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RUNNING ON EMPTY: TRUCKING DEREGULATION AND ECONOMIC THEORY

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RUNNING ON EMPTY: TRUCKING DEREGULATION AND ECONOMIC THEORY*

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I. INTRODUCTION

Deregulation, that powerful legal, economic, and political movement of the last decade, is beginning to reveal its profound impact upon the industries it has grasped. During the late 1970s and early 1980s, deregulation embraced airline, railroad, bus, telecommunications, broadcasting, banking, cable television, oil and gas and motor carrier industries. Stripped bare of government bureaucrats and layers of red tape, firms in these industries were cast into the stormy seas of the free market to sink or swim on their own.

Not unlike other deregulated industries, the motor carrier industry has been plagued by severe economic problems in the decade of deregulation. Indeed, perhaps the most onerous economic impacts of deregulation have been suffered by savings and loan institutions and motor carriers. Although deregulation of the thrifts made the headlines because the taxpayer has been saddled with more than half a trillion dollars in federal insurance liability, the trucking story has been left untold. Trucking only makes the local news when a semi turns over on the interstate and flattens a few automobiles. But make no mistake about it, the economic carnage in both industries has been relentless.

The level of bankruptcies and rate of concentration among motor carriers have been unprecedented in American business history. The public served by the trucking industry is paying highly discriminatory prices for service. Motorists are endangered by an unacceptable deterioration in the level of safety. As we shall see, these deleterious results of deregulation in the 1980s and 1990s parallel those which preceded economic regulation of motor carriers in the 1930s and of the railroads in the 1880s.[1]

Rate wars, bankruptcies, a deteriorating margin of safety, and consumer exploitation coalesced in the 1930s to prompt federal regulation of the motor carrier industry. In promulgating the Motor Carrier Act of 1935, Congress added trucking and bus companies to the jurisdiction of the Interstate Commerce Commission (ICC).[2] Destructive competition abated, and during the half century which followed, motor carrier service was ubiquitously

1. Congress deregulated motor carriers with the promulgation of the Motor Carrier Act of 1980. But de facto deregulation preceded de jure deregulation in the United States by about two years, tracing its origins to decisions of the U.S. Interstate Commerce Commission in 1977 and 1978. *De facto* deregulation of the motor carrier industry began with the liberalized approach of the Interstate Commerce Commission in 1977 and 1978, when the ICC began issuing operating authority more broadly defined, from a commodity and territorial perspective, than ever before. The nation's economic recession did not begin until 1979 and ended in about 1983, yet every leading economic indicator shows that the industry has progressively suffered virtually every year since 1977, both before and after the recession of the 1980s. *See* P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 40 (1989) [hereinafter P. DEMPSEY].

2. Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 (1935).

available throughout the nation at a price which was "just and reason Service to large and small communities throughout the nation was sa dependable. As in telephone regulation, there was some measure of subsidization performed under the regulatory umbrella of the ICC terstate transport) and the State Public Utility Commissions (PUCs) trastate transport), with more lucrative, denser traffic lanes paying a pre above marginal costs to subsidize rural and small community service.

Nearly a half century later, the fire kindled in a movement which economic regulation wasteful and hateful, and deregulation was adv as the means of achieving a more efficient and productive economy free market economists who promoted deregulation assumed that the carrier industry had relatively insignificant economic barriers to entr economies of scale, that destructive competition was unlikely, and th regulation would likely produce an atomistic market with a large nu of buyers and sellers in nearly textbook levels of perfect competition.[3] efforts persuaded Presidents Carter and Reagan to appoint individu the ICC who were strongly wedded to the ideology of laissez-faire an began de facto deregulation of trucking in the late 1970s.[4] Congre lowed suit by promulgating the Motor Carrier Act of 1980, a mode aimed at regulatory reform, but which has been interpreted as if it dated comprehensive deregulation.[5] These policies have crippled t dustry. After a decade of empirical evidence, we see that the assum of the free market economists were erroneous, and hence, the predi upon which they rested were, simply, wrong.

The folly of those economists affects not only the motor carrier ind which is perhaps the most important mode of for-hire transportatio the entire nation. The movement of goods over the highways accour more revenue than all the other modes of transportation (i.e., air, rail, and pipeline) *combined*.[6] Nearly everything we Americans consume clothes, our food, our furniture, our appliances—was at some point r by truck. Moreover, transportation as a whole accounts for nearly 1 the U.S. gross national product.[7] Hence, governmental policy here, or bad, has profound implications.

In the first part of this article, we will review the principal theo underpinnings of deregulation. In the second, we examine the resu deregulation upon this important industry and the public it serves. F we shall explore the theory of economic regulation, and advance a

3. For a more recent expression of the same views, see D. OWEN, DEREGULAT THE TRUCKING INDUSTRY (1988).

4. *See* Dempsey, *The Interstate Commerce Commission—Disintegration of an America Institution*, 34 AM. U.L. REV. 1 (1984).

5. *See* Dempsey, *Congressional Intent and Agency Discretion—Never the Twain Sha The Motor Carrier Act of 1980*, 58 CHI.-KENT L. REV. 1 (1984).

6. *See* R. SAMPSON, M. FARRIS & D. SHROCK, DOMESTIC TRANSPORTATION 12 (1990).

7. *Gridlock!*, TIME, Sept. 12, 1988, at 52, 55.

justification for a more responsible governmental approach to this important industry.

II. THE THEORY AND POLITICS OF DEREGULATION

The generation of Americans who lived through the Great Depression and World War II perceived government to be an essential companion—a friend who could achieve greater social good for society. The free market had produced the worst economic collapse in history, and millions of Americans lost their jobs, their homes, their self-esteem, and their faith in the philosophy of laissez-faire. They turned to government to find a solution. It was during this era that many of the independent regulatory agencies were born. Most were modeled after the first of these, the Interstate Commerce Commission, created in 1887 to reign in the monopoly railroads.

But the generation of Americans who lived through the 1960s and 1970s became cynical, perceiving government to be a malignant sore. Those on the left abhorred Watergate and the war in Vietnam. Those on the right opposed the Great Society and high taxes. Both converged on a path that viewed government with some hostility.

During the 1970s and early 1980s, deregulation became a bipartisan movement, one which swept America profoundly and provided a new order of radically less government intervention in the market. Presidents Carter and Reagan led the crusade for significant deregulation of major industries—broadcasting, banking, telecommunications, oil and gas, air, rail, and bus travel and trucking. That movement was coupled with deregulation in less industry-specific areas such as antitrust enforcement, and environmental, safety and health standards.[8]

The politicians saw it as a rallying point against inflation and high taxes, attacking "big government," "red tape" and "federal bureaucrats." Deregulation and the free market became as American as motherhood, apple pie and Chevrolet.

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 free market economists also argued that regulation caused these industries to be inefficient and to charge consumers excessive prices. In short, they found that the direct and indirect costs of regulation were exorbitant.[9] Thus, they argued, society would be better off if the dead hand of regulation was amputated and replaced with Adam Smith's invisible hand, clearing the way for

8. P. DEMPSEY, *supra* note 1.

9. *See* 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, 26-29 (1989).

marginal cost pricing and near-perfect competition in a healthy comp environment. The discipline of economics had not embraced an ideolog such religious passion since the Bolshevik Revolution.

In promoting motor carrier deregulation, most free market econ made wildly optimistic predictions about what deregulation would Typically, they insisted that prices would fall, productivity would im and concentration would decline. The economists believed that there few economies of scale in the trucking industry, and few significant ba to entry other than the regulatory requirement of certificates of publi venience and necessity. Moreover, the public was assured that, wi removal of licensing requirements, new entrants would spring up t established carriers, and that such new entry or the threat thereof discipline the market in a way that would ensure that consumers wo protected. This was the essence of "contestability theory."

Alfred Kahn is perhaps more responsible for transportation deregu than any other single individual.[10] While a number of scholars point the existence of economies of scale in trucking,[11] in urging deregu Kahn alleged that "there is very clear evidence that the relatively hig centration [in the motor carrier industry] . . . is, itself, a consequer regulation. . . ."[12] Kahn insisted that concentration levels were not the uct of economies of scale,[13] and that there were few economic barr

10. It was he, as Jimmy Carter's Chairman of the Civil Aeronautics Board, who fo lobbied in support of the Airline Deregulation Act of 1978, which, after a transition abolished airline entry and price regulation, and terminated the Civil Aeronautics B was Kahn, as Jimmy Carter's Chairman of the Council on Wage and Price Stabilit popularly referred to as the nation's Inflation Czar) who lobbied strongly on behalf o ing deregulation, ultimately leading to promulgation of the Motor Carrier Act of 1 Kahn said, "In my last years in the White House as adviser to President Carter on ir my staff and I devoted a large share of our energies to regulatory reform general most prominently and in particular, to the passage of the Motor Carrier Act of *Trucking Deregulation: Is It Happening?: Hearing Before the Joint Economic Comm.*, 97th 1st Sess. 3 (1981).

11. *See* Koeneker, *Optimal Scale and the Size Distribution of American Trucking Firm* TRANSP. ECON. & POL'Y 54 (1977); Ladenson & Stoja, *Returns to Scale in the U.S. T Industry*, 40 S. ECON. J. 390 (1974); Lawrence, *Economies of Scale in the General Freig Common Carrier Industry: Additional Evidence*, 17 TRANSP. RES. F. 169 (1976); Rakow *Differences According to Firm Size in U.S. Trucking*, TRANSP. J. 63 (Winter 1978).

12. *Examining Current Conditions in the Trucking Industry and the Possible Necessity for in the Manner and Scope of Its Regulations: Hearings Before the Subcomm. on Surface Transp of the House Comm. on Public Works and Transportation*, 96th Cong., 1st Sess. 416 [hereinafter *1979 House Hearings*].

13. Kahn stated:

> First of all, Senator Kennedy's own data, setting side by side a large number of parable markets, strongly suggest that there is a wide range in the number of ca than any given market will support, and that *a principal determinant of how many actually are is not the presence or absence of economies of scale but the ICC's regulatory The ICC undeniably restricts entry*; one can hardly conclude in these circumstance the dominance of some markets by a relatively small number of firms is the res anything but those artificial restrictions themselves.

Id. at 394 (emphasis added).

.[14] He also believed that the "immediate and constant presence of po-
l competitors . . ." would discipline the market and protect consumers
nst excessively high prices or poor service."[15] Kahn also declared, "I
'e genuinely that [under deregulation] we will have a more prosperous
try, both rail industry and trucking industry."[16]
us, Kahn insisted that it was the ICC's entry policies, not economies of
that were responsible for the "relatively high" concentration levels of
te 1970s, that exploitation by a concentrated industry would be ex-
ated by potential competition, and that deregulation would make mo-
rriage more prosperous. Because Kahn's basic assumptions about the
try were specious, his predictions were significantly off the mark.
ce 1980, the ICC has issued nearly 12,000 forty-eight-state irregular
general commodities certificates of public convenience and neces-
Nonetheless, not a single new firm has successfully entered the na-
less-than-truckload (LTL) industry.[18] Furthermore, as noted above,
e transport modes are more concentrated under deregulation than
were under regulation. In sum, it appears that, despite the assurances
e free market economists to the contrary, there are significant econ-
; of scale and economic barriers to entry.
hn has since conceded that the LTL industry is not atomistic in nature,
here are economies of scale in the business, and that successful entry

In 1977, in testimony before the Senate Judiciary Committee, Kahn insisted that the
nic barriers to entry and economies of scale were relatively insignificant:
trucking is not potentially an effectively competitive industry, then I do not know
industry in the country that is. I do not know of any industry that more nearly meets
prerequisites of effectively functioning unregulated competition.
ie capital requirements for entry are small. The ease of exit is very great. In other words,
e is no reason why anybody need stay for years and years in a depressed market.
it other industry do you have in which your capital requirement can itself get up on
els and move? The *economies of scale are* so *limited* that I do not know anybody who
:ves that the most efficient performance of that market requires that you have one
or only a couple of firms.
ght of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, 95th Cong., 1st Sess. 231 (1977) (emphasis added).
Kahn stated:
ie very mobility of trucks makes this an industry in which entry would, if the gov-
nent would get out of the way, be very easy; existing companies among the thousands
ply their trade in the United States, could easily move into one another's markets.
; immediate and constant *presence of potential competitors* on the outside of individual
graphic markets is the best possible protection consumers need against excessively
i prices or poor service.
House Hearings, supra note 12, at 394 (emphasis added). He continued:
best protection that the public has against being exploited by a concentrated industry
ailability of free entry, and trucking is an industry above any other industry in which
y could be relatively free, and *even if it is only potential, it will keep the firms in the stry honest.*
416-17 (emphasis added).
Id. at 421 (emphasis added).
TRAFFIC WORLD, Dec. 5, 1988, at Supp. E.
Leaseway did briefly, but retreated.

into the national LTL industry has not occurred.[19] Specifically, he now admits, "there *do seem to be some economies of scale in the LTL business*—in the carriage of LTL shipments to central collection points, assembling them in truckloads, and carrying them to disassembly points for transmission to their ultimate destination."[20] Since ICC licensing is de facto deregulated in trucking, only the existence of large capital requirements and economies of scale can explain the fact that not a single new entrant has emerged in the LTL industry since deregulation.

Why has deregulation failed to achieve much of what it has promised? Deregulation failed because it was a theory based on false assumptions. In theory, regulation distorted efficiency. The transportation industry was thought to be naturally competitive with no economies of scale or scope of consequence. It was believed that there were no significant barriers to entry except those of certificates of public convenience and necessity issued by regulatory authorities. It was thought that if incumbent firms enjoyed market power and raised prices to supracompetitive levels, new entrants would emerge to restore the competitive equilibrium. It was also predicted that destructive competition would not occur.

But industry experts disagreed, insisting that "[f]aced with excess capacity, carriers will use the increased pricing freedom to drop rates to variable costs in order to attract freight from competitors. The end result will be widespread price wars, bankruptcies, and chaotic conditions in the industry."[21] To this prediction, deregulation proponent John Snow replied, "Any tendency toward unsettled price conditions could be expected to be brief and mild."[22] But as we shall see below, what we have experienced under deregulation is unprecedented losses, a high number of bankruptcies, a shakeout of many small producers, an industry which is highly concentrated, and a lack of significant new entry. Furthermore, this has been neither brief nor mild.

The theory of contestable markets has not been sustained by the empirical evidence. Leaseway was the only major carrier to enter the less-than-truckload sector of the industry, and it exited after several years of significant losses.[23] There appear to be significant economies of scale, scope, and density, which create economic barriers to entry in the trucking industry. Additionally, the LTL sector requires a significant multimillion-dollar investment in a network of terminals, a large number of employees, and skilled management.[24]

19. Prepared Testimony of Alfred E. Kahn on Behalf of California Coalition for Trucking Deregulation 8 (Oct. 27, 1988) [hereinafter Kahn California Testimony].
20. *Id.* at 8 (emphasis added).
21. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J. 11, 12 (Spring 1988) (quoting P. MACAVOY & J. SNOW, REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 37 (1977)).
22. *Id.*
23. *Truckers in Trouble*, INSIGHT, Nov. 3, 1986.
24. *Is Deregulation Working?*, BUS. WK., Dec. 22, 1986, at 53.

egulation's proponents also did not foresee the monopsony power of hippers and the high level of discrimination that power creates. This helming strength of large carriers and large shippers has distorted the t for the sale of transportation services in a way that is antithetical to s of achieving allocative efficiency.

III. THE TRUCKING INDUSTRY TODAY— THE EMPIRICAL RESULTS OF DEREGULATION

egulation has produced results wildly divergent from that observed egulation theorists staring into their crystal balls. Unlimited entry and eregulation has created excessive capacity, declining productivity, deve competition, discriminatory pricing, inadequate returns on invest- a deterioration in safety, a decline in wages, an erosion in labor- ement relations, an enhanced number of bankruptcies, mergers, and itions, and, in the long term, unprecedented concentration. The U.S. carrier industry is becoming dominated by a very small number of nely large firms.[25] Overall, deregulation appears to have created an oly of megacarriers providing highly discriminatory pricing as smaller all into the social Darwinist abyss of bankruptcy. In the interim, those irms endanger the safety of those with whom they share the highways.

A. The Truckload, LTL Distinction

begin by noting one important distinction in the motor carrier in- . The industry can be divided into two broad sectors—truckload and an-truckload. The economic characteristics of these sectors are sigitly different. Typically, a truckload carrier picks up a large volume ent filling an entire trailer and carries it directly to destination without ing. In contrast, an LTL carrier must have a more sophisticated dison system. In the LTL system, there must be a multitude of trucks ng at numerous consignors, taking on small shipments at each stop. ipments are then consolidated and transported to remote terminal es where they are disassembled and loaded onto the smaller trucks ll take them to their ultimate destination. As we shall see, the terminal es and regional distribution systems of LTL transportation require cant capital investment.

B. Excessive Capacity and Declining Productivity

is book, *Economic Principles of Transportation*, published in 1935, nist W. T. Jackman summarized the pre-Motor Carrier Act problem by the ease of entry into trucking by unsophisticated entrepreneurs:

. DEMPSEY, *supra* note 1, at 129-69. Today, much of North America is dominated our largest trucking companies (i.e., United Parcel Service, Yellow, Consolidated ways, and Roadway), or its single bus company (i.e., Greyhound).

> In most cases the truck owner has no knowledge of his costs and keeps inadequate, if any, accounts. He takes whatever business he can get at a rate which the shipper will pay, in the hope that in the aggregate the financial returns will be favourable. But the mortality in the motor truck field is very heavy. . . .
>
> . . . The shipper wants a small shipment taken . . . and the motor carrier takes this, even if he has nothing else to make up a load, in the hope that by this service he may ingratiate himself with the shipper so as to get future traffic, and also anticipating that he may get something more along the route. On account of the many carriers, however, he may not get anything more, for there is not enough traffic to provide loads for all the operators. However, "hope springs eternal" and the operator continues to run his vehicle, even though he cannot get enough traffic to be reasonably remunerative. . . . Then, too, a man can get a truck, especially a second-hand one, for a small cash payment, and may intend to make it pay the balance of the cost by its use. Consequently, it is better for him to get a small amount of business than none at all; and, if traffic is scarce, he will cut his rates very low rather than see his truck lying idle. Where others see such men operating trucks upon the highway, the normal inference is that there must be some profit in it, and they likewise enter the service. . . . As a result, the number of trucks in operation greatly exceeds the traffic needs, thus causing continuous, widespread, and discriminatory rate cutting, with other unwholesome competitive conditions, which have created serious problems for producers, the public at large, and the railways.
>
> . . . .
>
> . . . [P]robably the greatest defect, is . . . the endless rate-cutting by a mass of carriers, each of which wants as large a share as possible of the business. The truck operators bid against one another for the available traffic and many shippers take advantage of this condition to beat down the rate to the lowest point, thus securing a rate which is wholly unreasonable. [26]

It is precisely these consequences of destructive competition, first seen in the preregulation era of the 1930s, that have emerged under deregulation in the 1980s. Indeed, 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.[27] Federal economic regulation was able to protect the public against widespread pricing and service discrimination, and alleviate the dire financial straits in which the railroads found themselves.

The empirical evidence of motor carrier deregulation in the United States reveals that a large number of new carriers entered the truckload sector of

26. W. JACKMAN, ECONOMIC PRINCIPLES OF TRANSPORTATION 842-44 (1935) (footnotes omitted).

27. *See generally*, P. DEMPSEY, *supra* note 1, at 6-10.

dustry during the initial years of deregulation.[28] Excessive capacity
l the proportion of empty trailers and the number of empty miles to
se and load factors to fall.[29] The immediate response to declining rates
ne of great public applause. This appeared to be a development of
benefit for shippers.[30]

vever, in the long run, there are some distressing trends. Among them
ining productivity[31]—more entry creates more capacity without stim-
g additional freight, and that simply leaves trucks emptier over more
In the short run, wealth is transferred first from investors, and then
labor, to shippers, particularly large shippers.

ductivity of interstate motor carriers has declined since federal dereg-
n began—this despite the introduction of larger and more efficient
nent.[32] Tremendous overcapacity, stimulated both by unlimited entry
ıe ruthless struggle for market share, has decreased average load fac-
)r general freight motor carriers. The average load for this segment
industry, which was 13.5 tons in 1978, fell to 12.8 tons in 1987.[33]

'acto federal deregulation of the motor carrier industry began under
Chairman A. Daniel O'Neal nearly three years prior to the promul-
of the Motor Carrier Act of 1980. Although productivity for general
t carriers grew by an average of 0.29% annually after 1969, it declined
1% per year between 1978 and 1986. In contrast, productivity levels

\ccording to one source, between 1980 and 1982, 11,000 new firms entered the
/. Richards, *Independent Truckers Who Hailed Deregulation Reconsider as a Rate War
ıd Taxes Rise*, Wall St. J., Mar. 31, 1983, at 56. According to another, between 1980
33, 49,726 new certificates for motor carrier operating authority had been granted
CC; this included certification of 13,806 new carriers. *ICC Chairman Tells Senate Panel
)rs Early Sunset of Agency*, TRAFFIC WORLD, Dec. 20, 1982, at 27. The ICC has also
expanded the ability of private carriers to engage in common carriage. *See, e.g.*,
Rules Modifications, 132 M.C.C. 927 (1982); Lease of Equipment and Drivers to
Carriers, 132 M.C.C. 56 (1982). *See* Borghesani, *Motor Carrier Regulatory Reform and
ct on Private Carriers*, 10 TRANSP. L.J. 389 (1978); Farris & Southern, *Federal Regu-
olicy Affecting Private Carrier Trucking*, 49 I.C.C. PRAC. J. 503 (1982). As of June 1,
ıe ICC had certificated 25,342 carriers. This represents a 43% increase in the number
ers holding operating authority since promulgation of the Motor Carrier Act of 1980.
mmission gave some 870 carriers nationwide authority, effectively deregulating them
ı entry standpoint until the end of time. *See Motor Courier Act of 1990: Hearings Before
te Surface Transportation Subcomm. of the Comm. on Commerce, Science and Transportation,*
)ng., 1st Sess. 91, 93 (1983) (statement of George Zigich, vice president of traffic,
ransp. Co.).

'. DEMPSEY, *supra* note 1, at 79.

d. at 100.

'roductivity for general freight carriers grew by an average of 0.29% annually after
declined by 0.21% per year between 1978 and 1986. In contrast, productivity levels
anufacturers increased an average of 2.4% per year after 1975. *Panelists Deplore Truck
on, Rate Discrimination at NARUC Confab*, TRAFFIC WORLD, Dec. 1, 1986, at 68-69
ıfter *Rate Discrimination*].

*Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Trans-
ı of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 96
ent of Dean Stanley J. Hille) [hereinafter *1985 Senate Hearings on MCA*].

TRAFFIC WORLD, Dec. 5, 1988, at Supp. J.

of all manufacturers increased an average of 2.4% per year between 1975 and 1986.[34]

Economist Dabney Waring, Jr. compared productivity levels of the trucking and railroad industries between 1970 and 1988. By comparing the number of ton miles to employment, he reached the following conclusions:

> Trucking productivity was increasing at an annual 1.9% rate from 1970 to 1979 while railroads were improving at a 3.6% annual rate. In 1980 trucking productivity dipped 4.1% and has stagnated since. Meanwhile, railroad productivity has accelerated to an 8.4% annual rate of increase. To what extent deregulation is responsible for the railroad fortunes is uncertain, but certainly federal deregulation has not been healthy for trucking.[35]

Similarly, Professors Ozment, Cunningham and Davis examined five measures of fuel efficiency and equipment utilization and found that "it cannot be concluded that energy efficiency and equipment utilization have improved since deregulation. In fact it appears that just the opposite has occurred. . . . [T]he net effect of deregulation on fuel efficiency and equipment utilization appears to have been negative."[36]

Since transportation is an industry particularly susceptible to overcapacity, unconstrained entry must necessarily lead to distress sale pricing in those markets where competition is excessive, at least until waves of bankruptcies wipe out the smaller and weaker rivals.[37] Since deregulation began, motor carrier profits, as measured by their return on equity, have consistently fallen below the rate of all manufacturers, and declining productivity must bear at least part of the blame. Excessive capacity and lost productivity have eroded the profitability of carriers, creating an unprecedented number of bankruptcies.[38]

Professor Martin Farris prophetically predicted that deregulation would

34. *Rate Discrimination*, *supra* note 31, at 68-69. The entry of large LTL carriers into territories previously served efficiently by regional carriers has caused per unit costs to increase as average load factors have declined. As a consequence, thousands of motor carriers have gone bankrupt or ceased operations in the postderegulation era. Many more would likely join the ranks of the "belly up" were it not for the unfunded pension liability imposed by the Employee Retirement Income Security Act (ERISA). Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329, 346-49 (1984) [hereinafter *Transportation Deregulation*]; N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 18-19 (1986).

35. D. Waring, Jr., Testimony Before the Michigan House of Representatives Standing Committee on Transportation 15 (Aug. 28, 1989) (available at office of *Administrative Law Review*).

36. Ozment, Cunningham & Davis, *Motor Carrier Fuel Efficiency and Equipment Utilization: Effects of Deregulation*, 30 TRANSP. RES. F. 431, 440 (1990).

37. *Transportation Deregulation*, *supra* note 34, at 351.

38. "Despite continued economic growth . . . bankruptcy remains one of the major financial problems of the decade. While many segments of the economy have been hard hit, nowhere is the problem more severe than in the transportation sector." Chow & Gritta, *Estimating Bankruptcy Risks Facing Class I and II Motor Carriers: An Industry-Specific Approach*, 55 TRANSP. PRAC. J. 352 (1988).

: a decline in efficiency and productivity prior to the promulgation of ederal Motor Carrier Act of 1980:

> e concern over efficiency in the regulated sector is a real paradox. Critics of onomic regulation allege that it produces inefficiencies which are exemplified . . . low load factors in air transportation, empty backhauls in trucking, energy ste, excess capacity, and idle capital all around. To the critics it is obvious that se "wastes of regulation" could be avoided if regulation were abolished and natural forces of supply and demand were allowed a free hand. The paradox ses in that the solution to these "inefficiencies caused by regulation" is more ess capacity, more duplication, more wasted energy, more idle capital, more pty backhauls, and low load factors caused by allowing more competition in ry and price. As more firms entered these markets and competed on a price is, excess capacity and waste would increase, not decrease.[39]

C. Monopsony/Oligopsony and Discriminatory Pricing

ıder deregulation, the trucking industry experienced a phenomenon was largely unanticipated—monopsony power of large shippers.[40] These ers enjoy monopsony power because their enormous volume of freight les them unilaterally to dictate rates.

etween 1983 and 1988, the Interstate Commerce Commission ap- ed ten general rate increases, totaling 51.3%.[41] Discounts off the pub- d rates are running up to 70% for the largest shippers, like J.C. Penney ohnson & Johnson[42] (and average between 35 and 37%).[43] But the steep unts are enjoyed exclusively by large-volume shippers.[44] Smaller ship- either pay the full rate or enjoy rather more modest discounts of, say, %.[45] In fact, many unsophisticated consignees pay the full undiscounted plus an additional 5-10% surcharge.[46] While most shippers perceive that are getting a bargain, in fact, smaller shippers are paying significantly

Farris, *The Case Against Deregulation in Transportation, Power, and Communications*, 45 . PRAC. J. 306, 329 (1978) (emphasis omitted).

Professor Grant Davis has observed that the nation's largest shippers exert monopsony e economic leverage they wield by conferring or withholding their vast volumes of it. The Fortune 500 can unilaterally dictate rates at (and for cash-starved carriers, below) arginal costs of trucking companies. *1985 Senate Hearings on MCA*, *supra* note 32, at tatement of Prof. Grant M. Davis).

Dolan, *Benefits of Economic Regulation of Oregon Intrastate Motor Carriers*, 17 TRANSP. 35, 255 (1989).

Schulz, *Rate-Cutting, Competition Darken Profit Picture for LTL*, TRAFFIC WORLD 15, 16 4, 1990).

Similarly, full airline fares have increased 156% since 1978, twice the growth rate of onsumer Price Index. Ott, *Industry Officials Praise Deregulation, But Cite Flaws*, AV. WEEK CE TECH. 88 (Oct. 31, 1988).

M. Foley, Testimony Before the Michigan House Transp. Comm. 11 (July 24, 1989) able in office of *Administrative Law Review*); D. Waring, Jr., Testimony Before the Mich- House Transp. Comm. 16 (Aug. 28, 1989) (source not available to the editors).

P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 97-100).

Schulz, *Collect Shipment Surcharges Latest Surprise to Small Shippers*, TRAFFIC WORLD ept. 11, 1989).

more for transportation today than they did prior to deregulation.[47]

Moreover, the distortion in transport pricing is reflected in the broader market for the sale of commodities.[48] If a large shipper can get his goods to market at a lower price than a smaller shipper, then the large shipper will, by definition, have a significant advantage in and access to the market for the sale of his commodities, one which might enable him to dominate that market.

The U.S. Supreme Court, in its seminal decision of *Munn v. Illinois*, recognized that transportation firms are the gatekeepers of the larger market for the sale of commodities; hence, it is imperative that their price and service offerings be nondiscriminatory.[49] If the market for transportation services is distorted, the market for the sale of commodities will be distorted as well.[50] A significant advantage that Fortune 500 companies enjoy under deregulation vis-à-vis their smaller rivals is of particular concern, unless one concludes that domination by huge corporations is not an undesirable phenomenon.

In addition to pricing distortion, there are two other products of the monopsony (or oligopsony) power of large shippers which have manifested themselves in the United States. One phenomenon is the ability of large shippers with market power to dictate excessively low rates that are insufficient to allow trucking companies to cover their full costs of operation. These low rates have a fatal economic impact on unsophisticated carriers that have an inadequate understanding of costs and lack the ability to counterbalance the monopsony power of large shippers.[51] The unsophisticated carriers underprice their services, which gives them insufficient resources to maintain a high level of safety. As a result of underpricing, the inefficient firms also drag efficient firms with them down into the Darwinist grave of bankruptcy.

Wisconsin, which deregulated intrastate trucking in 1982, provides a classic example of the dangers of underpricing. Since deregulation, many carriers have spiraled downward in bankruptcy. As one Wisconsin carrier noted:

> The large shippers are demanding transportation rates that are below carriers' costs. Large multi-page invitations to bid are distributed by shippers that spell

47. In testimony before the U.S. House of Representatives, a small shipper recently summarized the impact of transportation deregulation upon smaller enterprises. He stated that benefits of the Motor Carrier Act of 1980 were not helping small and medium shippers, and that their market was getting smaller. COALITION FOR SOUND GENERAL FREIGHT TRUCKING, THE RATIONALE FOR TRUCKING REGULATION: EXPOSING THE MYTHS OF DEREGULATION 9 (1986).

48. Pricing discrimination may cause serious injury to those enterprises or geographic regions disfavored by the pricing scheme. The U.S. Supreme Court has observed that "[d]iscriminatory rates . . . may affect the prosperity and welfare of a State. . . . They may stifle, impede, or cripple old industries and prevent the establishment of new ones." Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945).

49. 94 U.S. 113 (1876).

50. P. DEMPSEY, *supra* note 45, at 96.

51. Dempsey, *Punishing Smallness*, Cleveland Plain Dealer, Dec. 12, 1987, at 15A.

conditions under which to bid. Many carriers are so desperate for the business
t they are bidding each other to death just to generate additional revenues.
ny of these bids are far below the operating costs of carriers successful in
uring the business, consequently these carriers have no choice but to make
the difference on small shippers. Cash flow pricing results by carriers oper-
ıg in a weak financial condition, the weaker the carrier financially, the more
ɔortant it may become just to generate revenue to meet payroll and debt.
ese companies fall as easy prey for shippers to place heavy pricing demands
ɔn them. Demands are also being placed on carriers for discriminating and
:eptive rate discounting, rebating to parties not responsible for payment of
e charges.[52]

the striking similarity between these observations of the deregulated
:ing industry today with those of economist W.T. Jackman who ob-
:d the same conditions in the trucking industry more than half a century
:r, before economic regulation.[53]
second phenomenon which appears to be growing more widespread is
ɔractice by large shippers of sending commodities "freight collect,"
eby the consignee pays the full, published rate for transportation. The
shipper then forces the carrier to rebate to the consignor the differ-
between the full, published rate and the significant discount of up to
off the published rate.[54] This is nothing less than deliberate fraud being
iced on unwary consignees. Jackman noted that the practice of "secret
liscriminatory rates and the prevalence of rebates" was widespread in
930s, before regulation.[55]
sum, deregulation brought shippers an immediate fall in transport
s, followed by a longer-term increase in discrimination between large
small shippers, with the result that larger manufacturers, distributors,
:etailers today enjoy a significant advantage over their smaller compet-
This distorts the broader market for the sale of commodities, giving
r firms a decided advantage, and causes many motor carrier failures.
ɔnetheless, some deregulation proponents have made extraordinary
ıs as to the consumer benefits produced by deregulation. For example,
to Institute study authored by Robert Delaney claimed that trucking
gulation had (a) produced efficiency savings to the tune of $26 billion
ally; (b) was largely responsible for the extended period of national
very in the 1980s; and (c) caused U.S. producers and distributors to
between $56 billion to $90 billion annually in reduced inventories and

Sisel, *The Changing World of Deregulation: The Good—The Bad—The Ugly* 25 (testimony
e the Michigan House Transp. Comm. July 6, 1989).
See supra text accompanying note 26.
Dolan, *supra* note 41, at 255.
W. JACKMAN, *supra* note 26, at 847.

improved efficiency.[56] The many flaws in the Cato study have been well documented in separate studies by economist Dr. Irwin Silberman and Professor Jerold Muskin, and need not be repeated here.[57] Suffice it to say, such exaggerated claims have been found to rest on exceedingly weak foundations.

D. Destructive Competition: Inadequate Returns on Investment

The guru of transportation deregulation, Alfred Kahn, summarized the phenomenon of "destructive competition" which was the catalyst for promulgation of the Motor Carrier Act of 1935: "Competition was intense, profits and wages depressed, and the safety and reliability of the services provided by the industry, and especially by many of the new entrants, left much to be desired. . . ."[58] Like many contemporary free market economists, he insists that it was the Great Depression that caused these economic problems, not any unique economic circumstances surrounding the transportation industry.

Yet each of the conditions he describes—intense competition, depressed wages and profits, and deterioration of safety and reliability of service—which existed before regulation, have reemerged under deregulation, even in the absence of a Depression. The U.S. Office of Technology Assessment (OTA) notes:

> Profit margins have fallen even for the most successful carriers, a product of intense price competition caused partly by changes in manufacturing and partly by continuing overcapacity. Carriers' expenses per ton-mile are up 75 percent since 1978, while revenues have increased only 54 percent. General freight revenues . . . have not matched price increases in the general economy, particularly for large shippers and those in highly competitive city-pair traffic lanes. Carriers that serve small shippers and those in less competitive markets have fared better.[59]

In order to provide an accurate picture of the anemic nature of the motor carrier industry under deregulation, several different pictures are offered in the following charts, and all are grim. One measure of industry profita-

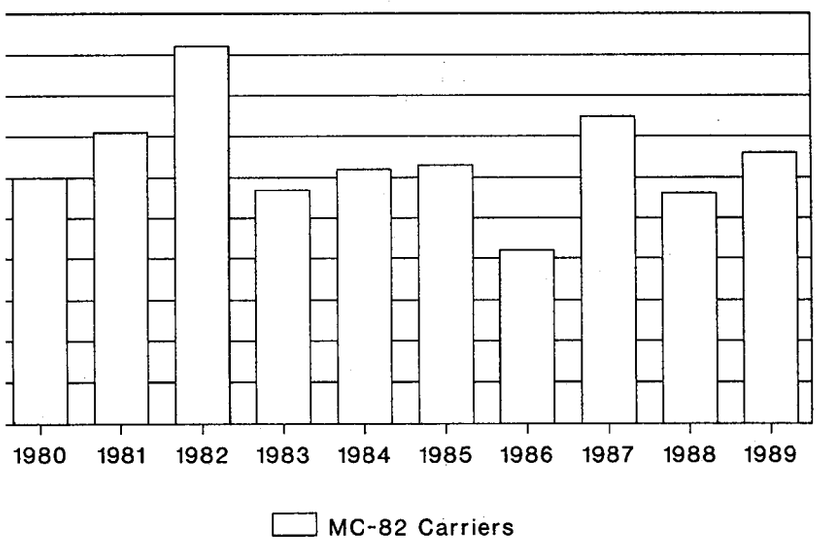
56. R. DELANEY, THE DISUNITED STATES: A COUNTRY IN SEARCH OF AN EFFICIENT TRANSPORTATION POLICY 1, 2, 9, 12 (1989) (source not available to the editors). These findings were embraced in a study prepared by an analyst at the Federal Trade Commission in a review of the literature, where the author alleged that "the total benefits of trucking deregulation . . . [is] between $39 and $63 billion per year, or between $160 and $260 for every American." D. OWEN, DEREGULATION IN THE TRUCKING INDUSTRY 1 (1988).

57. *See, e.g.*, Muskin, *Solving the Trade Balance Problem: The "Stuff" of Public Policy in Transportation*, 43 TRANSP. Q. 373 (1989); I. Silberman, Testimony Before the Michigan House Transp. Comm. on House Bill 4735, 21-22, (Oct. 11, 1989) (source not available to the editors).

58. A. Kahn, Statement Before the California Pub. Util. Comm'n 13 (Oct. 27, 1988).

59. U.S. OFFICE OF TECHNOLOGY ASSESSMENT, GEARING UP FOR SAFETY: MOTOR CARRIER SAFETY IN A COMPETITIVE ENVIRONMENT 24 (1988) [hereinafter OTA SAFETY STUDY].

Chart 1—Operating Ratios
(1980–89)



ge 96.4

/ is operating ratios—noninterest and nontax operating expenses as a entage of operating revenues. As Chart I reveals, operating ratios for MC-82 carriers (those required to file financial data with rate bureaus ect to the ICC's order in Ex Parte MC-82) have been abysmal under gulation, fluctuating between 94.2 (1986) and 99.2 (1982), and aver- g only 96.4 since deregulation.[60]

. I. SILBERMAN, GRAPHS FOR FOURTH QUARTER OF 1989 4 (1990) (source not available e editors). These data are compiled from the national data base of MC–82 carriers, the st in the industry.

OPERATING RATIOS OF MC–82 CARRIERS, 1980-1989

Year	Operating Ratio	Year	Operating Ratio
1980	96.0	1985	96.3
1981	97.1	1986	94.2
1982	99.2	1987	97.5

Thus, the margin for interest, taxes, and profit over the decade was a miserable 3.6%. In only a single year, 1986, did the industry achieve an operating ratio below 95. Dr. Irwin Silberman points out that this is all the more remarkable in light of the fact that the above data reflect operating ratios for the *survivors*, for a large number of MC-82 firms have disappeared, and their freight has been distributed among the remaining carriers.

In 1980, there were 239 MC-82 general freight carriers in the United States. By 1987, only 125 such carriers remained, and fifty of those had operating ratios in excess of 100.[61] Appendix A (on page 313) is a list of seventy-nine major carriers which have ceased operations, principally as a result of bankruptcy, merger, or shutdown.

Lest one conclude that motor carriers have always been so anemic, Chart II compares carrier operating margins[62] of the seven years preceding enactment of the Motor Carrier Act of 1980 with the eight years following it.[63]

Thus, the average operating margin preceding promulgation of the Motor Carrier Act of 1980 was 5.17, but fell after 1980 to 3.58—a deterioration of 30%. In contrast, the ICC has traditionally deemed a "reasonable" margin to be 7%, and the United Parcel Service (UPS) companies earn about 9%.[64] Return on equity also fell significantly after deregulation.[65] With

Year	Operating Ratio	Year	Operating Ratio
1983	95.7	1988	95.6
1984	96.2	1989	96.6
		Average	96.4

Silberman *supra* note 57, at 14.

61. Silberman, Testimony Before the California Pub. Util. Comm'n, at 2, 5 (Oct. 27, 1988) (source not available to the editors).

62. Operating margin is defined as the difference between operating revenue and operating expense (excluding interest and profit) divided by operating revenue.

63.

OPERATING MARGINS OF THE GENERAL FREIGHT INSTRUCTION 27 CARRIERS

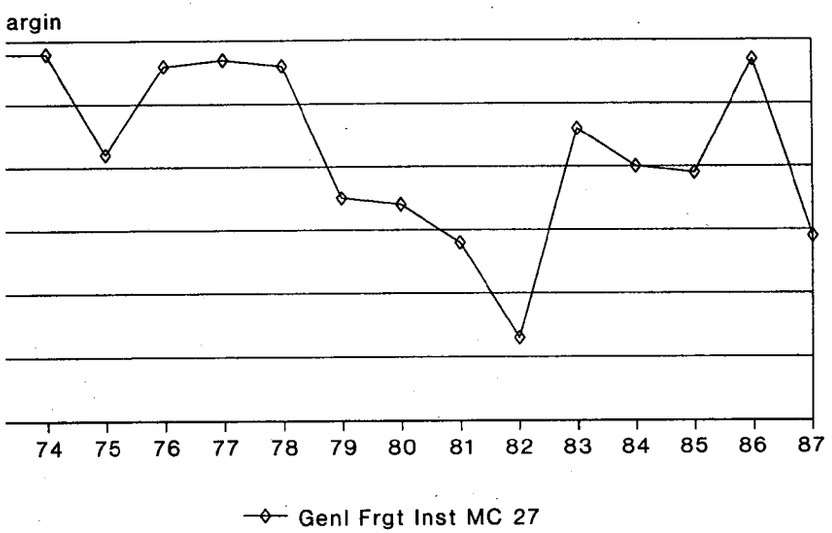
Year	Margin	Year	Margin
1973	5.8	1980	3.4
1974	5.8	1981	2.8
1975	4.2	1982	1.3
1976	5.6	1983	4.6
1977	5.7	1984	4.0
1978	5.6	1985	3.9
1979	3.5	1986	5.7
		1987	2.9
Average	5.17	Average	3.58

ATA FINANCIAL AND OPERATING STATISTICS, SUMMARY TABLE III. Data for 1973-75 are from quarterly reports. Data prior to 1973 are not available. *Reprinted in* D. Waring, Jr., *supra* note 44, at 5.

64. D. Waring, Jr., *supra* note 44 at 5.

65. Morash & Enis, *Investor Perceptions of the Impact of Deregulation on Motor Carrier Earnings*, 19 LOGISTICS & TRANSP. REV. 309, 310 (1983).

Chart II—Operating Margins
1973–87

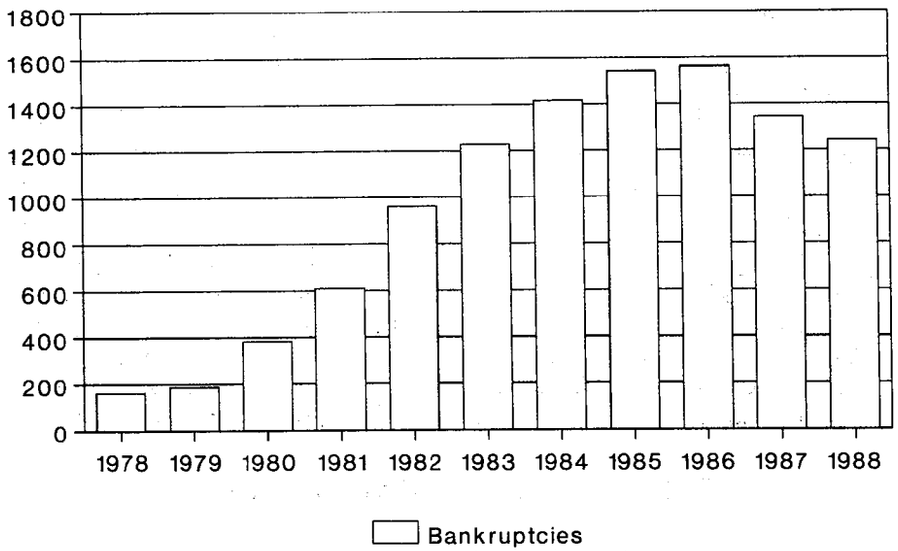


itability so poor, it is no wonder that bankruptcies have soared under gulation, as is revealed by Chart III.[66]

BANKRUPTCIES AND PROFIT MARGINS
FOR INTERSTATE MOTOR CARRIERS VIS-A-VIS
PROFIT MARGINS FOR ALL MANUFACTURERS SINCE 1978

Year	Motor Carrier Bankruptcies	Profit Margins* Motor Carriers	All Manufacturers
1978	162	2.92%	5.4%
1979	186	1.97	5.7
1980	382	1.73	4.8
1981	610	1.58	4.7
1982	960	0.77	3.5
1983	1,228	2.37	4.1
1984	1,416	2.24	4.6

Chart III—Motor Carrier Bankruptcies
1978–1988



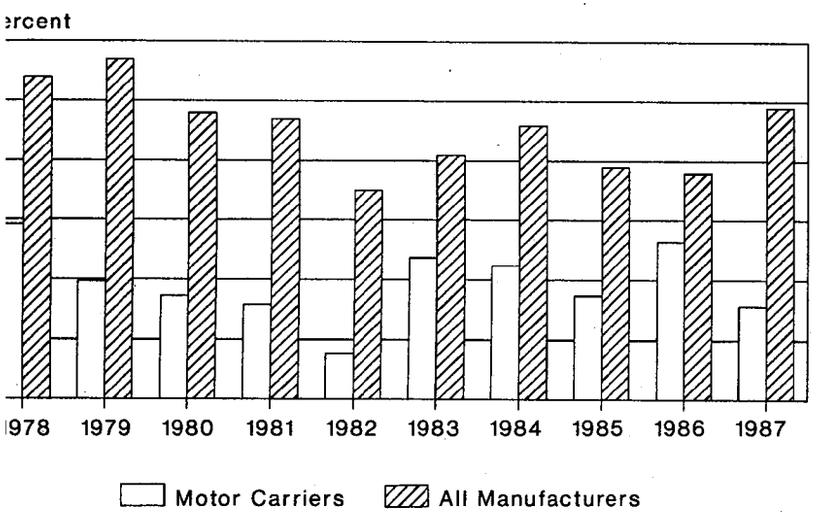
The period of deregulation is the era of the lowest returns in the trucking industry's history. As Chart IV reveals, profit margins have been highly

Year	Motor Carrier Bankruptcies	Profit Margins* Motor Carriers	All Manufacturers
1985	1,543	1.74	3.9
1986	1,564	2.64	3.8
1987	1,351	1.57	4.9

*Profits are measured as after-tax earnings as a percentage of gross revenues.

These statistics were compiled by Ron Roth, Director of Statistical Analysis of the American Trucking Association (Jan. 1988). Profit margins are measured in terms of after-tax earnings as a percentage of gross revenues. *See also*, R. ROTH, TRUCKING: AN OVERVIEW AND FOCUS ON PRESENT TIMES: THE MOTOR CARRIER INDUSTRY IN TRANSITION, IMPACTS AND IMPLICATIONS—A GRAPHIC PRESENTATION OF 1978–1986 (Sept. 1987) (source not available to the editors), and DUN & BRADSTREET, FAILURE DATA (1987) (source not available to the editors).

Chart IV—Profit Margins
Motor Carriers/All Manufacturers



s are measured as after-tax earn-
ıs a percentage of gross revenues

isfactory.[67] Bankruptcies have exceeded 1,000 a year each year since , continuing long after the recession of the early 1980s abated and fuel s fell.[68]

R. ROTH, *supra* note 66. Although productivity for general freight carriers grew by rage of 0.29% annually after 1969, it has declined by 0.21% per year since 1978. In st, productivity levels for all manufacturers have increased an average of 2.4% per ince 1975. *Panelists Deplore Truck Deregulation, Rate Discrimination at NARUC Confab*, IC WORLD 68, 69 (Dec. 1, 1986). Michael Evans found that productivity in the motor industry fell from an average annual 1.5% increase between 1960-1980 to 0.7% en 1980-1985. M. EVANS, THE ECONOMIC EFFECT OF TRUCKING REGULATION 3 (1987) t for the Coalition for Sound General Freight Trucking).

P. DEMPSEY, *supra* note 45, at 80. In 1978, the rate of bankruptcies among trucking nies was twenty failures per 10,000 companies, about the same as all businesses. In trucking suffered 150 failures per 10,000 companies, compared to 120 failures per) companies for all businesses. R. SAMPSON, M. FARRIS & D. SHROCK, DOMESTIC TRANS-TION 322-23 (6th ed. 1990).

In the less-than-truckload sector of the industry, more than 50% of the firms which existed before deregulation have failed.[69] Of the fifty largest trucking companies in 1965, only eleven remained in June of 1988, and four of them had operating ratios in excess of 100 (See Appendix B at page 315). By 1990, only seven remained. (See Appendix C at page 319.)

Indeed, these data are conservative. Between 1980 and 1989, the ICC revoked 18,557 common and contract motor carrier operating certificates and permits for failure to maintain adequate insurance.[70] This suggests that the failure rate may be much higher than that reported by Dun & Bradstreet, reflected above in Chart III.

The Reagan Administration's Interstate Commerce Commission provided the following justification for abdicating its statutory responsibility to regulate entry in motor carriage:

> Confronting the protestant with more vigorous competition—indeed, even competition which forces an existing carrier out of business—does not automatically cause harm to any aspect of the public interest. Congress, after all, requires us to foster efficiency in motor carrier transportation and there may well be situations in which, considering the transportation industry as a whole, it is preferable to replace an inefficient operator with a more efficient one and promote the introduction of innovative services or prices.[71]

There is absolutely no evidence to sustain the hypothesis that all of the several thousand carriers that ceased operations were inefficient. Unlimited entry has caused excessive capacity which in turn has led to lower productivity, which has caused unprofitability and widespread bankruptcies, shutdowns and mergers. Even efficient carriers, pricing at marginal costs, find it impossible to stay in business if they do not eventually recover fixed costs. And those with shallower pockets have a more difficult time in a market as filled with economic turmoil as trucking has been under deregulation. As Chart V reveals, the failure rate of trucking firms under deregulation has significantly exceeded that of other American industries, even though all industries suffered the effects of the recession of the early 1980s.[72]

69. Between 1978 (the year that de facto deregulation of interstate trucking began) and 1986, more than 54 percent of the LTL trucking companies went out of business, costing 120,000 employees their jobs. J. HARKINS, STATE OF THE LTL TRUCKING INDUSTRY (Dec. 1987).

70. M. Foley, *supra* note 44, at 23.

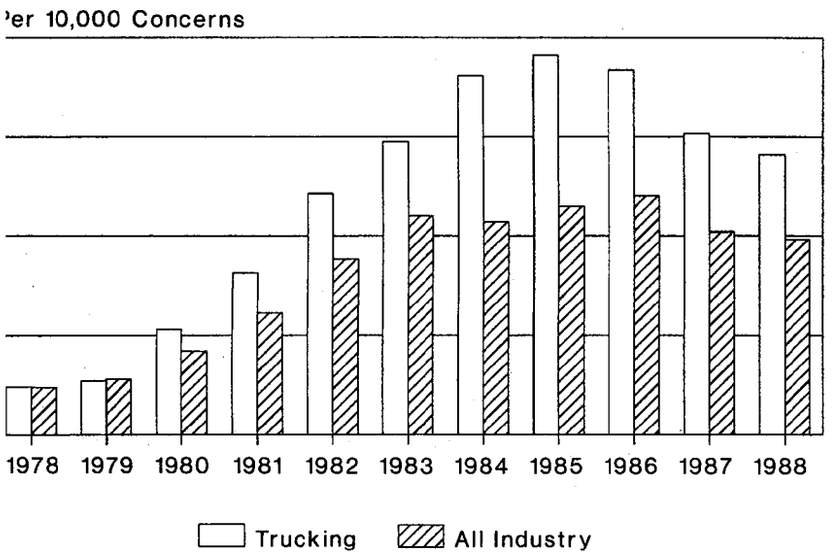
71. La Bar's, Inc., Ext.—Mountaintop Insulation, 132 M.C.C. 263, 272 (1980); discussed in P. DEMPSEY & W. THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 96-99 (1986).

72.

FAILURE RATE PER 10,000 CONCERNS

Year	Trucking	All Industry
1978	24.2	24.0
1979	27.2	28.0
1980	52.9	42.0
1981	81.2	61.0

Chart V—Failure Rate/10,000 Concerns
Trucking v. All Industry



ansportation economist Dabney Waring, Jr., has observed,

rior to deregulation, the failure rates in the trucking industry were almost ntical to the average for all industry. In 1980, however, trucking failures ;an to rise much faster than all industry, reaching a peak margin of more n 69% above the all-industry rate in 1984. It has since eased somewhat to a rent level 44% above the all-industry rate, probably due to the expanding

ear	Trucking	All Industry
982	121.3	88.0
983	147.5	110.0
984	180.7	107.0
985	191.1	115.0
986	183.6	120.0
987	151.5	102.0
988	141.0	98.0

aring, Jr., *supra* note 44 at 12. The failure rate per 10,000 firms was reported by Dun dstreet (source not available to the editors).

economy and the early destruction of the least healthy carriers.[73]

In the deregulated environment, we often see the phenomenon of pricing at or below short-term marginal costs. In part, this is inspired by the instantly perishable nature of the service being sold and the monopsony power of large shippers.[74]

Unlimited entry and rate deregulation have, as noted above, created excessive capacity, declining productivity, and therefore destructive competition which, in turn, has created inadequate returns on investment. This

73. *Id. See also* D. Waring, Jr., Rebuttal Testimony Before the California Pub. Utils. Comm'n in the Matter of General Freight Transportation by Truck 12 (Feb. 2, 1989).

74. P. DEMPSEY, *supra* note 45, at 84-85. Some free market economists insist that predatory pricing in the LTL industry is improbable, for it is unlikely that a carrier could recoup its losses once a competitor is driven from the market. Some suggest that the antitrust laws are a satisfactory means of dealing with the problem, and then go on to cite several unsuccessful antitrust complaints. The evidentiary, legal, and economic hurdles for successful civil prosecution of predatory behavior under Section 2 of the Sherman Act are formidable. Proving the existence of a conspiracy between competitors or other behavior designed to establish a monopoly is difficult, to say the least. And the reality is, the Justice Department has shown little enthusiasm in recent years for pursuing allegations of predatory behavior. And even if successful, antitrust remedies often only award monetary damages to the victor (and/or in a criminal action, imprisonment). They do not necessarily restore a lost competitor to the market. For example, a generous out-of-court settlement did not restore Sir Freddie Laker to the transatlantic passenger industry after his rivals drove him out of business with their predatory practices. Hence, while aggrieved firms may sometimes be vindicated, the consumers' interest in a healthy competitive environment is often left unprotected.

Alfred Kahn has expressed concern about predation in the airline industry. Said he, in a recent interview in *Antitrust*, "The airline industry clearly demonstrates the dangers of permitting unrestricted responses by incumbents to counter competitive entry, particularly with selective, pinpointed, or targeted price reductions." *Deregulation: Past, Present, and Future; Interview with Alfred E. Kahn*, 3 ANTITRUST 4, 7. Kahn continued, "The nature of entry is not independent of the policies of the incumbents. . . . If you know that if you enter a market you will immediately be met on the nose or even under the nose, that will affect your willingness to enter." *Id.* In testimony delivered in 1978 before the U.S. Senate Commerce Committee, in response to a question involving the tendency of airlines to purchase landing slots to gain control of an airport, Kahn said:

> Well, what you are describing, Congressman, is the possibility that the airlines, the big ones, may engage in some sort of predatory tactics, and that is a kind of predatory tactic.
>
> . . .
>
> I happen to be one of the few economists in the country who still believes there is such a thing, that it is really a danger.

Safety and Re-Regulation of the Airline Industry: Hearings Before the Senate Comm. on Commerce, Science and Technology, 100th Cong., 1st Sess. 162 (1987). In his article, "Deregulatory Schizophrenia," Kahn expounded upon the problem of allowing a competitor to be driven from the market via predatory means:

> As for the increasingly respectable view among economists that predation is nothing to worry about—why incur the cost of driving a rival from the market when you're unlikely to be able to sustain monopoly profits because rivals can always reenter?—my answer then was and still is: Does anybody really think that new price competitors will come to the consumer's rescue as promptly as their defunct predecessors? As I once heard Irwin Stelzer observe, a hiker might not pay much attention to a "no trespassing" sign standing alone, but if he sees the field behind it littered with bodies of previous trespassers, it's reasonable to suppose he will respect it.

Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059, 1067 (1987). Economic regulation can obviate the likelihood of predation by requiring cost-based and nondiscriminatory pricing.

ıomic anemia has had other deleterious consequences in addition to the ı failure rate among trucking firms. It has had an adverse impact on r-management relations and wages.

E. The Impact of Deregulation on Labor

ɛcause of the competitive pressures unleashed by deregulation, overall ıstry financial performance has declined to the point of inadequacy, de- ɛ the fact that the recession of the early 1980s has abated and fuel prices ɛ fallen. Because so many motor carriers have terminated operations ɛ 1980, more than 115,000 union members have lost their jobs.[75] For carriers that have survived, these competitive pressures have forced ıagement to engage in hard negotiations to reduce labor costs and tighten k rules.

s a result of the severe rate competition engendered by excessive capac- carriers cut costs wherever they can.[76] The alternative, as noted above, ten bankruptcy. For that reason, carriers have reduced wages for drivers mechanics.[77] Between 1979 and 1985, trucking wages fell 30% in Cal- nia. At the same time, factory wages increased more than 15%. At re- ɛd pay, driving becomes less attractive to skilled professionals, causing industry to hire unskilled and untrained drivers. Chart VI reveals rel- ɛ wage levels during the deregulation period.[78]

. TRAFFIC WORLD at Supp. I (Dec. 5, 1988). Another source states that between 1978)86, more than 45% of general freight carriers went out of business, costing 120,274 oyees their jobs. J. HARKINS, *supra* note 69. *See also*, C. PERRY, DEREGULATION AND DECLINE OF THE UNIONIZED TRUCKING INDUSTRY (1986).

. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking In- y*, in Northwestern University Conference Proceedings, Transportation Deregulation Safety 629, 663 (1987).

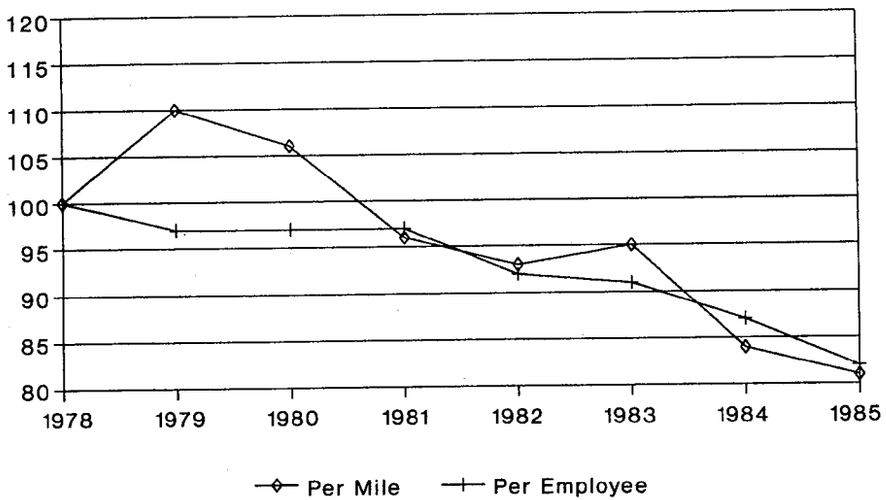
. An American Automobile Association (AAA) study concludes that because there are ɔther areas in which to cut costs, motor carriers whose profit margins are squeezed have alternative but to "run older equipment, pay less in wages, work drivers longer, and/ ɛimp on maintenance." F. BAKER, SAFETY IMPLICATIONS OF STRUCTURAL CHANGES URRING IN THE MOTOR CARRIER INDUSTRY 15 (1985) [hereinafter AAA SAFETY STUDY].

AVERAGE WAGES FOR MILEAGE-BASED DRIVERS
(Class I Carriers of General Freight)

ɛar	Index of Average Wages Per Mile	Index of Average Wages Per Employee
78	100	100
79	110	97
80	106	97
81	96	97
82	93	92
83	95	91
84	84	87
85	81	82
86	75	83
87	74	82

/aring, Jr., *supra* note 44, at 10. Mr. Waring developed these indices from data published

Chart VI—Average Wages for
Mileage Based Drivers



Class I Carriers of General Freight
1978=100

One source estimates that unionized motor carrier employees' wages have been reduced between $1 billion and $1.7 billion annually.[79] Dabney Waring, Jr., observed:

by the Interstate Commerce Commission in TRANSPORT STATISTICS OF THE UNITED STATES for drivers paid on a mileage basis (line-haul drivers). The dollar amounts were deflated using the CPI-U. 1978 = 100. *Id.* at 9.

79.
Since 1983, with the continuing erosion of carrier profits the average driver's wage per mile has been declining. In 1986, at $0.34 per mile, that figure was lower than any year since 1980 when the average was $0.36 per mile. During that same period, however, the average annual driver wage increased from $30,072 to $34,286. Therefore, drivers are driving more miles, but are doing so at less wages per mile. It is far from speculative to state that the increase in speed-related accidents is caused, in part, by the drivers'

early linehaul drivers are finding their work significantly less remunerative: % less remunerative per mile than in 1978, 30% less remunerative than in 80. Further, their annual income has declined 18% since 1978. But since this cline is less than the decline in wages per mile, they are driving more miles r less total income. This is not the sort of trend that will foster improved ghway safety.[80]

essor Grant Davis noted that "the impact on human capital as a result ıe deregulation raises numerous public policy questions and may well lt in costly industrial relations conflicts in the near future."[81] Deterio- ın in labor-management relations creates unnecessary enmity between ıps who need to work together. The consequences of such disharmony extend throughout the industry and into the area of public safety.

F. The Impact of Deregulation on Safety

s a study published by the American Automobile Association noted:

> ructural changes resulting from deregulation of the industry have produced combination of rapidly aging equipment operated by underpaid and over- rked drivers, many of whom are not intellectually or emotionally qualified r what they are doing and these changes are threatening the safe operation motor carrier equipment on the highways and endangering the lives of mo- ists and truckers alike. . . . By paying a driver less per mile, costs can . . . be duced. However, it is axiomatic that a driver will run the miles necessary to eet the income needs of himself or his family. Excess driving hours threaten ety.[82]

ıe average driver believes that about one in four of his fellow drivers ılarly operate their vehicles on the highway under the influence of illegal gs.[83] A recent National Transportation Board Study found that one- l of drivers killed in accidents had been drinking or using drugs.[84] Driv- ake amphetamines in order to fight the fatigue of staying behind the el excessive hours. Tight schedules and the pressure to make a living e many drivers to speed.[85] One driver wrote an article published by the *! Street Journal*. He put it this way:

ed to cover more miles in less time in order to meet their income requirements.

oley, *supra* note 44, at 21. Another states that, while wages in all industries rose 150% 1979, all truck drivers' wages rose only 130%, and truckload drivers' wages rose only). Shulz, *Smaller Profits, Higher Costs Cause Truckers to Increase Rates*, TRAFFIC WORLD 1, 1990), at 18.

Id. at 10.

Davis, *Regulatory Program of the United States Government: The Role for Economic Regu- ?*, 53 TRANSP. PRAC. J. 251, 258 (1986).

AAA SAFETY STUDY, *supra* note 77, at 16.

R. BEILOCK, MOTOR CARRIER SAFETY STUDY 7 (1989).

The study covered an eight-state area over a period of one year. Rosenfeld, *Fatigue, ol and Drugs Identified As Prime Causes of Fatal Truck Accidents*, TRAFFIC WORLD, Feb. 990, at 13.

See id. at 13; *see also* Barton, *A Trucker's Road to Safety and Sanity*, Wall St. J., Dec. 22, , at 18, col. 1.

> In 10 years of driving I have had no employer who expected less than twice the legally allotted number of hours. Many drivers, probably the majority, find themselves in similar binds. They must constantly break the law to keep their jobs. The resulting fatigue is the truck driver's real enemy and the true killer on the highway. . . .
>
> About 4,500 people died last year in traffic accidents involving trucks. If the same official zeal were focused on shippers and employers who demand outlawry from drivers, the first step will have been taken toward reducing that number. Until then, shippers will expect 68-hour trips from California to Boston, and profit will be made because drivers disregarded the law. More important, public safety will continue to be jeopardized.[86]

Under federal regulations, log books are supposed to show eight hours' rest after ten hours' work.[87] In reality drivers often exceed those limits and, in the industry, log books are referred to as "comic books."[88] As one source noted, "There is far too much pressure on owner-operators and trucking companies to work their drivers 70-80-90 hours a week just to compete or keep their jobs."[89] The result has been increased numbers of trucking accidents and related deaths and injuries. Fatigue has been cited by the National Transportation Safety Board as the largest single factor in causing fatal accidents.[90]

Many scholars have examined the relationship between trucking deregulation and the deterioration in safety. Daust and Cobb found a "relationship between federal economic deregulation and the substantial rise in safety-related incidents . . . [as well as a] cause-and-effect relationship of driver fatigue and unqualified drivers on traffic crash occurrences."[91] Carriers earning inadequate profits have cut training and forced drivers to work longer hours. Inexperienced drivers are three times more likely to have accidents than are experienced drivers.[92] Under the National Accident Sam-

86. Barton, *supra* note 85.

87. Specifically, truck drivers may drive no more than ten hours within a fifteen-hour period following eight consecutive hours off duty. In sleeper operations, the eight hours off duty can be divided into two periods. Drivers cannot drive more than sixty hours in a seven-day week. Schulz, *Truckers' Hours of Service Rules to Receive Comprehensive Study*, TRAFFIC WORLD, Dec. 4, 1989, at 20.

88. Kalette, *Truck Deaths: 4,500 a Year, 50+ Last Week*, USA Today, Mar. 23, 1987, at 2, col. 1.

89. Schulz, *supra* note 87, at 20.

90. Rosenfeld, *supra* note 85, at 13. An AAA study reveals that driver fatigue is the probable or primary cause of 41% of heavy truck accidents. AAA FOUNDATION FOR TRAFFIC SAFETY, A REPORT ON THE DETERMINATION AND EVALUATION OF THE ROLE OF FATIGUE IN HEAVY TRUCK ACCIDENTS, Executive Summary (1985). For purposes of this study, fatigue was defined as more than 15 consecutive hours of on-duty or defined activity time. *Id.* at 2.

91. Daust & Cobb, *The Relationship Between Economic Deregulation of the Motor Carrier Industry and Its Effects on Safety* in NORTHWESTERN UNIVERSITY CONFERENCE PROCEEDINGS, TRANSPORTATION DEREGULATION AND SAFETY 785-86, 788 (1987) [hereinafter DEREGULATION AND SAFETY CONFERENCE].

92. R. BEILOCK, *supra* note 83, at 10 (1989). "Using a threshold of five years driving experience to separate the two categories of drivers, almost one inexperienced driver in four has had an accident per year." *Id.* at 10-11.

; System, the three largest causes of accidents were (1) speeding, (2) the of training, and (3) the age of the vehicle.[93] All of these factors seem ıve grown worse under deregulation.

ıe industry also appears to be deferring new vehicle purchases.[94] Be- e carrier profits have been so severely squeezed, the average age of pment has increased dramatically since deregulation.[95] The average age ucks on the highway rose from six years in 1978 (when *de facto* dere- tion began) to 7.5 years in 1986.[96] According to Waring's interpretation ·ofessor Evans' data, the number of trucks twelve years or older on the way has more than doubled under deregulation.[97] Charts VII, VIII, IX reveal these distressing trends.[98]

onomically anemic carriers simply haven't the resources to invest in ıcing (and in some instances, repairing) aged equipment. Older vehicles ire greater maintenance, yet unfortunately, they are getting *less*. Car- have cut maintenance expenditures up to 3.6% annually. This means carriers are not buying spare parts when they need them and are not

OTA SAFETY STUDY, *supra* note 59, at 3.
AAA SAFETY STUDY, *supra* note 77, at 17. N. GLASKOWSKY, *supra* note 34, at 32.
Id.
M. Foley, *supra* note 44, at 22.
Dolan, *supra* note 41, at 273-74 (quoting D. Waring, Jr., statement before the Cali- ı Public Utilities Commission 4, Mar. 10-11, 1988).

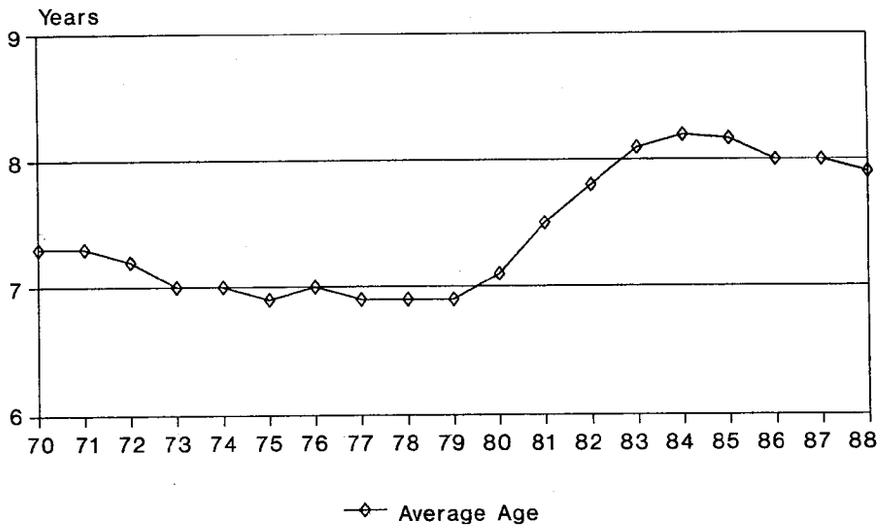
AGE OF TRUCKS, 1970—1988

ear	(1)	(2)	(3)	(4)
970	7.3	3.9	17.7	100
971	7.3	4.0	18.3	99
972	7.2	4.0	19.7	92
973	7.0	4.0	21.3	85
974	7.0	4.1	23.3	81
975	6.9	4.4	24.8	80
976	7.0	4.8	26.5	82
977	6.9	5.2	28.2	82
978	6.9	5.5	30.5	82
979	6.9	5.9	32.6	82
980	7.1	6.5	35.2	84
981	7.5	7.2	36.1	90
982	7.8	7.9	37.0	97
983	8.1	8.5	38.1	101
984	8.2	9.6	40.1	109
985	8.1	10.7	42.4	115
986	8.0	11.5	44.8	117
987	8.0	11.8	47.3	113
988	7.9	12.6	50.2	114

Average age, all trucks.
Number of trucks (millions), 12 years or older.
Number of trucks in use (millions).
Ratio of number of trucks 12 years and older to total trucks in use, indexed at 1970 = 100.

ıring, Jr., Testimony Before the Michigan House Committee on Transportation 6 (Aug.)89) (source not available to the editors).

Chart VII—All Trucks
Average Age (1970–1988)



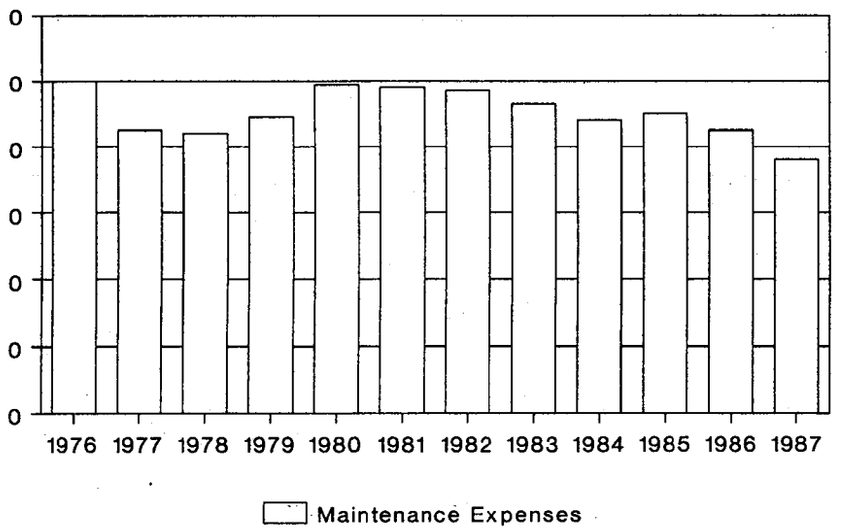
taking vehicles off the highway when they ought to be. Chart X sustains this dismal conclusion.[99]

99.

INDEX OF MAINTENANCE EXPENSES PER MILE

Year	Index
1976	100
1977	85
1978	84
1979	89
1980	99
1981	98
1982	97
1983	93
1984	88
1985	90
1986	85
1987	76

Chart X—Maintenance Expenses Per Mile
1976–1987



76 = 100

es and Canada; 73,311 driver or vehicle violations were discovered, and of service orders were issued against 10,134 trucks (32.1%) and 1,908 vers (6.1%).[104]

n American Automobile Association (AAA) study found that because re are few other areas in which to cut costs, motor carriers whose profit rgins are squeezed have little alternative but to "run older equipment, less in wages, work drivers longer, and/or skip on maintenance."[105] ilarly, Professors Corsi, Fanara, and Jarrell concluded:

]n the competitive post [deregulation] environment there is a significant re-itionship between poorer operating performance and a higher accident rate.

04. *Id.* at 18 (*citing* U.S. FEDERAL HIGHWAY ADMINISTRATION, 1 TRANSPORTATION ETY REPORTS No. 8 (July 3, 1989)).
05. AAA SAFETY STUDY, *supra* note 77, at 15.

> Despite claims to the contrary that deregulation and safety concerns are unlinked, it is clear that some firms operating in the new competitive environment in a precarious financial situation have significantly higher accident rates than do those not in financial distress.[106]

Professor Garland Chow found that the carrier that eventually goes bankrupt spends less on maintenance and new equipment, runs older equipment, and uses more owner-operators.[107]

It is not only the carrier exiting the unregulated market which poses a serious safety hazard on the highway. The new, undercapitalized, shoestring operator is also a threat. Professors Corsi and Fanara examined the impact of the Motor Carrier Act of 1980 upon safety and concluded that new entrants have accident rates between 27% and 33% higher than established carriers.[108] The Motor Carrier Act of 1980 exacerbated this problem by increasing the number of new entrants. Even Alfred Kahn admits the safety record "is markedly worse for the most recent entrants."[109]

Professor Grant Davis observed that "[t]here may well be a strong relationship between earnings, capacity, and safety."[110] Professor Nicholas Glaskowsky reached similar conclusions, noting that "[a]fter five years of deregulation three trends are fairly clear: (1) the equipment fleet of the motor carrier industry is aging, (2) a lot of maintenance (expense) is being deferred, and (3) the motor carrier accident rate is increasing."[111] A recent study of the U.S. Office of Technology Assessment echoed these findings:

> Overcapacity leads to price discounting and shrunken profit margins, creating difficult economic trade-offs for decisions about investment in safety-related equipment and safety-conscious hiring and scheduling practices. Competition, increased operating costs, and low, erratic profit margins create a need to control costs that can lead to shortchanging safety-related driver training, truck maintenance, and equipment improvements. . . . Costs and safety trade-offs are particularly problematic for owner-operators and small carriers, who have to generate revenue regularly to stay in business and may have no regular operations base or maintenance facility.[112]

Some sources allege that the number of truck-related accidents and fatalities have decreased, on a per-mile basis, since promulgation of the Motor

106. Corsi, Fanara, Jr., & Jarrell, *Safety Performance of Pre-MCA Motor Carriers, 1977 Versus 1984*, TRANSP. J. 30, 36 (1988). *See also* Corsi, Fanara, Jr., & Roberts, *Linkages Between Motor Carrier Accidents and Safety Regulation*, 20 LOGISTICS & TRANSP. REV. 149 (1984).
107. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*, DEREGULATION AND SAFETY CONFERENCE, *supra* note 91, at 629, 654 (1987).
108. Corsi & Fanara, Jr., *Effects of New Entrants on Motor Carrier Safety*, DEREGULATION AND SAFETY CONFERENCE, *supra* note 91, at 583 (1987). *See also* Corsi, Fanara, Jr. & Jarrell, *supra* note 106, at 30.
109. Kahn Oral Testimony, *infra* note 153, at 6283.
110. Davis, *Regulatory Program of the United States Government: The Role for Economic Regulation?*, 53 TRANSP. PRAC. J. 251, 254 (1986).
111. N. GLASKOWSKY, *supra* note 34, at 32.
112. OTA SAFETY STUDY, *supra* note 59, at 25.

rier Act of 1980. [113] But this allegation has not gone unchallenged. The
. Office of Technology Assessment concluded that the number of acci-
ts between 1981 and 1986 (the last year for which accurate data are
ilable) increased 15%, more than the increase in truck miles traveled
ing that period.[114] Further, OTA found that, by 1990, the total cost of
hway accidents will reach $65 billion annually, far outpacing any pur-
ted transportation pricing savings.[115] OTA's findings with respect to fa-
y levels are also sustained by the American Insurance Association, which
orted that the accident rate for interstate motor carriers increased from
5 per million miles in 1983, to 3.06 in 1984, to 3.39 for the first half of
5.[116] Professor Darwin Daicoff studied the data and concluded that
regulation has been associated with a deterioration in the rate of im-
vement in motor carrier safety whether expressed in motor carrier fa-
ies, injuries, or accidents per truck mile."[117]
rofessor Glaskowsky points out that deregulation has produced aging
ipment, deferred maintenance, and an increasing accident rate.[118] Pro-
or Daryl Wyckoff found a positive correlation between motor carrier
ulation and safety in that regulated carriers displayed a superior safety
compliance record vis-à-vis unregulated motor carriers.[119] Another
rce concluded, "Deregulation compounded the problems by creating
nomic circumstances that made trucking far more dangerous."[120]
ut does this overwhelming body of evidence conclusively prove, as the
egulators insist we must, that deregulation has caused a deterioration in
ty? Probably not. Neither has the U.S. Surgeon General, with all the
ources at her disposal, satisfied the burden of proving that cigarette
king causes cancer. In both instances, the burden of proving or dis-
ving a link ought to be placed upon those who, common sense tells us,
jeopardizing public safety.

G. Unprecedented Concentration

s a consequence of the ruthlessly competitive environment unleashed
leregulation, the U.S. transportation industry has become more highly

13. *Trucking Safety, Deregulation Unrelated*, TRAFFIC WORLD, Apr. 16, 1990, at 28.
14. OTA SAFETY STUDY, *supra* note 59, at 3. *See also* N. GLASKOWSKY, *supra* note 34,
-33.
15. OTA SAFETY STUDY, *supra* note 59, at 6.
16. N. GLASKOWSKY, *supra* note 34, at 32. A more recent decline in fatalities (if there
een one) despite the increase in the number of accidents may be attributed to mandatory
ph speed limits and mandatory state seat belt laws enacted during this period.
17. Daicoff, *Deregulation and Motor Carrier Safety*, 24 LOGISTICS & TRANSP. REV. 175,
(1988).
18. N. GLASKOWSKY, *supra* note 34, at 32.
19. *Motor Carrier Act of 1980: Report of the Senate Comm. on Commerce, Science, and Transp.*,
P. NO. 641, 96th Cong., 2d Sess. 85, 100 (1980).
20. Labich, *The Scandal of Killer Trucks*, FORTUNE, Mar. 30, 1987, at 85.

concentrated than it has ever been.[121] This high level of concentration has manifested itself not only among motor carriers, but also among airlines, railroads, and bus companies.[122] The eight largest U.S. airlines accounted for 81% of revenue passenger miles in 1978, and 92% in 1987;[123] the seven largest railroads accounted for 65% of revenue ton miles in 1979, and 89% in 1987; the eight largest motor carriers accounted for 20% of industry revenue in 1978, and 37% in 1987; and the bus duopoly of Greyhound and Trailways which preceded deregulation became an effective national monopoly with their merger after deregulation.[124] Because of the scale and

121. U.S. GENERAL ACCOUNTING OFFICE, PRICE COMPETITION AND MARKET STRUCTURE IN THE TRUCKING INDUSTRY 11, 14 (1987).
122. P. DEMPSEY, *supra* note 1, at 91-92. Even Alfred Kahn admits as much. *See* Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325 (1990).
123. *Safety and Re-Regulation, Hearings Before the Senate Commerce Comm.*, S. REP. NO. 468, 100th Cong., 1st Sess. 158 (1987) [hereinafter *Safety and Re-Regulation*]; P. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION (1990).
124. P. DEMPSEY, *supra* note 1, at 83-93, 129-93. Despite the freedom to raise prices and leave unprofitable markets created by deregulation, the bus industry suffered unprecedented losses under deregulation. Industry operating ratios were at least 96.9 every year between 1982 and 1986. R. NATHAN, FEDERAL SUBSIDIES FOR PASSENGER TRANSPORTATION, 1960-1988: WINNERS, LOSERS, AND IMPLICATIONS FOR THE FUTURE at Appendix C, Table C (1989). Part of this was due to "cream skimming" by new entrants which focused their operations on the denser, higher revenue traffic lanes. Excessive capacity in dense markets deprived carriers of the revenue needed to cross-subsidize weaker markets. Another part still was prompted by the impact of the airline rate wars of the early 1980s, created by the destructive competition unleashed by the Airline Deregulation Act of 1978. Supersaver air fares were luring passengers away from the bus stations and into airports. Even charter and tour deregulation had a deleterious effect upon carrier profitability. Jeremy Kahn painted the following portrait of the empirical results of deregulation:

> [W]ith the exception of a handful of intercity carriers engaged in regular route transportation (be it true intercity transportation or even long distance commuter service within major metropolitan areas), charter and tour revenues provide a significant—if not the most significant—proportion of most carriers' revenues. Deregulation of charter and tour operations on the federal level (and, generally on the state level to varying degrees) has resulted in overcapacity, leading to severe price competition, resulting in a diminution of overall carrier profits. This, coupled with ever increasing costs of operation, including the staggering cost of the newest intercity motorcoaches, increased cost of labor, including benefits, and other operating costs, including taxes, has resulted in mere economic survival being a major issue for many smaller charter and tour carriers within the industry.
>
> Regardless of the number of efficient management programs which are instituted, regardless of the modernization of maintenance facilities and customer service facilities, and regardless of computerization of record keeping and billing, many carriers are faced with a close-to-being-unbearable squeeze on their profits. . . .
>
> Many carriers are today operating aging fleets of equipment, with models costing the then significant amount of $155,000 now replaceable only with comparable models which cost twice as much.
>
> In many instances, only new entrants, highly leveraged, and barely able to make lease payments on these expensive coaches, enter the charter market and provide fierce price competition, anxious only in the short run to meet their leasing obligations, thereby further exasperating this problem.

J. Kahn, The U.S. Bus Industry Seven Years After Deregulation 16-17 (Address before the Canadian Transport Lawyers Ass'n, Nov. 18, 1989 [hereinafter J. Kahn]. (Source not available to the editors.) *See also* Kahn, *Stopping by the Bus Terminal on a Dark and Stormy Night: The U.S. Bus Industry Seven Years After Deregulation*, 18 TRANSP. L.J. 255 (1990). Because of

work economies inherent in all modes of transportation, the long-term duct of deregulation appears to be oligopoly of megacarriers.

)espite the predictions of the free market economists that deregulation ıld reduce concentration in the trucking industry, there are far fewer L competitors now than before deregulation. As noted above, while the -than-truckload sector of the motor carrier industry has experienced a keout of more than half of the firms which previously existed, there have n no new, major LTL entrants since deregulation began.[125] Although -e were nearly 500 LTL firms in 1973, fewer than 150 existed in 1986.[126] 'he MC-82 carriers are the largest in the industry, required by the ICC)e reflected in rate filings by the independent rate bureaus. Chart XI :als the high fatality rate among LTL carriers of size.[127]

ıemic performance and labor difficulties, Greyhound in the United States was placed tandard & Poor's "watch list" in 1983. *Caterpillar Tractor, 2 Others Added by S&P's Credit h List*, Wall St. J., Jan. 24, 1983, at 32, col. 3. In 1986, Greyhound of Arizona sold its estic operations to an investment group led by Fred G. Currey, a former chief executive er of Trailways Inc., for $350 million. *Greyhound to Sell U.S. Bus Operations for $350 on to Group of Investors*, Wall St. J., Dec. 24, 1986, at 3, col. 2. The following year, hound acquired its rival Trailways, for $80 million, and the U.S. bus duopoly became nopoly. *Greyhound Gets Clearance to Run Trailways for Now*, Wall St. J., July 3, 1987, at l. 5; *Greyhound Lines to Take Control of Trailways Assets*, Wall St. J., July 14, 1987, at 16, 2. Recognizing that Trailways was on its death bed, the U.S. Department of Justice iesced and withheld antitrust opposition under the "failing company" doctrine. *See* psey, *Antitrust Law and Policy in Transportation: Monopoly I$ the Name of the Game*, 21 GA. :v. 505 (1987).

ıile deregulation of the airline industry initially increased price competition by flooding ıarket with excess capacity, it caused the industry's profit margin to plummet, a large)er of carriers to fail, and mergers to lead to unprecedented levels of concentration. All 'hile small and rural communities lost bus service or faced extreme price discrimination. psey, *The Experience of Deregulation: Erosion of the Common Carrier Obligation*, 13 TRANSP. ST. 121, 172-74 (1981).

us, deregulation of the U.S. intercity bus industry has created an anemic monopoly ding poorer service than before deregulation. Even Alfred Kahn, the guru of deregu-ı, has acknowledged that bus deregulation was a threat to small communities, whose ıe is the intercity operator; therefore, had he been at the helm of government, he ıbly would not have deregulated the bus industry. Testimony of Alfred Kahn Before 'alifornia Public Utilities Commission on Cross-Examination by Paul Stephen Dempsey (Jan. 31, 1989).

e public has suffered unduly in the United States as free market economists played : with national transportation policy. Laissez-faire has made impossible the achievement e broader social and equity objectives of ubiquitous intercity passenger transportation ıg all to the infrastructure, even those living in remote communities, for it has obliterated elicate balance of cross-subsidies which only responsibly administered economic regu-ı can provide.

). N. GLASKOWSKY, *supra* note 34, at 25; U.S. GENERAL ACCOUNTING OFFICE, TRUCK-:EGULATION 11, 14 (1987).

). Silberman & Hill, *State of the LTL Industry*, TRANSP. EXEC. UPDATE 6 (Mar./Apr.

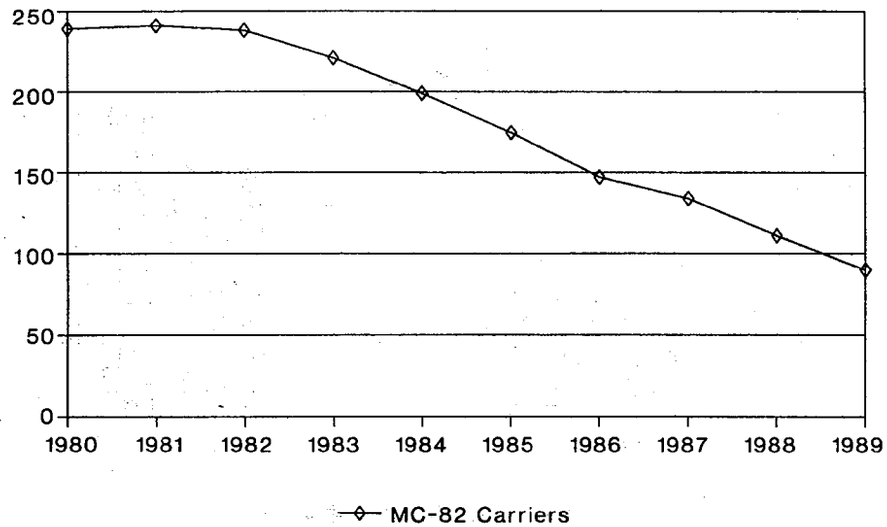
).

'.

CHART XI—NUMBER OF MC–82 IN NATIONAL DATABASE CARRIERS 1980-1989

Year	Number of Carriers
1980	239
1981	241

Chart XI—MC–82 Carriers
Number (1980–1989)



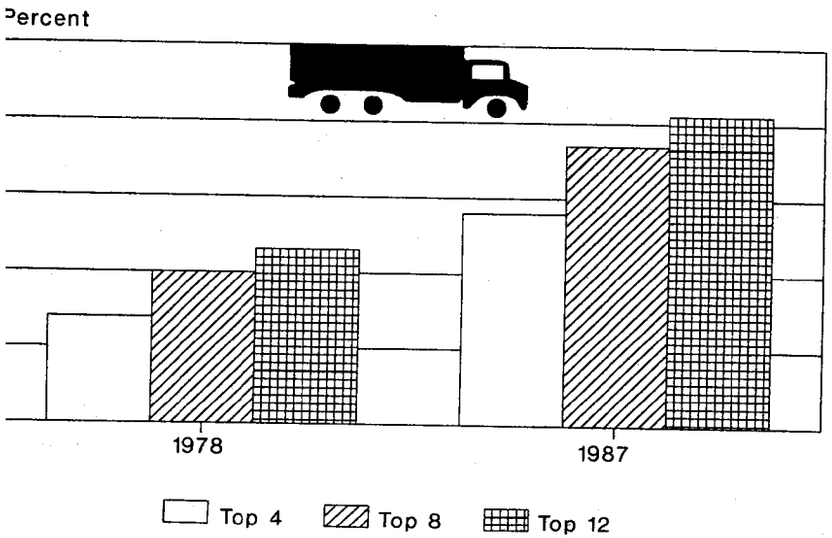
Thus, 62% of the largest general freight carriers have disappeared. A 1987 study of the General Accounting Office found that all geographic regions in the nation have experienced increased motor carrier concentration since deregulation began.[128] The industry has also never been more

Year	Number of Carriers
1982	238
1983	221
1984	199
1985	175
1986	147
1987	134
1988	111
1989	90

Irwin Silberman, Graphs for Fourth Quarter of 1989 1 (1990) (available from the author).

128. U.S. GENERAL ACCOUNTING OFFICE, TRUCKING REGULATION 11, 14 (1987).

Chart XII—Market Share of Top 12
Carriers as % of All ICC Carriers



ly concentrated on the national level. Relative market shares pre- and deregulation are set forth in Chart XII.[129]

ripped of entry regulation, the industry has become more highly con-rated than at any time in its history. The fact that not a single new LTL er of consequence has emerged strongly suggests the existence of econ-

CHART XII—MARKET SHARE OF TOP 12 CARRIERS AS PERCENTAGE OF ALL ICC CARRIERS (By Revenue)

	1978	1987
Top 4	14%	28%
Top 8	20%	37%
Top 12	23%	41%

IC WORLD, Dec. 5, 1988, Supp. J.

omies of scale.[130] Note also that the growth in the rate of trucking concentration has outstripped even that of airlines, which have been longer and, with federal preemption, more comprehensively deregulated.[131] Moreover, while no new major entrant has successfully emerged in LTL trucking, several new airlines have been launched (although most did not survive).

The largest motor carriers are also the most profitable. *Business Week* reported that in 1986, the ten largest LTL carriers accounted for nearly 60% of LTL shipments, and 90% of its profits.[132] In 1968, the five largest motor carriers accounted for 19.5% of the top 100 revenue, and 31% of the profits of the 100 largest carriers. In 1988, the five largest enjoyed 40% of the top 100 revenue, and 48% of the top 100 profit.[133] The three largest LTL motor carriers (Roadway, Yellow and Consolidated Freightways) grew from 21% of the operating revenue and 41% of the operating income of the 100 largest carriers in 1979, to 31% of the operating revenue and 61% of the operating income in 1985.[134] The big three have increased their relative market share by approximately 45% in just six years.[135]

Professor James Rakowski notes, "The concentration of revenue and,

130. Even Alfred Kahn now admits that LTL trucking has exhibited "a trend toward increasing concentration at the national level." Kahn Oral Testimony, *infra* note 153, at 6166. A Standard & Poor's survey of the trucking industry indicates that all the major LTL motor carriers now operate in all forty-eight states. *Id.* True, nearly every carrier that has applied for it has received forty-eight-state interstate general commodities motor carrier operating authority from an unusually liberal Interstate Commerce Commission, so they can surely hold themselves out as serving all forty-eight states. But the certificated authority and the real ability to serve all forty-eight states are often two entirely different things. It is unclear whether the Standard & Poor's reference refers to operating authority, interline ability, or actual operations.

131. This growth is evidenced by:

- The ten most profitable carriers in 1984 accounted for over 80% of all general freight carriers' profits.
- Between 1979 and 1983 the seventy-five largest general freight carriers increased their share of Class I less-than-truckload revenues from 79.2% to 88.2%.
- During this same period, the four largest carriers increased their market share from 26.4% to 30.6%, with the largest carrier increasing its share from 9.1% to 10.1%.

D. SWEENEY, C. MCCARTHY, S. KALISH & J. CUTLER, JR., TRANSPORTATION DEREGULATION: WHAT'S REGULATED AND WHAT ISN'T 172 (1986).

132. *Is Deregulation Working?*, BUS. WK., Dec. 22, 1986, at 50, 52.

133. Desmond, *20 Year Analysis of the Top 100*, COMM. CARRIER J. 122 (July 1988). The General Accounting Office found that the national share of the of the four largest LTL firms increased from 25% in 1980 to 36% in 1984, and as much as 50% in some regions of the country. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 128. By 1989, the four largest carriers enjoyed 40% of the industry's gross revenues, and 44% of its profits. P. Conn, Testimony Before the Michigan House Transportation Committee 4 (July 1989). Another source says the four largest trucking companies account for nearly half the revenue of the top 100 carriers, up from a third in 1980. McRoberts, *Fewer and Fewer Operators Can Keep on Trucking*, Chicago Tribune, Sept. 3, 1989, at 7-1, 7-4.

134. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J. 11, 13 (Spring 1988). Another source states that these three trucking companies "raised their market share from 21.7 percent of LTL revenue in 1979 to 36.5 percent in 1988." Schulz, *Rate-Cutting, Competition Darkens Profit Picture for LTL*, TRAFFIC WORLD, June 4, 1990, 15, 17.

135. Rakowski, *supra* note 134, at 13-14.

n more so, of profit is shown to have increased significantly in recent rs while a large percentage of firms are shown to be losing money or, at :, remaining barely profitable."[136] Indeed, smaller carriers are being psed by their larger competitors. Between 1980 and 1987, the market re of all but the ten largest MC-82 carriers declined, whether measured TL revenue, tonnage, or shipment counts.[137] These firms lost 55% of r truckload tonnage and 30% of their LTL tonnage under deregula-.[138] If these trends continue, smaller companies will play only a minor ipetitive role in general freight transportation.[139] One source predicts the current recession will result in a massive shakeout, ultimately leav- only about six carriers dominating the national network.[140] Another cipates that three or four megacarriers will dominate the industry, rcing higher rates and fewer service options on shippers. . . ."[141]
rofessor Glaskowsky has disputed the essential assumptions upon which egulation was predicated, saying:

he LTL for-hire carrier segment of the industry is *not* atomistic in any sense the word. A small and still shrinking group of increasingly large firms dom- ates this traffic nationally. LTL operations *do* have significant operating econ- nies of scale. The established large national LTL carriers *are* the beneficiaries an almost insurmountable financial barrier to entry: their large and wide- read terminal networks. . . .[142]

modern LTL operation of significant size involves an extensive network of rminals, a computerized management information system, a large number of nployees, has a need for a highly skilled management, and must be able to cope th the fact that most of its costs are fixed in the short run and at least semi- ed in the longer run. For these reasons, the barriers to entry in the LTL ctor of the motor carrier industry are high.[143]

n the basis of indisputable hard evidence, it is clear that one of the most gnificant results of deregulation of the motor carrier industry is that *large scale terstate LTL motor carriage has become a closed club with a dwindling number of mbers. . . .*

ne rate of growth of interstate LTL traffic concentration since deregulation without parallel in American business history. It is unquestionably a direct sult of motor carrier deregulation, and the increasing concentration of LTL

6. *Id.*
7. I. Silberman, Testimony Before the Michigan House Transportation Committee 16-)ct. 11, 1989).
8. *Id.* at 16.
9. *Id.* at 17.
0. McRoberts, *supra* note 133.
1. Schulz, *supra* note 42.
2. N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 9 (1986).
3. *Id.* at 25.

traffic in the hands of a shrinking number of carriers is continuing.[144]

Professor Rakowski also points out that not only do economies of size and scope create advantages for larger trucking firms,[145] but marketing economies, or the ability of larger carriers to serve a broader geographic area ubiquitously, "exist in the LTL business which give the larger carriers an edge in securing traffic in the new deregulated environment."[146]

H. The Impact of Deregulation on Small Communities

Another adverse effect of deregulation is its impact upon small community service and pricing.[147] In motor carriage, we have not yet seen the full impact of deregulation because there has been no federal preemption of intrastate trucking. Therefore, the deleterious consequences have been somewhat blunted. The overwhelming majority of states continue to regulate motor carrier entry and pricing.[148]

However, in those transport sectors where the federal government has preempted the states, the adverse impact upon small community service has been quite profound.[149] For example, after enactment of the Staggers Rail Act of 1980, more than 1,200 small communities lost all of their rail service.[150] Since promulgation of the Airline Deregulation Act of 1978, more than 130 communities have lost all air service.[151] And four years after promulgation of the Bus Regulatory Reform Act of 1982, more than 4,500 com-

144. *Id.* at 26 (emphasis in the original).
145. Rakowski, *The Market Failure in LTL Trucking: What Hath Deregulation Brought?*, 56 TRANSP. PRAC. J. 33, 36 (1988). "[I]t is evident there are definite economies of size or scope, even if the economy of scale issue is still unsettled. What this means in the marketplace is that, other things being equal, larger firms offering a superior service with more terminals and more points served have a greater probability of getting the freight." *Id.* at 36.
146. Rakowski, *supra* note 134.
147. P. DEMPSEY, *supra* note 1, at 195-216. Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987).
148. Since the Motor Carrier Act of 1980, only five states have deregulated their motor carrier industries. P. DEMPSEY, *supra* note 1, at 217.
149. Under the provisions of the Airline Deregulation Act, state jurisdiction over intrastate air service is totally preempted. And the Bus Regulatory Reform Act of 1982 gave the ICC jurisdiction to reverse PUC denials at bus discontinuances and rate increases. P. DEMPSEY, *supra* note 1, at 199.
150. P. DEMPSEY, *supra* note 1, at 210 n.26.
151. Goetz & Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 947 (1989). Havens & Heymsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641, 673 (1981). Should the federal subsidies for such service dry up, a significant number of them—perhaps most—would lose all air transport service. That is of significant concern when one realizes that 80% of 500 U.S. firms revealed that they would not locate a facility in a community which did not have reasonably adequate air service. *The Economic Impact of Federal Airline Transportation Policies on East Tennessee: Hearings Before the Senate Committee on the Budget*, 99th Cong., 1st Sess. 12-13 (1985) (testimony of Eugene Joyce).

nities had lost service, while fewer than 900 had gained it.[152] Even Alfred

·2. Letter from ICC Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 5) (source not available to the editors). The Bus Regulatory Reform Act of 1982 [BRRA] ficantly liberalized entry, exit and pricing of the U.S. bus industry, and largely preempted ıtates. 49 U.S.C. § 10922 (1988). Paradoxically, while the BRRA was premised on the ɔn that deregulation would enhance competition, the result has been a higher level of entration than has ever existed in the industry, poorer returns than have ever been zed, and a large and growing number of small community abandonments.

ıe BRRA liberalized entry by removing the requirement that applicants prove "public enience and necessity," leaving them with the obligation to establish only that they are willing and able" to provide the proposed operations. A protestant must then prove issuance of the authority sought will not be in the public interest. H.R. REP. NO. 97-97th Cong., 1st Sess. 29 (1981). Abandonments became easier too. Moreover, industry osed intrastate abandonments and price increases denied by the State Public Utility missions could now be appealed to the Interstate Commerce Commission, where they almost always reversed.

the first year under the BRRA, the bus industry announced termination or reductions rvice at 2,154 communities. U.S. DEP'T OF AGRICULTURE, RECONNECTING RURAL AMER-20 (1989) [hereinafter RECONNECTING RURAL AMERICA] (source not available to the ırs). The ICC estimated that 1,045 communities that lost service in the first year of ɡulation had no alternative intercity transportation. *Id.* By late 1986, 4,514 communities ost bus service, while only 896 had gained it. The big losers were small communities—2 of the small towns which lost service had a population of 10,000 or less. Letter from Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 1986), *supra*. This loss rvice falls particularly hard on nonmetropolitan and rural populations, which have a ɛr percentage of children and elderly who need access to public intercity transport than ·ban areas. *See* RECONNECTING RURAL AMERICA, *supra* at 8.

ıo suffers when bus service deteriorates or becomes more expensive? Individuals in the ıt income groups, people living in rural areas, and the young and elderly rely dispro-onately upon buses for transportation.

ring 1977, the last year the U.S. Department of Commerce performed a travel survey, of all intercity bus passenger miles were traveled by individuals living in rural areas, ıared to trains (20%) and airlines (15%); families earning less than $10,000 a year ac-ted for 45% of intercity bus passenger miles, compared to trains (25%), automobiles), and airlines (15%). The trend continues. A 1988 survey by Greyhound Lines Inc. led that 44.8% of its passengers were from families which earned less than $15,000 a R. NATHAN, FEDERAL SUBSIDIES FOR PASSENGER TRANSPORTATION, 1960-1988: ıERS, LOSERS, AND IMPLICATIONS FOR THE FUTURE 17 (1989) [hereinafter R. NATHAN]. le under the age of eighteen or over the age of sixty-four accounted for half of intercity assengers, compared to automobiles (33%), railroads (25%), and airlines (17%). *Id.* at).

e isolation of rural America has had a pernicious social and economic impact. *See* Demp-*ɬate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This ıngered Species*, 32 AM. U.L. REV. 335, 343-44 (1983). The U.S. Department of Agri-ɛe recently summarized the impact of deregulation upon small towns and rural com-ties:

Many rural residents no longer have intercity public transportation available to them. s no longer possible "to get from here to there." The combined effect of rail, air, l bus deregulation has simply removed many rural areas from the intercity transpor-on network. In those small communities where some form of intercity transportation ill available, the cost of travel has risen, sometimes dramatically. . . .

The net result for many rural residents is increased isolation from society at large, as ing with other communities becomes more and more difficult. An alternative for ıe elderly people is to move away from their homes in rural areas to an urban area—ɛre they no longer have the support of their local community network and where y may require the support of human services agencies to remain independent. . . .

T]here may be an incremental addition to a larger trend toward increased isolation rising costs for rural communities. As costs rise, businesses close, thereby reducing

Kahn saw a need for economic regulation to protect service to small communities, saying, "I'm not sure I would ever have deregulated the buses because the bus is a lifeline of many small communities for people just to get to the doctor or to the Social Security office."[153]

The national air system, the national rail system, and the national bus system have all suffered a loss in the number of communities served under deregulation.[154] Paradoxically, the U.S. transportation system is shrinking despite the fact that the nation's population is increasing. The loss of transport services creates an outmigration of investment, jobs, and population to crowded urban areas, a social consequence which may not be desirable.

the number of services available locally. And as the number of services decline, residents are forced to travel farther to access medical care, shopping, employment opportunities, and social and recreational outlets. As people travel to meet basic needs, the cycle of decline is reinforced as individuals combine their trips to the larger community to include the doctor, the shopping center, and the theater—and bypass the local business as an additional, unnecessary stop. Eventually, population declines as access to basic services becomes too difficult or too costly for rural residents to sustain.

RECONNECTING RURAL AMERICA, *supra*, at 26-27. The U.S. intercity bus network is shrinking under deregulation. Peaking at 27.7 billion intercity passenger miles traveled in 1979, it has fallen steadily each year since to 23 billion passenger miles in 1987. R. NATHAN, *supra*, at Appendix B, Table B-1.

Prior to its deregulation, industry officials predicted that deregulation would result in drastic service reductions to small communities. Harry Lesko, president of Greyhound of Arizona, said that "Eighty-nine percent of our routes are subsidized by the bread-and-butter primary routes. . . . [I]f we are to keep our lines running and the scheduled miles operating on the primary routes to satisfy the high-density population factors, the rural areas are going to have to suffer because they're straining the main line system." *Intercity Bus Service in Small Communities: Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. 17 (1978). Similarly, Charles Webb, president of the National Association of Motor Bus Owners, insisted that "[t]he one conclusive argument against removal of controls on entry by motor carriers of passengers stems from their obligation to provide service to thousands of small cities and towns and to vast rural areas either without profit or at a loss, and from the fact that it would be unconscionable either to permit new entrants to skim the cream of the traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation." Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 105 (1976). *See* P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 205 (1989).

Moreover, the loss of bus service means the loss of the most fuel efficient and least pollutive mode of transport. R. NATHAN, *supra*, at 20-24. In 1985, the various modes consumed the following amounts of fuel per passenger mile:

FUEL CONSUMPTION BY MODE

Mode	Bus per passenger mile
Buses	1,323
Trains	2,800
Automobiles	4,040
Commercial Aviation	4,376
General Aviation	11,339

Id. at 20.

153. Testimony of Alfred Kahn Before the California Public Utilities Commission on Cross Examination by Paul Stephen Dempsey at 6337 (Jan. 31, 1989) [hereinafter Kahn Oral Testimony].

154. *Id.* at 6300-01.

tudies performed by DOT during the first five years of deregulation gested that LTL service had increased for small communities. However, ıore recent study of small community service finds the trend to be just opposite. Comparing service between 1976 and 1988 at 4,326 points in ven western states, Folger Athearn, Jr., found that 66% lost all their LTL vice. He concludes,

> his study, conducted more than three years after the last of the DOT studies, ıdicates that short-term gains have been replaced by long-term losses in LTL :rvice due to numerous motor carrier bankruptcies and/or the abandonment f their common carrier obligations by financially distressed truckers. These :sults confirm the predictions of those who were opposed to trucking deregu-tion.[155]

rices also appear to have increased significantly for small towns which receive motor carrier service.[156] As we shall see below, many commu-es are served solely by United Parcel Service. UPS sets a price somewhat er than the United States Postal Service for small parcels, but enjoys fit margins well above those of other industries, suggesting a pricing ıcture reflecting its monopoly position in the market.

loreover, many large carriers are refusing to provide discounts on inter-movements.[157] Hence, local regional carriers are unable to provide the ll communities they serve with the discounts enjoyed in the national ing structure. This means that pricing to and from small communities igher, on average, than competitive rates in larger markets.

ome deregulation proponents contend that, prior to deregulation, the took no action to ensure that regulated carriers provide service to small ımunities. In fact, the administrative scheme of licensing entry encour-d a continuation of service to small communities. Since new certificates ıld be granted where an applicant could establish that "existing service inadequate," under regulation, incumbents had an incentive to provide quate service to all points in their certificated territories, so as to main-the economies of density they enjoyed.[158] Satisfaction of the common ier obligation was mandated by the informal activities of the predereg-ion ICC Bureau of Enforcement in response to service complaints. eover, the overwhelming majority of states, both before and after fed-

5. Athearn, Jr., *LTL Service in the West: Long-Term Losses Replace Short-Term Gains*, TRANSP. F. 98 (1989).

6. Thomas Gale Moore, a nationally recognized proponent of deregulation, admits that of small communities have suffered a loss of air service since deregulation began, while t prices have increased disproportionately for them. Moore, *U.S. Airline Deregulation: Its ts on Passengers, Capital, and Labor*, 29 J.L. & ECON. 1, 15, 18, 28 (1986).

7. Dolan, *Benefits of Economic Regulation of Oregon Intrastate Motor Carriers*, 17 TRANSP. 235, 262 (1989).

8. *See* P. DEMPSEY & W. THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 5 (1986); Dempsey, *supra* note 5, at 1; Dempsey, *Entry Control Under the Interstate Com-Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 E. FOREST L. REV. 729 (1977).

eral deregulation, regulate intrastate motor carriage. In some states, rate averaging ensures cross-subsidization for small community service. Hence, intrastate regulation assures that many small communities continue to receive adequate motor carrier service.

Prior to deregulation, small shippers enjoyed statutory protection against pricing and service discrimination.[159] After deregulation, interstate pricing discrimination is pervasive. As noted above, large shippers with monopsony power unilaterally dictate significant discounts below the full published rates, rates which are climbing to make up for the erosion of carrier productivity.

Many deregulation proponents point to studies financed by the U.S. Department of Transportation on intrastate deregulation in Florida and Arizona in 1982 and 1984 to support the hypothesis that rates have declined.[160] Of course, that period of economic recession was the worst since the Great Depression, so one would expect transportation prices to fall as manufacturing declined. In addition, these studies were based on questionnaires, or attitudinal-perception data, rather than on "hard" data. Professor Chow notes that significant disparities can result in research prepared under these alternative methodologies.[161] For example, asking a small shipper who receives a 5% discount off the published rate whether he feels that rates are reasonable might elicit a different response if he was informed that the large shipper across the street enjoys a 70% discount for equivalent shipments.

The DOT studies also concluded that while "common carrier service [in small communities] is perceived to be of low quality accompanied, sometimes, by high rates," service was considered to be adequate because of the existence of private carriage and United Parcel Service.[162] That is, indeed, an interesting observation, for UPS has a virtual monopoly on small package shipments. UPS dominates about 80% of the small parcel market nationally, while the United States Postal Service carries most of the rest. UPS participates in proceedings of the U.S. Postal Rates Commission arguing for higher and higher U.S. Postal Service rates for small packages. The result is that UPS is able to capture the lion's share of the small parcel market simply by underpricing the U.S. Postal Service. As Chart XIII reveals, UPS's market power has enabled it to earn supracompetitive profits, far higher than the rest of the motor carrier industry and, indeed, higher than the average for

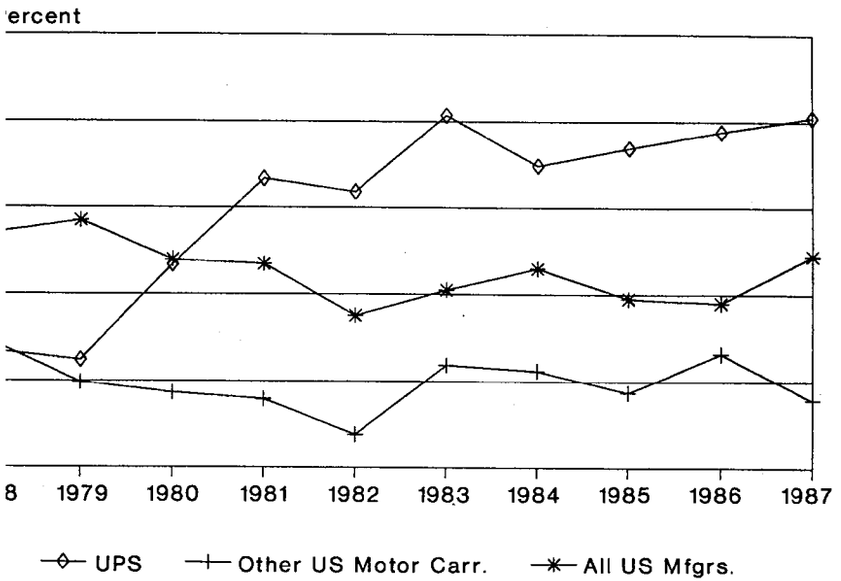
159. Dempsey, *Rate Regulation and Antitrust Immunity in Transportation*, *supra* note 152, at 335.

160. Virtually every study prepared or financed by the U.S. Department of Transportation during the last decade has concluded that transportation deregulation is a success.

161. Chow, *An Evaluation of Less-Than-Truckload Transport in Small Rural Communities of Western Canada*, 19 LOGISTICS & TRANSP. REV. 225 (1983).

162. Beilock & Freeman, *Deregulated Motor Carrier Service to Small Communities*, TRANSP. J. 71, 74 (Summer 1984).

Chart XIII—Relative Profit Margins



merican industry.[163]
ence, during the 1980s, UPS has outperformed not only the ailing mo-
carrier industry, but the average of all manufacturing industries in the

3.

RELATIVE PROFIT MARGINS

ar	UPS	Other U.S. Motor Carriers	All U.S. Manufacturers
78	2.70%	2.92%	5.4%
79	2.48	1.97	5.7
80	4.69	1.73	4.8
81	6.67	1.58	4.7
82	6.37	0.77	3.5
83	8.14	2.37	4.1
84	6.97	2.24	4.6
85	7.38	1.74	3.9
86	7.76	2.64	3.8
87	8.10	1.57	4.9

United States, even during the recession and the period of high fuel prices which dominated the early portion of that decade. This could not have occurred unless UPS had market power to set its prices above competitive levels. Market power is the ability of a firm to maximize profits by maintaining prices above or restricting output below the competitive level for a significant period of time.[164] The result is a transfer of wealth from consumers to producers, and is therefore regressive in character.

In fact, UPS has grown to be the dominant transportation company of all modes, with gross revenues of $12.4 billion in 1989, and profits of nearly $700 million—the largest of any transportation firm in the nation.[165] But if UPS is earning supracompetitive profits, why have new entrants not been attracted to its markets like sharks to the smell of blood? Under the theory of contestability (upon which deregulation was largely premised), new entry, or the threat thereof, should hold profit margins down to competitive levels. But entry into the less-than-truckload industry has proven difficult because of the high costs incurred in developing terminal operations geared to the movement of small shipments. As noted above, major LTL trucking companies utilize a network of hub-and-spoke systems which include hundreds of satellite terminals and dozens of large consolidation centers.[166] Such factors have coalesced effectively to prohibit a single major LTL carrier from emerging since *de facto* deregulation of U.S. trucking began in 1978. [167] In fact, not only has a new competitor not emerged, poor levels of productivity, excessive capacity, numerous bankruptcies, significant economies of scale and scope, and economic barriers to entry have caused the number of major LTL carriers to dwindle significantly since deregulation.

IV. TOWARD A NEW THEORY OF ECONOMIC REGULATION

A nation's government is inextricably intertwined with its economy. Neither trade nor, indeed, civilization can proceed without government. In modern western nations, government guarantees property rights, sets standards of fair trade, provides a forum for peaceful dispute resolution, and maintains currency as a medium of exchange. These things are essential if commerce is to flow freely. Prospects for economic growth are dim in a state

Profit margins are calculated on the basis of net after-tax income as a percentage of gross revenues. The first column is derived from UPS Annual Reports over the years in question. The last two columns are taken from Dempsey, *The Deregulation of Intrastate Transportations: The Texas Debate*, 39 BAYLOR L. REV. 1, 9 (1987), P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 16 (1989), and ATA MOTOR CARRIER ANNUAL REPORT over the years in question.

164. *See* Dempsey, *Antitrust Law and Policy in Transportation: Monopoly I$ the Name of the Game*, 21 GA. L. REV. 505 (1987).

165. *The Service 500*, FORTUNE, June 4, 1990, at 297, 328.

166. *Is Deregulation Working?*, *supra* note 132, at 53.

167. *Id.*

ıaos and anarchy. Order and predictability are required—sheriffs and shals are necessary to enforce legal rights and responsibilities. Even pri- consensual ordering via contract and property transactions requires ernment and its law as a means of dispute resolution. Thus, govern- t's participation in the economy is essential.

ı modern nations, the fundamental question is not whether government participate, but to what extent it shall participate. Hence, governmental icipation is a matter of degree. How shall a nation allocate decisional onsibility between private entrepreneurs and government over such ers as the price, quantity, and quality of goods produced? Additionally, shall a nation allocate decisional responsibility between producers, on one hand, and consumers, employees, and the general public, on the r?

ı socialist economies, the government itself owns the means of produc- and allocates resources by dictating the level of production, which goods be produced, and at what price they'll be sold. This is an extremely cult task, and several European communist nations appear to be aban- ng that system as costly, inefficient, and wasteful. In capitalist nations, production decisions are made by private entrepreneurs, driven by a it motive to invest their own capital into privately owned and operated rprises.

rofit is a two-edged sword. On the one hand, it serves as an effective ulant for efficiency, productivity, and responsiveness to consumers, who votes of approval in the form of currency in favor of those entrepre- s who best satiate their desires. The lure of profit encourages producers im costs and satisfy consumer tastes and preferences. In a fully com- ive environment, consumers receive the goods and services they want ıe lowest cost to society for their production—something economists ribe as "allocative efficiency."

n the other hand, profit inspires greed, producing the classic Scrooge, niser, who will do anything to maximize his personal wealth, such as workers slave wages and dangerous working conditions, pollute the air the water with carcinogens, ruthlessly subvert competitors and com- ion, and satiate the public's hedonistic desire for sex and drugs—all for ust of wealth.

any of these results are deemed undesirable by modern societies. So in alist nations, government is employed in a somewhat schizophrenic ca- y—as a means of facilitating the attributes of freedom in a market, circumscribing those noxious results of too free a market. Govern- t intrudes both to facilitate the cornucopia of goods and services private ership can bring and to protect the public against harm.

gain, line drawing becomes a problem. Which things ought to be en- aged in a market and which discouraged? In democratic nations, these ions are left to elected representatives, who essentially draw lines, gen-

erally reflecting the will of the people, in laws which define the metes and bounds of acceptable behavior.

Free market economists argue that the lines should be drawn in a way which attempts to create perfect competition, which will achieve "allocative efficiency." While perfect competition exists in economic models, it rarely exists in the real world.[168] Even in economics textbooks, it requires some rather strict assumptions—for example, that preexisting or resulting distributions of wealth are irrelevant, that consumers have perfect information, that they and producers behave rationally, and that no single producer has "market power" (the ability to increase profits by unilaterally constricting production or raising price).[169] Since these things often do not exist, government becomes involved to correct for "market failure," trying to encourage fair competition. Antitrust laws are an example of governmental intervention designed to punish efforts to diminish competition.

But even if perfect competition could be achieved, economic goals are not the only goals of a nation. A nation is a political body, and sometimes it chooses to achieve social goals which may even diminish efficiency in the distribution of its resources. For example, a nation may decide to transfer wealth to the elderly or the poor, even though they are unproductive.

The choice among economic and social goals is a difficult one, and is further complicated by the wide variety of means available to achieve such goals once identified. Government can attempt to (1) completely ban the enterprise (illicit drugs and prostitution); (2) own and operate the industry (public education and the postal system); (3) regulate levels of pricing and service (electricity and telephones); (4) regulate industry standards and qualifications (the legal and medical professions, or cigarette advertising); (5) sanction undesirable behavior through the judiciary (antitrust and punitive damages for products liability); (6) tax and spend (high taxes on alcohol, and subsidies for low-income housing).

What is this thing, regulation, which had become such a monster that its eradication was pursued with such triumphant zeal? Regulation involves government oversight. In effect, and in a general sense, the government looks over the shoulder of the private entrepreneur and says to him: "You have an obligation to serve the public interest. You shall neither exploit nor harm your consumers, your workers, or others. You are entitled to make a fair profit, and no more. But you must also serve the public interest."

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168. According to theory, the market is self-correcting—demand adjusting the amount of supply to produce equilibrium. This, however, is a theory which can be demonstrated only in the laboratory. If there is any impurity in the real arena, the formulae break down. Unfortunately, impurities are not merely a possibility, they are a certainty. The free market extremists fail to perceive the noneconomic forces which abound: political forces, social forces, as well as the impossibility of manifesting an industry with the requisite characteristics of perfect competition.
Waring, *Motor Carrier Regulation—By State or by Market?* 51 ICC PRAC. J. 240, 241-42 (1984).

169. *See* Dempsey, *supra* note 9.

nd what is the public interest? It is the interest of all who are affected he industry—consumers, shippers, consignees, stockholders, highway ɔrists, managers, and employers, large and small, urban and rural—to y safe, adequate and dependable service at a reasonable price . . . to be :ed fairly. It is also the national interest in such things as ubiquitous ice and national defense.

egulation is as old as the republic. Early on, the nation imposed tariffs ɪ foreign imports and set standards of weights and measurement. The ern age of regulation is commonly thought to have begun in 1887 with creation of the Interstate Commerce Commission—the nation's first pendent regulatory agency—to regulate the most important infra- cture industry of the era, the railroads. Antitrust law (in effect, a reg- ɔry enterprise employing different means) followed shortly thereafter the promulgation of the Sherman Act of 1890 and the Clayton Act of 4.

. major growth of regulation occurred during the 1930s in response to economic collapse created by what then was perceived to be too free a ket. During the New Deal, a number of additional regulatory agencies e created to regulate industries and enterprises important to the nation's ıomy—including the Federal Communications Commission, the Secu- s and Exchange Commission, the Federal Power Commission, the Na- al Labor Relations Board, and the Civil Aeronautics Board. The U.S. reme Court expressed the tenor of the times:

>]here has been a growing appreciation of public needs and of the necessity of ıding ground for a rational compromise between individual rights and public elfare. The settlement and consequent contraction of the public domain, the essure of a constantly increasing density of population, the interrelation of e activities of our people and the complexity of our economic interests, have evitably led to an increased use of the organization of society in order to protect e very bases of individual opportunity. Where, in earlier days, it was thought at only the concerns of individuals or of classes were involved, and that those the state itself were touched only remotely, it has later been found that the ndamental interests of the state are directly affected; and that the question is ɔ longer merely that of one party to a contract as against another, but of the e of reasonable means to safeguard the economic structure upon which the ɔod of all depends.[170]

he next major wave of regulation occurred during the 1960s, taking a erent form by focusing on such problems as the environment, safety, lth, and consumer protection.

hese instances of growing government reflect an evolution in the na- ıal psychology in which communitarian values came to supplant a tradi- ıal individualistic or more libertarian ideology. As noted above, it came ɔe recognized that in a crowded, interrelated society, the actions of in-

'0. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934).

dividuals affect us all. It was the public interest that regulation was created to satisfy.

Government as a participant in economic decisionmaking has come in for a rhetorical savaging during the past decade, in a political movement which saw most restraints on economic freedom as a nuisance at best and wasteful and unnecessary at worst. The political creed of "deregulation" became the ideological centerpiece of an economic policy which had laissez faire as its foundation.

In the 1970s, inflation drove many to complain about the aggregate drag on the economy provided by comprehensive governmental oversight. American business objected to the Kafkaesque metamorphosis of government into a grotesque creature it did not understand. Presidents Ford, Carter, and Reagan pursued an aggressive policy to eradicate regulation. In one instance, Congress abolished a regulatory agency (the Civil Aeronautics Board), and sowed the ground with salt.

In part, the new wave of individualism is a response to regulatory failure—the perceived inefficiency and waste engendered by an unresponsive and lethargic government bureaucracy. But it also reflects a more deep-seated ideological notion of individual freedom, a notion which is at the root of the American experiment in liberty.

The trouble is, we cannot do without government. Someone must pave the roads, deliver the mail, and protect the borders. And collectively, we can do things we cannot do individually—like maintain parks in cities and educate all our children. So again, it is not a question of whether we will have a government, but one of how much government we shall have, and what it shall do.

In a homogeneous society, such as that of many of the nations of Europe, communitarian values find less resistance. Collectively, there is a public consciousness and responsibility in these nations by those who have to assist those who have not, for they are alike in race, religion, and culture. But in a heterogeneous society, such as that of the United States, those in need are not like those who are not; hence, there is perhaps more resistance to communitarian values here than abroad.

But the pendulum on things political, legal, and economic tends to swing as popular opinion evolves. Just as regulatory failure brought cries for deregulation, market failure will inevitably bring demands for reregulation.[171] The excesses of one generation become the catalysts for reform of the next.

Indeed, that trend already appears to be emerging. Fresh with indigestion with a myriad of problems, Congress has recently considered bills proposing reregulation of various aspects of the cable television, railroad, airline, telephone, savings and loan, and broadcasting industries. Many politicians have expunged "deregulation" from their campaign speeches as the dreaded "D" word.

171. *See* Dempsey, *supra* note 9.

ıus, among the most important issues facing our government is what be the proper relationship between government and our economy, and government can achieve desirable social and economic goals most ef- ntly and at least cost. How can we tailor the governmental solution to economic and social problems without making things, on balance, worse they were before government intervened? It is the position of the au- that neither rigid governmental supervision nor laissez faire is realistic sponsible. With that as a starting point, let us examine the origins of omic regulation of the motor carrier industry.

oblems of destructive competition in the motor carrier industry, seem- endless bankruptcies, and the deterioration of wages, working condi-, and safety they create, gave birth to economic regulation in the 1930s. ıis author has noted elsewhere:

ring the Great Depression, the motor carrier industry was plagued with an ersupply of transportation facilities. Intensive competition among truckers pressed freight rates excessively and caused hundreds of bankruptcies. Entry o the industry was easy. The ranks of the unemployed provided an endless ol of drivers; with a drivers license and a used truck they could haul goods hire. Not knowing what their costs were, or victimized by shippers with ater market power, they frequently took traffic at below-cost rates. They ve for gas money, or to cover their monthly payments on the truck, and kept ling until needed repairs brought the truck to a halt. Soon they were bankrupt, ile their truck was patched up and sold to yet another entrant and the cycle eated itself. All the while, efficient and productive trucking companies and lroads were also hemorrhaging dollars.[172]

en preceding the Great Depression, as early as 1926, the U.S. Depart- t of Agriculture issued a report concluding that entry and rate stabili- n of highway transport would be beneficial to prevent overexpansion.[173] nning that year, Congress, in each session, considered bills for economic lation of the motor carrier industry.

veral economists of the day also advocated the need for economic reg- on. In 1928, at a meeting of the American Economic Association, Wil- M. Duffus declared, "Most students of transportation will agree, I think that there must be some sort of central planning looking toward the dination of our various transportation agencies on a sound economic financial basis.[174] Henry R. Trumbower argued that rail and motor age "should be regarded as a regulated monopoly."[175]

her economists agreed. Shan Szto condemned excessive competition as ıo benefit to anybody," making the industry "unattractive to respon-

. P. DEMPSEY, *supra* note 163, at 16-17.
. W. JACKMAN, *supra* note 26, at 846-47.
. R. FELTON & D. ANDERSON, REGULATION AND DEREGULATION OF THE MOTOR IER INDUSTRY 7 (1989) (quoting Duffus, *Commercial Motor Transportation—Discussion*, CON. REV. Mar. 1929, at 249.
. *Id.*

sible business people."[176] Harold G. Moulton and his Brookings Institution associates criticized the waste and instability created by excessive competition and urged comprehensive coordination of transportation.[177] D. Philip Locklin summarized the inherent characteristics which warranted economic regulation: "The ruinous type of competition does develop; discrimination in rates does appear; the condition of overcapacity does not correct itself automatically; and the struggle for survival in the face of inadequate revenues leads to deterioration of safety standards, evasion of safety regulations, financial irresponsibility and generally unsatisfactory service."[178] Professor Paul Kauper noted that "The 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."[179]

The Great Depression exacerbated the problems which had surfaced in transportation. In 1933, the Interstate Commerce Commission concluded that the ease of entry and the inadequate knowledge by unsophisticated entrepreneurs of their costs "condemned the industry to chronic instability and excessive competition."[180] Specifically, the ICC found that rate instability resulted in "widespread and unjust discrimination between shippers. . . . the loss of much capital invested. . . . [a] tendency to break down wages and conditions of employment . . . [and an] [i]ncrease in the hazard of use of the highways."[181] Two years later, the federal coordinator of transportation, Joseph B. Eastman, expressed even greater concern over the economic chaos plaguing the industry, which was caused by unlimited entry and exacerbated by the Great Depression.[182] Note the striking similarity between the economic conditions which preceded deregulation and the empirical results of deregulation, summarized above.

In promulgating the Motor Carrier Act of 1935, giving the Interstate Commerce Commission entry and rate regulatory jurisdiction over trucking and bus companies, the 74th Congress concluded:

> Motor carriers . . . are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an ex-

176. *Id.* (quoting S. Szto, Federal and State Regulation of Motor Carrier Rates and Services, 13, 24 (1934) (U. of Penn. Ph.D. diss.)).
177. *Id.* at 8 (citing H. MOULTON & ASSOCIATES, THE AMERICAN TRANSPORTATION PROBLEM 889-90 (1933)). Sadly, Brookings today is a bastion of laissez faire ideologues who attack economic regulation at every opportunity and who insist that deregulation has produced billions of dollars in consumer savings.
178. *Id.* (quoting D. LOCKLIN, ECONOMICS OF TRANSPORTATION 670 (7th ed. 1972)).
179. Kauper, *State Regulation of Interstate Motor Carriers*, 31 MICH. L. REV. 1097, 1111 (1933). *See also* Kauper, *Federal Regulation of Motor Carriers*, 33 MICH. L. REV. 239 (1934).
180. R. FELTON & D. ANDERSON, *supra* note 174 at 5 (citing *Coordination of Motor Transportation*, 182 I.C.C. 263, 362-63 (1932)).
181. *Id.* (citing *Coordination of Motor Transportation*, 182 I.C.C. 263, 383 (1932)).
182. *Id.* (citing S. DOC. NO. 152, 73d Cong., 2d Sess. 14 (1934)).

:reme which tends to undermine the financial stability of the carriers and jeoardizes the maintenance of transportation facilities and service appropriate to :he needs of commerce and required in the public interest. The present chaotic :ransportation conditions are not satisfactory to investors, labor, shippers, or the :arriers themselves. . . .

. .

. . The ultimate objective of [the Motor Carrier Act of 1935] is a system of :oordinated transportation for the Nation which will supply the most efficient neans of transport and furnish service as cheaply as is consistent with fair treatnent of labor and with earnings which will support adequate credit and the ıbility to expand as need develops and to take advantage of all improvements n the art. All parts of such a system of transportation should be in the hands of :eliable and responsible operators whose charges for service will be known, dependable, and reasonable and free from unjust discrimination.[183]

[n the eyes of the early advocates of regulation, transportation was parularly prone to alternative periods of destructive competition and mopoly or oligopoly. Because of the tremendous economies of scale along ıny different dimensions exhibited by much of the transport sector, the t-of-pocket or marginal cost of providing service tends to lie far below its ll or average cost. Moreover, transportation firms sell what is, in essence, the nature of an instantly perishable commodity. Once the truck leaves terminal, any unused space is lost forever. It cannot be warehoused and d another day as could, say, canned beans.

Alfred Kahn once remarked that he could see no difference between ınsportation firms and grocery stores. Imagine a grocer who was selling mmodities which had the spoilage properties of open jars of unrefriger:d mayonnaise. He would be forced to have a "fire sale" every afternoon order to rid himself of unsold inventory, for it could not be warehoused d sold another day.

So it is with transportation capacity. Unlimited entry creates excessive pacity which, in turn, creates destructive competition and economic ane-a. Hence, unconstrained competition in these circumstances tends to drive e price down towards marginal cost, causing profits to disappear. Bankptcies and mergers ensue as excess capacity is weeded out, and a profitable onopoly or oligopoly inexorably emerges. The restoration of market power ıy well be accomplished by a blatantly discriminatory rate structure with ice differences between markets reflecting not relative costs, but the dif-ing degree of competition.

[n the view of the early advocates of regulation these two phenomena—structive competition and powerful monopolies—were simply two sides the same coin. The purpose of regulation, under these circumstances, s to eliminate this Hobson's choice for consumers: preventing the poten-l threats to safety, service and investment posed by destructive competi-

83. S. REP. NO. 482, 74th Cong., 1st Sess. 2-3 (1935).

tion, on the one hand, and the price-gouging and price discrimination associated with market power in a consolidated industry, on the other.[184] A healthy competitive environment was envisioned, with government protecting the public interest by establishing the perimeters of lawful behavior.

In addition to the discriminatory pricing that deregulation has unleashed, declining productivity engendered by excessive capacity appears also to have caused destructive competition between the motor carriers themselves.[185] And it is worse for motor carriers than it is for the other modes of transport.

Railroads and airlines have significant advantages that motor carriers do not. True, all sell an instantly perishable product, and the short term marginal costs of production are nil (adding an extra passenger to a scheduled flight costs the airline only a few additional drops of fuel and another bag of peanuts). Yet (like telephone, electric and gas distribution companies) railroads and airlines can control a bottleneck—monopoly rail lines or airport infrastructure, respectively—and therefore exert market power to raise prices or reduce service levels to maximize profit. Thus, air fares for passengers who begin or end their trips at a concentrated hub airport are 27% more expensive than for passengers who do not. Electric utilities claim their rail rates for coal from monopoly railroads are exorbitant.

In contrast, while a motor carrier can build a terminal facility which it operates exclusively, a competitor can build its terminal facility across the street. Thus, until the trucking industry becomes very highly concentrated, there will be relatively and significantly less opportunity to enjoy market power vis-à-vis the other modes, for truckers control no equivalent bottleneck.

Second, airlines can, by lowering prices, tap the elasticities of demand to stimulate significant new business. Lower prices can lure the discretionary traveler to fill a seat which might otherwise go empty. A $99 fare will fill planes with throngs of passengers off to Disneyland (or, for that matter, Wally World) who might not otherwise make the trip. In contrast, trucking companies cannot, by lowering prices, appreciably increase the volume of freight shipped, for transportation rates are too small a percentage of the total cost of most products to stimulate significant additional demand. Certainly, trucking companies can steal freight away from competing motor carriers or from railroads by lowering prices. But the aggregate volume of freight shipped will not grow appreciably.

Third, motor carriers are subservient to the whims of large shippers who, by threatening to withhold their vast volumes of freight, can unilaterally dictate rates far below the carriers' average costs. In order to survive, the carrier must cover its fixed costs by charging discriminatory prices—significantly higher rates charged to smaller and rural shippers.

Motor carriers have only a couple of shields from the ravages of destructive competition. First, an overwhelming number of states have rejected the fed-

184. P. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 4 (1990).
185. *See* Murray, *Turmoil in Trucking*, DUN'S BUS. MONTH (May 1982).

experiment in motor carrier deregulation and continue to regulate in-
ıte trucking. Second, the antitrust immunity accorded rate bureaus allows
rationality in the rate structure. Incredibly, the U.S. Department of
ısportation would like to do away with both of these protections.
rely, other industries sell services which are in the nature of instantly
hable commodities and which have *de minimis* short term marginal
—hotels, movie theaters, bowling alleys, to name a few. Most can avoid
uctive competition by making up fixed costs on auxiliary products and
ces. For example, concessions of popcorn and soft drinks are the real
t centers for the oligopoly theaters (they lose money or break even on
ssions). For the moviegoers in the theater, these are monopoly conces-
. Hotels earn significant income from restaurants, room service, con-
on services, and leased space for shops in the lobby, and can differentiate
products based on location and class of service.
ansportation firms have only two major variables with which to differ-
te their product—speed and price—and have nearly no auxiliary mo-
ly opportunities with which to make up fixed costs. Moreover,
portation is even more prone to instant perishability than are hotel
ıs or bowling alleys. Empty hotel rooms and unused bowling alleys can
ld ten minutes or several hours later. In contrast, once the truck leaves
rminal, the aircraft pulls away from its gate, or the train pulls its cars
from its siding, any empty space is lost forever.
ıre importantly, we don't care whether movie theaters become an oli-
ly charging exorbitant or highly discriminatory prices, for we can stay
and watch television, rent a movie for our VCR, read a good book,
a thousand different things with our leisure time. The numerous
ıatives of leisure keep pricing in check.
ıt transportation is a *necessity*. It is the circulatory system of the nation—
eins and arteries through which commerce flows—and an important
tator of communications. We *must* get our goods to market, and too
, we *must* travel to business meetings (teleconferencing has made only
ıll dent in this market). While discretionary airline travel is sometimes
ctively priced (reflecting the varied alternatives to vacation time, in-
ng driving the station wagon to Lake Wobegon with the kids), business
l is not, and both are often restricted in onerous ways. If these markets
istorted by highly imperfect competition, we suffer distortions in mar-
which depend upon them. Other businesses are adversely affected, and
ipple effect of distortion is pernicious.
ırious sectors of the economy and various regions of the nation can be
sely affected by the aggregate impact of pricing and service discrimi-
n. We depend upon the transportation network to allow us to exchange
s between all regions; this advances several economic and social goals,
as promoting a geographic dispersal of population, avoiding the ills of
crowding, allowing economic and social diversity and pluralism, ex-

panding the production and consumption market, and promoting a geographic distribution of wealth.

Like telephone services, gas and electricity, access to the transportation infrastructure is a necessity for the public, and hence, in the nature of a public utility. None of the transportation firms individually are public utilities, but the national transportation *system* is at least a quasi-public utility. The system is the fabric that binds the nation together, and regulation is the glue that holds the system together. Prudently administered economic regulation assures that the national transportation system does not disintegrate into its antagonistic parts, and that individual firms cooperate to provide service which, from the perspective of the individual user, works effortlessly. Conversely, deregulation has deleterious systemic effects in creating a regime of transportation firms competing to the death rather than cooperating to ensure that operations flow smoothly.

Motor carrier service must be ubiquitously available at an adequate level and a fair price or the public will suffer. The process of production is not complete until goods are in the hands of consumers. Just as a clogged artery can halt the flow of blood and seriously damage a body organ, a constipated transportation (or energy or communications) system will cause industrial organization to collapse. To return to our previous comparison, the infrastructure industries affect consumers and the economy in a way that bowling alleys do not.

While economists insist that only natural monopolies should be regulated, they ignore the necessity feature of the infrastructure (communications, energy, and transportation) industries. Moreover, certain thin transportation markets are natural monopolies, and all the infrastructure industries, including transportation firms, do tend toward concentration in reaction to destructive competition.

And further, we can regulate transportation firms with a clear conscience because they consume a public resource. Airports and airways and highways belong to the public. Our tax dollars built them, paved them and maintain them. Even the early railroads were given public land on which to build, and even those that weren't have used the government power of eminent domain to obtain their rights of way. Our taxes built the public infrastructure, and therefore, we have a right to exact a *quid pro quo* from the private firms which use them—to demand that these public resources be used in the *public* interest. If we had laid the wood for bowling alleys, perhaps we could justify their regulation (although again, we need not—they are not a necessity, other sectors of the economy don't depend upon them, and alternatives keep pricing in check).

We can legitimately insist that transportation firms satisfy the public need for ubiquitous service at a fair price, that the service not endanger public safety (we have a right not to be killed by the trucks with which we share the highways), and that they will serve the needs of national defense.

udently administered economic regulation can accomplish both eco-
c and social goals deemed to be in the highest public interest. Among
conomic goals is the prevention of distortions created by imperfect
etition. Regulation can avoid the regressive wealth transfers created
arket power, including the monopsony power of large shippers unilat-
to dictate rates which are noncompensatory. Additionally, regulation
meliorate the market power of large carriers, preventing them from
ing excessively high rates to small shippers and undercutting their
eting carriers.

gulation can also avoid the problem of externalities, which manifests
in the impact of inadequate profits upon highway safety and the dis-
natory pricing and service provided to small communities. Shippers have
ng incentive to keep their private fleets of trucks repaired and driven
ll-trained drivers, for the tort system will hold them accountable for any
ent third parties injured or killed because of their negligence. In con-
shippers can use unsafe common carriers with virtual impunity. They
fore have an economic incentive to shave the common carriers' profit
in to the bone, for there is no piercing of the corporate veil to hold
ers accountable for their ruthless greed, so to speak. Because the com-
carrier or its insurer pays for injury to the innocent automobile drivers,
ipper can externalize the cost of unsafe transportation.

course, some injured parties find the carrier in bankruptcy, or without
ance, and are never compensated. And however well money can ease
it often fails to restore health, and never restores life. Thus, exerting
psony power to shave the common carrier's rate below compensatory
can be economically rational for the shipper, while causing undesir-
externalized costs on society in terms of deteriorating safety and loss
man life.

gulation can not only ameliorate the problem of externalities, it can
ccomplish a number of important social goals. It can engender a re-
of cross-subsidization providing for equality of access to all shippers
o all communities, large and small. Regulation can create a geographic
bution of opportunity for economic growth, spread over a larger and
diverse group of participants, thereby enhancing pluralism. It can
e that small and remote users enjoy the same access to the broader
et for the sale of goods as do large firms, thereby enhancing compe-
in that broader market for the sale of goods.[186]

bney Waring, Jr., eloquently summarized the appropriate role of gov-
ent in the market with respect to motor carrier transportation:

ernment has responsibilities, principal among which is maintaining the in-
tructure of essential services necessary for the commerce and amenities of a
ized nation. Certainly the government would be a poor manager of the motor

P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION (1989).

carrier industry or of any business. But it is not management of the motor carriers which is at issue. It is the metes and bounds, parameters, if you will, of performance. It is requiring that carriers fulfill their common carrier obligation; of seeing that service is not abandoned when there is not a viable alternative; of monitoring service offerings to see that capacity is not so far in excess of demand that gross waste results; of opening entry selectively to assure adequate numbers of carriers; of preventing any semblance of predatory pricing; of forbidding exploitation of market dominance situations be they in the area of geography, commodity, size of a shipment, or whatever. Such regulation, however, should leave a significant latitude for managerial discretion in pricing, service options, and operational decisions.[187]

V. CONCLUSION

Recently, the Consumer Federation of America issued a report revealing consumer perceptions of the impact of deregulation. It found: (a) a plurality, perhaps a majority of people, support enhanced regulation; (b) with respect to neither transportation nor communications does a majority believe that deregulation has been in the best interest of individuals or the nation; and (c) a plurality believes that deregulation has hurt consumers.[188] According to the study, support for transportation and telecommunications regulation reached a low point in the early 1980s, but has since climbed back to the higher levels of the 1970s.[189] Support for economic regulation has followed the reverse trend. In a *Business Week* poll conducted in 1987, 49 percent of respondents said "no" when asked whether the results of deregulation of airlines, trucking and telecommunications has been positive, while 46 percent said "yes." It is clear that as Americans become better acquainted with deregulation, they become less enamored with it.

This is not true of the U.S. Department of Transportation. Despite growing evidence of widespread failure, DOT continues tenaciously to insist that "moves to deregulation were almost universally needed and well-founded."[190] Incredibly, DOT believes that even more deregulation would be better. This is the same DOT that issued a long-awaited National Transportation Policy which argued the states should pay for the deteriorating infrastructure of highways, but that they should be preempted from regulating intrastate motor carriage, thereby forcing them to follow the course of deregulation.

Transportation is a part of the broader infrastructure which is the foun-

187. Waring, *supra* note 168, at 242.

188. CONSUMER FEDERATION OF AMERICA, PUBLIC OPINION ABOUT REGULATION AND DEREGULATION IN THE TRANSPORTATION AND COMMUNICATIONS INDUSTRIES (May 1988).

189. *See* 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. 527 (1989).

190. U.S. DEPARTMENT OF TRANSPORTATION, MOVING AMERICA: NEW DIRECTIONS, NEW OPPORTUNITIES 69 (1990).

ɔn for economic growth. In most nations, that infrastructure (commu-
ions, energy, and transportation) is owned, subsidized, or regulated by
rnment. Even the preregulation Anglo-American common law circum-
ed pricing and service discrimination by common carriers. We in the
ed States have recently taken a different path and entered the Brave
World of deregulation and the imperfect economic environment that
eates. Most nations view the infrastructure as an essential foundation
economic growth, and therefore, distortions in it cannot be tolerated.
for that reason that these industries are treated differently from other
ɔrs of the economy. There is also a strong public interest in motor car-
because these firms are users of a public resource—highways—which
shared by nearly all citizens. If carriers are to use this scarce public
ırce, they have traditionally been required to do so in a way that achieves
der social goals.

ıe net impact of deregulation is that the social objectives for which
lation has traditionally been a catalyst have been abandoned. We have
he industry and the public it serves to a highly imperfect market which
reated gross distortions between large and small firms. The net effect
regulation is that the larger users of the system (the large shippers), in
hort run, and the larger providers of the service (the large carriers), in
onger run, are its principal beneficiaries. Small shippers, small com-
ities, and small transportation firms are clearly disadvantaged in an
gulated environment. Professor Rakowski succinctly summarized the
ts of motor carrier deregulation:

> The results of deregulation in the LTL sector have been the opposite of what
> s predicted by the deregulators. Instead of more competition, . . . [we have]
> reasing concentration of both revenues and profits. Instead of more compet-
> rs, there are fewer firms in this segment of the industry now than prior to
> egulation and open entry. Bankruptcies and voluntary departures (often be-
> ıse of impending doom) have thinned the ranks of competitors and there has
> n essentially no new entry.[191]

ıe same problems which exist today in a deregulated trucking environ-
are those which existed in the 1930s prior to motor carrier regulation
ı the 1880s, prior to rail regulation) and differ only in magnitude.[192] A
ɔn which fails to learn from its history is doomed to repeat it. The United
s has an extremely short memory and is prone to reliving its past. The
has come to roll back deregulation.

1. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Truckload Sector*, TRANSP. J. 11, 21 (Spring 1988).

2. In the 1930s, the world was ravaged by the worst economic depression of this century; during the early 1980s, the economy was struggling. After the recession, the economy was much improved. Yet, the same parallels exist between destructive competition in the era preceding regulation and the destructive competition in the 1980s following deregu-

APPENDIX A—Carrier List

No.	Carrier	Number	Bur	Oper Rev	Comments
1	A & H Truck Lines, Inc.	002962	CMB	32,096	Merged into Advance Transportation 1-1-88
2	Advance United	107605	MWB	22,409	Bankrupt 1986
3	Associated Truck Lines	069833	RMB	178,982	Merged with ANR Frt 1-1-86
4	Barber Trans	097699	RMB	18,179	Merged with Human 4th quarter 1986
5	Beacon Fast Freight	067216	NEB	8,665	Out of business May 1985
6	Best Way Motor Freight	009269	PIB	6,768	Ceased operations 1-87
7	Blue Arrow-Douglas	002990	CMB	27,143	Merged with CW Transport 10-3-83
8	BN Transport	063562	RMB	68,339	Chapter 11 1-85
9	Bourne's Trans	099749	MAC	4,824	Ceased operations 10-31-86
10	Branch Motor Express Co.	010875	MWB	149,567	Out of business 8-16-84
11	Briggs Transport Co.	029555	MWB	66,794	Ceased operations 9-18-84
12	Budig Western Trucking	077016	CMB	11,849	Bankrupt 1985
13	Bynes Motor	105275	CSA	18,303	Merged with Helms 1983
14	C W Transport, Inc.	111594	CSA	100,041	Ceased operations 1987
15	Campbell "66"	075320	MWB	86,090	Ceased operations 8-14-86
16	Central Motor Exp.	038320	SMC	4,595	Merged with Yellow Freight 12/82
17	Chickasaw Motor	121597	SMC	1,414	Merged with Service Transport 12-7-84
18	Clairmont	103859	MWB	48,298	Ceased operations 1-11-85
19	Commercial Lovelace Mtr	014252	CMB	84,615	Chapter 11—1984
20	Commercial Mtr Frt	020824	CMB	23,192	Merged with Commercial Lovelace 1982
21	Cook Motor Lines, Inc.	106451	ECA	14,135	Out of business 1-88
22	Curry Motor Freight	060087	MWB	20,337	Merged with Central Freight 1984
23	Delta Lines, Inc.	056640	RMB	144,937	Merged with McLean 8-85
24	Duff Truck Line, Inc.	014314	CMB	57,460	Merged with OK Trucking 6-1-87
25	East Texas	014432	RMB	198,863	Merged with ABF Frt 9-12-82
26	F & W Express	107913	SMC	4,805	Discontinued operations 10-14-83
27	Falwell Fast Frt, Inc.	000903	MAC	1,606	Ceased operations 6-83
28	Follmer Trucking Co.	033520	MAC	3,468	Merged with North Penn Transfer 1983
29	Garrett Frt Lines	000263	RMB	156,816	Merged with ANR Freight 1-1-86
30	Gateway Transport Co., Inc.	080430	CMB	126,712	Merged with Maislin (Maislin ceased operations 7-12-83)
31	Gordon's Transport, Inc.	011220	CSA	105,611	Out of business 1983
32	Graves Truck Line	053965	RMB	73,151	Merged with ANR Freight 1-1-86
33	Great Lakes Exp	028478	MAC	20,251	Out of business 1984
34	Haverhill & Lawrence	009936	NEB	2,052	Out of business 12-6-84
35	Helms	000629	CSA	95,669	Merged with Ryder 12-31-70
36	I.R.C. & D.	040235	CMB	8,270	Out of business 1982
37	ILL-CALIF EXPRESS	048958	RMB	110,696	Ceased operations 3-31-84
38	IMFS, Inc.	035628	ECA	255,459	Out of business 5-14-85
39	IML Freight, Inc.	033641	RMB	166,292	Out of business 5-84
40	Johnson, Bruce, Trucking	030446	SMC	15,564	Bankrupt 10-1-84

44	M. R. & R. Trucking	105881	CSA	25,084	Merged with Smith's Transfer 1986
45	Manley Truck	058902	MWB	14,984	Bankrupt 3rd quarter 1986
46	Mason & Dixon	059583	CSA	178,070	Out of business 1984
47	McLean Trucking Co.	031389	SMC	585,477	Chapter 11 1-10-86
48	Mercury Freight	113528	SMC	14,715	Out of business 2-28-85
49	Mercury Motor Exp.	115093	SMC	47,703	Out of business 11-26-84
50	Milne Truck Lines	044605	RMB	69,573	Ceased operations 1-87
51	Motor Freight Express	059957	MAC	78,926	Out of business 1982
52	Murphy Motor Freight	108937	MWB	82,521	Chapter 7 2-24-87
53	Mushroom Transp. Co.	065580	MAC	33,148	Chapter 11 6-24-85
54	N.Y.–Mass Motor	017470	NEB	1,624	Out of business 5-14-87
55	Oneida Motor Frt, Inc.	083430	MAC	44,672	Chapter 11 7-10-85
56	Pacelli Bros	061007	NEB	2,461	Sold to Terminal & Transp System Inc. 4-24-87
57	Renner's Express Inc.	057239	CMB	15,656	Bankrupt 11-13-85
58	Robinson Truck Line	016502	SMC	3,638	Merged with Brown Transport 12-26-84
59	Rupp & Southern Tier Frt	035153	MAC	3,590	Liquidated as of 4-25-86
60	Ryder Truck Lines	002900	CSA	652,257	Merged with PIE Nationwide 4th quarter 1985
61	Salt Creek Frtwys	059856	RMB	28,871	Chapter 11 8-85
62	Sanborns Motor Express	002770	NEB	40,065	Merged with A-P-A Transport 7/31/87
63	Schuster Express	108587	MAC	43,555	Merged with Pilot 1983
64	Seaway Motor Exp, Inc.	057194	MAC	2,812	Out of business 1-88
65	Shay's Serv. Inc.	098017	MAC	2,482	Acquired by AAA Trucking 10-13-86
66	Silver Wheel Frt Lines	107576	RMB	25,792	Ceased operations 7-83
67	Smiths Transfer	110683	CSA	300,307	Merged with American Freight 4th quarter 1987
68	Stordahl Truck	089782	MWB	2,433	Purchased by Penners 4th quarter 1983
69	Sturm Trucking Co	108649	MWB	5,729	Merged with Hyman 11-23-81
70	Suburban Motor Freight	044447	CMB	28,879	Ceased operations 2-20-87
71	System 99	098327	RMB	76,586	Out of business 10-85
72	T. I. E.	087109	MAC	13,857	Merged with Red Star 1-1-86
73	Texas-Oklahoma	116004	MWB	34,098	Merged with Advance-United 4-1-85
74	Thurston Motor Lines	105457	SMC	94,192	Merged with Brown Transport
75	Time-OC, Inc.	035320	RMB	155,959	Out of business 1981 (eliminated general freight)
76	Tucker Freight Lines	030504	CMB	33,008	Out of business 3rd quarter 1983
77	United Trucking Service	070151	CMB	38,255	Ceased operations late 86/early 87
78	Warner & Smith Mtr Frt	065660	CMB	6,168	Bankrupt 3-5-84
79	Wooleyhan Transport Co.	062745	MAC	6,789	Bankrupt 4-26-85
	TOTAL			5,581,377	

Note: Dohrn Transfer (merged with Halls Motor 4-81) not included in above report; only 1980 revenues available.

APPENDIX B (1 of 2)
TOP MOTOR CARRIERS IN 1965

No.	Carrier Names	Revenues (000)	1965 Operating Ratios
1.	Consolidated Freightways	147,339	93.8
2.	Roadway Express	120,910	90.4
3.	Associated Transport	96,451	92.7
4.	Pacific Intermountain Express	71,967	94.0
5.	McLean Trucking Co.	69,078	94.1
6.	Interstate Motor Freight	64,196	93.2
7.	Spector Freight System	62,779	96.3
8.	Denver Chicago Trucking Co.	55,810	89.1
9.	Pacific Motor Trucking	51,869	93.6
10.	Henns Freight Lines	51,043	95.1
11.	Transamerican Freight Lines	50,245	97.7
12.	Yellow Transit Freight	49,673	85.0
13.	Gateway Transportation	46,686	91.4
14.	Time Freight	45,944	91.7
15.	Transcon Line	43,590	83.6
16.	Eastern Express	43,422	94.1
17.	Anchor Motor Freight	42,724	93.6
18.	Ryder Truck Lines	40,555	96.8
19.	Garrett Freightlines (ANR)	40,491	91.6
20.	Western Ollette NC.	38,210	93.6
21.	Associated Truck Lines (ANR)	37,859	93.3
22.	UML	37,688	88.8
23.	NCRWalk Truck Lines	37,393	97.3
24.	Red Ball Motor Freight	36,002	92.6
25.	Jones Motor Co.	35,757	96.4
26.	Navajo Freight Lines	35,127	95.3
27.	Wilson Freight Co.	34,169	94.7
28.	United Buckingham Freight	32,814	94.0
29.	Branch Motor Express	32,578	98.2
30.	Kramer-Consolidated Freight	32,083	99.7
31.	Ill. Calif. Express	31,736	94.3
32.	Watson-Wilson Trans. Sys.	31,482	101.8
33.	Hemingway Transport	30,913	97.1
34.	Overnite Transportation	30,669	86.5
35.	Strickland Transportation	30,325	96.8
36.	Cooper-Jarrett	30,083	93.9
37.	Carolina Freight Corres.	29,881	92.7
38.	Gordons Transport	29,417	89.7
39.	Midwest Emery Freight System	29,213	99.6
40.	Akers Motor Lines	28,767	90.7
41.	Terminal Transport	28,500	91.3
42.	All States Freight	27,712	99.5
43.	Johnson Motor Lines	28,038	92.8
44.	East Texas Motor Freight	27,712	90.2
45.	Mason and Dixon Lines	27,187	94.7
46.	Leeway Motor Freight	26,261	95.5
47.	Ringsey Truck Lines	24,577	96.4
48.	Arkansas Best Freight Sys.	24,186	93.0
49.	Pilot Freight Carriers	23,923	96.5
50.	Adley Express Co.	22,591	103.2
51.	Commercial Motor Freight	22,567	92.2
52.	Halls Motor Transit	22,376	90.8

No.	Carrier Names	Revenues (000)	1965 Operating Ratios
53.	Central Freight Lines	22,174	90.3
54.	B & P Motor Express	22,060	92.2
55.	Central Wisconsin Motor Trans.	21,950	92.3
56.	Campbell "68" Express	21,590	95.5
57.	St. Johnsbury Trucking	21,123	91.2

Compliments of Samuel Rubenstein—Freight Transportation Consultants, Inc.)
Source not available to the Editors.

APPENDIX B (2 of 2)
TOP MOTOR CARRIERS IN 1965
(As of 1988)

No.	Carrier Names	Revenues (000)	1965 Operating Ratios	1987* Operating Ratios
1.	Consolidated Freightways	147,339	93.8	95.1
2.	Roadway Express	120,910	90.4	94.6
3.				
4.	Pacific Intermountain Express	71,967	94.0	104.3
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.	Yellow Transit Freight	49,673	85.0	95.8
13.				
14.				
15.	Transcon Line	43,590	83.6	103.3
16.				
17.	Anchor Motor Freight	42,724	93.6	
18.				
19.	Garrett Freightlines (ANR)	40,491	91.6	103.1
20.				
21.				
22.				
23.				
24.				
25.	Jones Motor Co.	35,757	96.4	98.9
26.				
27.				
28.				
29.				
30.				
31.				
32.				
33.				
34.	Overnite Transportation	30,669	86.5	86.9
35.				
36.				
37.	Carolina Freight Corres.	29,881	92.7	94.9
38.				
39.				
40.				
41.				
42.				
43.				
44.				
45.				
46.				
47.				
48.	Arkansas Best Freight Sys.	24,186	93.0	98.0
49.	Pilot Freight Carriers	23,983	96.5	113.1

No.	Carrier Names	Revenues (000)	1965 Operating Ratios	1987* Operating Ratios
50.				
51.				
52.				
53.	Central Freight Lines	22,174	90.3	92.7
54.				
55.				
56.				
57.	St. Johnsbury Trucking	21,123	91.2	89.3

•CHILTON'S COMMERCIAL CARRIER JOURNAL, July 1988 (As of June 1988). Source not available to the Editors.

APPENDIX C
TOP MOTOR CARRIERS IN 1965

No.	Carrier Names	1988 Actual Revenues (000)
1.	Consolidated Freightways	$1,749,200
2.	Roadway Express	1,693,500
3.		
4.	Pacific Intermountain Express	498,800
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.	Yellow Transit Freight	1,991,600
13.		
14.		
15.	Transcon Line (ANR)	734,100
16.		
17.		
18.		
19.		
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21.		
22		
23.		
24		
25.		
26.		
27.		
28.		
29.		
30.		
31.		
32.		
33.		
34.	Overnite Transportation	638,500
35.		
36.		
37.	Carolina Freight Carriers	531,600
38.		
39.		
40.		
41.		
42.		
43.		
44.		
45.		
46.		
47.		
48.	Arkansas Best Freight Sys.	616,800
49.		
50.		

Source not available to the Editors.