Marquette Law Review

Volume 95
Issue 4 *Summer 2012*

Article 7

The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure

Paul Stephen Dempsey

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure*, 95 Marq. L. Rev. 1151 (2012).
Available at: http://scholarship.law.marquette.edu/mulr/vol95/iss4/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

Marquette Law Review

Volume 95
Issue 4 *Summer 2012*

Article 7

The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure

Paul Stephen Dempsey

Repository Citation

Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure*, 95 Marq. L. Rev. 1151 (2012).
Available at: http://scholarship.law.marquette.edu/mulr/vol95/iss4/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE RISE AND FALL OF THE INTERSTATE COMMERCE COMMISSION: THE TORTUOUS PATH FROM REGULATION TO DEREGULATION OF AMERICA'S INFRASTRUCTURE

PAUL STEPHEN DEMPSEY*

INTRODUCTION

For a thousand years from its dedication in 360 A.D., Constantinople's Hagia Sofia was the largest building in the world. As the first Christian Emperor, Constantine had ordered pagan temples pillaged and leveled. Several of Hagia Sofia's stones thus were taken from a nearby Roman temple, which itself had borrowed stones from an earlier Greek temple on the same site. Indeed, as Vikings found themselves in the city during the middle of this time period, some graffiti may attest to a worship of Norse gods. Hagia Sofia was a Christian cathedral until 1453, when the invading Ottoman Turks converted it to an Islamic mosque. In 1935, it was converted into a secular museum. So in today's Istanbul, various generations in turn worshiped Greek gods, Roman gods, a Christian God, and a Moslem God—to say nothing of the Norse gods—on the same hallowed ground. Today, as a museum, Hagia Sophia is no longer a place of worship of any god.

As we shall see with respect to regulation of the transportation industry, succeeding generations worship different economic gods as well. Building upon principles of Roman law, English courts, beginning in the Middle Ages, imposed upon "common carriers" special duties to serve all without discrimination and with strict liability for loss and damage to goods in their care.[1] In 1887, the U.S. government

---

* Tomlinson Professor of Global Governance in Air & Space Law and Director of the Institute of Air & Space Law, McGill University. The author was an Attorney-Advisor (1975–1977) and Legal Advisor to the Chairman (1981–1982) of the Interstate Commerce Commission.

1. Jurgen Basedow, *Common Carriers—Continuity and Disintegration in U.S. Transportation Law*, 13 TRANSP. L.J. 1, 3 (1983).

established the first independent regulatory agency, the Interstate Commerce Commission ("ICC" or "Commission"), and would grant it jurisdiction to regulate the rates and practices of the railroads. Currently, several federal agencies, including the Surface Transportation Board, the Federal Maritime Commission, the Federal Energy Regulatory Commission, and the Department of Transportation, regulate rail, motor, air, and water carriage, as well as pipelines and freight forwarders. Despite substantive differences between the kind and scope of regulation by the various agencies, each mode of transportation is in the business of moving passengers or commodities from one point to another.[2]

But the policy objectives driving transportation regulation have changed significantly since 1887. Congress initially instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from the deleterious consequences of unconstrained competition. Then, just as market failure had given rise to economic regulation, regulatory failure gave rise to deregulation.[3] Thus, in the last quarter of the twentieth century and into the twenty-first, regulatory policy has sought to stimulate competition in order to enhance consumer welfare. Managed competition across a number of infrastructure industries was jettisoned in favor of market Darwinism. Transportation, as the first major industry to be regulated and, nearly a century later, the first to be deregulated, has been at the forefront of this dramatic (r)evolution in economic policy.

In short, the transportation industry has been a great sea upon which the relationship between government and the market has ebbed and flowed over time, with various aspects of laissez-faire, regulation, managed competition, subsidization, and socialism cast upon it during several historical periods.

---

2. The differences in regulation reflect the inherent economic differences among the modes of transportation, the legislative history of the regulation, the language of the specific statutory provisions, the philosophical and political composition of the individuals serving on the regulatory commissions, and the role of the judiciary in either circumscribing or encouraging regulatory activity.

3. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1397–1403 (1998); Paul Stephen Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1, 13–35 (1989).

This Article surveys some of the historical, political, economic, and public policy forces that have been catalysts for regulation and deregulation. In Constantinople (now Istanbul) and a hundred other national capitals, it is common for young generations to ignore the lessons of history and conclude that their ancestors got it wrong.

I. THE WORLD BEFORE THE INTERSTATE COMMERCE COMMISSION

As Adam Smith was penning *The Wealth of Nations*, America was casting off mercantilism with its Revolution of 1776 against King George III. With the adoption of the U.S. Constitution in 1787, America would embrace laissez-faire to the point of permitting slavery. A century later, America would change course again. Some of the intervening time merits comment.

A. The Robber Barons

Along Europe's Rhine River stand a number of medieval castles, testament to the German robber barons who built them. The Rhine was a principal highway of commerce for medieval Europe. The barons would exact a toll from all the barge traffic on the river, with the enforcement mechanism of sinking the barges that would not pay. The toll would be set at whatever the market would bear. In nineteenth-century America, a new group of robber barons emerged; they, too, would attempt to gain control of the transportation network and exact a toll from all who passed.

Cornelius Vanderbilt, who began the string of consolidations that led to intensive competition among the railroads, is an important and illustrative example. Although steamboats had made Vanderbilt the richest man in the nation, between 1857 and 1862 he sold his steamboat interests and began buying railroads. He noted that, in 1860, 30,000 miles of rail were carrying seventy percent of the freight, but that this was segmented among scores of small firms. For instance, if a passenger wanted to travel from New York to Chicago, he would have to change trains seventeen times, from one small line to another. By 1868, Vanderbilt had consolidated a number of smaller railroads into the New York Central Railroad, allowing a passenger to travel from New York to Chicago without changing trains and with transit time reduced from fifty hours to twenty-four.[4]

4. Vanderbilt captured the old New York Central (running from Albany to Buffalo) by refusing to connect its passengers or freight with his lines at Albany. The Central capitulated, selling the line to Vanderbilt, who amalgamated his lines into the New York Central trunk

Others followed Vanderbilt's lead, and three additional railroads soon competed between New York and Chicago—the Pennsylvania, the Baltimore and Ohio, and the Erie. Without sufficient traffic to support multiple lines, competition became intense. Large shippers served by more than a single railroad enjoyed special low rates, under-billing, and, in some instances, rebates, occasionally even on the shipment of competitors' traffic.[5]

One example of the rate wars was that practiced between the New York Central and Erie railroads. After a series of price wars, which brought the price of moving cattle from Chicago to New York down to $1.00 a car, Jim Fisk, president of the Erie, bought all the cattle available and shipped them aboard Vanderbilt's New York Central.[6]

---

line, running from the seaboard to the Great Lakes. MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861–1901, at 71 (1962).

It is said that Vanderbilt was worth $11 million in 1853 but $105 million upon his death in 1877. *Id.* at 13–14. The steamboat-to-railroad switch was not the first instance of the adaptability that enabled him to accumulate such a fortune. As a master of sailing vessels, Vanderbilt lamented paddle wheelers, which had been introduced in 1807; and when the latter proved their value in transporting passengers, Vanderbilt insisted that they could never be used for freight "because the machinery would take up too much room." *Id.* at 13. But when this prediction proved incorrect, Vanderbilt had the best steamboats built for his lines and became a dominant player. *Id.* at 13–14. By the 1850s, he had more than 100 vessels afloat. *Id.*

5. W.D. Brewer, *Regulation—The Balance Point*, 1 PEPPERDINE L. REV. 355, 366 (1974). For example, on shipments of oil from western Pennsylvania to Cleveland, John D. Rockefeller's Standard Oil received a forty-cent rebate on every barrel it shipped, plus another forty cents per barrel shipped by its competitors. Standard Oil would also receive comprehensive information about the oil shipped by its competitors, proprietary information that was invaluable in underpricing them. One biographer described the rebates as "an instrument of competitive cruelty unparalleled in industry." RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 136 (1998) (quoting JOHN T. FLYNN, MEN OF WEALTH 444 (1941)). Such rebates were, indeed, one of the means by which Rockefeller managed to take over the refineries in Cleveland that competed with Standard Oil and, eventually, to establish a national monopoly. HENRY W. BRAGDON & SAMUEL P. MCCUTCHEN, HISTORY OF A FREE PEOPLE 391–92 (1967). According to John's brother, Frank, the message was, "If you don't sell your property to us it will be valueless, because we have got the advantage with the railroads." JOSEPHSON, *supra* note 4, at 119. At the turn of the century, Yale President Arthur Hadley observed that "the railroad is not merely an instrument fostering monopoly; it is itself an example of the tendency of monopoly. Railroad consolidation has put the control of the country's business into the hands of a few large corporations." ARTHUR TWINING HADLEY, RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS 21 (1903). "The public sees no limit to the growing power of corporations, and it regards this growth with a kind of vague fear." *Id.* at 42.

6. Paul Stephen Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329, 334 (1984); *see also* Oren Harris, *Symposium on the Interstate Commerce Commission—Introduction*, 31 GEO. WASH. L. REV. 1, 5 (1962) (alluding to rate wars involving shipment of cattle in the 1860s).

Rate wars in competitive markets drove down profits, leading carriers to raise prices to shippers without alternative means of transport. Often, a farmer located along an intermediate point served by only a single railroad would find that the price he was charged to ship his grain to market was higher than that charged to another shipper, even though that other farmer's grain would be moved a longer distance over the same line.[7] Hence, pricing in this era was highly discriminatory. Prices were generally low, but unstable, between points served by competing railroads or having access to navigable waterways, and relatively high (and even extortionate) at points between which shippers had no alternative means of transport.[8] Pricing began to reflect the level of competition in any market, rather than the cost of providing service. Moreover, preferred shippers enjoyed special rates, under-billing, and rebates.[9]

All of this occurred in an era prior to the existence of the antitrust laws. Ruinous rate wars, often of a predatory nature, designed to drive

---

7. Transportation rates from location points that a single rail carrier served were significantly higher than those rates charged at points where railroad competition existed. This was true even though points in the former group were often closer to the ultimate destination. For example, it cost more to ship goods from Poughkeepsie to New York City on the only line available, the New York Central Railroad, than to ship goods from Chicago to New York City, where both the Pennsylvania and Erie Railroads competed with the New York Central Railroad. BRAGDON & MCCUTCHEN, *supra* note 5, at 427. Indeed, transportation costs were commonly higher on a shorter haul than on a longer haul even on the same line in the same direction. Price competition among carriers serving common geographical points led to rampant rate wars. Carriers handled many shipments at substantial losses in hopes of forcing other carriers out of business, thereby enabling the victorious carrier to serve the particular location point on its own terms. Paul Stephen Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This Endangered Species*, 32 AM. U. L. REV. 335, 339 (1983).

8. U.S. DEP'T OF TRANSP., A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY 116 (1978) [hereinafter PROSPECTUS FOR CHANGE].

9. For example, Standard Oil had a "secret agreement with the railroads running out of Cleveland by which the rates on its products would be 25 to 50 percent below those charged other companies." BRAGDON & MCCUTCHEN, *supra* note 5, at 391–92. John D. Rockefeller admitted:

> A public rate was made and collected by the railroad companies, but so far as my knowledge extends, was seldom retained in full; a portion of it was repaid to the shipper as a rebate. By this method the real rate of freight which any shipper paid was not known by his competitors, nor by other railroads, the amount being a matter of bargain with the carrying companies.

JOSEPHSON, *supra* note 4, at 113. Railroad rebates "hastened the shift toward an integrated national economy, top-heavy with giant companies enjoying preferential freight rates." CHERNOW, *supra* note 5, at 115.

competitors out of business, were interspersed with price fixing and pooling agreements, whereby carriers in competitive markets would agree to raise prices and pool revenue and freight, whereupon rates soared.[10]

B. Political Corruption, Financial Piracy, and Discrimination

The enormous concentrations of wealth and power stemming from railroading led to political corruption, as railroad entrepreneurs bribed legislators and judges, sold them stock at less than fair market value, and gave them free passes, so as to avoid taxation and regulation.[11] So immense were the powers of the American robber barons that they became the law unto themselves. As was said to have been remarked by Cornelius Vanderbilt, "What do I care about the law? Hain't I got the power?"[12] Fraud, deceit, and corruption marked the era.[13]

Many carriers issued watered stock, manipulating its price up or down to make quick profits. One example involved Cornelius Vanderbilt's attempt to take over the Erie Railroad, which competed with Vanderbilt's New York Central. The Erie was owned by "the sanctimonious and treacherous [Daniel] Drew, the fearless Jim Fisk, [and] the impassive, stealthy Jay Gould."[14] They got wind of the

---

10. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 254 (2003); *see* CHARLES LEE RAPER, RAILWAY TRANSPORTATION: A HISTORY OF ITS ECONOMICS AND OF ITS RELATION TO THE STATE 207 (1912).

11. SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 730–31, 763–64 (1965).

12. JOSEPHSON, *supra* note 4, at 72.

13. A particularly notorious example was the Credit Mobilier scheme. The *New York Sun* in 1872 labeled Thomas Durant of the Credit Mobilier (through which much of the Union Pacific's public capital flowed) as "The King of Frauds." RUSSELL BOURNE, AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS, AND HIGHWAYS 94 (1995). The *Sun* described "[h]ow the Credit Mobilier bought its way through Congress," listing the "Congressmen who have robbed the People and who now support the National Robber." *Id.* at 94–95. The paper alleged that Durant and his co-conspirators had "gobbled" more than $211 million of public money. *Id.* at 95. Well into the twentieth century, it would be said that "[t]he Credit Mobilier to which the construction of the Union Pacific was sublet at an outrageous profit still smolders as a Sodom and Gomorrah in the desert of financial desolation and Congressional venality." WINTHROP M. DANIELS, AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY 45 (1932).

14. JOSEPHSON, *supra* note 4, at 74. Jay Gould subsequently compelled the Union Pacific to purchase the inflated stock of rail carriers he controlled—the Kansas Pacific and Denver Pacific, both land-grant railroads emptied of their state subsidies and private capital, now but "streaks of rust" ending in the desert. With the Wabash, the St. Joseph & Denver, the Missouri Pacific (which he acquired for only $3.8 million even though $25 million had been lavished on it in subsidies), and the Missouri, Kansas & Texas also in his portfolio,

attempted takeover and began issuing watered stock.[15] They had some expertise: Drew had prospered in the cattle trade by inaugurating the concept of "watered stock," whereby cattle were kept thirsty throughout the journey, then given drink only immediately before they were weighed for sale.[16]

The Panic of 1873 gave fuel to the fire of wildly fluctuating rates. The Panic had been precipitated by the financial failure of James J. Hill, the financier of the Northern Pacific. By the end of the year, nearly one-fifth of the nation's railroad mileage was in bankruptcy. Rail rate competition was intensified by the Panic of 1873 and the long depression that followed.[17] The rate wars did not subside until 1877.[18]

The situation "left almost everyone dissatisfied," as it would later be summarized:

> The railroads tried to avoid the constant rate wars, rebates to favored shippers, or low rates. Farmers wanted lower rates and protection against discriminatory rate practices. Shippers in

---

Gould threatened the Union Pacific that if it did not buy his two parallel railroads, he would stretch a competing line all the way to the Pacific Ocean. *Id.* at 199–203. Gould was given 200,000 shares of the Union Pacific (then worth about $10 million) for the worthless Kansas Pacific and Denver Pacific lines. *Id.* at 200–01; BOURNE, *supra* note 13, at 18, 96. Long before, Daniel Drew had said of Gould, "His touch is death." JOSEPHSON, *supra* note 4, at 201. There were other instances. "[I]ts treasury empty, its stock maintained by secret loans at a high price—the poor Wabash was to crash in a sensational debacle, in which it appeared afterward that Jay Gould was in no way involved. He was simply not there when it happened." *Id.* at 203. These actions injured both investors and the shipping public, for the carriers found it necessary to maintain high rates in order to pay dividends on these inflated stock issues. BRAGDON & MCCUTCHEN, *supra* note 5, at 427.

15. Printing Erie stock ferociously to feed Vanderbilt's insatiable thirst, Fisk said, "If this printing press don't break down, I'll be damned if I don't give the old hog all he wants of Erie." JOSEPHSON, *supra* note 4, at 126. Although Vanderbilt himself had issued watered stock from time to time, he was taken. In the ensuing battle over the Erie, both sides bribed New York legislators and judges. As a result of such stock manipulation, "[t]he railroad treasury was thus gutted for the benefit of the erstwhile combatants," and the Erie was unable to pay dividends for half a century. DANIELS, *supra* note 13, at 21–22.

16. JOSEPHSON, *supra* note 4, at 18. Watering stock was a concept Drew introduced to the securities industry as a stockbroker and head of the house of Drew, Robinson & Co.

17. RAPER, *supra* note 10, at 206.

18. The rate wars "brought ruin to the companies, and little advantage to the shippers as a whole. To some shippers it, to be sure, meant low rates. To others, notably those located at the intermediate non-competitive points, it brought the condition of still higher charges for transportation service; the chief burden of the maintenance and fixed charges rested upon these shippers, in favour of those at the great competitive points. It was, in fact, during these years of intense competition, that abusive discriminations were at their worst. These were the 'dark days' of the history of the American railways." *Id.*

> competitive markets wanted greater rate stability and assurances that they would not be placed at a competitive disadvantage relative to those shipping the same product from the same or other origins.[19]

A widespread interest in regulation thus began to develop.

To be sure, some were unhappier than others. In particular, reaction to price discrimination practiced by the railroads became the basis for the consumer revolt by the agrarian society formed in 1867 known as the National Grange.[20] This political movement led a number of state legislatures to promulgate laws to regulate the railroads.[21]

---

19. PROSPECTUS FOR CHANGE, *supra* note 8, at 116.

20. After America's young men returned to their farms following the Civil War, the production of cereal crops increased, and prices fell. Dempsey, *supra* note 10, at 260. Moreover, rate discrimination, bribery of public officials, and financial piracy became widespread. The "National Grange of the Patrons of Husbandry" (a sort of rural freemasons society, more commonly known as the Grangers) led the political charge for regulation. The National Grange was a powerful political organization of 1.5 million western farmers banded together in 20,000 lodges. *Id.* at 260–61. It would call for regulation of railroads, grain elevators, and public warehouses. *See generally* GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS (1971). The desire for economic growth led both the federal and many state and local governments to provide economic incentives to railroads to build westward. Dempsey, *supra* note 10, at 261. In addition to the federal and state land grant incentives, the railroad promoters also turned to individuals located along the rights of way for investment capital. Many farmers mortgaged their farms—starry-eyed with the prospect of lucrative dividends and reasonably priced access to eastern markets. However, they were disappointed on both counts. Dividends were poor, or nonexistent. Many railroads went through bankruptcy and reorganization, and the value of their stock was wiped out. Some had issued watered stock in order to raise money fraudulently. Governments and farmers alike suffered as many railroads went through bankruptcy and reorganization. *Id.*

State governments attacked the rail industry for its bribery of public officials, sale of worthless securities, and rate and service discrimination between places and persons. In addition, farmers were left with mortgages, worthless stock, exorbitantly priced or nonexistent transportation, and increased taxes needed to cover local government investments. *Id.* at 261–62. Midwestern farmers, the primary victims of the rate abuses, assailed the excessively high and discriminatory rates that the railroads charged to carry agricultural products from points of origin over which carriers had a monopoly to eastern markets or processing areas. They criticized the railroads' high rates, land grants, and political power. In the meantime, their taxes were increased to cover the parallel investment made by their state and local governments. This led to a blind antagonism toward the railroads. The result was a political movement calling for regulation. *Id.* at 262.

"The Granger movement is of significance in the evolution of government regulation, because it was the first time that American society regulated an industry by setting up a regulatory structure outside of the courts and the common law." Laurence E. Gesell & Martin T. Farris, *Antitrust Irrelevance in Air Transportation and the Re-Defining of Price Discrimination*, 57 J. AIR L. & COM. 173, 175 (1991). *See generally* MILLER, *supra*.

21. In 1869, Illinois passed the first statute requiring the railroads to offer just,

C. Labor Unrest

The monopoly power wielded by Rockefeller's Standard Oil led to such deep rebates as to result in massive revenue losses by railroads. In 1877, Rockefeller insisted that the Pennsylvania Railroad cease oil refining or he would divert traffic to other roads. In the wake of Rockefeller's onslaught, the Pennsylvania fired hundreds of workers, slashed wages twenty percent, and doubled the length of trains without expanding crews.

Also that year, the four major eastern railroads—the Pennsylvania, New York Central, Erie, and Baltimore and Ohio (B&O)—set up a rate control pool and cut wages by ten percent. After the B&O announced wage cuts, a general railroad strike ensued. Wages had been reduced, yet dividends to stockholders were still being paid. It would be one of the bloodiest battles in American labor history, resulting in dozens of fatalities.[22]

Working conditions on the railroads were onerous. Workers complained of long hours, no overtime pay, the lack of job security, and dangerous workplace conditions.[23] In 1886, a bloody strike erupted on the Chicago, Burlington & Quincy Railroad.[24] The Brotherhoods began

---

reasonable, and uniform rates. *See* MILLER, *supra* note 20, at 71–75. Because state legislators had other public business consuming their time, several states established commissions to develop expertise in order to adjudicate rate disputes, regulate the intricacies of their railroad industry, and protect the public interest in transportation matters. In the west, these state commissions had the power to regulate rail rates, whereas in the east the commissions, many of longer vintage, usually had only advisory powers. *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION 57 (1984).

22. Trainmen at Martinsburg, West Virginia, refused to handle freight trains; trains stopped at Grafton; fights broke out at Wheeling. To quell the uprising, state governors ordered out their militias, which President Rutherford B. Hayes supplemented with federal troops. For a week, nearly the entire railroad system ground to a halt. Violence broke out in Baltimore, Chicago, St. Louis, St. Paul, Omaha, and San Francisco. In Pittsburgh, a group of 20,000 strikers and supporters confronted 10,000 militiamen and police; 500 tank cars, 120 locomotives, and 27 buildings were torched by trade unionists; 24 people died. Walter P. Gray III, *Rails West!*, *in* RAILS ACROSS AMERICA: A HISTORY OF RAILROADS IN NORTH AMERICA 28, 49 (William L. Withuhn ed., 1993) [hereinafter RAILS ACROSS AMERICA]. Although the revolt subsided, it inaugurated a new era of labor militancy in American industry. CHERNOW, *supra* note 5, at 201–02. It was the first great American industrial strike. Don L. Hofsommer, *The Nation's Arteries*, *in* RAILS ACROSS AMERICA, *supra*, at 90, 106.

23. In 1888 alone, 2,070 railway workers were killed, and another 20,148 were injured. In 1894, Eugene V. Debs and the American Railway Union held an unsuccessful strike against wage reductions. BOURNE, supra note 13, at 100, 109.

24. William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The*

to amalgamate to form unions, as Congress became convinced that the railroads needed regulating.[25]

II. THE INTERSTATE COMMERCE COMMISSION

A. Creation of the ICC

Abuses in the railroad industry were not unique to America, and neither was regulation. In Great Britain, advisory powers concerning railroads were given to a newly established Board of Trade in 1840.[26] In 1844, a commission was established to report to Parliament on applications for railroad charters. It was clear that competition was not effectively regulating traffic and rates. Yet another commission was established in 1846.[27] In 1854, the British Parliament passed the Railway and Canal Traffic Act to protect local roads and through traffic, secure proper facilities, and prohibit discriminatory treatment of shippers.[28] But this proved inadequate. Parliament would respond again with the Act of 1873, which created the Railway and Canal Commission, by which the industry was regulated.[29] In contrast, Belgium, Prussia, France, Austria, Italy, and Canada responded to these concerns by nationalizing their railroads.[30]

In the United States, it took a bit longer, and socialism would be no part of the solution. The political pressure for regulation of the railroads was not just targeted at the states. The Granger movement also had an impact in Washington, D.C. In 1887, against the backdrop of the *Wabash* decision,[31] Congress promulgated the Act to Regulate Commerce,[32] establishing the nation's first independent regulatory agency—the Interstate Commerce Commission. The Interstate Commerce Act, as it would become known, succinctly established a

---

Contrived Collision of the Interstate Commerce Act with the Railway Labor Act, 24 TRANSP. L.J. 241, 245 (1997).

25. Hofsommer, *supra* note 22, at 106.

26. HADLEY, *supra* note 5, at 171.

27. *Id.*

28. Railway and Canal Traffic Act, 1845, 17 & 18 Vict. C. 31 (Eng.), *reprinted in* HENRY W. DISNEY, THE LAW OF CARRIAGE BY RAILWAY app. at 247 (5th ed. 1921).

29. RAPER, *supra* note 10, at 20–23.

30. *See* HADLEY, *supra* note 5, at 22, 187–235.

31. Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886) (holding that states could not regulate interstate rail traffic).

32. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

comprehensive regulatory regime over the rail industry, some of whose important details can be described as follows:

> The Act granted the ICC the authority to regulate the interstate rates charged by railroads, thereby ensuring that the rates would be just and reasonable. Under the Act, rail carriers could no longer discriminate in rates or services between persons, localities, or traffic. Furthermore, they could no longer charge a higher rate for a shorter distance that was included within a longer haul over the same line in the same direction. Nor could the rail carriers pool freight or revenue. Most importantly, railroads were required to make their rates public, file them with the newly formed Commission, and adhere to the published tariffs.[33]

Although the rail-industry witnesses in Congress's hearings leading up to the Act overwhelmingly had favored regulatory legislation, the Interstate Commerce Act was still rather effective consumer legislation. It included provisions the industry favored (e.g., requirements that rates be just and reasonable and that unjust discrimination, preference, and prejudice be abolished), but it also included provisions against which the railroads had lobbied (e.g., the prohibitions against pooling and against charging more for a short haul than a longer haul over the same line in the same direction).[34]

Never before had Congress established an independent regulatory commission to exercise the commerce power conferred under Article I, Section 8 of the Constitution. President Grover Cleveland appointed the distinguished jurist, Thomas Cooley, to the Interstate Commerce Commission, and Cooley was elected its first chairman.[35]

---

33. Dempsey, *supra* note 7, at 341 (footnotes omitted).

34. George Chandler, *The Interstate Commerce Commission—The First Twenty-Five Years*, 16 TRANSP. L.J. 53, 55 (1987).

35. Cooley, a former Chief Justice of the Michigan Supreme Court, a law professor, and author of treatises in constitutional law, torts, and tax, was among the most prolific and gifted lawyers in the nation. Roscoe Pound, for two decades the dean of Harvard Law School, considered Cooley one of the top ten judges of all time. The *New York Times* referred to him as "the father of the Interstate Commerce bill." FRANK N. WILNER, COMES NOW THE INTERSTATE COMMERCE PRACTITIONER 102 (1993). Shortly after his appointment to the ICC, Cooley recommended creation of an association for state regulatory utility commissioners. This would become the National Association of Regulatory Utility Commissions (NARUC), established in 1889. William R. Childs, *State Regulators and Pragmatic Federalism in the United States, 1889–1945*, 75 BUS. HIST. REV. 701, 706–07 (2001).

B. The Birth of the Modern Regulatory Movement

The Interstate Commerce Act was the first comprehensive regulation of any industry in the United States.[36] It was the first time in American legal history that an industry was regulated by a structure outside the courts and the common law (which had theretofore inartfully attempted to prohibit discrimination and abuses by common carriers).[37] The Interstate Commerce Act preceded the Sherman Antitrust Act by three years. Together, these two pieces of legislation formed "the cornerstone of regulation in America," and from those two acts of Congress came "a proliferation of government regulatory controls."[38]

Perhaps it was inevitable that government would come to play a role in protecting the public and industry from the ravages of economic instability and exploitation. As one commentator remarked, "The railroad dominated the U.S. economy and society in the 19th century. The domination existed from every standpoint—capitalization, employment, community impact or entrepreneurial opportunity. There was no force, industrial or religious, which matched the societal impact of the railroad after the first third of the 19th century."[39]

In all events, it is agreed that the creation of the ICC marked the birth of economic regulation in America. To be sure, the precise importance can be assessed differently. Thus, one commentator has observed, "The ICC is one of the earliest instances we can point to where the federal government intervened directly in the economy to

---

36. David M. Warner, *To Hell on the Railroads: Why Our Technology and Law Encourage a Degrading Culture*, 26 TRANSP. L.J. 361, 382 (1999).

37. ROY J. SAMPSON, MARTIN T. FARRIS & DAVID L. SHROCK, DOMESTIC TRANSPORTATION: PRACTICE, THEORY, AND POLICY 211–16 (6th ed. 1990).

38. PAUL STEPHEN DEMPSEY & LAURENCE E. GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 195 (1997). The intersection of these regulatory schemes is explored in another contribution to this collection of essays remembering the Interstate Commerce Act, 125 years after its passage. Randal C. Picker, *The Interstate Commerce Act and the Sherman Act: Playing Railroad Tycoon*, 95 MARQ. L. REV. 1135 (2012).

39. Joseph Auerbach, *The Expansion of ICC Administrative Law Activities*, 16 TRANSP. L.J. 92 (1987) (expanding on the statement that "[t]he genesis of the public policy [in favor of economic regulation] lay in the significance of railroad transportation to the fastest growing nation in world history"). Another has observed that "[w]e know that with the introduction of the railway there came a new factor into the life of the nation, and of the world, which radically affected all phases of that life. The railway is both quantitatively and qualitatively different from other and earlier means of conveyance and communication." 1 LEWIS HENRY HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES 75 (1968).

protect the economically weak from the economically strong."[40] Another has emphasized its more specific legacy, noting this: "From our own perspective a century later, the greatest significance of the 1887 Act to Regulate Interstate Commerce lies in its creation of the prototypical federal regulatory agency."[41] Indeed, in this latter regard, during the ensuing decades, the ICC became the model for economic regulation of a host of infrastructure industries—and for the numerous federal and state agencies that emerged to perform the regulatory function.[42]

C. Restoration and Expansion of Jurisdiction

To focus on the ICC itself: Although Congress expanded the ICC's jurisdiction in the years after 1887 (giving it jurisdiction over rail safety in 1893, for example),[43] decisions of the U.S. Supreme Court significantly reduced the ability of the nascent commission to regulate rates effectively.[44] Congress responded by restoring and expanding the Commission's jurisdiction through several Progressive Era reforms passed between 1903 and 1910. In 1903, Congress enacted the Elkins Act,[45] which prohibited rail rebates and granted the Commission authority to impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs.[46] Three

---

40. James C. Miller, III, *Keynote Address to ICC Centennial Celebration*, 16 TRANSP. L.J. 40, 41 (1987).

41. MCCRAW, *supra* note 21, at 61–62.

42. *See* Kearney & Merrill, *supra* note 3, at 1333–34.

43. Chandler, *supra* note 34, at 57–58 (discussing the Safety Appliance Act).

44. For example, in two cases involving the Cincinnati, New Orleans & Texas Pacific Railway, the Court held that the ICC had no authority to prescribe rates for the future. Although the Commission could conclude that an existing rate was excessive and unlawful, and therefore award reparations to the complaining party, it could not insist on a reduction in future rates, which would have protected others similarly situated or the general public. *See* ICC v. Cincinnati, N.O. & Tex. Pac. Ry., 167 U.S. 479, 511 (1897); Cincinnati, N.O. & Tex. Pac. Ry. v. ICC, 162 U.S. 184, 196–97 (1896). In ICC v. Alabama Midland Railway, 168 U.S. 144, 173–74 (1897), the Supreme Court effectively deprived the Commission of its ability to enforce the long and short-haul provisions of the 1887 statute. Thus, by the turn of the century, an essentially impotent ICC faced increasing rail rates, rail consolidations that were reducing competition, and rail carriers that were continuing jointly to fix rates. I.L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 32–35 (1931). Another essay in this symposium reflects on these early times for the Commission. James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131 (2012).

45. Ch. 708, 32 Stat. 847 (1903).

46. *Id.* § 1, 32 Stat. at 847–48.

years later Congress passed the Hepburn Act,[47] giving the Commission jurisdiction over express, sleeping-car, and steamship companies, as well as over fuel pipelines.[48] This Act also conferred on the ICC jurisdiction to determine and prescribe maximum rates.[49] Additionally, Congress gave the Commission the power to establish through-routes and joint rates among non-competing carriers and to prescribe their divisions, and forbade the issuance of free passes except for clergy.[50]

Although the Elkins and Hepburn Acts were designed to prohibit rebates, in 1907 the ICC reported that Standard Oil was still "secretly accepting rebates, spying on competitors, setting up bogus subsidiaries, and engaging in predatory pricing."[51] President Theodore Roosevelt and his cabinet were eager for a test case proving Standard Oil's collusion with the railroads. The company was charged with taking rebates from the Chicago and Alton Railroad after the Elkins Act prohibited them, and a federal district court issued the largest fine in American corporate history up to that time (nearly $30 million).[52] While this was reduced on appeal, the era of railroad rebates was coming to an end.[53] Teddy Roosevelt was among the strongest presidential proponents of a virile and vigorous Interstate Commerce Commission.[54]

Congressional attention continued beyond Roosevelt's presidency. In 1910 Congress passed the Mann–Elkins Act,[55] which revitalized the Interstate Commerce Act's long and short-haul provisions[56] and established new rate procedures.[57] Under this Act, the Commission could, on its own initiative, suspend tariffs pending an investigation of their lawfulness.[58] The Act also created a Commerce Court to review ICC decisions.[59] In 1911, the court reviewed thirty ICC decisions and

47. Ch. 3591, 34 Stat. 584 (1906).
48. *Id.* § 1, 34 Stat. at 584.
49. *Id.* § 4, 34 Stat. at 589.
50. *Id.*; Hofsommer, *supra* note 22, at 106.
51. CHERNOW, *supra* note 5, at 538–39.
52. *Id.* at 539–41.
53. Standard Oil would fall to the antitrust laws and be dismembered in 1911. *Id.* at 554.
54. *See* DANIELS, *supra* note 13, at 70–80.
55. Ch. 309, 36 Stat. 539 (1910).
56. *Id.* § 8, 36 Stat. at 547.
57. *Id.* § 9, 36 Stat. at 548.
58. *Id.* § 13, 36 Stat. at 554.
59. *Id.* §§ 1–3, 36 Stat. at 539–42.

reversed twenty-seven of them—a reversal rate that led Congress to abolish the court in 1913.[60]

As war supplies and munitions flowed eastward, gridlock along the eastern seaboard led Congress to consolidate the nation's railroads into a single national system supervised by the U.S. government. At war's end, it was clear that the rail system suffered from duplicative overcapacity and deferred maintenance. After World War I, the policy of the federal government shifted from one of protecting the public against the market abuses of the transportation industry to one of preserving a healthy economic environment for common carriers. Congress's primary action was to promulgate the Transportation Act of 1920, also known as the Esch–Cummins Act.[61]

The new legislation was preoccupied with the financial health of the industry. The ICC was given jurisdiction over minimum rates (to supplement its existing authority over maximum rates); power to regulate entry and exit from markets (by issuing certificates of public convenience and necessity); authority to regulate intercorporate relationships, the issuance of securities, and mergers (to ensure a sound financial structure); and a mandate to draft a plan for consolidating the multiple parallel rail companies into a more efficient and smaller number of larger firms.[62] But the effort to consolidate the rail system died stillborn for lack of support from the industry.

Title III of the Transportation Act of 1920 also created a new agency, the Railroad Labor Board, which attempted to avoid interruptions to commerce by negotiating disputes.[63] Title III was designed to deal with the sometimes-violent confrontations between labor and management in the railroad industry (which had included not only major strikes in 1877, 1886, 1888, and 1894 but some 105 railroad

---

60. Chandler, *supra* note 34, at 57. During the period from 1889 until World War I, not only was the power of the ICC enhanced, but strong regulatory commissions also were established in a substantial majority of the states. DANIELS, *supra* note 13, at 53. Other legislation also reined in the railroads. The Panama Canal Act of 1912 prohibited the railroads from owning ocean carriers traversing the canal. The Clayton Act of 1914 prohibited interlocking railroad directorates. The Adamson Act of 1916 gave labor the eight-hour workday. *Id.* at 55. According to Professor Daniels, "By this time the railroad Sam[s]on had been rather effectively shorn by the Congressional Delilah." *Id.*

61. Ch. 91, 41 Stat. 456 (1920).

62. PAUL STEPHEN DEMPSEY & WILLIAM E. THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 3, 12–13 (1986).

63. Ch. 91, §§ 304, 307, 41 Stat. at 470–71.

strikes between 1899 and 1904).[64] A national strike in 1922 revealed that the 1920 Act still was not the solution. So in 1926 Congress promulgated the Railway Labor Act,[65] the first legislation to force management to recognize and bargain with employee representatives.[66] It would later be extended to the airline industry.

D. Replication of the Model in the Great Depression

The Great Depression was the most painful economic period in the history of the United States. It shook to the very core America's faith in laissez-faire. The Missouri Pacific Railroad became the first railway to fall into bankruptcy during this time; by 1939, one-third of the nation's rail mileage was in receivership.[67] Congress believed that stability and growth of the infrastructure industries—including banking, securities, energy, communications, and transportation—were essential if the United States was to enjoy national economic recovery. A sound economy could be built on top of a solid infrastructure foundation.

Hence, during the 1930s, Congress created a number of new federal agencies to regulate these important industries, including the Federal Power Commission (1930), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the National Labor Relations Board (1935), and the Civil Aeronautics Authority (1938), reorganized as the Civil Aeronautics Board (1940). Most were modeled on the first independent federal agency, the Interstate Commerce Commission.

The agencies' independence was of utmost importance—that is, of course, their independence from the Executive Branch. They were to be shielded from the political winds that blow down Pennsylvania Avenue by being made relatively autonomous from the White House. The independent regulatory commissions were, in a sense, arms of Congress, created under its powers to regulate interstate and foreign commerce pursuant to Article 1, section 8 of the U.S. Constitution.

---

64. The railroad industry had pressed for the establishment in major cities of Army bases, whose soldiers could be called out to quell strikes with force. Prior legislation, including the anemic Arbitration Act of 1888, the Erdman Act of 1898, and the short-lived Newlands Act of 1913, had failed to eliminate the conditions that gave rise to strikes.

65. 44 Stat. 577 (1926).

66. For an excellent review of this history, see Mahoney, *supra* note 24, at 245–51.

67. H. Roger Grant, *Hard Times*, *in* RAILS ACROSS AMERICA, *supra* note 22, at 130, 130–31.

III. THE ICC AT MID-CENTURY

A. Economic Regulation of Motor Carriers

The early twentieth century had seen the emergence of a new form of competition: the motor carrier.[68] With the development of a national system of highways in the 1920s, motor carriers became an increasingly viable competitor to railroads. The combination of the pneumatic tire, the internal-combustion engine, assembly-line production, and hard-surface roads brought sensational growth to the industry.

But not all was well. The industry itself was plagued by its own growth. A driver's license and a down payment on a truck were all it took to get into the industry. Many entrepreneurs were unsophisticated, had little idea what their costs were, and took freight for non-remunerative prices. Sometimes they were victimized by shippers with monopsony power dictating excessively low rates. Wages were poor. Many firms fell into bankruptcy. But used-truck dealers simply recycled the trucks, and the capacity problems persisted. Industry overcapacity drove trucking rates down to a level that made it impossible for many truckers to maintain their equipment, and highway safety suffered.

All of this led many states to regulate motor carriers, limiting entry and requiring that rates be reasonable. By the mid-1920s, thirty-three states regulated motor freight transport, and forty-three regulated bus companies. But the U.S. Supreme Court in 1925 handed down a decision that stripped the states of their ability to regulate interstate movements.[69]

---

68. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines. The following year, the first scheduled bus service began in New York City. Yet growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry. World War I demonstrated the potential for motor transport. Thousands of motor vehicles were produced for the Army; they quickly proved their superiority over mules in transporting men and materiel to the front. After the Great War, thousands of surplus Army trucks became the vehicles for growth of the commercial motor transport industry. By 1918, the nation had more than 600,000 trucks. *See* Dempsey, *supra* note 10, at 273–74 (and sources cited).

69. Buck v. Kuykendall, 267 U.S. 307 (1925). In *Buck*, the State of Washington had denied a motor common carrier's application for operating authority, on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam rail service. Dempsey, *supra* note 7, at 344. The Supreme Court recognized that safety promotion and highway conservation are legitimate reasons for constraining interstate transportation, but it concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition. Before *Buck*, forty states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity. *Id.*

After that, uncontrolled rate wars broke out among interstate carriers. Bankruptcies proliferated. Safety problems were exacerbated. Unscrupulous truckers sometimes stole the freight that had been entrusted to them. Bus companies and brokers occasionally absconded with the ticket revenues of unwary passengers. Fraudulent practices became widespread.

As early as 1926, the U.S. Department of Agriculture issued a report concluding that entry and rate stabilization of highway transport would be beneficial to prevent over-expansion.[70] Beginning that year, Congress, in each session, considered bills for economic regulation of the motor carrier industry. Several economists of the day also advocated the need for economic regulation.[71]

The Wall Street stock market crash of 1929 exacerbated the problem. It set in motion the most prolonged and severe economic depression in modern history. It had a profound impact upon economic and political policy in the United States. The prevailing view soon became that the market had failed to serve society's needs, and failed badly. Only enhanced government involvement in the national economy could restore the stability required for economic growth. With 3.5 million trucks on the highway, and with thousands of factories

70. W.T. JACKMAN, ECONOMIC PRINCIPLES OF TRANSPORTATION 846–47 (1935).

71. For example, in 1928, at a meeting of the American Economic Association, William M. Duffus declared, "Most students of transportation will agree, I think[,] that there must be some sort of central planning looking toward the coordination of our various transportation agencies on a sound economic and financial basis." JOHN RICHARD FELTON & DALE G. ANDERSON, REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY 7 (1989). Henry R. Trumbower argued that transportation (rail and highway) should be considered a regulated monopoly. *Id.* Other economists agreed. Shan Szto condemned excessive competition as of "no benefit to anybody," making the industry "unattractive to responsible business people." *Id.* (quoting Shan Szto, Federal and State Regulation of Motor Carrier Rates and Services 13, 24 (1934) (unpublished Ph.D. dissertation, Univ. of Penn.)). Harold G. Moulton and his Brookings Institution associates criticized the waste and instability created by excessive competition, and urged comprehensive coordination of transportation. *Id.* at 8 (citing HAROLD GLENN MOULTON & ASSOCIATES, THE AMERICAN TRANSPORTATION PROBLEM 889–90 (1933)). Professor Paul Kauper noted that "[t]he present demoralization of interstate motor transportation, due to unsound competitive practices, and the menace of such unrestricted competition to the integrity of the national transportation system as a whole create problems that call imperatively for federal legislation." Paul G. Kauper, *State Regulation of Interstate Motor Carriers*, 31 MICH. L. REV. 1097, 1111 (1933); *see also* Paul G. Kauper, *Federal Regulation of Motor Carriers*, 33 MICH. L. REV. 239 (1934).

shutting down, there was less freight to fill empty trucks. The financial health of the industry spiraled downward.[72]

With the support of the ICC,[73] most of the state public utility commissions (PUCs), the truck, bus, and rail industries, and many shippers, Congress promulgated the Motor Carrier Act of 1935,[74] adding bus and trucking companies to the jurisdiction of the Interstate Commerce Commission.[75] The Act gave the ICC authority over entry and rates of motor carriers of passengers and commodities.[76] Among the purposes of this legislation were the prevention of destructive competition among motor carriers and the protection of motor and rail carriers from each other.[77] Representative Sadowski, a principal

---

72. Congress first attempted to restore stability by promulgating the National Industrial Recovery Act, allowing industries to establish "Codes of Fair Competition" to diminish the heated level of competition in an industry. Such codes were adopted by many industries, including motor carriers. But in 1935, the U.S. Supreme Court struck down the legislation on constitutional grounds. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935). Because the Court in 1925 had prohibited the states from regulating interstate motor carrier operations, *see supra* note 69 and accompanying text, such activities would be once again unregulated absent further federal legislation.

73. In 1933, President Franklin Roosevelt appointed the distinguished ICC commissioner, Joseph Eastman, to the new position of Federal Coordinator of Transportation, with the responsibility to recommend legislation "improving transportation conditions throughout the country." Emergency Railroad Transportation Act, 1933, ch. 91, § 13, 48 Stat. 211, 216 (1933). The National Association of Railroad and Utility Commissioners had sponsored a bill (the "Rayburn Bill") calling for economic regulation of the trucking industry. The position was quickly endorsed by Eastman and the ICC.

74. Ch. 498, 49 Stat. 543 (1935). This amendment divided the Interstate Commerce Act into two parts. The original Act was designated "Part I." The Motor Carrier Act of 1935 was then added as "Part II."

75. *See generally* Daniel W. Baker & Raymond A. Greene, Jr., *Commercial Zones and Terminal Areas: History, Development, Expansion, Deregulation*, 10 TRANSP. L.J. 171, 176 (1978).

76. Promoting safety also was a principal mandate to the agency. The new legislation gave the ICC power to establish requirements for the qualifications of drivers, maximum hours of service, and standards of equipment.

77. THOMAS D. MORGAN, ECONOMIC REGULATION OF BUSINESS 66–67 (1976). It was feared that a continuation of unrestrained market forces might lead to a loss of service or higher prices for small shippers and small communities, leaving the surviving carriers to concentrate on high-revenue traffic. Thus, as Joseph Eastman said, "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it." William E. Thoms, *Rollin' On . . . To a Free Market: Motor Carrier Regulation 1935–1980*, 13 TRANSP. L.J. 43, 48 (1983) (quoting Eastman's remarks before the Senate Committee on Interstate Commerce in 1935). The concern was expressed that without regulation, the economies of scale inherent in the industry would cause concentration, and inevitably,

sponsor, described "the purpose of the bill [as] to provide for regulation that will foster and develop sound economic conditions in the industry."[78] In short, economic stability and enhanced safety were the Motor Carrier Act's major purposes.

Under economic regulation, the industry grew and prospered. Motor carriers became responsible, reliable, and safe enterprises. Competition became healthy, with modest government oversight of rate levels and entry. Efficient and well-managed carriers began to earn a reasonable return on investment. The stability of the motor carrier industry provided a foundation for national economic recovery.

B. The Structure of Economic Regulation

It is worthwhile to sketch briefly the ICC's basic approach to economic regulation of transportation. The agency's work encompassed several principal clusters of activities:

Entry and Exit—The ICC prescribed what routes could be served, designating which applicants would be allowed to serve proposed city-pairs or territories. Once a carrier served a market, it ordinarily could not cease service unless it received governmental approval to exit. In granting either entry or exit, the agency would issue a certificate of public convenience and necessity. Typically, service offerings were also regulated in a manner in which carriers were under a common carrier obligation to provide adequate service in the territories described by their operating certificates. Finally, carrier safety, financial and managerial ability, and compliance disposition were regulated in certification proceedings in which the agency was required to find the applicant fit, willing, and able to perform the proposed service.

Rates—The agency had authority to review whether rates in carrier-filed tariffs were just, reasonable, and nondiscriminatory. The agency protected the public against the extraction of monopoly rents and

---

oligopolistic and monopolistic markets. In short, the destructive potential of excessive competition was everywhere apparent.

One can dust off the history books of the nineteenth century and find that many of these conditions existed in the railroad industry before it was regulated in 1887. For example, the unregulated railroads were beset with fierce price wars in competitive markets while exacting highly discriminatory monopoly rates in markets in which they enjoyed market power. Destructive competition produced economic anemia, which encouraged consolidations and monopolization. *See supra* text accompanying notes 4–21.

78. Baker & Greene, *supra* note 75, at 178.

pricing discrimination. Efficient and well-managed carriers were allowed the opportunity to earn a reasonable return on investment.

Antitrust—The agency would review proposed carrier mergers, acquisitions, and consolidations, interlocking relationships, securities issuances, and inter-carrier agreements to determine whether they were in the public interest. Approval generally shielded these arrangements from the Sherman and Clayton antitrust acts.

Consumer Protection—The agency would prohibit unfair and deceptive competitive practices, such as false and misleading advertising.

Throughout the twentieth century, most state PUCs regulated the intrastate aspects of these industries in essentially the same areas of oversight.

C. The Interstate Commerce Commission at Its Zenith

Until the demise of the northeast railroads in the 1970s, the Interstate Commerce Commission was regarded as a model of good government. At the agency's fiftieth anniversary, the ICC was praised for its "vigor, spirit, and statesmanlike administration."[79] A leading Congressman said of the ICC, "Without desire to aggrandize itself, but actuated by what it believe[s] to be in the public interest, free from partisanship or politics and resisting pressure from whatever source, it does its work."[80]

At the Commission's seventy-fifth anniversary, Supreme Court Justice Felix Frankfurter eloquently summarized the agency's strengths:

> [T]he Commission illustrates, throughout its life, unblemished character[—]character meaning a fastidious regard for responsibility, a complete divorcement between public and private interest, and all other concomitants of a true and worthy conception of public duty. Alas, that cannot be said of all public bodies, but it can be said that this Commission throughout its seventy-five years has had a career of unblemished character.
>
> Secondly, . . . we are here to celebrate as striking a manifestation of competence in government as any I know of in

79. Clyde B. Aitchison, *The Evolution of the Interstate Commerce Act: 1887–1937*, 5 GEO. WASH. L. REV. 289, 321 (1937).

80. John J. Esch, *The Interstate Commerce Commission and Congress—Its Influence on Legislation*, 5 GEO. WASH. L. REV. 462, 502 (1937).

> the three branches of government. . . .
>
> . . . .
>
> Thirdly, it is a necessary condition, before a Commission can effectively act, that it be independent. . . .
>
> . . . .
>
> . . . [The ICC] has maintained not merely formal independence, but actual independence of word and deed, and has been a laboratory demonstration of how economic problems may be worked out by trial and error. Finally, by virtue of all these considerations, the Commission has been a pacemaker, a model, for the subsequent commissions which, in turn, have been created in response to economic and social demands in their fields of activity.[81]

This era of good feelings would not last.[82]

IV. THE INTERSTATE COMMERCE COMMISSION IN DECLINE

A. Railroad Regulatory Reform

The growth of interstate highways led to a shift of traffic from rail to the motor carrier industry. Coupled with the move of industry out of the northeastern "rust belt" into the southeastern and western "sun belt," this led to a decline of railroad profitability. Yet it was regulation that took the blame for the collapse of the northeastern railroads.

Conrail was formed in 1973 with the merger of the bankrupt Penn Central (formerly the Pennsylvania and New York Central railroads) and five smaller railroads.[83] The bankruptcy of the Penn Central, the Rock Island, and, later, the Milwaukee made Congress fearful that the government would end up owning, maintaining, and operating the nation's rail system. As it had earlier bailed out railroad passenger service with the creation of Amtrak (and would later bail out the airline

---

81. FELIX FRANKFURTER, *The Interstate Commerce Commission*, *in* OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956–1963, at 235, 236–44 (Philip B. Kurland ed., 1965). Justice Frankfurter also prophetically foresaw the things that could cause the demise of the ICC. *See* Dempsey, *supra* note 6, at 378.

82. To be sure, there had been dissenting voices along the way. *See, e.g.*, Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952).

83. Paul Stephen Dempsey, *Antitrust Law and Policy in Transportation—Monopoly I$ the Name of the Game*, 21 GA. L. REV. 505, 547 (1987).

industry after the catastrophic impact of September 11th), Congress stepped in to bail out Conrail with a massive infusion of federal capital.

By the mid-1970s, the political mood in Washington had shifted against economic regulation. Regulatory failure took much of the blame for the anemic state of the rail industry. In order to restore the health of the rail industry, Congress passed the Regional Rail Reorganization (3R) Act of 1973,[84] the Railroad Revitalization and Regulatory Reform (4R) Act of 1976,[85] and the Staggers Rail Act of 1980.[86] Collectively, the legislation limited the ICC's jurisdiction over rail ratemaking, circumscribing its ability to regulate rates unless the traffic in question was "market dominant." Rail exit from unprofitable markets also became easier. Additionally, the legislation partially preempted state jurisdiction over rail rates and operations. The Staggers Rail Act reduced the ICC's jurisdiction over rates.[87] Mergers and acquisitions became robust in this post-regulatory era. Whereas in 1939, 1,323 Class 1 railroads operated in the United States, today there are fewer than ten. In fact, today the United States is dominated by two massive western railroads (the Union Pacific and the BNSF) and two large eastern railroads (the Norfolk Southern and CSX).

B. The Politics of Deregulation

It should be noted that regulatory reform and deregulation are not

---

84. Pub. L. No. 93-236, 87 Stat. 985 (1974).

85. Pub. L. No. 94-210, 90 Stat. 31 (1976).

86. Pub. L. No. 96-448, 94 Stat. 1895 (1980).

87. The Staggers Act authorized ICC jurisdiction over rates only if the traffic was in fact market dominant and the proposed rates were more than 170% of variable costs. Railroads were free to raise or lower rates at will unless, with respect to an increase, the carrier had market dominance over the traffic or, with respect to a decrease, the rates would be lowered below a "reasonable minimum" (in the latter regard, if the rate was above the variable costs of providing the service, it was conclusively presumed to contribute to "going concern value" and therefore above a reasonable minimum). Staggers also freed railroads to enter into contracts with shippers covering rates and levels of service. *See id.* §§ 201–203, 208, 94 Stat. at 1895, 1898–902, 1908.

With the appointment of pro-deregulation commissioners, the ICC defined "market dominance" in such a way that it was rarely deemed to exist. According to the Commission's interpretation, it did not exist if there was intermodal competition, intramodal competition, product competition, or geographic competition. Subsequently, the Commission took the position that carriers should be generally free to raise rates until either they became "revenue adequate" or "stand-alone costs" were achieved. Potomac Electric Power Co. v. ICC, 744 F.2d 185 (D.C. Cir. 1984). Stand-alone costs are essentially what it might cost an electric utility, for example, to lay its own rail line to a coal mine. Producers of coal and electric utilities called for legislative relief from this administrative deregulation.

the same thing, although the political movement for the former probably served as a catalyst for the latter. Regulatory reform, as originally conceived, consisted of a modest political agenda for improvement of the regulatory process.

It was argued that government had become bloated, fat, and lazy. Agencies were headed by political cronies rather than professional managers. Lethargy snuffed out innovation. The agencies had allegedly been "captured" by the industries they regulated.[88] Consumer advocate Ralph Nader assembled a team of law students who wrote a scathing 1,200-page critique of the ICC. That report, *The Interstate Commerce Omission*, described the agency as an elephant's graveyard of political hacks, who enjoyed "deferred bribes" in the form of a "revolving door" of subsequent employment in the industry that they regulated.[89]

The time and resources expended in complying with the regulatory labyrinth were perceived as excessive, as were the costs to taxpayers.[90] Following enactment of the Administrative Procedure Act of 1946, the ICC was the largest employer of administrative law judges.[91] Yet the ICC was a *tiny* federal agency, with only five commissioners, eight clerks, and two messengers in 1887, growing to eleven commissioners and some 2,700 government servants at its high water mark in the 1940s.[92] Contrast that with the U.S. Department of Transportation,

---

88. In analyzing the motives and behavior of administrative agencies, some commentators have suggested that after an initial developmental period, an agency inevitably falls captive to the industries it regulates. *See* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 294 (1955) (arguing that commissions tend to become protective representatives for agencies regulated); James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1055–56 (1975) (stating that regulated groups exert pressure on an administrative agency in proportion to their economic importance); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954) (concluding that Congress's failure to provide clear statutory standards leads to control of agencies by private groups).

89. ROBERT C. FELLMETH ET AL., THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC 20–39, 311 (1970).

90. Dempsey, *supra* note 3, at 26. The Yak Fat Controversy is an example of what was wrong with the excessive procedural morass into which the ICC had degenerated. Fed up with railroad opposition to every trucking rate filed, Robert Hilt II of Hilt Truck Line in Omaha, Nebraska, filed a tariff seeking to haul 80,000-pound truckload lots of yak fat from Omaha to Chicago at 45 cents per hundred pounds. A number of railroads objected on grounds that the rate was non-compensatory; Hilt's tariff was suspended pending investigation. In truth, there was not a single yak within 10,000 miles of Omaha—not even in zoos. WILNER, *supra* note 35, at 151–52.

91. WILNER, supra note 35, at 98.

92. *See id.* at 233; Leonard S. Goodman, *Getting Started: Organization, Procedure and Initial Business of the ICC in 1887*, 16 TRANSP. L.J. 7, 8–16 (1987).

which by 1980 had about 115,000 employees.[93]

The regulatory reform movement, on the whole, seemed to appreciate the important public benefits that government was performing, but advanced a belief that the governmental function could be performed better, more expeditiously, efficiently, and economically. The regulatory reform movement focused largely on *means*. It called for greater regulatory flexibility to allow the industry to respond to market forces.

In contrast, the deregulation movement focused largely on *ends*. Deregulators wanted the very heart of the regulatory function amputated from the body politic, and free-market economists provided the intellectual artillery, insisting that transportation firms were not public utilities, as they had been commonly perceived.[94]

The context is broader. The generation of Americans who grew up during the Great Depression and World War II saw government as an essential companion—a mechanism for achieving greater social good, protecting the country from threats without and within. For most of these Americans, the Depression shattered confidence in the theory of laissez-faire. The free market had produced the worst economic collapse in history; millions of Americans lost their jobs, their homes, their self-esteem, and their faith in the philosophy of a free market. They turned to government to find a solution. It was during this era that many of the independent regulatory agencies were born.

But the generation of folks who grew up in the 1960s and 1970s emerged cynical, perceiving government to be a malignant sore. Those on the left abhorred Lyndon Johnson's war in Vietnam and Richard Nixon's Watergate. Those on the right were offended by the social engineering of Johnson's Great Society and the accompanying larger government and higher taxes. Both converged on a common path that viewed government with hostility. That provided the foundation for a bipartisan political movement.[95]

During the 1970s and early 1980s, deregulation became a bipartisan movement, one that swept America profoundly and provided a new

---

93. U.S. DEP'T OF TRANSPORTATION, 14TH ANNUAL REPORT 47 tbl.2 (1980).

94. *See* RICHARD E. CAVES, AIR TRANSPORT AND ITS REGULATORS: AN INDUSTRY STUDY (1962); GEORGE W. DOUGLAS & JAMES C. MILLER III, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY (1974).

95. *See generally* PAUL STEPHEN DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION: THE TRANSPORTATION INDUSTRY IN TRANSITION, at xv (1989).

order of radically less government intervention in the market. In Congress, liberal Democratic Senator Teddy Kennedy and conservative Republican Senator Bob Packwood locked arms in a war with transportation regulation. All fronts were determined to advance against regulation. At the White House, Democratic President Jimmy Carter and his successor, Republican President Ronald Reagan, led the crusade for significant deregulation of major industries—broadcasting, banking, telecommunications, oil and gas, air, rail, bus, and trucking. That movement was coupled with deregulation in less-industry-specific areas such as antitrust enforcement and environmental, safety, and health standards.

On Capitol Hill, Kennedy fired the opening salvo in hearings on airline deregulation that he conducted as chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure.[96] These hearings served as the political genesis of congressional reform. Coached by law professor (and future Supreme Court Justice) Stephen Breyer,[97] Kennedy began the hearings by saying, "Regulators all too often encourage or approve unreasonably high prices, inadequate service, and anticompetitive behavior. The cost of this regulation is always passed on to the consumer. And that cost is astronomical."[98]

Free-market economists, who for years had attacked the phenomenon of economic regulation, provided the intellectual justification. They insisted that government distorted the competitive equilibrium, created a misallocation of resources, and was "in bed with" or "captured by" the industries it regulated. The neoclassical market economists also argued that the costs of regulation were exorbitant.[99] Thus, they argued, society would be better off if the "dead hand" of regulation were amputated and replaced with Adam Smith's "invisible hand," clearing the way for marginal-cost pricing and textbook levels of near-perfect competition in a healthy competitive environment. The

96. Jurisdictionally, it was an odd thing for a judiciary subcommittee to take up airlines or their regulation, for there was an aviation subcommittee already established under the Senate Commerce Committee chaired by Howard Cannon.

97. Kennedy had been persuaded by Breyer, subcommittee counsel, that airline regulation was ripe for attack on behalf of consumers. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 40 (1985). Breyer had previously been a Harvard Law School professor, and the Brookings Institution had published his book calling for natural gas deregulation. STEPHEN G. BREYER & PAUL W. MCAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 132–34 (1974).

98. DERTHICK & QUIRK, *supra* note 97, at 41.

99. *See* Dempsey, *supra* note 3, at 26–29.

discipline of economics had not embraced an ideology with such religious passion since the Bolshevik Revolution.[100] It would snowball into an avalanche that swept over nearly all of government.

The first major step was the Airline Deregulation Act of 1978,[101] which would deregulate pricing and entry, and sunset the Civil Aeronautics Board in 1985. As one authority has noted, "Deregulation succeeded against industry opposition because it was supported by a coalition of academics able to highlight concrete examples of lower fares with less regulation, consumer groups, politicians looking for an anti-inflation or pro-free market issue, public disgust with scandals, and charismatic individual spokesmen, all of which excited a media blizzard that lasted for several years."[102] This would set the stage for Congress to sunset the Interstate Commerce Commission a decade later.

C. Regulatory Failure and Deregulation

Ironically, just as economic regulation was born of *market* failure, during the last quarter of the twentieth century deregulation was born of *regulatory* failure. After the dust settled from the Great Society, there was a widely held perception that government was inefficient, costly, and ineffective.[103] Much of the momentum for deregulation was born of the exasperation of businesses and individuals over what was perceived to be an unwieldy and expensive Washington bureaucracy, which tied them in red tape.[104] The direct and indirect costs of regulation were viewed as expensive and inflationary. The direct costs were felt in the tax dollars directly needed to support the agencies and their large staffs. But the indirect costs were also large—the armies of lawyers, lobbyists, accountants, and expert witnesses needed to satiate the agencies' enormous appetite for paper and endless hearings. "Regulatory lag" not only was costly in terms of the impact of market inflation upon obsolete pricing, but it made business decision-making difficult, for the regulatory future was uncertain and unpredictable.

Economist Robert DeFina estimated that for each dollar spent by

---

100. Paul Stephen Dempsey, *Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*, 20 TRANSP. L.J. 185, 187–89 (1992).

101. Pub. L. No. 95-504, 92 Stat. 1705 (1978).

102. Michael E. Levine, Essay, *Why Weren't the Airlines Reregulated?*, 23 YALE J. ON REG. 269, 291 (2006).

103. Paul Stephen Dempsey, *Erosion of the Regulatory Process in Transportation—The Winds of Change*, 47 ICC PRAC. J. 303, 319 (1980).

104. *Id.*

government directly to regulate, industry suffered an economic burden for compliance of twenty times as much. Under this hypothesis, taxpayers spent $3 billion in 1976 to run the regulatory agencies, while industry theoretically spent an additional $60 billion to comply with the regulations the agencies imposed.[105] Regulatory agencies are headed by individuals who are products of a system of political patronage and, like academic institutions, staffed by individuals with, some would claim, excessive job security—an environment not conducive to productivity or efficiency.[106]

The point of expense was forcefully made. Professor Bernard Schwartz noted this as one of the two major causes of contemporary disillusionment with administrative agencies:

> The goal of cheap and inexpensive justice by experts, one of the chief reasons for setting up agencies, has proved illusory. The administrative process has too often proved even more expensive and time-consuming than the judicial process. Even more important has been the increasing failure of agencies to protect that very public interest they were created to serve. The administrative process, which had once been vigorous in fighting for the public interest, has become an established part of the economic status quo. It has come to terms with those it is ostensibly regulating; the "public interest" is equated more and more with the interest of those being regulated.[107]

Professor William Jones gave as an example the inability (or unwillingness) of regulatory agencies to protect the public against monopoly abuses. "In most multi-firm regulated industries," he wrote, "the principal focus of price regulation is not on protecting consumers from monopolistic exploitation, but on protecting rivals from vigorous pricing competition."[108] Thus, over time, many agencies lost sight of

---

105. *Id.*

106. Like civil-service protection of government employees, tenure of college professors seems to have a debilitating effect upon all but the self-motivated. Post-tenure, too many professors crawl into a fetal position or, at any rate, semiretirement, making little contribution to education beyond the classroom. *See* Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 381 & tbl.1 (1985).

107. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 26 (2d ed. 1984).

108. William K. Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 CORNELL L. REV. 303, 323 (1980).

their responsibility to protect the "public" (defined by some as the consumer interest), and embraced the policy of facilitating the optimal economic interests of the industries that they regulated.

The direct and indirect costs of regulation were inflationary, and created distortions in the marketplace which resulted in a misallocation of society's resources. The distortions were perverse. In transportation, it was argued that regulation created excessive service and insufficient pricing competition (vis-à-vis that which might have existed in the absence of regulation). Railroads earned an inadequate return on investment, leading to several carrier failures during the 1970s (the Penn Central, Milwaukee, and Rock Island "mighty fine" Line principal among them).[109] In natural gas, regulation imposed low prices, but created massive shortages. In telecommunications, regulation underpriced local service but overpriced long distance.[110]

As a consequence, beginning more or less in the 1970s, there was a strong bipartisan political movement to free industry from the shackles of regulation. Legislative regulatory reform essentially began in the railroad industry with the 3R Act of 1973 and 4R Act of 1974, followed by the Staggers Rail Act of 1980. Airlines followed, with the Air Cargo Deregulation Act of 1977,[111] the Airline Deregulation Act of 1978,[112] and the Civil Aeronautics Board Sunset Act of 1984,[113] which terminated the CAB and transferred its remaining responsibilities to the Department of Transportation (DOT).[114] The Motor Carrier Act of 1980[115] and the Household Goods Transportation Act of 1980[116] reduced federal economic regulation of trucking operations. Congress reshaped regulation of the intercity bus industry in the Bus Regulatory Reform Act of 1982.[117] The Surface Freight Forwarder Deregulation Act of 1986[118] deregulated freight forwarders other than those handling household goods. The Negotiated Rates Act of 1993[119] addressed

---

109. For criticism of railroad regulation and praise of deregulation, see Frank N. Wilner, *Railroads and the Marketplace*, 16 TRANSP. L.J. 291 (1988).

110. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 19 (1982).

111. Pub. L. No. 95-163, 91 Stat. 1278 (1977).

112. Pub. L. No. 95-504, 92 Stat. 1705 (1978).

113. Pub. L. No. 98-443, 98 Stat. 1703 (1984).

114. *Id.* § 3(e), 98 Stat. at 1704.

115. Pub. L. No. 96-296, 94 Stat. 793 (1980).

116. Pub. L. No. 96-454, 94 Stat. 2011 (1980).

117. Pub. L. No. 97-261, 96 Stat. 1102 (1982).

118. Pub. L. No. 99-521, 100 Stat. 2993 (1986).

119. Pub. L. No. 103-180, 107 Stat. 2044 (1993).

problems arising out of filed-rate regulatory requirements in the trucking industry. The Trucking Industry Regulatory Reform Act of 1994[120] further reduced regulation of the trucking industry.

These legislative initiatives of Congress were coupled with the presidential appointment of a large number of free-market economists and deregulation ideologues to the federal agencies.[121] The collective result was the most comprehensive change in government policy since the New Deal, and profoundly in the opposite direction.

The trucking industry provides an example. The largest number of proceedings before the ICC involved motor carriers, which numerically comprised the single most substantial mode of transport subject to ICC regulation.[122] The regulatory environment for the motor carrier industry that preceded the 1980 Act was by no means devoid of competition. Indeed, more than 16,000 motor carriers held operating authority from the ICC. Marketplace imperatives of supply and demand largely influenced the establishment of rates, although government intervention existed to restrain carriers from exploiting monopoly or oligopoly market positions or to prohibit larger carriers from employing predatory pricing activities to drive their smaller competitors out of business. The market, therefore, provided the basis for the lion's share of the decisions regarding pricing and service, and the government participated only occasionally to protect those societal objectives that Congress stated to be within the public interest.

Trucking nonetheless became a focus of the regulatory reform campaign in the 1970s. For instance, retailer Sears, Roebuck & Co. led a public relations campaign against the onerous paperwork and costly burdens of regulation. The American Trucking Association was an ineffective opponent, having long lost the ability to command attention on Capitol Hill.

After lengthy hearings,[123] Congress passed in 1980 both the Motor

---

120. Pub. L. No. 103-311, 108 Stat. 1683 (1994).

121. *See* Paul Dempsey, *The Interstate Commerce Commission—Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1 (1984). Late ICC Chairman Joseph Eastman argued that "[z]ealots, evangelists, and crusaders have their value *before* an administrative tribunal, but not *on* it." Joseph B. Eastman, *Twelve Point Primer*, 16 TRANSP. L.J. 175, 177 (1987).

122. *See* 94 ICC ANN. REP. 99–100 (1980); 93 ICC ANN. REP. 102–03 (1979); 92 ICC ANN. REP. 94–96 (1978); 91 ICC ANN. REP. 101–02 (1977); 90 ICC ANN. REP. 113–14 (1976).

123. The introduction to the House report provides an insight into the effort Congress devoted to this investigation:

Carrier Act[124] and the Household Goods Transportation Act[125] to liberalize entry and rates of trucking companies. Though not intended to create deregulation, the new legislation was so interpreted by a highly politicized and ideological Interstate Commerce Commission.[126]

V. SUNSET OF THE INTERSTATE COMMERCE COMMISSION

Throughout much of its history, the ICC was regarded as among the most competent and highly respected governmental agencies. Presidents traditionally selected commissioners for the ICC almost as carefully as they have chosen Justices of the United States Supreme Court, emphasizing their competence, integrity, and ability to apply the law with skill and reason.[127]

Times changed. As noted above, on the ICC's fiftieth anniversary, the agency was praised for its vigorous and spirited administration of the law and for its prudent, nonpartisan protection of the public interest.[128] Supreme Court Justice Felix Frankfurter heralded the seventy-fifth anniversary of the ICC in even more-glowing terms.[129] But in 1987, at the centennial celebration of the ICC's existence, many were critical of the institution.[130] Those favoring regulation were disappointed in the

---

> The Motor Carrier Act of 1980 is the product of over 18 months of continuous study of one of the most complex issues ever undertaken by this Committee. In the last 1 1/2 years, 16 days of hearings were conducted, with 215 witnesses presenting the views of nearly every entity in our society touched by this industry. On two of those days, the Committee's hearings were held in Chicago jointly with the Senate Committee on Commerce, Science and Transportation. In addition, thousands of letters from consumers—from beef processor to independent owner-operators—have been received and considered. Through this process, Congress has reaffirmed its role to control and set policy and guidelines for the conduct of interstate commerce.

HAROLD T. JOHNSON, MOTOR CARRIER ACT OF 1980, H.R. REP. NO. 96-1069, at 1 (2d Sess. 1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2283.

124. Pub. L. No. 96-296, 94 Stat. 793 (1980).

125. Pub. L. No. 96-454, 94 Stat. 2011 (1980).

126. Dempsey, *supra* note 10, at 343; Paul Stephen Dempsey, *Congressional Intent and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI.–KENT L. REV. 1, 17 (1981).

127. *See* Aitchison, *supra* note 79, at 401 (concluding that the ICC has promoted equal justice and improvement of general welfare); Oren Harris, *The Commissioners*, 31 GEO. WASH. L. REV. 309 (1962) (lauding the excellent work of ICC commissioners over seventy-five-year period).

128. *See supra* note 79 and accompanying text.

129. *See supra* note 81 and accompanying text.

130. *See, e.g.*, Miller, *supra* note 40; Robert S. Burk, *The Interstate Commerce Commission—The Last Twenty-Five Years*, 16 TRANSP. L.J. 76 (1987).

ICC's unwillingness to follow its statutory mandates. Those favoring deregulation felt that the ICC had not gone far enough.

Changes in the agency's membership had a substantial effect. Although Congress designated the ICC to be an eleven-member body, by the mid-1970s presidents were appointing no more than seven members. The large size of the Commission traditionally had contributed to its conservatism; policy change within the Commission rarely had been radical. By appointing individuals dedicated to radical change and by keeping the Commission's membership small, however, the White House quickly and dynamically shifted the Commission's internal policy to one enthusiastically dedicated to deregulation.

Before 1967, the president appointed the commissioners, who in turn elected the ICC's chairperson from among their members. In order to deal with criticism of "capture," Congress during the Nixon administration empowered the president to designate which commissioner would serve as chairperson.[131] This authority sharply increased presidential influence over the Commission and its chief officer and undermined the ICC's traditional autonomy from the executive branch.[132] The increase in presidential power over the regulatory agencies did not end the pernicious influence of the "revolving door" of senior administrators moving to industry. President Carter's deregulatory Civil Aeronautics Board Chairman, Alfred Kahn, and his principal CAB lieutenants, Phil Bakes and Michael Levine, all

131. Reorganization Plan No. 1 of 1969, 83 Stat. 859 (1969).

132. Congress can delegate the power to regulate commerce in a manner that enhances or diminishes presidential influence. There are at least four models of delegation: delegation directly to the president, *see* Field v. Clark, 143 U.S. 649, 690–97 (1892); delegation to an executive branch agency, *see* United States v. Grimaud, 220 U.S. 506, 521–23 (1911); delegation to an independent regulatory commission subject to presidential review, *see* SCHWARTZ, *supra* note 107, at 9–15; and delegation to an independent regulatory commission without presidential review, *see id.* By choosing the last approach in creating the ICC, Congress intended to minimize presidential influence over the agency. *See* Humphrey's Executor v. United States, 295 U.S. 602, 624–26 (1935) (Congress's purpose in creating regulatory agencies independent of executive authority was to free agencies to exercise their judgment without hindrance); *see also* Freedman, *supra* note 88, at 1060–61 (insulation of administrative agencies from executive branch ensures integrity of administrative process); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 963–70 (1980) (Congress has power to restrain executive control over agency policymaking). *But see* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1410–11 (1975) (noting redeeming reasons to justify presidential intervention in regulatory process); Verkuil, *supra*, at 956–58 (arguing that presidential power to control, coordinate, and guide policymaking is a means of holding agencies accountable).

ended up involved in Frank Lorenzo's Texas Air empire: Kahn on the board of New York Air, Levine as an executive there (later going on to a senior position at Northwest Airlines), and Bakes as an executive at Eastern Airlines. Carter's ICC chairman, Darius Gaskins, later became CEO of the Union Pacific Railroad. So the dilution of the independence of the ICC from the executive branch did little to stem the regulated industry's capture of the regulator.

By the late 1970s and early 1980s, there was a deliberate attempt by the executive branch to give this quasi-judicial agency an ideological mission by means of the appointment process. For example, President Carter filled vacant seats on the Commission with individuals fervently dedicated to deregulation, as did his successor, President Reagan.[133] Relatedly, alleging political patronage in the appointment process, some observers criticized the quality of presidential appointments to the ICC.[134]

Presidents Carter and Reagan accomplished comprehensive deregulation even in the absence of statutory authority. White House influence in the ICC, as reflected in ICC endorsement of presidential policy, reached its highest level in the agency's history.[135]

---

133. One prominent Washington, D.C. attorney observed that "the Commission became highly politicized during the Carter Administration." *Lawyer Blames Political Ideologues for Commission's Regulatory Failures*, TRAFFIC WORLD, May 24, 1982, at 34, 34–35. President Carter appointed Chairman Darius Gaskins, Jr., and Commissioners Marcus Alexis and Tad Trantum, who were referred to by some as the "Three Marketeers." Although the Ford appointees had moved moderately in the direction of liberalized entry and ratemaking, their deregulatory efforts paled in comparison to the vigorous efforts of the Carter economists. President Reagan continued this trend with the appointment of his own deregulation ideologues. Reagan appointed Frederic N. Andre, Malcolm M.B. Sterrett, and Heather J. Gradison to the ICC. *"Newcomers" Now Dominant as ICC Members*, TRAFFIC WORLD, Jan. 10, 1983, at 16, 17.

134. *See* FELLMETH ET AL., *supra* note 89, at 1 (political connections and political party are two important qualifications for commissioners); *see also* ABRAHAM RIBICOFF, *The Regulatory Appointments Process*, *in* 1 STUDY ON FEDERAL REGULATION, S. DOC. NO. 95-25, at xxxi (1st Sess. 1977) ("[N]either the White House nor Senate has demonstrated a sustained commitment to high quality regulatory appointments.").

135. *See* ERNEST GELLHORN & RICHARD J. PIERCE, JR., REGULATED INDUSTRIES 382 (1982) (arguing that catalyst for transportation deregulation originated in the executive branch, not the legislative). The White House became the dominant political force influencing ICC policy. *See* Verkuil, *supra* note 132, at 944–47 (discussing Carter administration's confrontations with agency policymakers). Dean Verkuil noted that "[h]ighly charged White House intervention poses a danger of frustrating the will of Congress as expressed in legislation establishing an agency and defining its mission." *Id.* at 949–50; *see also* Don Byrne, *ICC Chairman Taylor Again Displays Depth of Rift Between Commissioners*, TRAFFIC WORLD, Apr. 16, 1984, at 46, 47 (ICC no longer heeds congressional mandate but

In all events, the ICC moved resolutely toward deregulation. By 1979, the ICC was granting ninety-eight percent of the applications filed for motor carrier operating authority.[136] The Commission supplemented its efforts to open the floodgates of entry and to deregulate ratemaking with numerous other decisions and rulemakings.[137]

---

follows executive policy). With the Commission dominated by the deregulatory policy of the executive branch and with Congress split on the wisdom of deregulation, the remaining check on aberrant ICC action was the judiciary. *See* Dempsey, *supra* note 126, at 55 (discussing judiciary's role in overseeing ICC). Litigants frequently and successfully used the judicial forum to challenge the Commission's actions. Many federal courts of appeals concluded that the ICC's actions in the area of motor carrier deregulation were inconsistent with its statutory obligations. One court recognized that the Commission's actions were de facto deregulation despite the absence of statutory authority. Argo–Collier Truck Lines Corp. v. United States, 611 F.2d 149 (6th Cir. 1979). Noting the ICC's tendency to ignore the burden of proof by resolving doubts in favor of an applicant for common carrier status, the court announced its suspicion that the ICC was disregarding congressional intent by making decisions solely for the purpose of increasing competition. *Id.* at 155 (ICC's conclusions not supported by substantial evidence or legislative intent).

The ICC in the late 1970s was abdicating its responsibility to engage in meaningful rate and entry regulation. *See* Paul Stephen Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 TRANSP. L. INST. 121, 136–137 (1980). Reviewing the Commission's actions, courts found the ICC's decisions to be without an apparent legal or factual basis. *See, e.g.*, Humboldt Express, Inc. v. ICC, 567 F.2d 1134, 1137 (D.C. Cir. 1977) (remanding after finding no information in administrative record that indicated basis of decision to transfer operating authority from one carrier to another); Pitre Bros. Transfer, Inc. v. United States, 580 F.2d 140, 143–44 (5th Cir. 1978) (remanding because of ICC's failure to address petitioner's arguments); Campbell Sixty-Six Express, Inc. v. ICC, 603 F.2d 1012, 1014 (D.C. Cir. 1979) (remanding decision to ICC because of lack of rational connection between findings and decision). They found it necessary to remind the ICC that Congress's decision to enter into comprehensive regulation contravened the ICC's apparent belief that national policy unqualifiedly favors competition. *See* Trans-Am. Van Serv. v. United States, 421 F. Supp. 308, 323 (N.D. Tex. 1976) (noting congressional mandate that ICC must determine those cases in which grant of operating authority will serve public convenience and necessity) (citing FCC v. RCA Communications, 346 U.S. 86, 91 (1953)).

136. *See* James W. Freeman & Robert W. Gerson, *Motor Carrier Operating Rights Proceedings—How Do I Lose Thee?*, 11 TRANSP. L.J. 13, 15 n.3 (1979) (providing statistics of percentage of applications for operating authority that ICC approved from 1975 until 1979); *see also* Dempsey, *supra* note 126, at 17 (discussing liberal regulatory policies of ICC during late 1970s).

137. *See, e.g.*, Arrow Transp. Co. v. Extension-Boise, Idaho, 131 M.C.C. 941 (1980) (increasing burden on party opposing grant of new entry to show that such entry would have deleterious effect on opposing party's overall operations); Change of Policy Consideration of Rates in Operating Rights Application Proceedings, 359 I.C.C. 613 (1979) (easing ICC policy by suggesting acceptance of applications that promised lower rates to shippers); Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,296, 60,298 (1979) (emphasizing need for new competition and not protection of existing carriers); *see also* Dempsey, *supra* note 126, at 14–21 (discussing ICC's deregulatory decisions); Freeman & Gerson, *supra* 136, at 63–64 (questioning whether ICC's relaxed standards were better, cheaper, or more efficient than previous standards).

The rhetoric of deregulation, however, outpaced the law. Although pro-deregulation Commissioners urged pricing deregulation, the statute required that all rates be included in tariffs filed with the ICC and that carriers could not lawfully deviate from their filed rates.[138] The result was that motor carriers were wildly discounting their rates, not filing the discounts with the ICC, and dropping into bankruptcy. Trustees in bankruptcy began to file to recapture the difference between the amount charged and billed and the amount specified in the ICC-filed tariff, pursuant to the "filed rate doctrine." Billions of dollars were sought from shippers. Congressional dissatisfaction with the anomaly of de facto deregulation and de jure regulation was a catalyst for eliminating the tariff-filing requirement in 1994.[139]

The ICC Termination Act of 1995[140] then sunset the Interstate Commerce Commission itself, deregulated and amended certain of the agency's functions, and transferred jurisdiction over rail, motor, bus, broker, freight forwarder, and pipeline services to the newly created Surface Transportation Board (STB) and the DOT.[141] Jurisdiction over motor carriers, water carriers, brokers, and freight forwarders is now vested in the Office of the Secretary of Transportation, and the states are preempted from certain intrastate regulation of motor carriers.[142] The STB is a three-member independent panel within the U.S. Department of Transportation.[143] It is essentially a railroad regulatory agency—as had been the original ICC.

CONCLUSION

The transportation industry has undergone a remarkable metamorphosis—from horses and wagons, to steamships, to railroads, to trucks and automobiles, to aircraft and space craft—a transformation that is far from over. The evolution of technology, of America's economy, and indeed, of economic theory and political ideology all has

138. *See* DEMPSEY & THOMS, *supra* note 62, at 168.

139. For a reflection on the detariffing movements in transportation and telephony and some of its challenges, see the foreword to this set of articles marking the 125th anniversary of the enactment of the Interstate Commerce Act. Joseph D. Kearney, *The Last Assembly of Interstate Commerce Act Lawyers*, 95 MARQ. L. REV. 1123 (2012).

140. Pub. L. No. 104-88, 109 Stat. 803 (1995).

141. *Id.* §§ 101, 102, 201, 109 Stat. at 804–07, 932 (codified in part as amended at 49 U.S.C. §§ 701, 10102(1), 10501 (2006 & Supp. IV 2010)).

142. *Id.* § 103, 109 Stat. at 859, 865, 884 (codified as amended at 49 U.S.C. §§ 13501, 13521, 13531, 13904 (2006 & Supp. IV 2010)).

143. *Id.* § 201, 109 Stat. at 932 (codified at 49 U.S.C. § 701(b) (2006)).

contributed to the relationship between government and this important infrastructure industry, one which today accounts for approximately sixteen percent of the gross national product.

Few industries play as broad or vital a role in the economy as transportation. Throughout American history, a network of roads, canals, railroads, and airways has spurred growth by making possible the movement of goods from one market to another. Transportation has historically been identified as an industry "affected with a public interest."[144] The common carrier obligation—the principle that service be open to all upon reasonable request and on fair and nondiscriminatory terms—has been imposed upon commercial transportation providers since the Middle Ages. So regulatory oversight of the surface transportation industry has long been considered necessary and justified to protect the public's interest in having adequate transportation available on reasonable terms.

More affirmatively, perhaps, federal, state, and local governments in the United States have a long history of building, financing, subsidizing, and promoting transportation. The land grants and government subsidies helped build the railroads; the nationalization of rail passenger service helped restore the health of the freight railroads. Government carries the mail. It builds the roads, highways, transit lines, airports, and seaports. It does all this because it understands the profound positive social and economic externalities that transportation potentially offers. Whenever possible, the provision of transportation services in the United States has been left to private firms (a/k/a common carriers). When it has not been economically feasible, as with airports, air traffic control and the airways, urban transit, small community air service, and intercity passenger rail service, the government has assumed responsibility; that is, federal, state, and local governments have subsidized or provided these services.

Across this time (or since 1887, at any rate), federal regulation of the transportation sector of the United States' economy has served various purposes: to remedy market deficiencies (such as the lack of effective competition or the existence of destructive competition), to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the states. These purposes and the manner in which regulation has been implemented to achieve them affect not only the performance of the companies and industries in this

144. Munn v. Illinois, 94 U.S. 113, 126, 130 (1877) (internal quotation marks omitted).

sector, but also the ability of the United States to lead the global economy.

In 1887, Congress passed the Interstate Commerce Act to protect the shipping public from the monopoly power of the rail industry, and created the Interstate Commerce Commission to carry out that regulatory charge. In 1935, the Commission's regulatory authority was extended to include the nascent interstate trucking and bus operations. Other sectors of surface transportation—pipelines, domestic water carriers, and freight forwarders—were subjected to economic regulation in 1910, 1940, and 1942, respectively. Airlines were regulated in the same fashion beginning in 1938. Federal economic regulation of transportation developed into a comprehensive web of governmental oversight of entry and exit, rates, consolidations, and service quality. Regulation reached its high water mark in the 1950s and 1960s.

In the late 1970s and early 1980s, Congress began to pare and refine federal transportation regulation to reflect contemporary industry conditions and evolving ideological attitudes. The result was to reduce significantly the federal presence in the interstate transportation industry. Perceived successes in transportation deregulation became the political catalyst for comprehensive deregulation across many infrastructure industry sectors.

Today, railroads have consolidated into four major lines; the bus industry has one large survivor; and several hundred airlines and trucking companies have gone bankrupt. Ironically, the only major airline to support deregulation, United Airlines, ended up in the largest bankruptcy in aviation history. Former American Airlines CEO Bob Crandall observed:

> Our airlines, once world leaders, are now laggards in every category, including fleet age, service quality and international reputation.
>
> . . . [T]he financial health of the industry, and of the individual carriers, has become ever more precarious. Most have been through the bankruptcy process at least once, and some have passed through on multiple occasions.
>
> . . . .
>
> I feel little need to argue that deregulation has worked poorly in the airline industry. Three decades of deregulation have demonstrated that airlines have special characteristics incompatible with a completely unregulated environment. To put things bluntly, experience has established that market forces

> alone cannot and will not produce a satisfactory airline industry, which clearly needs some help to solve its pricing, cost and operating problems.[145]

The effects have been widespread. Deregulation of the power industry unleashed Enron to wreak havoc on consumers and investors.[146] Deregulation of the telecommunications industry has led to financial instability.[147] Deregulation of the financial industry resulted in a trillion-dollar bailout of the savings and loan industry, followed years later by the subprime mortgage crisis, which resulted in the housing industry meltdown and several trillions more in taxpayer liability in propping up the largely deregulated banking and financial industry.

The cumulative weight of these events triggered the most serious economic collapse in American history since the Great Depression, saddling our generation and the next with unprecedented debt. Deregulation of trade has transformed the United States, the wealthiest nation on the planet, into a debtor nation, in which middle-class industrial jobs have located offshore, leaving Americans to retrain as greeters in Wal-Mart, full of goods produced abroad. The economists tell us this is beneficial for "consumer welfare," irrespective of the fact that a consumer needs a job to buy the cheap imported goods. It is said of economists that they know the price of everything and the value of nothing. They have led this stampede toward free and unregulated markets, and working-class Americans pay the price for their myopic adventurism.

Despite the economic crisis of contemporary America, the politicians and the public remain in denial that deregulation had anything to do with the disintegration of the American economy. This is perhaps because, unlike the 1930s, the collapse of the twenty-first century did not result in the collapse of the banking industry, leaving the

---

145. Robert L. Crandall, Remarks at The Wings Club, in New York (June 10, 2008), *available at* http://www.wingsclub.org/eventspeeches_2008-06.html.

146. "The collapse of Enron Corporation, the criminal indictment of its auditor Arthur Andersen, the bankruptcy of Pacific Gas and Electric Company, and the rolling blackouts and price spikes of the California energy crisis of 2000–2001 all have one thing in common: They were caused by legislative and administrative failures to design regulatory institutions that adequately constrained opportunistic behavior." Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 472–73 (2002) (footnotes omitted).

147. Paul Stephen Dempsey, *Adam Smith Assaults Ma Bell with His Invisible Hands: Divestiture, Deregulation, and the Need for a New Telecommunications Policy*, 11 HASTINGS COMM. & ENT. L.J. 588, 588–91 (1989).

country penniless and unemployed. Today, instead, the banks are solvent, subprime housing has been repossessed, and the American economy has been transformed into lower-paying service-sector jobs. America remains in this trap so long as the prevailing wisdom is that market can do no wrong and government can do no good. We have not learned from the wisdom of George Santayana: those who forget the lessons of history are doomed to repeat it. Judge Richard Cudahy has observed:

> Economic activity and its political analogues are inherently cyclical, and regulatory institutions must be attuned to the cyclical nature of things. A good deal of the time, competition advances innovation and growth, but there is indeed sometimes such a thing as destructive competition. We have apparently known destructive competition, linked to predatory pricing, in the airline industry and may continue to know it. Competition in this industry has been destructive because on balance wealth has been destroyed and both tangible and intangible values have been undermined. Competition itself has been weakened, and for that reason a return to some form of regulation is likely.[148]

In the nineteenth century, market failure gave birth to transport regulation. The public interest in transportation was deemed paramount. Nearly a century after economic regulation was born, an inflationary economy, coupled with a perceived failure of the regulatory mechanism, gave birth to deregulation. Undoubtedly, the pendulum of American public policy will swing again. Like transportation itself, public policy in this vital infrastructure industry is in perpetual motion.

---

148. Richard D. Cudahy, *The Coming Demise of Deregulation*, 10 YALE J. ON REG. 1, 15 (1993).