High-Speed Rail Bills from 1991-2008

<table>
<thead>
<tr>
<th>Bill Type</th>
<th>Total</th>
<th>SENATE</th>
<th>HOUSE</th>
<th>Breakdown by %</th>
<th>SENATE</th>
<th>HOUSE</th>
</tr>
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<tbody>
<tr>
<td>Authorization</td>
<td>37</td>
<td>16</td>
<td>21</td>
<td>43</td>
<td>57</td>
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<tr>
<td>Corridor Planning</td>
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<td>1</td>
<td>2</td>
<td>33</td>
<td>67</td>
<td></td>
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<tr>
<td>Financing</td>
<td>35</td>
<td>12</td>
<td>23</td>
<td>34</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>Energy Concerns</td>
<td>14</td>
<td>8</td>
<td>6</td>
<td>57</td>
<td>43</td>
<td></td>
</tr>
<tr>
<td>Safety and Security</td>
<td>15</td>
<td>3</td>
<td>12</td>
<td>20</td>
<td>80</td>
<td></td>
</tr>
<tr>
<td>Technology</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>75</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Economy Stimulation</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>14</td>
<td>86</td>
<td></td>
</tr>
</tbody>
</table>

* Some bills may contain more than one type.  
* Authorization: includes authorized appropriations, authorize Secretary of Transportation to establish special corporation, committee or agencies, to provide supports for HSR design and research.  
Financing: to provide direct financial assistance for HSR infrastructure.  
Corridor Planning: specific HSR corridor or route planning, service improvement.  
Energy Concerns: to promote energy independence by bolstering rail infrastructure.  
Safety and Security: to strengthen national security and improve intercity passenger rail safety, to prevent railroad fatalities, injuries.  
Technology: To encourage development of HSR related technology.  
Economy Stimulation: to provide support for HSR investment to restore the United States economy.

Among these focuses, the most dominant issues are legislative support and allocated financing. Legislative support is important because it demonstrates authorization for HSR development, while financing allows HSR projects to begin. These two elements are key to HSR development in the United States. Furthermore, post 9/11 efforts to improve safety and security on rail travel have also driven public sector stakeholders to improve cooperation in the development and oversight of domestic rail travel. Considered in conjunction with statistical indicators, emphasizing that rail rider-ship increases when gasoline prices rise and that rail travel can maintain rider-ship after gasoline prices level off, a healthy environment for developing HSR exists. A confluence of circumstance and opportunity lead to the proposed Program for Real Energy Security


Act, sponsored by Representative Steny H. Hoyer’s in 2007. The bill proposed a series of solutions to promote energy independence by several means, including supporting passenger rail travel. The bill sought to improve passenger vehicle fuel technology and efficiency and provided the financial means to bolster the American rail infrastructure. In particular, the bill added specific sections that created high-speed rail infrastructure bonds and provided tax incentives to bond holders to stimulate high speed rail development.

One common objective for these HSR policy proposals is to build an efficient HSR system in the United States. However, neither lawmakers nor the President have personal experience with HSR. Therefore, when the idea of HSR is addressed, reactions from both Congress and the White House are very cautious. Under such a scenario, for HSR to be accepted, policymakers must be persuaded that HSR can benefit the nation. It seems that the long-term benefits, such as congestion alleviation and energy consumption reduction, are too far off in the future to see any practical immediate effects. Consequently, those tangible advantages that can be seen in a short term are preferred by policy communities in order to prove its feasibility.

One of the major tangible advantages of developing HSR in the United States that has been advocated is job creation and economic growth. Figure 1 shows the relationship between number of proposed HSR bills introduced in Congress and economic conditions. According to Table 1, from 1991 to 2008, there were a total of three periods when HSR bills were prevalent. Interestingly, Table 1 also indicates that the years with the most HSR proposals submitted were primarily during economic recessions. The first year was in 1991 when the economic recession caused high unemployment, massive governmental deficits and slow GDP growth. In 1991 alone, eleven HSR related bills were submitted, among

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64. See id. § 503.
65. See id. §§ 301, 401, 403.
67. See Calum MacLeod, China’s Fast Trains May Offer Tips for U.S., USA TODAY, Feb. 8, 2010 at B10; see also U.S. to Learn from Europe on High-Speed Rail: Transport Chief, AFP, (May 30, 2009), http://www.google.com/hostednews/afp/article/ALeqM5jDs5_AbwZmRyOi4kScPqHp_cLJFA (Only until recent years when high-speed rail was promoted by President Obama, many top governmental officials began to seek first-hand experience on high-speed rail in other countries).
68. MacLeod, supra note 68 (“Not everyone thinks high-speed rail is right for the United States.”).
69. Id.
which seven were Magnetic Levitation development bills. A second recession occurred in the early 2000s, particularly from 2001 to 2003. Again, 2003 is another year that has more HSR bills proposed in Congress. Most of the bills directly addressed economic stimulation and job creation with a strategy of increasing transportation infrastructure investment.

The Rail Infrastructure Development and Expansion Act for the 21st Century, proposed by Representative Don Young, former chairman of the House Committee on Transportation and Infrastructure, on June 24, 2003 required the establishment of an authority for States or Interstate Compacts to issue $12 billion in federally tax-exempt bonds and $12 billion in federal tax-credit bonds for infrastructure improvements in high-speed passenger railroad infrastructure. Although the bill failed to be enacted by Congress, it did reveal that HSR promotion was receiving congressional attention as one method to combat the economic downturn.


74. H.R. 2570, §§ 2, 4.
The third wave of HSR proposals associated with economic recession concerns began in 2008. Compared with prior recessionary years, the number of HSR bills proposed was not as significant; yet, these bills did show more realistic development plans that also increased their likelihood of passage through Congress. For example, the Passenger Rail Investment and Improvement Act of 2008, H.R. 6003 concretely articulated federal appropriations of funds for a HSR corridor development plan. It also provided measures to promote private sector development of the Northeast Corridor and other potential high-speed rail. On October 16, 2008 a related bill, the Railroad Safety Enhancement Act of 2008, H.R. 2095, was signed into law. The act expressed a clear statement of the federal government's role in the development of the national HSR. With a detailed HSR legislative guideline, the passage of the ARRA on February 17, 2009 was connected with the PRIIA, and it linked the HSR to the purposes of economy stimulation and job creation.

From the multiple HSR policy proposals during 1991 and 2008, it

75. Legislative data sources for Table 1 were generated by a search of congressional legislative search engines for the term “high speed rail.” Gross domestic product (GDP) data is provided by the U.S. Bureau of Economic Analysis, available at http://www.bea.gov/national/index.htm#gdp.
76. H.R. 6003, §§ 501-04.
77. Id. § 208.
79. Id. (articulating revisions to the high-speed rail assistance program to authorize federal assistance for federal high-speed rail corridor planning activities and authorizing appropriations).
demonstrates that in the United States the idea of building HSR system becomes more likely to meet the short-term objective of stimulating the economy and creating jobs rather than long-term objectives. Because the long-term benefits of HSR, such as alleviation of congestion in other modes, reducing energy consumption, and boosting regional development, not only depend on the system itself, but also on other external variables such as traffic deviation from other modes, source of electricity generation, and the density of urban areas crossed, the actual effect of outcomes becomes hard to predict.\(^8\) Comparatively, the HSR short-term benefits are much more solid for policy communities to focus on. Therefore, in the policy stream, many proposals tend to link HSR with short-term tangible objectives so that it can become more likely to rise to the top of the governmental agenda.

C. **Political Stream**

In the MS model, flowing independently alongside the problem and policy streams, the political stream is composed of such things as national mood, pressure group campaigns, election results, partisan or ideological alignments in Congress, and changes of administration.\(^8\) The emergence of a HSR is mostly pushed by two major components of political stream: ideological alignments in Congress and changes of administration. In the United States, the idea of HSR stands for a new dimensional perspective that aims at solving contemporary transportation problems, such as relieving congestion and greenhouse gas reduction.\(^8\) However, because of the unpredictable social and economic outcomes and tremendous capital cost, Republicans and Democrats have formed different standpoints regarding government’s role in HSR spending. Republicans generally represent a conservative ideology on government spending. They believe government spending on HSR is too risky to be affordable.\(^8\) Democrats, generally represent a liberal ideology, prefer increasing government spending on HSR to spur development and achieve better connection among city centers.\(^8\) These ideological discrepancies can be tracked by the recent usage debate of HSR stimulus money in Madison, Wisconsin.


\(8\) \textit{Kingdon, supra note 13, at 162.}

\(8\) \textit{See Barack H. Obama, President of the U.S., and Joseph Biden, Vice President of the U.S., Remarks by the President and Vice President on a Vision for High-Speed Rail in America} (Apr. 16, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-and-the-Vice-President-on-High-Speed-Rail/).


\(8\) \textit{Id.}
Democrats proposed a new state office building be one of the first new station stops on a high-speed rail network paid for primarily with federal dollars, while Republicans opposed that idea because of a concern about runaway government spending. From a broader view, through the party initiation of HSR and Maglev related bills proposed from 1991 to 2008 (See Table 2), HSR and Maglev matters are more likely to be addressed by Democrats than Republicans in Congress. Consequently, the shift of the political majority in both Congress and the administration directly affects the viability of HSR proposals on the governmental agendas.

Table 2 - Proposed High-Speed Rail and Maglev Bills from 1991-2008

<table>
<thead>
<tr>
<th>Bill Type</th>
<th>Breakdown by Number</th>
<th>Breakdown by %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>REPUBLICAN</td>
</tr>
<tr>
<td>High-Speed Rail</td>
<td>65</td>
<td>23</td>
</tr>
<tr>
<td>Magnetic Levitation</td>
<td>8</td>
<td>1</td>
</tr>
</tbody>
</table>

American political history has two periods when HSR became part of the governmental agenda. The first period started with the passage of ISTEA in 1991 and ended with the passage of Swift Rail Development Act in 1994. The second period started in late 2007 with the passage of the Railroad Safety Enhancement Act of 2008 and is still ongoing today. In the first period, Democrats controlled both Houses. From 1989 to 1996, eight HSR proposals and six Maglev proposals were submitted to Congress. More interestingly, all the proposals were submitted by

85. Id.
86. Table 2 demonstrates that high speed rail bills proposed by Democrat are 30 percent higher than Republican, and magnetic levitation bills are proposed by Democrats 72 percent more than Republicans.
88. In the 103rd Congress, the Democratic Party controlled the U.S. Senate with as many as 57 seats, and the U.S. House of Representatives with 258 seats.
Democrats. In the second period, the nation was in a recession. Due to more uniform ideological distributions in the House and Senate, a variety of HSR policy proposals were submitted and awaiting a policy window opening.

Another important political stream component appeared and helped facilitate the passage of HSR bills, the change of administrations. Now HSR is back on the governmental agenda and is basically attributable to the new unified rail leadership. President Obama, as one of the most active HSR advocates in this country, collaborated with a longtime rail user, Vice President Joseph Biden, and a new Secretary of Transportation, Ray LaHood, to speed up the national HSR development process to an unprecedented stage.

Started in 2008, America suffered a severe economic recession, which at one point caused the unemployment rate to reach 10.2%, and tens of thousands of businesses to shut down. In order to get the economy to recover as soon as possible, the ARRA was passed on February 17, just one month after President Obama’s inauguration. In this Act, an eight billion dollar transportation infrastructure investment was dedicated to HSR, something that had never been done before. As the first African-American President, Barack Obama was thought to be a revolutionary in American politics. Moreover, he seems to have greater interest in innovation and more courage to take on challenges than his predecessors. Because of this, he seeks new alternatives to solve old
problems. On the unveiling event of the national HSR plan on April 16, 2009, President Obama said, "[w]hat we need, then, is a smart transportation system equal to the needs of the 21st century. A system that reduces travel times and increases mobility. A system that reduces congestion and boosts productivity. A system that reduces destructive emissions and creates jobs."98

Meanwhile, Vice President Joseph Biden and Secretary of Transportation Ray LaHood have helped President Obama push HSR as well as implement the HSR.99 In fact, as a long time train user, Biden was in charge of the infrastructure expenditure from the Obama stimulus package whose purpose was to counteract the ongoing recession.100 Also, it shows that HSR is Secretary LaHood's top priority as Transportation Secretary. After the announcement of the national HSR plan in April 2009, he has been actively involved in allocating HSR money.101 Not only did he visit Spain to gain knowledge for HSR development in the United States, but he also had discussions with HSR grant applicant states to allocate the money to the most practical routes.102 In short, the change of administration was a key component in the HSR political stream.

According to the MS model, "the agenda is affected more by the problems and political streams, and the alternatives are affected more by the policy stream."103 A "policy window" indicates an opportunity for policy entrepreneurs who are "advocates of proposals to push their pet solutions."104 When policy windows open, policy entrepreneurs act to couple the three streams.105 In Florida, a policy window has opened. A case study of the Florida HSR explores how policy entrepreneurs couple the three streams because Florida's Tampa-Orlando HSR plan was awarded $1.25 billion in federal HSR grants and is likely to be the first real HSR system completed.106 Although studies have shown that the

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98. Obama, supra, note 83.
99. See id.
101. See id.
102. See id.
103. See Kingdon, supra note 13 at 168.
104. Id. at 165.
105. See id. at 196-97.
most recommended places to have HSR are city pairs in the Northeast Corridor. Florida’s success in winning the initial HSR as the single developing HSR in the United States is no surprise. Florida’s HSR is not merely a solution to the transportation issue; more importantly, it is the outcome of political gaming among different stakeholders. Through this case analysis, we can understand how the United State’s policy entrepreneurs are achieving the HSR policy goals through the coupling of activities.

III. The Window Opens for Florida HSR

The original idea of building HSR in Florida can be dated back to 1976. “For more than 30 years, lawmakers and state officials have ordered studies . . . including a 1984 report that said it was a necessity for the 21st century,” proposing a passenger system to connect big metropolitan cities in Florida, such as Miami, Orlando, and Tampa. In 2000, voters approved a constitutional amendment mandating a high-speed rail system in the state. Yet, Governor Jeb Bush led a charge to veto the amendment in 2004, which consequently killed the high-speed rail authority. However, Florida’s rail advocates never gave up their hope for HSR.

The Florida Department of Transportation actively prepared HSR proposals and waited for another opportunity to arrive. In 2009, the passage of the ARRA opened a window for nationwide HSR advo-
A dedicated fund of eight billion and five billion in appropriations in the next consecutive five years will be spent on the national HSR plan. On April 16, 2009, the Secretary of Transportation announced criteria for applying for the federal HSR fund. Then nine months later, just after the State of the Union, President Obama flew to Tampa and announced that Florida had been awarded $1.25 billion in HSR money. Although the amount did not meet the $2.6 billion needed for Florida’s proposal, it demonstrated that the Florida HSR seized this unique opportunity and would most likely be the first state to implement HSR.

Florida’s HSR success did not happen by chance. In fact, its success reflects how political factors play a tremendous influence in the outcome of HSR in the United States. At a time that both the problem window and political window opened, Florida’s HSR policy entrepreneurs actively coupled policy, problem, and political streams, which helped their HSR dream become reality.

A. Problem Window

Probably the most obvious window for Florida’s HSR is the economic recession. Florida was severely affected by the recession. According to the Bureau of Labor Statistics in March of 2010, the unemployment rate was 12.3%, much higher than the national level of 9.7%. Putting Floridians back to work is the most urgent task the Florida government has ever faced. Under this condition, the HSR propo-

114. See Dutzik supra note 56 at 8 (For the first time, the federal government has invested significant resources towards the development of high-speed rail in the United States, with $8 billion allocated in the ARRA and $2.5 billion more allocated in Congress’s fiscal year 2010 budget. This has opened a great opportunity for state and interest groups coupling their passenger rail projects with concrete federal financial support).
116. See FRA supra note 2 at 14-15 (detailing the general selection criteria for projects and corridors).
High-Speed Rail

sal is reconsidered as an alternative to create jobs and is well suited to the public and labor unions’ current need. The economic recession has consequently pushed the state government to take HSR seriously and put it on the agenda. When the ARRA was passed, Florida’s economic situation had naturally stimulated the state to develop ideas for HSR.

Another open problem window for consideration of HSR was the price of gasoline soaring to four dollars per gallon in 2008. The increasing price of gas had scared many Floridians to conclude that their state transportation system had become too dependent on the automobile. Alternatives had to be considered in order to combat a future Florida energy crisis.

B. Political Window

Not only did the problem window open, but also the political window opened at the same time. Barack Obama became the President of the United States and by de facto a huge political window opened for HSR in Florida. First, President Obama strongly supports HSR in the United States, so his cabinet members are actively helping him carry out the national High-Speed Intercity Passenger Rail Program. Shortly after his announcement of the vision for HSR in America on April 16, 2009, USDOT began detailing a plan for selecting qualified HSR project proposals nationwide. Since the initial announcement of the designation of the Florida HSR corridor linking Miami with Orlando and Tampa in 1992, the Florida HSR corridor has been formally integrated into the national HSR plan. Therefore, when a new intercity passenger rail program became part of the governmental agenda, Florida’s Tampa-Orlando HSR corridor naturally gained the attention of the federal government.

Second, Barack Obama’s special individual tie with Florida has

122. Matthews & Tracy, supra note 119.
123. See id.
125. Id.
129. See generally id.
helped to support a policy preference to benefit his patrons. More precisely speaking, his success in winning the state of Florida in the 2008 presidential election, which was largely attributable to Florida's "I-4" constituents' support, was an important factor. The I-4 corridor refers to the area that borders the 132 mile stretch of the I-4 interstate. The westbound point starts at Tampa and the eastbound ends at Daytona Beach. This area contains a large population and is the most important political swing area for Florida elections. Winning "I-4" normally means winning the whole state because North Florida is largely the Republican's turf while South Florida is Democratic. It was thought to be "the most important part of the most important state in the most important election." In 2004, the voters heavily voted for Bush, which helped Bush win the state. In 2008 it swung behind Democratic candidate Obama, helping Obama win Florida by a 2.8% margin of victory (see Figure 3). Obama is greatly indebted to Floridians. Because Florida was severely affected by the recession, Obama wants to pay back his Floridian supporters and help them get back to work quickly. On January 28, 2010, just two days after his State of Union speech, President Obama together with Vice President Joseph Biden went to Tampa, Florida. In a Tampa town hall meeting, he announced his firm support with a $1.25 billion down payment for the HSR project between Tampa and Orlando. As he said, the stimulus money would go to buy right-of-ways, build track, and conduct engineering and environmental work that could create 23,000 jobs over four years. Generally, because of the political connection with I-4 corridor constituents, President Obama's support for Florida HSR has undeniably strengthened.

131. Id.
132. Id.
133. Id.
134. Id.
136. Zeleny, supra note 118.
137. Id.
138. Id.
Third, Florida’s geographic advantages makes it an exceptional place to build the HSR model that can help Americans get real experience with HSR, and thus, obtain more political support for it. Currently, the debate about building a HSR system in the United States is focused on the high implementation costs versus unpredictable future benefits. Normally, the HSR-related benefits are measured through rider-ship; the more riders, the bigger benefits it will generate. However, future rider-ship projections are based on current data, and the reality might be quite different because no one has ever experienced HSR and its benefits. Consequently, the cost becomes the focal point that creates the major challenges.

The key to make HSR successful is to establish a dedicated right-of-way so that running at a true high speed can be guaranteed to attract more riders. Unlike other countries, over sixty percent of the land in the United States is privately owned and the government has a very difficult

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142. Id.
time obtaining land for public usage. Because of the high cost of land, as well as constraints from ‘Not in My Backyard (‘NIMBY’), the cost of HSR turns out to be extremely high. This is why the Acela Express, which runs between two of the most densely populated areas, still cannot achieve a true high speed of over 120 mph on average. It simply doesn’t have a dedicated right-of-way, and it even has to run on a shared track with freight trains in some parts of NEC corridor. Building another dedicated right-of-way will face lots of constraints from NIMBY persons. Choosing Florida I-4 rather than other planned national HSR corridors as a starting point is smart because the proposed Tampa-Orlando HSR line will be constructed on the land beside I-4 which is owned by the federal government, so land-acquisition costs are minimal. Also, because the land is almost flat in the I-4 corridor, the cost to build a HSR route will not be too high compared with other corridors. Such a low construction cost is likely to face less opposition both from legislators and the public, and thus, allow the Florida HSR plan to become a reality much faster. If the state and federal financing hold, the first phase of the railway is scheduled to be completed by 2015.

In sum, after more than a decade’s waiting, both the problem and political window for Florida’s HSR has opened. The soaring of gas prices during the economic recession made people realize the need to find an alternative transportation mode to face future energy issues, while the economic recession made people aware of the necessity of creating jobs and stimulating the economy. These events have captured the attention of governmental officials both at the state level and the federal level, and thus, triggered the opening of the problem window for HSR proposals. Also, with a pro HSR administration in office, Obama gives interest groups, legislators, and agencies an opportunity to push HSR positions and proposals they did not have with the previous administration. With a special political bond with the Florida I-4 constituents, as well as the region’s unique topological advantages for HSR, the political window opened for Florida’s HSR. When the windows open, policy entrepre-

145. See generally id.
146. Id.
147. Id.
150. Zeleny, supra note 118.
neurs began actively coupling the problem and political stream to the policy stream and ultimately facilitated acceleration of the HSR to become reality.

C. COUPLING BY POLICY ENTREPRENEURS

In Kingdon's theory, policy entrepreneurs are defined as "advocates who are willing to invest their resources—time, energy, reputation, and money—to promote a position in return for anticipated future gain in the forms of material, purposive, or soldiery benefits." The coupling activity by HSR policy entrepreneurs can be analyzed at both the federal and state level. One pivotal policy entrepreneur that pushed the HSR at federal level was Representative John Mica, who represents Florida's 7th congressional district where the proposed Tampa-Orlando HSR is located. As the highest-ranking Republican on the Transportation and Infrastructure Committee, Mica has been collaborating with Committee Chair Jim Oberstar (D-Minn.) to promote HSR. In March 2008, Rep. Mica proposed H.R.5644 in order to provide for competitive development and operation of high-speed rail corridor projects in the United States. The bill proposed a plan to allow a secretary to set up criteria for selecting HSR feasible corridors. The bill was incorporated into the PRIIA and signed by President Bush into law. This was the first time that a concrete HSR implementation plan was made by law. Meanwhile, Mica also proposed that federal money should be used to leverage other resources to support HSR projects. With a bipartisan pull at federal level, Mica helped pave the way for HSR coming to Florida.

In addition, other members of Florida's congressional delegations were active in coupling the state legislature with the White House by delivering relevant information to each other. Because of their coupling

154. H.R. 5644.
155. H.R. 5644.
156. See generally id.
activities, the state has obtained an opportunity to prove its seriousness about getting into the HSR business to the White house, and at the same time the White House knows what Florida really thinks of HSR. One of the vital efforts was made by Congressman Alan Grayson, who showed he knows how to cater to the White House when it means getting something done for his Orlando district. Congressman Grayson consulted with White House Chief of Staff Rahm Emanuel about the decision-making process. "Emanuel told him that there was real concern in the White House that Florida was not fully ready for [HSR], and that it might not be willing to spend any of its own money toward that end. . . . Florida needed to show it was serious—and it did, by bringing [Secretary] LaHood to Orlando in October 2009 for a public meeting with rail advocates." Congressman Grayson rode with Secretary LaHood for the 45-minute trip to the airport. "The visit was followed up with action in the state legislature."

At the state level, state legislators were actively linking problems with prepared policy proposals. Since the announcement of eight billion dollars in dedicated HSR funds, many states have been trying to get a share. Based on the requirement of PRIIA, USDOT has established a series of selection criteria for applications. One of the important requirements is that the federal HSR fund will be allocated only to those states that are willing to provide state funds to finance HSR projects. The Secretary of Transportation Ray LaHood mentioned that state leaders "have little chance at a federal commitment if they wouldn't put some of their own skin in the game."

In order to seize this opportunity, policy entrepreneurs have tried to create the best conditions for the federal money's arrival. Florida Governor Charlie Crist is one of these policy entrepreneurs who have been pushing the Florida State Legislative to support HSR. As the result of many efforts, the Florida Rail Act (HB1) was passed on December 8, 2009.
Florida lawmakers endorsed a commuter train for central Florida, agreed to pay more for commuter rail service in south Florida, and potentially improved the state’s chances of winning federal funding for high-speed rail. Governor Crist, “who personally lobbied lawmakers on the legislation (HB1), called the outcome of the special session ‘a brave and historic step to transform Florida’s future - not only as it relates to transportation in our state, but also for the employment and economic opportunity of our people.’” Although there might be a cost for lobbying for the HSR, these coupling activities can help policy entrepreneurs acquire a much greater political benefit if the couplings have been successful.

Another key policy entrepreneur is Doc Dockery, who has been pushing HSR for twenty-eight years. Started in 1982, he helped establish the Florida High-speed Rail Commission to explore a bullet train for the state. He “felt so strongly about the state’s [HSR] needs that he refused to sit idle in 1999 when Gov. Jeb Bush took office and put the brakes on plans to build a system connecting Florida’s five major metropolitan areas.” In 2000, Dockery spent three million dollars of his own money persuading voters to pass a constitutional amendment requiring construction of the system. And in 2001, “he worked to draft legislation creating the Florida High Speed Rail Authority... Dockery served on that authority, which completed environmental and rider-ship studies, identified routes and selected a contractor to build and operate the system.” Although in 2004, the amendment was repealed by voters.

170. Id. (Florida House Bill No. 1 (HB 1) passed after the Senate voted 27-10 in favor of the legislation on December 8, 2009, and Governor Crist signed the bill on December 16, 2009); Lloyd Dunkelberger, Crist Signs Bill to Help Commuter Rail Lines, THE LEDGER (Fla.), Dec. 16, 2009, at B1, available at http://www.theledger.com/article/20091216/NEWS/912165078 (The bill has provided concrete requirements for the state government to take part in the passenger rail development process, such as creating the Florida Statewide Passenger Rail Commission to monitor passenger rail systems, advising DOT concerning rail service and constructing, maintaining, repairing, operating, and promoting high speed rail systems. Fla. House of Representatives); Fla. Laws 2009-271.

171. Dunkelberger, supra note 170.

172. Id.

173. Lobbying costs for high speed rail may include expenditures associated with hiring a lobbyist, inviting policymakers to give speeches, hosting high speed rail conference, etc.


175. Id.

176. Id.

177. Id.

178. Zink, supra note 175.

179. Id.
at the urging of Governor Bush. However, the Florida High Speed Rail Authority has never stopped its function of pushing HSR forward. Through numerous studies, the Florida HSR has been supported with a more solid technical foundation, which later directly facilitated the Tampa-Orlando HSR Corridor and met DOT’s selection criteria for applying for federal funds and finally succeeded.

In sum, because of the economic recession and the emergence of Obama administration, the windows for HSR have truly opened for HSR proposals and advocates. One of the most significant opportunities for HSR is in Florida. Compared to the total $3.6 billion investment cost, the $1.25 billion award, amounting to approximately 35 percent of the total cost, is the highest ratio funded HSR project that is underway. It also shows that the Florida HSR will likely be the first true HSR service in the United States. Although many people still doubt whether the money has been allocated correctly to support Florida HSR, the reality has proved Florida rail advocates are indeed running ahead. Because of policy entrepreneurs’ persistent coupling activities, three elements—problem, proposal, and political receptivity—are all coupled in a single package, and thus, are poised to achieved HSR success in the United States.

IV. Conclusion

In this study, we followed John Kingdon’s Multiple Stream Mode to record the different political factors that affect the HSR’s agenda setting into three streams—problem, policy and politics. The findings show that in the United States, HSR is primarily addressed as an alternative to pro-

180. Id.
181. Id.
182. CHRONOLOGY, supra note 129, at 12-14 (DOT establishes criteria for selecting qualified HSR projects to get this grant); Leo King, LeMieux Urges Florida Solons to Move on Rail; LaHood Urges State Solons On, EXAMINER (Fla.), Oct. 22, 2009, http://www.examiner.com/transportation-in-jacksonville/lemieux-urges-florida-solons-to-move-on-rail-lahood-urges-state-solons-on (In order to be eligible for federal funding support, the Florida study was re-evaluated and submitted in October 2009); see also NEPA § 102, 42 U.S.C. § 4332 (2006) (Required by the National Environmental Policy Act (NEPA), all proposed HSR plans must ensure that potential system impacts to the natural and built environment have been assessed and any potential impacts will be mitigated); 42 U.S.C. § 4332(2)(C)(i) (2010); 40 C.F.R. § 1505.2 (2010).
183. See HSIPR, supra note 11 (listing the investment costs and estimated federal awards for all HSR applications).
vide sustainable medium distance travel service over a long-term. While in the short-term, HSR goals are creating jobs and stimulating the economy. The idea of HSR hasn't just emerged in recent years. On the contrary, it has been promoted by rail stakeholders, as well as Democratic lawmakers for almost a half century. Many kinds of planning, preliminary studies and policy proposals have been prepared, waiting for a window to open. However, the recent economic recession as well as the transition of the federal government administration finally opened the window for HSR. The short-term objective of the current national HSR promotion is political more than any other reason. Under such scenario, those states with substantial political advantages, such as Florida and California, have naturally waited in the front of the line to gain federal support. Moreover, as the catalysts in the process of policymaking, policy entrepreneurs' coupling activities have further advocated connecting their prepared proposals to politics and problem streams, which finally helped achieve their political outcome. The initial award of $1.25 billion of federal funding for Florida's HSR corridor project has proven that their success is largely attributed to the contributions of HSR policy entrepreneurs.

To conclude, the promotion of HSR in the United States is more a product of the American political game than the demand of transportation mode. Whether current HSR policy will truly make President Obama's national HSR strategy plan become reality is still hard to predict because the current open window for HSR may close soon. The current proposals for HSR from the legislative perspective are more likely to be seen as solutions for job creation and as ways to stimulate the economy. However, this perspective may be risky if only the short-term objective is addressed. USDOT reports that the whole national HSR system would cost no less than $500 billion. Compared to this figure, the current thirteen billion dollars (eight billion dollars plus the pledged future five billion dollars) HSR fund is only a seed. The goal of creating jobs may be achieved through the ARRA in the short term, but whether the long term objective of building a cost effective HSR system can be achieved is still unknown. However, one thing that is obvious: if a truly efficient and reliable national HSR system is desired in the United States, more consideration should be put on the long-term objectives instead of the short-term. The implementation of an efficient national HSR system should not solely depend on political and problem windows. It must also be technically and economically feasible. This means the current focus of HSR development should be on fundamental research instead of any

hasty on-site construction. This research should include: project funding, corridor route planning and design, rider-ship forecasts, cost-benefit estimations, operation and management design, and national HSR publicity campaigns. Only by eliminating irrational political reactions to HSR will America get on the right track for future mobility, both stimulating the economy and achieving a new era of sustainable transportation.
Compensable Property Rights and Visibility Damages in Public Transportation Infrastructure Projects: Department of Transportation v. Marilyn Hickey Ministries

Kurtis T. Morrison*

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II. Introduction

Echoing the U.S. Constitution, the Colorado Constitution provides that no private property shall be taken or damaged for public use, unless just compensation has been provided to the property owner.\(^1\) In Colorado, just compensation is determined by a panel of three or more persons in accordance with statutory requirements set by the General Assembly.\(^2\) Compensation rendered must be equal to an owner’s loss so as to place him or her in an identical pecuniary position had the taking never occurred—thereby making the owner whole.\(^3\)

Often, condemnations involve only a taking of a fraction of an owner’s property. In such cases, the remainder property may suffer value reductions due to the taking, thereby entitling the owner to compensation for damages to the residue property.\(^4\)

The Colorado Supreme Court has held that compensation for remainder property damages is the market value reduction resultant of the taking, offset by any special benefits gained.\(^5\) Various courts have delineated factors to determine a remainder’s market value diminution: view of the premises, surrounding of the premises, physical characteristics of a property, price at the time of purchase, prices of neighboring land, expert assessments and opinions, potential property uses, improvements, net income generated from the property, and likelihood of condemnation.\(^6\)

Yet, in relation to remainder damages due to public transportation im-

\(^1\) Col. Const. art. II, § 15, cl. 1.

\(^2\) Col. Const. art. II, § 15, cl. 2; Poudre Valley Rural Elec. Ass’n v. City of Loveland, 807 P.2d 547, 554 (Colo. 1991) (stating that the General Assembly may delineate requirements and amounts pertaining to the amount of compensation a condemnee may receive).

\(^3\) Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797, 806 (Colo. 2001).


\(^5\) Jagow, 49 P.3d at 1161 (Colo. 2002) (citing La Plata, 728 P.2d at 698) (“The proper measure of compensation for damages to the remainder property is ‘the reduction in the market value of the remaining property that is caused by the taking,’ offset by the amount of any special benefits accrued due to the condemnation project.”) (emphasis original).

\(^6\) United States v. 25.02 Acres of Land, More or Less, 495 F.2d 1398, 1400 (10th Cir. 1974); City of Brighton v. Palizzi, 214 P.3d 470, 476 (Colo. App. 2008).
provements, one factor has received specific attention by the Colorado courts—visibility damages.

In Colorado, conflicts between property ownership and new and expanding transportation infrastructure have led to a number of court cases regarding compensation for line of sight impairments or losses, including takings that impact scenic vistas or views. Landmark infrastructure investments, such as the Interstate-70 ("I-70") viaduct, the Interstate 25 ("I-25") Transportation Expansion project ("T-REX"), and the FasTracks light-rail system have all required public takings. Consequently, owners of condemned properties have sought compensation for adversely affected remainders. Often, plaintiffs have pursued visibility damages to recoup for value losses incurred by property remainders.

This analysis reviews the 2007 Colorado Supreme Court decision that addressed the compensability of visibility damages, Department of Transportation v. Marilyn Hickey Ministries. In Hickey Ministries, a fraction of an owner's property was condemned, upon which a concrete overpass was constructed. The structure blocked a line of sight between the plaintiff landowner's remainder property and I-25. The plaintiff pursued compensation for value reductions due to the visibility loss of the remainder.

II. FACTS AND PROCEDURAL HISTORY


8. See, e.g., Board of County Comm'rs. v. Vail Assocs, Limited, 468 P.2d 842 (Colo. 1970) (public taking related to I-70 construction); Hickey Ministries, 159 P.3d at 112 (public taking related to T-REX project); Jeffrey Leib, RTD Alerts 164 More of Land Seizure: the Agency's Letters to Owners Along the West Rail Line Offer Few Details Other than Square Footage, Denver Post, Nov. 2, 2008, at B-01 (public takings related to FasTracks).
9. See Hickey Ministries, 159 P.3d at 112; La Plata, 728 P.2d at 696; Kahn's, 543 P.2d at 714; Troiano, 463 P.2d at 449.
10. Hickey Ministries, 159 P.3d at 112.
11. Id.
13. Hickey Ministries, 159 P.3d at 112.
To accommodate a new mass transit light-rail track line along the I-25 western curbside, the Regional Transportation District ("RTD") and the Colorado Department of Transportation ("CDOT") exercised eminent domain authority to condemn a narrow, 650-foot stretch of land. The condemned property, located at the northwestern corner of the I-25 and Orchard Road interchange, was part of a religious campus owned by Marilyn Hickey Ministries ("Hickey Ministries"). The condemned property, approximately 10,000 square feet, two percent of the total campus area, was valued at $259,000 in compensable damages.

The I-25 and Orchard Road interchange is heavily traveled by motorists commuting to and from various commercial centers and residential zones, including downtown Denver, the Denver Tech Center, and suburban and exurban developments. At the time of the condemnation, the Hickey Ministries property was visible from the I-25 southbound lanes, permitting thousands of commuters to view the campus daily. Once the 650-foot property was acquired, CDOT constructed a concrete wall, upon which the light-rail tracks descended an overpass clearing Orchard Road. The size and location of the new wall blocked I-25 southbound motorists' line of sight of the religious campus.

Hickey Ministries filed a claim for $1.9 million in pecuniary damages, mostly due to visibility losses to the remaining property of the religious campus—an amount over six times the value of the property actually condemned. In adjudicating the claim, the question before the Colorado Supreme Court in Hickey Ministries was whether a landowner can be compensated for loss of visibility of one's property due to transportation infrastructure construction.

In its claim, Hickey Ministries contended that "the retaining wall obscures passing motorists' views of its . . . property, which includes a substantial church complex." CDOT and RTD counterargued that visibility of property is not a compensable attribute used in establishing property valuations for compensation. Neither party disputed the bedrock facts that the overpass wall obstructed passing motorists' visibility of the religious campus, and that there was no barrier to access.

In the trial court, CDOT and RTD filed a motion in limine to ex-
clude evidence demonstrating the campus’ market value loss due to the barrier’s obstruction of I-25 drivers’ line of sight towards the property.\textsuperscript{24} The court agreed. The court found that a “view” is not compensable in determining the reduction of the remainder property’s value; although views originating from the location of the taken property could be a valuation factor.\textsuperscript{25} Thus, in regards to the light-rail wall, Hickey Ministries’ damages would not account for lost visibility since the line of sight was of a property remainder.

On appeal, the decision was reversed.\textsuperscript{26} Relying on a 1986 Colorado Supreme Court decision, the appellate court held that a remainder’s reduction in value requires compensation for “all damages that are the natural, necessary, and reasonable result of the taking.”\textsuperscript{27} Whether or not such damages to the remainder are “aesthetic” was deemed irrelevant.\textsuperscript{28} Accordingly, the appellate court remanded the case for reevaluation of the condemned property’s compensable value, specifically accounting for the loss of passing motorists’ visibility.

The Colorado Supreme Court granted certiorari to determine “whether the court of appeals erred in ruling that the landowner, part of whose property is being taken by eminent domain for a state transportation project, may recover damages for the impairment of passing motorists’ view of the remainder of the landowner’s property.”\textsuperscript{29}

### III. LEGAL BACKGROUND AND PRECEDENT

Eminent domain law provides just compensation, generally, for three sets of property damages: property damages due to a condemnation; property remainder damages residual to a condemnation; and special damages.\textsuperscript{30} *Department of Transportation v. Marilyn Hickey Ministries* was a question of compensation for a remainder.

The Colorado Supreme Court has held that “not every depreciation in the value of [a landowner’s remainder property] can be made the basis of an award of damages.”\textsuperscript{31} The construction and enhancement of public structures often results in obstructed or altered sight lines; consequently, property values may suffer. In response, landowners often pursue damages for either loss of sight directed towards their property or views out-

\begin{itemize}
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Dep’t of Transp. v. Marilyn Hickey Ministries, 129 P.3d 1068, 1070 (Colo. App. 2005).
  \item \textsuperscript{27} Id. (citing *La Plata*, 728 P.2d at 700).
  \item \textsuperscript{28} Id. (citing Herring v. Platte River Power Auth., 728 P.2d 709, 712 (Colo. 1986)).
  \item \textsuperscript{29} Hickey Ministries, 159 P.3d at 112.
  \item \textsuperscript{30} See *La Plata*, 728 P.2d at 698-700.
  \item \textsuperscript{31} Gayton v. Dep’t of Highways, 367 P.2d 899, 900-01 (Colo. 1962) (citing People ex rel. Dep’t of Pub. Works v. Symons, 357 P.2d 451, 453 (Colo. 1960)).
\end{itemize}
ward from their property. Compensation for visibility damages, from both public transportation authorities and other entities, varies by jurisdiction. In Colorado, the modern rule was established in the 1969 decision: *Troiano v. Colorado Department of Highways*.

### A. Establishment and Reaffirmation of the Troiano Rule on Visibility Damages

In 1969, the court established the still-standing rule regarding visibility damages, due to transportation public improvements, both towards and from a property. In *Troiano v. Colorado Department of Highways*, a motel owner brought an inverse condemnation proceeding against the Colorado Department of Highways (the predecessor state agency to the Colorado Department of Transportation) and the Colorado State Highway Commission.

During the 1960s, construction of the Eisenhower Interstate Highway System was underway. In Colorado, a key highway system segment was the construction of an elevated I-70 viaduct through the north Denver area. One property owner objected to its construction, claiming an adverse effect upon her business constituting an inverse condemnation.

Troiano, a north Denver motel owner, sought $110,000 in damages due to diminution in her property's value stemming from the viaduct's construction. Among her arguments, Troiano claimed the viaduct reduced motorists' views of her property; thereby reducing the motel's property value. Arguing that visibility is of utmost importance in generating customers for her business, Troiano contended that the Department of Highways caused diminished value to her property, requiring compensation.

Pointing to non-Colorado authorities, the Colorado Supreme Court drafted an opinion that serves as the modern day rule regarding visibility rights related to public improvements. The court held that a property

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34. Id.

35. Id. at 449.

36. Id.

37. Id. at 488.

Property Rights and Visibility Damages

owner has no right to have travelers pass by his or her property; consequently, there is no right to have one’s property remain visible to passing motorists. Thus, there is no right to visibility \textit{emanating from} the property.

Following the \textit{Troiano} ruling, the court again affirmed that line of sight is not a compensable right. In the 1975 decision \textit{City of Boulder v. Kahn’s, Inc.}, a Boulder establishment, protesting closure of a street to traffic, argued for visibility damages due to loss of its patrons’ views. The plaintiffs crafted a number of arguments against the City of Boulder’s closure of Pearl Street (to develop what is now the Pearl Street Mall of downtown Boulder). In one supporting argument, the property owner asserted a right to have patrons drive by and view the establishment’s location.

Relying on the \textit{Troiano} rule, the court dispensed with this claim. Although the cases had distinguishing facts—\textit{Troiano’s} visibility claim dealt with reduced motorist visibility, \textit{Kahn’s} represented a complete removal of motorist traffic—the court soundly rejected the claim, utilizing the \textit{Troiano} rule preventing visibility damages.

B. \textit{La Plata Electric Association, Inc. v. Cummins} – Establishment of the “Natural, Necessary, and Reasonable Result” Rule

In 1981, six years following \textit{Kahn’s}, the court ruled on \textit{La Plata Electric Association, Inc. v. Cummins}. In \textit{La Plata}, the court evaluated visibility damages specifically related to loss of a property remainder’s aesthetic appeal and scenic views. The court held that a plaintiff could receive compensation for “all damage” including aesthetic damage. Yet, this was not a departure from the \textit{Troiano} rule.

In \textit{La Plata}, an electric cooperative association planned to condemn an easement to install a power line along a stretch of land near Durango, Colorado. The site crossed through a property with an impressive view of the city and mountains. At the valuation hearing, damages to the

\begin{thebibliography}{9}
\bibitem{39} \textit{Troiano}, 463 P.2d at 455-56.
\bibitem{40} \textit{Id.} (“Loss of affinity or eye appeal . . . is non-compensable.”).
\bibitem{41} \textit{Kahn’s}, 543 P.2d at 714.
\bibitem{42} \textit{Id.}
\bibitem{43} \textit{Id.} (“Respondents contend that persons have the right to drive by their establishments on Pearl Street and view them while driving by. That argument was negated in [Troiano].”).
\bibitem{44} \textit{Id.}
\bibitem{45} \textit{La Plata}, 728 P.2d at 703.
\bibitem{46} \textit{Id.}
\bibitem{47} \textit{Id.}
\bibitem{48} \textit{Id.} at 697.
\bibitem{49} \textit{Id.}
\end{thebibliography}
remainder property were set at $5,000. The landowners disagreed. A valuation of $5,000 was, in their estimation, too low, and ought to account for aesthetic damage to the property due to the power line’s planned construction. The court granted certiorari to determine whether visible aesthetic damage was legally cognizable, and, thus, whether it should be accounted for in the remainder’s valuation.

The landowners’ appraisers testified that the remainder’s value was reduced due to two impacts: unattractiveness of the utility’s power line, and obstruction of the property’s views due the line’s location. As such, the remainder’s damages were $5,000. The utility objected, unsuccessfully, to admission of the appraiser’s testimony.

The La Plata Electrical Association relied on Troiano, arguing for the court to rule the dispute as a simple visibility damages case. The court conceded that aesthetic damages caused by the construction of public structures, as in Troiano, are noncompensable. However, it distinguished La Plata from Troiano, in that the Troiano case was regarding an inverse condemnation action, whereas the case at hand was a taking in the form of an easement across the owner’s property. Thus, the court chose not to follow the Troiano rule in deciding the outcome of La Plata.

In place of the Troiano rule, the appellate court drafted an alternative rule allowing compensation for aesthetic damages “specifically relating to power lines.” The Colorado Supreme Court accepted the result, but rejected the rule used to reach the conclusion. In crafting its own rule, the court declared that when a value reduction occurs to a property remainder following a taking, the landowner should be compensated for all damages that are “the natural, necessary, and reasonable result of the taking.” Two justifications were provided.

The first of the court’s reasons was that numerous other jurisdictions have adopted similar rules. The court stated:

Some of these authorities [from non-Colorado jurisdictions] explicitly recognize a distinction between the assessment of compensation in the case of a partial taking—in which all damages that flow from that taking are compe-

50. Id.
51. Id. at 698.
52. Id. at 697.
53. Id.
54. Id. at 699.
55. Id. at 698-99 (citing Troiano, 463 P.2d at 456).
56. Id. ("... prior cases, including Troiano, have involved inverse condemnation actions by landowners in which these owners claimed that damage to their property resulted from the use of adjoining or nearby land by a public entity; no physical taking of the plaintiff landowners' property occurred.").
57. Id. at 699.
58. Id. at 700.
sable—and the assessment of compensation in the case of alleged damages when no land has been taken—in which only damages unique or special to the property are compensable. Others approve compensation, without so-
phisticated explanation, when the evidence establishes a reduction in the value of a remainder because of *general aesthetic damage flowing from the construction of a public improvement on the portion taken.*

Secondly, the court reasoned that the above-stated approach is better reasoned . . . in terms of fairness and economic reality.

Providing hypothetical scenarios, the court defended this position as a matter of equity—landowners that sell a fraction of their property would adjust their sales price to account for an adverse impact to their remaining property following the sale. As such, the court concluded that landowners should also receive damages that account for value reductions to their property when a portion of their land is taken by a public authority.

The new rule, providing recovery for all remainder property damages brought about as the “natural, necessary, and reasonable result” of the original taking was also coupled with a correlative. Not only is full recovery provided, but a property owner may present “any relevant evidence concerning diminution of market value caused by the taking.”

This provision would be at the core of the Hickey Ministries contenttion twenty years later in the CDOT case.

The *La Plata* rule was immediately used in another Colorado Supreme Court decision. In *Herring v. Platte River Power Authority*, the court disposed of a claim in which a landowner sought compensation for remainder damages after a portion of his property was condemned for a municipal electrical facility. Testifying on behalf of the property owner, an appraiser stated that construction of the electrical facility on the condemned property reduced the value of the remainder property, in that the “nonharmonious” appearance of the facility detracted from the landowner’s remainder. As in *La Plata*, the court permitted recovery for “all damages to the remainder” captured within the scope of “natural, necessary, and reasonable” results of the taking.

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59. *Id.* (emphasis added).
60. *Id.* at 701.
61. *Id.*
62. *Id.* at 700.
63. *Id.* at 703.
65. *Id.* at 711-12.
66. *Id.* (citing *La Plata*, 728 P.2d at 700).
IV. THE COURT'S DECISION

In the Hickey Ministries case, Troiano and La Plata, would serve as the parties' chief support for their arguments. CDOT and RTD contended that visibility, either inward or outward, is never a factor for compensation, as stated in the visibility damages rule established in Troiano.67 Hickey Ministries countered that, under La Plata, it can recover for “all damages” to the remainder property that are the result of the taking of the 650-foot strip of land.68

Writing for the majority, Colorado Supreme Court Chief Justice Mary Mullarkey found for CDOT and RTD, thereby reversing and remanding to reinstate the trial court’s decision.69 Although the court found that compensation may be received for damages to a property remainder,70 “[motorists’] visibility of a property . . . is not a compensable property right under the Colorado Constitution and our case law.”71 The Court reached its conclusion, following a sharp criticism of the lower court’s reliance on La Plata, reasoning that Hickey Ministries, like the motel owner in Troiano, had neither a right to continued passing traffic nor a right to motorists’ continued visibility of the religious campus.72

A. INAPPLICABILITY OF LA PLATA ELECTRIC ASSOCIATION v. CUMMINS

In the Hickey Ministries opinion, the court also refuted the appellate court’s reliance on La Plata in ruling against CDOT and RTD.73 The criticism was based on two distinguishing points.

First, the court stated that the appellate court incorrectly relied upon the La Plata decision as its authority for holding in favor of Hickey Ministries. Specifically, the appellate court founded its reasoning on the La Plata rule that “a property owner should be compensated for all damages that are the natural, necessary and reasonable result of the taking.”74 The Colorado Supreme Court found this language too broad to cover visibility of one's property, thus limiting its elasticity.75 As argued by CDOT, although La Plata assures compensation for “all damages,” this

67. Opening Brief at 10, Hickey Ministries, 159 P.3d 111 (No. 05SC816).
68. Answer Brief, supra note 23, at 1 (emphasis added).
69. Hickey Ministries, 159 P.3d at 116.
70. Id. at 113 (citing Jagow v. E-470 Pub. Highway Auth., 49 P.3d 1151, 1156 (Colo. 2002)).
71. Id. at 116.
72. Id. at 113, 115.
73. Id. at 113 (“We find the court of appeals’ reliance on La Plata to be misplaced; the controlling precedent is Troiano. We hold that because a landowner has no continued right to traffic passing its property, the landowner likewise has no right in the continued motorist visibility of its property from a transit corridor.”).
74. Id. (quoting La Plata, 728 P.2d at 700).
75. See id.
rule is limited to only "legally cognizable damages."\textsuperscript{76} The Colorado Supreme Court agreed.

The court also acknowledged that \textit{La Plata} contained significant factual differences from \textit{Hickey Ministries} and the controlling precedent, \textit{Troiano}.\textsuperscript{77} In \textit{La Plata}, a public utility condemned a vacant parcel to construct an electric transmission line across the property.\textsuperscript{78} The claim arose for damages to visibility \textit{emanating from} the claimant's property. However, in both \textit{Hickey Ministries} and \textit{Troiano}, the claim arose out of the loss of visibility \textit{towards} the claimant's property.\textsuperscript{79} The court found the facts significantly distinguished, so as to dismiss \textit{La Plata}'s relevance to the case at hand. The Court stated:

\begin{quote}
Rather, the sole basis of [Hickey Ministries'] claim is that motorists passing along a narrow 650 foot strip of land have a diminished view of the remainder property. \textit{La Plata} did not recognize a right to visibility looking toward one's property. As we stated above, \textit{La Plata} only involved the loss of aesthetic value when taking an easement for an electric transmission line and all of the resulting damages following from such a taking.\textsuperscript{80}
\end{quote}

Even if Hickey Ministries attempted to employ the same strategy used by the \textit{La Plata} landowner—arguing for damages due to loss of aesthetic appeal—the argument would fail as the blocked views are entirely dissimilar. In \textit{La Plata}, a scenic vista was obstructed by a power line; in \textit{Hickey Ministries}, an interstate highway was obstructed by a concrete barrier. To the court, this argument would not pass muster. There is no comparison between an obstruction of a scenic valley and mountain view, versus the blocking of unpleasant sights of passing traffic and resultant noise.\textsuperscript{81} If anything, Hickey Ministries \textit{benefitted by the obstruction}. As such, the plaintiff chose not to pursue an aesthetic value claim, which the court certainly would have ruled against.

Therefore, the court dismissed \textit{La Plata}'s relevance to the case at hand, opting instead to rely on \textit{Troiano} as the correct controlling author-

\begin{footnotes}
\item[76.] Opening Brief, supra note 62, at 11 ("While \textit{La Plata Electric} states that landowners are entitled to 'all damages' that are the natural, necessary and reasonable result of the taking, the 'all damages' language has been in Colorado law for many decades. Yet, Colorado cases have limited recovery to all \textit{legally cognizable} damages.").
\item[77.] \textit{Hickey Ministries}, 159 P.3d at 115.
\item[78.] \textit{La Plata}, 728 P.2d at 697.
\item[79.] \textit{Hickey Ministries}, 159 P.3d at 115 ("\textit{La Plata} only recognized as compensable the value of a remainder property's aesthetic view, not the visibility of a property from a public transit corridor or the lack of a right to continued traffic flow past a property.").
\item[80.] Id.
\item[81.] Id. ("In the present case, [Hickey Ministries] does not claim a diminution in aesthetic value because the retaining wall obstructs its view from the remaining property out toward I-25. Nor could it reasonably claim that a view of a busy interstate freeway had any inherent aesthetic value.").
\end{footnotes}
ity through which to adjudicate the case.\textsuperscript{82}

\section*{B. No Right to Continued Passing Traffic or Continued Visibility Based on \textit{Troiano v. Department of Highways}}

In finding for the petitioner, the Court relied upon \textit{Troiano} as its controlling authority.\textsuperscript{83} In \textit{Troiano}, the court examined a claim of compensation for lost visibility due to the nearby construction of an elevated interstate highway.\textsuperscript{84} The \textit{Troiano} plaintiff motel owner sought damages for diminished property value stemming from the loss of visibility of her business due to the construction of the I-70 viaduct.\textsuperscript{85} Ultimately, the plaintiff failed to convince the court that the motel's loss of motorist visibility was compensable.\textsuperscript{86} In deciding \textit{Hickey Ministries}, the Supreme Court relied on two chief provisions from \textit{Troiano}. First, the court concluded that Hickey Ministries had no right to continued passing motorists adjacent to its property.\textsuperscript{87} Citing \textit{Troiano}, the court repeated that "a property owner has no right to have the traveling public pass his property . . .".\textsuperscript{88} In applying the \textit{Troiano} rule, the court reasoned that, similarly, Hickey Ministries lacked any legal right to a stream of passing automobiles along an adjacent public thoroughfare.\textsuperscript{89}

Second, the court declared that the lack of a right to continued traffic would be inconsistent with a right to continued traffic visibility.\textsuperscript{90} Again, the court's holding was founded on \textit{Troiano}—coupled with similar, albeit nonbinding, authorities from Utah and Missouri state courts—holding that there is simply "no inherent property right to continued traffic or visibility along the I-25 transit corridor."\textsuperscript{91}

The court further reasoned that Hickey Ministries religious campus never even possessed a right to the benefit it claimed to have lost.\textsuperscript{92} I-25 was funded by taxpayers. Despite the fact that Hickey Ministries enjoyed the benefit of being seen by I-25 motorists, this was a benefit it never

\textsuperscript{82} \textit{Id.} at 113.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Troiano}, 463 P.2d at 449, 455.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at 456.

\textsuperscript{87} \textit{Hickey Ministries}, 159 P.3d at 116.

\textsuperscript{88} \textit{Id.} at 114.

\textsuperscript{89} \textit{Id.} at 114-15.

\textsuperscript{90} \textit{Id.} at 114.

\textsuperscript{91} \textit{Id.} at 114-15 (citing State ex rel. Mo. Highway Transp. Comm'n v. Dooley, 738 S.W.2d 457, 468 (Mo. Ct. App. 1987) (citing Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470, 474 (Mo. 1965) (holding that visibility loss due to the erection of an elevated viaduct is not an element of damages in condemnation proceedings)); Ivers v. Dep't of Transp. of State, 154 P.3d 802, 807 (Utah 2007) (holding that property owners have no protected interests in their property's visibility from an adjacent road, despite a taking)).

\textsuperscript{92} \textit{Hickey Ministries}, 159 P.3d at 116.
possessed. Rather, the court cast the benefit as an “artificially created condition” which “does not inhere in the compensable value of the . . . property.” As support, the court repeated Justice Oliver Wendell Holmes, Jr.’s statement that “when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away.”

In short, a property owner has no right to the benefits of a public structure. Hence, Hickey Ministries held no right for I-25 to remain in its present form, despite any benefits that it enjoyed from its current positioning and location. As such, Hickey Ministries could not be compensated for changes to I-25, just as a local business establishment has no right to compensation for a municipality’s relocation of a neighboring police station, firehouse, or other civic institution bestowing value on the property.

Based on this line of reasoning, grounded in the Troiano rule, the Supreme Court held that Hickey Ministries was unable to recover losses due to lost motorist visibility of the religious campus—a right that it never possessed in the first place.

V. Implications

The Hickey Ministries decision, and the Troiano rule, hold significant implications for property owners and public transportation entities in Colorado. The resultant case law removes visibility damages, due to transportation projects, as a compensable right, for remainder properties. As a result, property owners, already having suffered property losses due to eminent domain, are prevented from receiving damages to their remaining land due to the construction of transportation infrastructure preventing passersbys from viewing their land or improvements.

This holding is particularly meaningful for parties located adjacent to transportation corridors—such as developers acquiring parcels to construct new transit-oriented development projects near light-rail stations. Such parties are acutely aware of the value of high visibility and high traffic locations in promoting their business interests. As a common business model, many private sector developers strategically locate projects adjacent to transportation infrastructure, specifically to take advantage of heightened visibility, passing motorists, and other transportation-related benefits. Under Hickey Ministries, such property owners would have no redress should a local government, metropolitan planning organization, public highway authority, transit agency, or CDOT choose to remove,

93. Id.
94. Id. (quoting Stanwood v. Malden, 31 N.E. 702, 703 (Mass. 1892)).
95. Id.
relocate, or reconstruct a transportation structure in such a way that mini-
mizes or eliminates the visibility and traffic that the property owner once
enjoyed and benefited from.

For example, the owner of a business establishment along a state
highway may lose a number of patrons should CDOT determine that rer-
outing an adjacent highway is necessary. Under Hickey Ministries (and
Troiano), should a restaurant owner bring a lawsuit to recover damages
for the loss of visibility of her restaurant, she would most likely fail to
recoup the value losses. Similarly, an urban residential property devel-
oper that invests significant capital to construct a housing development
alongside a planned mass transit light-rail station could not recover dam-
ages in court, should RTD belatedly decide not to erect a station at that
location, or to even construct the light-rail line altogether.

In contrast to these challenges for property ownership, Hickey Min-
istries and the Troiano rule provide flexibility for Colorado governmental
entities exercising their police power and management of transportation
networks. By removing visibility damages, a strong disincentive against
rerouting or improving highways and other structures that impact sights
and views is removed. In Hickey Ministries, CDOT and RTD relied on
this argument. CDOT contended that a ruling in favor of Hickey Minis-
tries would release a heavy fiscal burden on the state, by establishing a
new rule affirming a right to be seen by adjoining highways—a complete
deviation from the established and reaffirmed Troiano rule against visi-
bility damages. Such a rule would unleash a “great financial burden on
[state transportation authorities” in the form of litigation costs and “in-
ward” visibility damages.96 This point is underscored by the expert valua-
tion of the religious campus: damages for the land condemned was set at
$259,000; damages for the remainder property’s loss of motorists’ views,
$1.9 million.97

Had the court adopted this departure from the Troiano rule, poten-
tially staggering costs due to similar property visibility losses could have
adversely affected or altered future transportation planning, encouraging
transportation officials to defensively plan transportation networks and
improvements so as to avoid costly conflicts with property owners. Such
a rule could be triggered at all levels—either the rerouting of a highway,
or the growth of a thick tree on a public roadside right of way. Any visual
blockage could potentially result in visibility damages requiring compensa-

96. Opening Brief, supra note 62, at 10-11.
97. Id. at 4-5, 8.
A. EXERCISING THE STATE'S POLICE POWER FOR TRANSPORTATION SYSTEM MODIFICATIONS

In its opinion, the court also engaged in the topic of transportation system modifications being within the state's police power. Construction of a light-rail line, and an adjoining concrete overpass, was, in the court's estimation, appropriately within the police power and did not impair access to the plaintiff's property. The court held that:

Underlying Troiano... is the recognition that a public transit corridor like I-25 is an always evolving multi-modal point of access to a city's transportation infrastructure. The state's police power enables continued modifications to its public transportation systems and the "right of access is subject to reasonable control and limitation... it would be inconsistent to recognize a right to visibility but no right to have the traveling public pass one's property. Under Troiano, there is simply no inherent property right to continued traffic or visibility along the I-25 transit corridor.100

The court concluded that CDOT and RTD "reasonably constructed the T-REX freeway and light rail portions... and accomplished this without impairing access to the Orchard Road entrance point to the Happy Church."101 Although this statement is likely mere dicta, the court identifies two key factors for an appropriate exercise of police power related to transportation infrastructure: reasonableness and access. Although the court opted not to provide further elaboration, the implication is that the state, although bound to basic property ownership rights and law, still retains authority to modify its transportation infrastructure network. However, the state is bound to act reasonably in its execution such that access may not be unduly impaired by adjacent property owners.102

VI. CONCLUSION

At its foundations, Department of Transportation v. Marily Hickey Ministries makes clear the difference in seeing from and being seen, along with the corresponding interaction of compensable property rights. In matters of public transit corridors, the court rejects the latter.103

The Hickey Ministries decision has implications for both governments and private property owners. Governmental transportation entities are
shielded from liability for visibility damages in such cases, thereby preventing potential litigation due to newly constructed, sight-blocking infrastructure. However, *Hickey Ministries* may also spur reticence by private actors seeking to locate business interests alongside transportation corridors. Fearful that such locational advantages may be lost or altered in the future, such property owners may reconsider the benefits of locating alongside transportation corridors.