

THE YALE LAW JOURNAL

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Railroad Regulation Reinterpreted

ABSTRACT. Railroading today is profitable but struggles to serve customers, workers, and communities, as punctuated by recent high-profile disputes and disasters. This Note traces the development of the legal regulation of railroads from the Progressive Era's antimonopoly vision to today's deregulated environment. Railroads' financial success and operational failures both come from this deregulation in the 1970s and 1980s. Yet deregulators retained a Progressive Era tool requiring fair treatment for all—the common-carrier obligation—in muted form. Given the need for a resilient, expansive rail network today, policymakers should consider using the common-carrier obligation, or more direct legal and institutional responses such as reregulation, public options, and nationalization, to address the problems that plague the industry.

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INTRODUCTION

Since early 2020, the railroad industry has presided over a series of high-profile disasters. In 2021, amidst the influx of consumer goods during the COVID-19 pandemic, major railroads struggled to maintain service, hurting shippers and consumers.¹ The next year, in 2022, the industry almost came to a halt as irate workers criticized a “brutal” scheduling regime that punished them for taking sick leave.² Finally, in 2023, a Norfolk Southern train carrying hazardous chemicals derailed in East Palestine, Ohio, and emergency first responders released the chemicals for fear of an explosion.³ East Palestine residents reported finding dead animals in the area and developing coughs and rashes.⁴ The chairman of the railroad’s main economic regulator, the Surface Transportation Board (STB), observed “disturbing current trends facing the management of the four” major U.S. railroads.⁵

The railroads’ high-profile failures have not, however, hurt their strong financial performance. Most Class I railroads, the six big railroads that make most of the money and carry most of the country’s freight,⁶ routinely outperform the

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1. See PETER S. GOODMAN, *HOW THE WORLD RAN OUT OF EVERYTHING: INSIDE THE GLOBAL SUPPLY CHAIN* 211-12 (2024).
 2. Hugh Cook, *Local BNSF Railroad Workers Say the New Attendance Policy Is “A Brutal Policy,”* WYO. PUB. RADIO (July 8, 2022, 4:48 PM MDT), <https://www.wyomingpublicmedia.org/open-spaces/2022-07-08/local-bnsf-railroad-workers-say-the-new-attendance-policy-is-a-brutal-policy> [https://perma.cc/HCP9-XYZA].
 3. NAT’L TRANSP. SAFETY BD., *PRELIMINARY REP. RRD23MR005, NORFOLK SOUTHERN RAILWAY TRAIN DERAILMENT WITH SUBSEQUENT HAZARDOUS MATERIAL RELEASE AND FIRES 3* (2023), <https://www.nts.gov/investigations/Documents/RRD23MR005%20East%20Palestine%20OH%20Prelim.pdf> [https://perma.cc/NV3N-CFAK].
 4. Erica L. Green, *‘I Feel Like I Don’t Matter’: East Palestine Waits for a Presidential Visit*, N.Y. TIMES (Dec. 28, 2023), <https://www.nytimes.com/2023/12/28/us/politics/east-palestine-biden.html> [https://perma.cc/DFP5-MECY]; Dino Grandoni & Joyce Koh, *More than 43,000 Aquatic Animals Are Dead Near Ohio Train Derailment*, WASH. POST (Feb. 23, 2023), <https://www.washingtonpost.com/climate-environment/2023/02/23/ohio-train-derailment-animals-deaths> [https://perma.cc/659T-3X79]; Aria Bendix & Alicia Victoria Lozano, *Residents Near Ohio Train Derailment Diagnosed with Ailments Associated with Chemical Exposure, Including Bronchitis*, NBC NEWS (Feb. 25, 2023, 7:00 AM EST), <https://www.nbcnews.com/health/health-news/ohio-derailment-chemicals-people-diagnosed-bronchitis-rcna71839> [https://perma.cc/85LV-VBEC].
 5. Martin J. Oberman, Chairman, Surface Transp. Bd., *Speech at Southeast Association of Rail Shippers 2024 Spring Meeting 1* (Feb. 29, 2024), https://www.stb.gov/wp-content/uploads/02-29-24_Oberman_SEARS-speech.pdf [https://perma.cc/5RGX-JVUR].
 6. As of 2025, a Class I railroad is defined as “any carrier earning revenue greater than \$1.05 billion.” *Economic Data*, SURFACE TRANSP. BD., <https://www.stb.gov/reports-data/economic-data> [https://perma.cc/4USZ-9DRH].

S&P 500 in total returns for much of this century.⁷ The railroads' financial success in the 2020s continues its trend from the past decade; the *American Journal of Transportation* reported in 2019 that railroading was the country's "most profitable industry."⁸

Those incredible financial results bode well for the shareholders and managers of an industry that is foundational to the American economy. Measured in "ton-miles," which is one ton of freight moved one mile, freight railroads ship about 30% of freight in the country, including important goods like food and chemicals.⁹ Countless goods have some connection to the rail network, and the railroad industry estimated in 2022 that a shutdown would cost the economy at least \$2 billion per day.¹⁰ Both the Biden and the second Trump Administrations' policy goals of promoting domestic manufacturing and extricating supply chains from China depend on being able to move materials too heavy and low margin to transport by truck.¹¹

This Note argues that the railroad industry's problems and profits today are legacies of the deregulatory era of the 1970s and 1980s. Not simply aberrations, railroads' contemporary crises are manifestations of decades-long trends. Bringing together industry data, contemporaneous commentary, and legislative, judicial, and administrative decisions, this Note illuminates the legal sources of the railroad industry's power and the problems that power presents today. In doing

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7. Data from Bloomberg Terminal reveal that three of five publicly traded Class I railroads outperformed the S&P 500 between January 1, 2009, and June 18, 2025. These data also show that all five of these railroads outperformed the S&P 500 for most of the twenty-first century, with the S&P 500 only overtaking two railroads in the last two to three years. Data are on file with author.
 8. *Railroads Are USA's Most Profitable Industry with a 50% Profit Margin*, AM. J. TRANSP. (Oct. 22, 2019, 11:10 AM), <https://www.ajot.com/news/railroads-are-usas-most-profitable-industry-with-a-50-profit-margin> [<https://perma.cc/AL2W-LHCS>]; Chris Isidore, *Major Railroad Posts Record Earnings, Spends More on Share Repurchases than on Its Employees*, CNN BUS. (Jan. 24, 2023, 2:32 PM EST), <https://www.cnn.com/2023/01/24/business/union-pacific-railroad-earnings/index.html> [<https://perma.cc/F66Q-QVUJ>].
 9. Fed. R.R. Admin., *Freight Rail Overview*, U.S. DEP'T TRANSP., <https://railroads.dot.gov/rail-network-development/freight-rail-overview> [<https://perma.cc/N949-ES7N>].
 10. See Trains Staff, *AAR Report Says Rail Shutdown Would Cost \$2 Billion a Day (Second Update)*, TRAINS (Feb. 19, 2024), <https://www.trains.com/trn/news-reviews/news-wire/aar-report-says-rail-shutdown-would-cost-2-billion-a-day> [<https://perma.cc/9MCS-U3HG>].
 11. See Phillip Longman, *Train Drain*, WASH. MONTHLY (Oct. 29, 2024), <https://washington-monthly.com/2024/10/29/train-drain> [<https://perma.cc/54J8-HUYU>]. On "Bidenomics," see generally Andrew Yamakawa Elrod, *What Was Bidenomics*, PHENOMENAL WORLD (Sept. 26, 2024), <https://www.phenomenalworld.org/analysis/what-was-bidenomics> [<https://perma.cc/MKK2-XQ6Y>], which explains the development of "Bidenomics"; and Adam Tooze, *Great Power Politics*, LONDON REV. BOOKS (Nov. 7, 2024), <https://www.lrb.co.uk/the-paper/v46/n21/adam-tooze/great-power-politics> [<https://perma.cc/TJ2W-QBJ4>], which discusses "Bidenomics" in the context of industrial policy.

so, the Note seeks to recover how the law governing railroads previously advanced multiple values and to reveal how the different values law advances today are shortcomings of railroad deregulation. The current paradigm, which prioritizes competition through contracts and railroad profitability, fails to capture the full relevance of the railroad industry to policy goals other than private profit. The current situation of the railroad industry also suggests that accounting for increased corporate power of the railroads can resolve the ostensible disconnect between lackluster performance and high profits. Railroad deregulation worked, in the narrow sense of securing financial success, but failed in the broader sense of addressing the plural problems facing the public from railroading itself.

An alternative framework existed before deregulation. From the Progressive Era until deregulation in the 1970s, the Interstate Commerce Commission (ICC) regulated railroads, requiring them to offer open and fair prices on nondiscriminatory terms. As a prominent 1886 Senate Report explained, Congress structured substantive railroad regulation, motivated by the broader antimonopoly concern of “controlling the steady growth and extending influence of corporate power and of regulating its relations to the public,” while also recognizing that “no corporations are more conspicuously before the public eye” or more “directly affect every citizen in the daily pursuit of his business or avocation” than the railroads.¹² The Progressive Era paradigm took railroads to be public utilities with special duties, including the duty as common carriers to serve all comers on reasonable request. This common-carrier obligation (CCO) captured the guiding principle that railroads and other infrastructural-networked industries owe a duty to the public and not only to their managers and shareholders.

The Progressive Era paradigm ended when, responding to a wave of both financial and operational difficulties, Congress and Presidents Ford and Carter “deregulated” the railroad industry, appointing like-minded regulators and removing the legal tools the country had used to govern rail networks.¹³ As one measure of success, profits suggest that the railroads have thrived. But they have thrived precisely by undermining the values that the regulated era sought to promote—such as stability, geographic fairness, and development—and by undermining the constituencies that it sought to protect. Railroads have become more powerful precisely because of their legal environment, including the ideological landscape of deregulation.

This Note argues not only that contemporary problems come from the deregulatory movement of the 1970s and 1980s, but also that the goals and distinct approach of the regulated era might prove instructive for the future. Part I traces the problems of today’s railroad industry to the advent of Precision Scheduled

12. S. REP. NO. 49-46, at 3 (1886).

13. See *infra* Part III.

Railroading (PSR). Investors and managers now push railroads to prioritize cutting costs and raising prices over maintaining and improving service, capacity, resilience, and safety. Part II articulates the Progressive Era paradigm of railroad regulation that deregulation eventually replaced, emphasizing the Era's animating concern: checking the concentration of private power over key infrastructure.

Part III connects the ability of railroads to enact PSR to the deregulatory moment of the late 1970s and 1980s. In that period, policymakers explicitly reoriented railroad policy around maximizing profits rather than checking corporate power. Deregulatory legislation contributed to discrimination between customers, consolidation of market power, and reductions in service to smaller communities. Despite deregulation, however, a key duty from the Progressive Era remained in place: the CCO. Concerned that excessively loosening constraints on railroads would harm less powerful and smaller shippers, Congress maintained the CCO, albeit in a significantly weakened form. Part III reviews the untapped potential of the CCO given the accommodating, if sparse, judicial precedent interpreting the CCO.

Part IV proposes using STB – the federal agency charged with the economic regulation of freight rail – and its power to enforce the CCO to begin to address many of the current harms that railroads pose to businesses, workers, communities, and climate action. Through rulemakings, adjudications, and guidance documents, STB could use what remains of the CCO to start alleviating these harms. Part IV also considers more active policy responses to the power and problems of the railroad industry, such as reregulation and public ownership or operation. While the values animating the Progressive Era are still relevant today, I do not argue for an unthinking and wholesale return to that approach, given the political and institutional limitations of the present. Part V lays out additional responses policymakers could consider to address the current shortcomings of rail regulation today: reregulation, public options, and public ownership.

This Note makes at least three contributions. First, it challenges prevailing narratives about the success of deregulation. Nearly all evaluations of railroad deregulation regard it as a success, with a characteristic appraisal concluding, “Policymakers’ faith in the market has, for the most part, been rewarded.”¹⁴ Most

14. Curtis Grimm & Clifford Winston, *Competition in the Deregulated Railroad Industry: Sources, Effects, and Policy Issues*, in DEREGULATION OF NETWORK INDUSTRIES: WHAT'S NEXT? 41, 42 (Sam Peltzman & Clifford Winston eds., 2011). For other positive assessments of rail deregulation, see, for example, Vikram Maheshri, Clifford Winston, Jia Yan & Scott Dennis, *Railroad Competition and Innovation*, in REVITALIZING A NATION: COMPETITION AND INNOVATION IN THE US TRANSPORTATION SYSTEM 201, 202 (Clifford Winston & Jia Yan eds., 2024); Stephen Moore, *Don't Regulate the Rail Industry*, HERITAGE FOUND. (Feb. 6, 2020),

evaluations, however, have inadequately accounted for the railroads' recent exercise of market power in PSR, focusing more on the 1980s and 1990s and less on the 2000s to the present. Regardless, railroad deregulation is, as one of its supporters touted, "widely regarded as [a] bipartisan policy success[]". Forty years later, no one has seriously proposed to reverse" it.¹⁵

Second, this Note refines the revived interest in the public-utility concept in the Law and Political Economy (LPE) and new Networks, Platforms, and Utilities (NPU) schools by drawing out the difficulty of regulating private enterprise to provide key infrastructure.¹⁶ In the process, this Note demonstrates the importance of the LPE movement's emphasis on economic power. Registering the power of railroads and how that power shapes outcomes for other stakeholders in society helps to reveal the broader consequences of deregulation. Third, this Note draws on current case law regarding the railroads' extant, yet diminished, CCO to suggest an existing pathway for addressing railroads' power.

A few clarifications help focus this Note. First, though passenger rail service is important, most of this Note will be about freight railroading. Until the federal government's creation of Amtrak in the early 1970s, private railroads carried both freight and people.¹⁷ But passenger service thrives in dense regions and is harder to run profitably by an entirely privately run railroad.¹⁸ Second, the railroad industry has two primary regulators: STB and the Federal Railroad Administration (FRA). STB is the primary economic regulator and succeeded ICC in

<https://www.heritage.org/transportation/commentary/dont-regulate-the-rail-industry> [<https://perma.cc/P5P8-BS6K>]; PAUL TESKE, SAMUEL BEST & MICHAEL MINTROM, *DE-REGULATING FREIGHT TRANSPORTATION: DELIVERING THE GOODS* 43-44 (1995); and Richard L. Schmalensee & Wesley W. Wilson, *The Staggers Act at 35: Railroad Economics and Regulation*, 49 REV. INDUS. ORG. 127, 128 (2016).

15. Jerry Ellig, *Forty Years After Surface Freight Deregulation*, REGUL. REV. (Dec. 14, 2020), <https://www.theregreview.org/2020/12/14/ellig-forty-years-after-surface-freight-deregulation> [<https://perma.cc/C3A3-8Y8W>].
16. See *infra* Conclusion.
17. Bill Delaney, *Congress Creates Amtrak to Save Passenger Rail Service*, EBSCO (2023), <https://www.ebsco.com/research-starters/history/congress-creates-amtrak-save-passenger-rail-service> [<https://perma.cc/GPP6-UD4Y>].
18. Freight railroading still has implications for passenger rail: in most parts of the country, Amtrak has to share freight railroads' track. Amtrak has criticized freight trains for "ignor[ing] the law" and "caus[ing] 900,000 minutes . . . of delay in 2023" by prioritizing themselves over Amtrak, despite a statute requiring the opposite. *Delayed by Freight: Measuring On-Time Performance Across Our Network*, AMTRAK (Apr. 2024), <https://www.amtrak.com/on-time-performance> [<https://perma.cc/K54Q-38E6>]; see also Complaint at 1-2, United States v. Norfolk S. Co., No. 24-cv-02226 (D.D.C. July 30, 2024) (suing to enjoin Norfolk Southern to provide Amtrak "passenger trains with their statutory right to preference over freight transportation").

1996,¹⁹ while FRA focuses on rail safety. Third, the Note concentrates on “Class I” railroads since they are the dominant carriers in the rail industry.

A final clarification is conceptual. Throughout the Note, I discuss the ability of the public to participate in the exercise of private power through the regulatory process. This choice comes from the criticism of neoliberal policy that highlights neoliberalism’s “encasement” of economic activity from “other political demands beyond the demand for efficiency itself.”²⁰ Applied here, railroad deregulation prioritized private profits and “encased” it from the oversight and supervision of the public as effected through ICC and STB. Part of the deregulatory project was statutory, but another part was ideological, as regulators themselves understood their mission to be ensuring railroads’ financial health.²¹ The point in understanding deregulation as removing public input over putatively private power is not to assume regulation’s efficacy but to highlight the democratic mechanisms and values that the Progressive Era paradigm advanced and the deregulatory one scaled back. By recovering a past way of ensuring public participation in private power, this Note aims to contribute to discussions over how law influences market outcomes.

I. FREIGHT RAILROADING TODAY: PRECISION SCHEDULED RAILROADING

The dominant trend in the railroad industry in recent years has been the shift toward a business model known as PSR. Today, the freight-railroading industry has six Class I railroads.²² Yet even that figure fails to convey the concentration in the freight-railroading market: in actuality, two sets of duopolies control at least 80% of their respective markets.²³ Norfolk Southern and CSX control essentially all freight rail traffic in the eastern United States (east of Chicago and the Mississippi River) while Union Pacific and BNSF control essentially all traffic

19. *About STB*, SURFACE TRANSP. BD., <https://www.stb.gov/about-stb> [<https://perma.cc/9SPW-D88Z>].

20. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1797 n.48 (2020) (citing QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 5-7, 13 (2018)).

21. See *infra* Section III.B.2.

22. *Class I Railroads 101*, TRAINS (Feb. 5, 2024), <https://www.trains.com/trn/train-basics/abcs-of-railroading/class-i-railroads-101> [<https://perma.cc/X6DA-SZZ2>].

23. Matthew Jinoo Buck, *How America’s Supply Chains Got Railroaded*, AM. PROSPECT (Feb. 4, 2022), <https://prospect.org/economy/how-americas-supply-chains-got-railroaded> [<https://perma.cc/9V5R-5Z36>].

in the western United States (west of Chicago and the Mississippi River).²⁴ With their market power, these four railroads have been able to reshape and dictate market outcomes to serve themselves and their shareholders by cutting costs to the point of causing service disruptions, labor dissatisfaction, and safety concerns.

This Part provides an overview of PSR and a discussion of its harms. More than random, the multiple crises and criticisms of the railroad industry today either come from or are severely exacerbated by PSR and the railroad industry's push to maximize profits at the expense of workers, communities, consumers, and shippers. This Part surveys the problems of the modern railroad industry, focusing on the 2000s to the present day.

A. *Precision Scheduled Railroading*

Today, Class I railroads prioritize the interests of shareholders above all other constituencies, imposing costs on workers, shippers, communities, and consumers while transferring billions of dollars to investors. From 2010 to 2023, Class I railroads made \$344 billion in net income, “of which,” STB Vice Chair Karen J. Hedlund said in March 2024, “they returned almost \$270 billion to their shareholders in dividends and buybacks.”²⁵ PSR is the predominant mode of operating railroads today and manifests the railroads’ unrestrained shareholder supremacy. Far from aberrant corporate actors, the managers and investors imposing shareholder supremacy are part of a “larger parable of modern American capitalism,” *New Yorker* writer John Cassidy explained in 2022.²⁶ “Most of all, though, it is a story of financialization, and of prioritizing payments to wealthy stockholders over everything else, including serving the public interest.”²⁷

24. The remaining two railroads, Canadian National and Canadian Pacific Kansas City, serve traffic along the Mississippi River into Canada and Mexico. *See id.*

25. Karen J. Hedlund, Vice Chair, Surface Transp. Bd., Avenues for Encouraging Growth of the Nation’s Rail System: Speech Delivered at the Annual Meeting of the American Short Line and Regional Railroad Association 1 (Mar. 25, 2024), <https://www.stb.gov/wp-content/uploads/VC-Hedlund-Freight-Growth-ASLRRRA-Speech-3.24.24PDF.pdf> [<https://perma.cc/HMU5-RZZE>].

26. John Cassidy, *The Averted National Rail Strike Is a Parable of Contemporary American Capitalism*, *NEW YORKER* (Dec. 6, 2022), <https://www.newyorker.com/news/our-columnists/the-averted-national-rail-strike-is-a-parable-of-contemporary-american-capitalism> [<https://perma.cc/48CZ-D4F6>].

27. *Id.*

“Precision railroading is a way of thinking,” E. Hunter Harrison explained in 2005.²⁸ Harrison invented PSR across his stints as chief executive officer (CEO) at four Class I railroads during his career. After Harrison retired from railroading in 2010, financiers Bill Ackman and Paul Hilal convinced Harrison to come out of retirement in order to implement PSR at the Canadian Pacific railroad and then at CSX, the biggest and most important railroad in the southeastern United States.²⁹ The CSX board of directors and shareholders welcomed Harrison, excited about the profits he would bring in.³⁰ By 2018, Norfolk Southern and Union Pacific had announced that they, too, were implementing PSR-like programs, with all Class I railroads implementing PSR or PSR-like approaches by 2019.³¹

Executives describe PSR as an operational strategy.³² Railroads implementing PSR run their trains on a schedule, rather than waiting for specific trains to fill up before departing, and attempt to maximize the load that any particular train carries as well as the speed at which that train carries it.³³ At a network level, PSR favors longer, faster movements between origins and destinations over hub-and-spoke systems, which can entail higher costs to sort traffic and redirect train cars at centralized hubs based on their final destinations.³⁴ The ultimate goal is at the financial level: minimize the company’s operating ratio (OR) — a

28. E. HUNTER HARRISON, *HOW WE WORK AND WHY: RUNNING A PRECISION RAILROAD* 2 (2005).

29. Howard Green, *How Bill Ackman Convinced Hunter Harrison to Ride the Rails Again*, FIN. POST (Sept. 14, 2018), <https://financialpost.com/feature/how-bill-ackman-convinced-hunter-harrison-to-ride-the-rails-again> [<https://perma.cc/NH52-CKR2>]; Jacquie McNish & David Benoit, *CSX Agrees to Hire Hunter Harrison as CEO*, WALL ST. J. (Mar. 6, 2017, 7:37 PM ET), <https://www.wsj.com/articles/csx-agrees-to-hire-hunter-harrison-as-ceo-1488829040> [<https://perma.cc/5T7B-DQZC>].

30. McNish & Benoit, *supra* note 29 (reporting Harrison’s surprise at the “depth of investor support for [Harrison’s] leadership”).

31. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105420, *FREIGHT RAIL: INFORMATION ON PRECISION-SCHEDULED RAILROADING* 9 (2022). Though BNSF remains the lone official Precision Scheduled Railroading (PSR) holdout, industry observers report that BNSF has adopted PSR-like measures. See, e.g., Esther Fung, *Can a ‘Precision Scheduling’ Expert Fix Berkshire Hathaway’s Railroad?*, WALL ST. J. (Oct. 4, 2024, 5:30 AM EDT), <https://www.wsj.com/business/logistics/can-a-precision-scheduling-expert-fix-berkshire-hathaways-railroad-f33811e4> [<https://perma.cc/H5DC-4RBS>].

32. See, e.g., *What Is Precision Scheduled Railroading?*, UNION PAC.: TRACK REC. (Sept. 17, 2019), <https://www.up.com/customers/track-record/tro91019-precision-scheduled-railroading.htm> [<https://perma.cc/C3SX-WPKQ>].

33. See Michael Baudendistel, *What Is Precision Scheduled Railroading (PSR)?*, FREIGHTWAVES (Jan. 9, 2020), <https://www.freightwaves.com/news/what-is-precision-scheduled-railroading-psr> [<https://perma.cc/3U6K-FBV3>].

34. See *id.*

company's operating expenses divided by its operating revenue.³⁵ Harrison and PSR proponents have pushed to cut costs as much as possible.

PSR in practice manifests as a type of just-in-time operation used to cut costs at the expense of service, safety, and workers. Observers and regulators decry railroad management's "worship of the Cult of OR."³⁶ Over the past decade, Wall Street analysts and investors have increasingly pressured railroads to drive their OR down to sixty or below, meaning that for every dollar the railroad earns, it spends sixty cents on operating expenses such as labor, equipment, or track, with the rest going to financing expenses and shareholder buybacks and dividends.³⁷ For much of the second half of the twentieth century, an OR in the seventies or eighties was considered good.³⁸ Yet Harrison's first private jet was named "OR59," an indication of his ultimate goal.³⁹

Easy ways to cut OR are to skimp on service, squeeze workers and shippers, underinvest in capacity, and shirk on safety. Since PSR, as well as pressures to implement PSR-like practices, rose to prominence in the early 2010s, railroads have laid off workers, idled equipment and processing yards, and pushed for ever-longer trains to extract every dollar from their tracks.⁴⁰ Workers have argued that rather than maximizing productive efficiency, or doing more with less, "[t]he PSR model is [to] do less with less."⁴¹ Doing less with less can make

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35. See Bill Stephens, *Class I Operating Ratios Reach Another New Low Despite Pandemic*, TRAINS (Mar. 4, 2021), <https://www.trains.com/trn/news-reviews/news-wire/class-i-operating-ratios-reach-another-new-low-despite-pandemic> [<https://perma.cc/LN9V-ZJ4Y>]. Note that operating ratio (OR) is technically discussed as taking operating expenses divided by operating revenue and then multiplying by one hundred to produce numbers in the tens, as opposed to decimals between zero and one. See *id.* ("The basic formula is the same: Operating ratio is determined by dividing operating expenses by operating revenue.").
 36. Martin J. Oberman, Chairman, Surface Transp. Bd., Speech at North American Rail Shippers 2024 Annual Meeting 4 (May 1, 2024), <https://www.stb.gov/wp-content/uploads/5.1.24-Oberman-NARS-Speech-Final.pdf> [<https://perma.cc/5H5S-3WY3>].
 37. See Bill Stephens, *How Wall Street Holds Railroads Hostage: Analysis*, TRAINS (Feb. 26, 2024), <https://www.trains.com/trn/news-reviews/news-wire/how-wall-street-holds-railroads-hostage-analysis> [<https://perma.cc/YT5P-NK5A>].
 38. HOWARD GREEN, RAILROADER: THE UNFILTERED GENIUS AND CONTROVERSY OF FOUR-TIME CEO HUNTER HARRISON 86 (2018).
 39. Dan Schwartz & Topher Sanders, *The True Dangers of Long Trains*, PROPUBLICA (Apr. 3, 2023, 6:00 AM EDT), <https://www.propublica.org/article/train-derailment-long-trains> [<https://perma.cc/72PM-AP8V>].
 40. See Buck, *supra* note 23.
 41. Joanna Marsh, *STB Chairman 'Not Optimistic' About Pace of Rail Service Improvement*, FREIGHTWAVES (Aug. 15, 2022), <https://www.freightwaves.com/news/stb-chairman-not-optimistic-about-pace-of-rail-service-improvement> [<https://perma.cc/3VX9-T6BJ>]; see also Peter Coy, *How America's Trains Nearly Went Off the Rails*, N.Y. TIMES (Dec. 9, 2022), <https://www.nytimes.com/2022/12/09/us/politics/rail-trains-safety.html>.

financial sense by enabling executives and shareholders to make billions in profit: Ackman's firm reaped \$2.6 billion.⁴² Ackman's partner Hilal, who would spin off a fund of his own and install Harrison at CSX, estimated that across the four railroads Harrison ran in his career, Harrison "created \$54.4 billion in value."⁴³ Besides Ackman and Hilal, PSR minted millionaires among its backers.⁴⁴

B. Harms from PSR

In the past decade, PSR has contributed to harms not revealed by railroads' profits and OR. This Section chronicles stakeholders' complaints about the railroads and traces those concerns back to railroads' push toward greater cost cutting. Reducing workers and equipment while demanding increased output from the remaining labor and capital has harmed shippers, workers, consumers, communities, and passengers, even as the country needs to ship *more* goods by train, as opposed to trucks, to address climate concerns and industrial policy goals. By looking at the railroads in the twenty-first century, this Section shows that the railroads have failed, along the metrics discussed, to serve both the country's shipping needs and stakeholders other than managers and shareholders.

1. Customers: Shippers and Consumers

Railroads have raised prices for shippers—businesses that ship goods and commodities. Food, chemicals, hazardous waste, consumer goods, equipment, and more all move (or could move) by rail. However, over the past two decades, railroads' accumulation of market power⁴⁵ and subsequent shift toward PSR has corresponded with higher rates for scores of goods. Shippers have faced increasing rates for their rail shipments over the past two decades: inflation-adjusted rates for rail service rose by almost 30% between 2005 and 2022.⁴⁶ Over a similar

www.nytimes.com/2022/12/09/opinion/railroad-trains-labor.html [<https://perma.cc/RTF7-RFWU>] ("Railroad managers seem to understand that their cost-cutting went too far—that instead of doing more with less, they ended up doing less with less.").

42. GREEN, *supra* note 38, at 175; *see also id.* at 175 n.8 ("In Canadian dollar terms, Pershing calculated it made 327.1 percent on its investment in [Canadian Pacific].").

43. *Id.* at 240 n.2.

44. *See, e.g., id.* at 59 (reporting that at the Illinois Central Railroad, a much smaller railroad than CSX, PSR's success "had created twenty-seven millionaires in its ranks").

45. *See infra* Section III.B.

46. Martin J. Oberman, Chairman, Surface Transp. Bd., Speech at Rail Trends 6 (Nov. 16, 2022), <https://www.stb.gov/wp-content/uploads/Oberman-Railtrends-Speech-2022-11-16.pdf>

period, the Producer Price Index for rail transportation, one measure of prices, more than doubled, outpacing trucking and commodities.⁴⁷ Shippers' groups have raised the alarm, with one trade association arguing in 2015 that "78% of freight rail stations are captive to a single major railroad."⁴⁸ The association estimated that those "captive shippers" provided 50% of railroads' revenue in 2019 and that railroad revenue from captive shippers has increased 231% since 2004, with especially sharp increases in 2018 and 2019.⁴⁹ Railroads, in other words, seem to be exercising their market power over shippers.

Part of the reason railroads have increased the rates they charge has been not only to increase their revenue, but also to increase their *margins* by discouraging unprofitable or less profitable freight from traveling by rail.⁵⁰ Shippers complain of "demarketing" which, as Phillip Longman explains, refers to practices where railroads "actively turn away profitable but low-margin business—for example, hauling grain or consumer appliances—if the move doesn't involve huge volumes or requires boxcars to be hauled back empty."⁵¹ As a result, excluded

[<https://perma.cc/VRT9-2YM5>]. The Rail Customer Coalition, a group of shippers, estimate the rates increased by over 40% from 2004 to 2019. RAIL CUSTOMER COAL., *THE LITTLE ENGINE THAT COULDN'T* 7 & 29 n.1 (2023), https://www.freightrailreform.com/wp-content/uploads/2023/12/LittleEngineThatCouldnt_FullBook.pdf [<https://perma.cc/3PAQ-WL5E>].

47. Compare FRED, *Producer Price Index by Industry: Rail Transportation*, FED. RSRV. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/PCU48214821> [<https://perma.cc/2WG6-WTZW>] (comparing the Producer Price Index from January 1, 2004, to January 1, 2025, for rail transportation), with FRED, *Producer Price Index by Industry: General Freight Trucking, Long-Distance Truckload*, FED. RSRV. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/PCU4841214841212> [<https://perma.cc/83EV-H2EV>] (comparing the same for freight trucking), and FRED, *Producer Price Index by Commodity: All Commodities*, FED. RSRV. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/PPIACO> [<https://perma.cc/M2LY-L93A>] (comparing the same for all commodities).
48. *Why We Need Freight Rail Reform*, RAIL CUSTOMER COAL. [3] (2015), <https://www.freightrailreform.com/wp-content/uploads/2015/02/Why-Rail-Presentation-32415.pdf> [<https://perma.cc/LC8W-FK2N>].
49. Escalation Consultants, Inc., *Economic Analysis: Consolidation and Increasing Freight Rail Rates*, RAIL CUSTOMER COAL. 4-5 (June 2021), <https://www.freightrailreform.com/wp-content/uploads/2021/07/Economic-Analysis-Consolidation-and-Increasing-Freight-Rail-Rates.pdf> [<https://perma.cc/HL77-DWSZ>].
50. Phillip Longman, *Amtrak Joe vs. the Modern Robber Barons*, WASH. MONTHLY (Nov. 7, 2021), <https://washingtonmonthly.com/2021/11/07/amtrak-joe-vs-the-modern-robber-barons> [<https://perma.cc/6NWU-MM7H>].
51. *Id.*

shippers, often farmers or chemicals suppliers, must either pay higher prices or shift their shipments to trucks.⁵²

PSR has also contributed to service breakdowns and congestion in the past decade. Just as important as rate levels are *service* levels, since shippers need to be able to rely on rail service to plan their own logistics and operations.⁵³ When Harrison took over CSX in 2017, he immediately presided over a series of cuts to implement PSR: from 2016 to 2018, CSX's capital spending fell 36%; its number of engines and cars fell 11% and 18%, respectively; and it laid off 16% of its workforce.⁵⁴ That summer, congestion skyrocketed, with train speeds down, waiting time up, and accidents rising to their highest level in more than a decade.⁵⁵ Factories nearly shut down as they waited for shipments that were weeks late.⁵⁶ STB expressed concern to Harrison about the "widespread degradation of rail service."⁵⁷ Meanwhile, CSX dropped its OR from 69.2% and 67.4% in 2016 and 2017, respectively, to 60.3% in 2018, with most of the reductions coming either through price increases or through reduced spending on workers and

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52. See Claire Kelloway, *Are We Getting Railroaded?*, WASH. MONTHLY (Apr. 2, 2021), <https://washingtonmonthly.com/2021/04/02/are-we-getting-railroaded> [https://perma.cc/RG4D-G82M]; Glenn Hess, *Shippers Seek Rail Rate Relief*, CHEM. & ENG'G NEWS (Apr. 29, 2013), <https://cen.acs.org/articles/91/i17/Shippers-Seek-Rail-Rate-Relief.html> [https://perma.cc/AF8B-MZP7]; see also Agric. Mktg. Serv., *The Role of Rail in Agricultural Transportation*, U.S. DEP'T AGRIC., <https://agtransport.usda.gov/stories/s/Agriculture-on-Rail/25z9-ismv> [https://perma.cc/N6BR-RTJE] (presenting data on the importance of railroad transportation for agricultural products).
 53. See ROBERT E. GALLAMORE & JOHN R. MEYER, *AMERICAN RAILROADS: DECLINE AND RENAISSANCE IN THE TWENTIETH CENTURY* 91 (2014) ("Under recognized logistics principles, shipper decisions typically are based on on-time reliability and inventory minimization factors; these are more important than necessarily trying to find the lowest possible absolute level of transportation rates, and they are service qualities for which trucks have competitive advantages over railroads.").
 54. Will Robinson, *Precision Pushback: How CSX Is Changing the Rules of Railroad*, JACKSONVILLE BUS. J. (Sept. 17, 2019), <https://www.bizjournals.com/jacksonville/news/2019/09/17/special-report-how-csx-is-changing-the-rules-of.html> [https://perma.cc/6RAA-6DME]; see also CSX Corp., Annual Report (Form 10-K) 22 (Feb. 6, 2019), <https://www.sec.gov/Archives/edgar/data/277948/000027794819000011/csx-12312018x10k.htm> [https://perma.cc/4X9T-NXGF] (reporting a decline in capital spending from \$2.705 billion in 2016 to \$1.745 billion in 2018).
 55. Robinson, *supra* note 54.
 56. Paul Ziobro, *Trains in Vain: Epic CSX Traffic Jam Snarls Deliveries, from Coal to Fries*, WALL ST. J. (Aug. 22, 2017, 5:59 PM ET), <https://www.wsj.com/articles/waiting-for-a-train-epic-csx-traffic-jam-sows-chaos-from-coal-to-french-fries-1503417959> [https://perma.cc/3DLS-AS7W].
 57. David Sparkman, *CSX Disaster Steps Up Scrutiny by Congress and the STB*, MH&L (Sept. 1, 2017), <https://www.mhlnews.com/transportation-distribution/article/22054535/csx-service-disaster-steps-up-scrutiny-by-congress-and-the-stb> [https://perma.cc/EHH5-KHWU].

equipment.⁵⁸ Reflecting on the period, STB Chairman Martin J. Oberman said, “[T]he abrupt radical changes across the CSX Network . . . caused immediate and catastrophic consequences to customers, other railroads, the CSX workforce, and the public.”⁵⁹

PSR also contributed to the 2021-2023 supply-chain crisis. During the COVID-19 pandemic, Class I railroads experienced slowdowns in service, driving up costs for shippers and consumers.⁶⁰ Years of shuttering equipment and railyards and laying off workers meant that the railroad industry was unprepared for the surge in consumer spending on goods. For example, in 2019, Union Pacific closed the Global III Intermodal Ramp (Global III) railyard that sorted trains outside of Chicago, with Union Pacific executive Kenny Rocker promising that closing the facility would bring “more consistent, reliable and predictable service.”⁶¹ In 2021, however, Union Pacific completely shut down service between Los Angeles and Chicago for a week because it was unable to process tens of thousands of shipping containers.⁶² The company then reopened Global III.⁶³ Despite that clear reversal in policy and the serious, intervening service disruption, Rocker told Wall Street analysts days after Global III’s reopening that Union Pacific would be able to “take some pretty robust pricing to the market.”⁶⁴ That is, the COVID-19 shock to supply chains reached railroads whose cost-cutting reductions in workers or equipment left them with little excess capacity to handle that shock. Severe cost-cutting measures can seriously harm shippers, consumers, workers, and citizens who depend on railroads to carry food, technology, chemicals, and other essential goods.⁶⁵ Though railroads were only one component of a larger breakdown in supply chains that various forms of sector-

58. Robinson, *supra* note 54; see also *CSX Corporation’s Operating Ratio from FY 2013 to FY 2021*, STATISTA (Aug. 24, 2023), <https://www.statista.com/statistics/549097/operating-ratio-csx-transportation> [<https://perma.cc/K8T2-462Z>] (recording the decrease in CSX’s OR from 71.1% in 2013 to 55.3% in 2021).

59. Oberman, *supra* note 36, at 7.

60. GOODMAN, *supra* note 1, at 209-14.

61. *Chicago Intermodal Simplification and Service Update from Kenny Rocker, EVP, Marketing and Sales*, UNION PAC. (May 2, 2019), <https://www.up.com/customers/announcements/customernews/generalannouncements/CN2019-28.html> [<https://perma.cc/B8GV-RJ9Q>].

62. See Buck, *supra* note 23.

63. See *id.*

64. *Union Pacific Corporation’s (UNP) CEO Lance Fritz on Q2 2021 Results – Earnings Call Transcript*, SEEKING ALPHA (July 22, 2021, 2:15 PM ET), <https://seekingalpha.com/article/4440738-union-pacific-corporations-unp-ceo-lance-fritz-on-q2-2021-results-earnings-call-transcript> [<https://perma.cc/8PFU-4D3T>].

65. See *Urgent Issues in Freight Rail Service*, SURFACE TRANSP. BD. 10 (Apr. 26, 2022), <https://www.stb.gov/wp-content/uploads/304767-2.pdf> [<https://perma.cc/S3ES-NSLA>].

specific deregulation helped to make brittle,⁶⁶ that larger breakdown became a — perhaps *the* — key inflationary pressure in the country during the Biden Administration. By 2024, economist Peter R. Orszag attributed the persistent inflation throughout the Biden Administration to the “unprecedented supply-side shock” of the COVID-19 pandemic, “which extended beyond the crisis itself.”⁶⁷

2. Workers and Safety

When railroads lay off workers, the onus of keeping the trains running falls on the remaining employees. Since 2015, the height of railroad employment this century, railroads have reduced their total workforce by approximately one-quarter, or 50,000 workers.⁶⁸ Among workers specifically tasked with operation and maintenance, from January 2015 to January 2024, employment fell from approximately 147,000 to 104,000, a 29% decrease.⁶⁹ The workers remaining are generally on call almost every day of the year, meaning they have to be ready to run trains on a few hours’ notice, with little ability to plan their lives and sleep schedules.⁷⁰ In a 2022 survey of rail workers, nearly 40% of engineers and conductors reported experiencing fatigue on most or nearly every trip and feeling “too tired to drive home after work” after most or nearly every trip.⁷¹ The enormous pressure put on workers isn’t a coincidence. PSR creator Harrison, upon hearing of workers being “afraid to call in sick,” said, “I worked a lot of days when I was sick. . . . Go somewhere you don’t have to work when you’re sick.”⁷²

66. See David Dayen & Rakeen Mabud, *How We Broke the Supply Chain*, AM. PROSPECT (Jan. 31, 2022), <https://prospect.org/economy/how-we-broke-the-supply-chain-intro> [https://perma.cc/8JVT-BHP5].

67. Peter R. Orszag, *The Real Story of Inflation*, WASH. POST (Nov. 14, 2024, 6:00 AM ET), <https://www.washingtonpost.com/opinions/2024/11/14/inflation-american-rescue-plan-covid> [https://perma.cc/9G2L-JKQG].

68. FRED, *All Employees, Rail Transportation*, FED. RSRV. BANK ST. LOUIS (Jan. 10, 2021, 7:51 AM CST), <https://fred.stlouisfed.org/series/CES4348200001> [https://perma.cc/RUN6-TQG7].

69. *Employment Data, January 2024*, SURFACE TRANSP. BD., <https://www.stb.gov/reports-data/economic-data/employment-data> [https://perma.cc/X2HC-QZQ7]; *Employment Data, January 2015*, SURFACE TRANSP. BD., <https://www.stb.gov/reports-data/economic-data/employment-data> [https://perma.cc/X2HC-QZQ7].

70. Aaron Gordon, ‘The Worst and Most Egregious Attendance Policy’ Is Pushing Railroad Workers to the Brink, VICE (Apr. 5, 2022, 9:00 AM), <https://www.vice.com/en/article/5dgezn/the-worst-and-most-egregious-attendance-policy-is-pushing-railroad-workers-to-the-brink> [https://perma.cc/R37G-9G4F].

71. FED. R.R. ADMIN., U.S. DEP’T OF TRANSP., DOT/FRA/ORD-23/17, THE IMPACT OF COMMUTE TIMES ON THE FATIGUE AND SAFETY OF LOCOMOTIVE ENGINEERS AND CONDUCTORS 31 (2023), <https://railroads.dot.gov/sites/fra.dot.gov/files/2023-06/FRA%20Rail%20Fatigue%20Survey%20Report.pdf> [https://perma.cc/QPK9-C73E].

72. GREEN, *supra* note 38, at 148.

At the same time, workers say that, especially over the past decade, railroad management has pressured workers to sacrifice safety for speed.⁷³ Decades ago, inspectors – workers who inspect trains for safety defects – spent approximately three minutes per car to flag safety issues.⁷⁴ Today, under PSR, that time has dwindled: in 2021, Norfolk Southern gave employees one minute and twenty-four seconds to inspect a rail car, which can have a perimeter of up to one hundred feet.⁷⁵ *Vice* reported, “Thanks to the staff cuts, rail yard closures and operation consolidation, workers that used to inspect perhaps 300 cars a day are now inspecting three or four times that.”⁷⁶

Pressing fewer workers to do more in less time has predictably affected the safety of those workers, as well as people who live near train tracks. Since 2013, the railroad accident rate has risen a staggering 123% at Norfolk Southern, 52% at Union Pacific, and 72% at CSX.⁷⁷ Moreover, reporting suggests that FRA’s data likely undercounts significant numbers of worker deaths and injuries because railroad management often discourages or intimidates workers from reporting their injuries.⁷⁸ The *Associated Press* noted that, over the past decade, “[w]hen the distance freight travels is factored in, the rate of accidents and derailments

73. Aaron Gordon, ‘It’s Going to End Up Like Boeing’: How Freight Rail Is Courting Catastrophe, *VICE* (Mar. 22, 2021, 9:00 AM), <https://www.vice.com/en/article/3angy3/freight-rail-train-disaster-avoidable-boeing> [<https://perma.cc/ZK8T-RPN7>].

74. *Id.*

75. *Id.*; see, e.g., *Railroad Equipment*, CSX, <https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment> [<https://perma.cc/L3FW-JJMX>] (outlining railroad-car types and dimensions).

76. Gordon, *supra* note 73. “In one bulletin board material, a worker said, safety was listed as the fourth most important thing, behind measures like reducing car dwell time and getting trains back on the rails. The workers have a joke around the shop floor now: ‘Safety Fourth.’” *Id.*

77. Maddock Thomas, *Putting America Back on Track: The Case for a 21st Century Public Rail System*, PUB. RAIL NOW 8 (July 2024), <https://repository.library.brown.edu/storage/bdr:gf5st8f/PDF> [<https://perma.cc/4ED6-9P88>] (citing Federal Railroad Administration (FRA) data); see also Peter Eavis, *Since Ohio Train Derailment, Accidents Have Gone Up, Not Down*, N.Y. TIMES (Jan. 30, 2024), <https://www.nytimes.com/2024/01/28/business/ohio-train-derailment-safety-east-palestine.html> [<https://perma.cc/7KSP-MGHX>] (noting an increase in railroad accidents in the year after the high-profile East Palestine accident and congressional concerns about railroad safety standards).

78. Topher Sanders, Dan Schwartz, Danelle Morton & Gabriel Sandoval, *What’s Missing from Railroad and Safety Data? Dead Workers and Severed Limbs*, PROPUBLICA (Mar. 13, 2024, 5:00 AM EDT), <https://www.propublica.org/article/railroad-safety-data-missing-dead-workers-severed-limbs> [<https://perma.cc/34VX-K8ZC>]; Topher Sanders, Jessica Lussenhop, Dan Schwartz, Danelle Morton & Gabriel Sandoval, “Do Your Job.” *How the Railroad Industry Intimidates Employees into Putting Speed Before Safety*, PROPUBLICA (Nov. 15, 2023, 6:00 AM EST), <https://www.propublica.org/article/railroad-safety-union-pacific-csx-bnsf-trains-freight> [<https://perma.cc/JAQ8-8SYW>].

has worsened.”⁷⁹ Research in the journal *Risk Analysis* similarly found that longer trains, a hallmark of PSR,⁸⁰ present a higher risk of derailment.⁸¹

The immense pressure PSR puts on workers contributed directly to two crises involving the railroad industry in recent years. First, during the COVID-19 supply-chain crisis, railroads were unable to respond quickly to the upturn in consumer demand; in implementing PSR, they eliminated “‘extra boards,’ or backup train crews on call just in case,” which “backfired when those employees were needed.”⁸² Second, railroad workers’ anger at PSR for its incessant workload with little ability to take sick leave erupted in their 2022 labor dispute. This brought the country’s supply chains to the brink of crisis again, prevented only by a deal brokered by the Biden Administration that left workers feeling “betrayed.”⁸³ One said, “We worked through the pandemic. We were considered essential. And now it seems like we’re expendable.”⁸⁴

3. *Smaller Communities*

The railroad industry’s implementation of PSR has also indirectly harmed smaller communities. One of the key features of PSR has been its use of increasingly long trains, which allows railroads to carry more freight with the same number of workers. All Class I railroads have reported using longer trains to

79. Josh Funk, *Buttigieg Scolds Railroads for Not Doing More to Improve Safety Since Ohio Derailment*, AP NEWS (Mar. 12, 2024, 4:47 PM EDT), <https://apnews.com/article/railroad-safety-east-palestine-derailment-buttigieg-aar-a44191c3e7c8517995e9737e46ae7915> [https://perma.cc/TE65-J6PQ].

80. See *infra* Section I.B.3.

81. Peter M. Madsen, Robin L. Dillon, Konstantinos P. Triantis & Joseph A. Bradley, *The Relationship Between Freight Train Length and the Risk of Derailment*, 2024 RISK ANALYSIS 2616, 2624 (finding that 100-car-long trains have an 11% higher risk of derailment than a fifty-car-long train and that 200-car-long trains have a 24% higher risk).

82. Buck, *supra* note 23 (quoting Greg Regan, president of a labor organization called the Transportation Trades Department).

83. Meg Herschlein & Paula Pecorella, *Railroad Strike Ahead? Rail Workers Just Want Sick Leave*, MORE PERFECT UNION (Nov. 22, 2022), <https://perfectunion.us/railroad-strike-ahead-rail-workers-just-want-sick-leave> [https://perma.cc/3PX8-KHTW] (quoting one worker as saying, “We need time to sleep, we need time to rest, we need to enjoy our lives. We don’t have any of that now.”); Will Bunch, *Dems and GOP Unite to Sell Out the American Worker. Maybe We Need a Labor Party.*, PHILA. INQUIRER (Dec. 4, 2022, 10:27 AM ET), <https://www.inquirer.com/opinion/commentary/rail-workers-biden-betrays-labor-20221204.html> [https://perma.cc/4C6K-U395]. For more on the legal framework that railroad workers navigate, see Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1494-1504 (1990).

84. Herschlein & Pecorella, *supra* note 83.

drive down costs, but precise data about train lengths are hard to obtain.⁸⁵ One Class I railroad told the Government Accountability Office that the “percentage of trains over 10,000 feet long has increased from less than 3 percent in 2017 to more than 25 percent in 2021.”⁸⁶ Another reported that their average train length increased from “5,250 feet [long] in 2011 to about 7,000 feet in 2021.”⁸⁷

Longer trains often impose indirect harms on the communities in which they operate.⁸⁸ Towns have complained about trains blocking street crossings for hours at a time, resulting in kids on their way to school climbing through gaps between train cars despite the extraordinary risk of those trains moving suddenly with little to no warning.⁸⁹ The *Jacksonville Business Journal* reported that “CSX trains were ticketed for blocking intersections 161 times in 2018 and 130 times in 2017—up from just one ticket in 2016.”⁹⁰ Yet at the same time, many smaller communities have no access or limited access to rail networks, meaning that they suffer because of long trains without directly benefiting from them. As a final example, one side effect of longer trains ends up being longer lines in which trains idle, waiting to pull into railyards. The result is pollution, in the form of toxic emissions and noise, as well as the concentration of risk building in communities right next to railyards if trains carry toxic materials.⁹¹

The East Palestine disaster is emblematic of the concern that people across the country have about trains that pass through their backyards. Carrying hazardous materials including vinyl chloride, Norfolk Southern train 32N derailed just outside of East Palestine, Ohio.⁹² After first responders feared that the vinyl

85. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 31, at 15.

86. *Id.*

87. *Id.*

88. Another problem is for shippers whose goods may be more vulnerable to theft. During the COVID-19 pandemic, people just outside the port of Los Angeles and Long Beach took advantage of trains' lengths to steal consumer goods. Malia Wollan, *The Great Freight-Train Heists of the 21st Century*, N.Y. TIMES (Feb. 4, 2024), <https://www.nytimes.com/2024/01/23/magazine/train-robbery-amazon-packages.html> [<https://perma.cc/9KNC-GQDD>].

89. Topher Sanders, Dan Schwartz & Joce Sterman, *As Rail Profits Soar, Blocked Crossings Force Kids to Crawl Under Trains to Get to School*, PROPUBLICA (Apr. 26, 2023, 12:00 PM EDT), <https://www.propublica.org/article/trains-crossing-blocked-kids-norfolk-southern> [<https://perma.cc/7PR8-YDYG>].

90. Robinson, *supra* note 54.

91. See Joce Sterman, Scott Smith, Brandon Wissbaum & Jamie Grey, *Long-Idling Trains Create Health, Environmental Concerns Nationwide*, INVESTIGATETV (Feb. 26, 2024 1:27 PM EST), <https://www.investigatetv.com/2024/02/26/long-idling-trains-create-health-environmental-concerns-nationwide> [<https://perma.cc/YVY9-PHSV>]; Nicole Greenfield & Amanda MacMillan, *Protect Your Community from “Bomb Trains,”* NRDC (May 11, 2022), <https://www.nrdc.org/stories/protect-your-community-bomb-trains> [<https://perma.cc/Q2FB-XB7F>].

92. NAT'L TRANSP. SAFETY BD., *supra* note 3, at 1-2.

chloride would explode, they performed a “controlled venting” and evacuated the nearby area.⁹³ While the direct cause of the derailment was likely overheated equipment, workers argued that the train was too long and heavy: “151 cars, 9,300 feet long, 18,000 tons.”⁹⁴ Longer trains are generally more likely to derail.⁹⁵

4. *Climate and Industrial Policy: Underexpansion*

A successful climate-change policy likely requires expanding rail networks. Freight railroads are many multiples more fuel efficient than their nearest alternative: trucking. As the Biden Administration observed, freight rail moves 28% of U.S. freight by ton-miles but accounts for only 2% of transportation emissions “thanks to its significantly higher efficiency than freight trucking.”⁹⁶ A railroad needs only one gallon of diesel fuel to carry one ton of freight more than 470 miles, while a heavy freight truck uses the same amount of fuel to carry that same ton less than one-third as far, 151 miles.⁹⁷ The American Association of Railroads, the railroads’ trade association, points out that railroads are “the most fuel-efficient way to move goods over land and one train can move nearly 500 tons on one gallon of fuel while also removing hundreds of trucks off the highway.”⁹⁸

Industrial policy will also require an expanded rail network. “If you’re looking to make more things in America, like semiconductors,” says a chemical industry trade group, “you need to be able to move them.”⁹⁹ Many goods,

93. *Id.* at 3.

94. Michael Kaplan, *Excess Size Caused Train to Break Down in Days Before It Derailed in Ohio, Employees Say*, CBS NEWS (Feb. 15, 2023, 7:12 PM EST), <https://www.cbsnews.com/news/ohio-train-derailment-east-palestine-norfolk-southern-excess-size> [https://perma.cc/FN9H-BVK7].

95. See Madsen et al., *supra* note 81, at 2624.

96. *The U.S. National Blueprint for Transportation Decarbonization: A Joint Strategy to Transform Transportation*, DEP’T OF ENERGY AND DEP’T OF TRANSP. AND DEP’T OF HOUS. & URB. DEV. AND ENV’T PROT. AGENCY 66 (Jan. 2023), <https://www.energy.gov/sites/default/files/2023-01/the-us-national-blueprint-for-transportation-decarbonization.pdf> [https://perma.cc/H8LL-JEQT].

97. *An Action Plan for Rail Energy and Emissions Innovation*, DEP’T OF ENERGY AND DEP’T OF TRANSP. AND DEP’T OF HOUS. & URB. DEV. AND ENV’T PROT. AGENCY 14, 55 (Dec. 2024), https://www.energy.gov/sites/default/files/2024-12/doe-cere-modal-reports_rail-energy-emissions-action-plan.pdf [https://perma.cc/4WL5-HYL7].

98. *Freight Rail & Climate Change*, ASS’N OF AM. R.R.S. 2 (Feb. 2024), <https://www.aar.org/wp-content/uploads/2023/06/AAR-Climate-Change-Fact-Sheet.pdf> [https://perma.cc/E6WU-WGUV] (“Moving freight by rail instead of truck lowers GHG emissions by up to 75%, on average.”).

99. Caitlin Harrington, *A US Freight Rail Crisis Threatens More Supply Chain Chaos*, WIRED (Aug. 30, 2022, 10:00 AM), <https://www.wired.com/story/a-us-freight-rail-crisis-threatens-more-supply-chain-chaos> [https://perma.cc/9HJG-PFUE].

especially commodities and manufacturing inputs, have to move by rail because of their volume and low per-unit value.¹⁰⁰ Yet just as expanding rail to supplant trucks has become more relevant for climate and industrial policy, railroads have ceded significant market share to trucks. Then-STB Chairman Martin J. Oberman noted in 2021 that if railroads had maintained their 2002 market share, there would have been one million fewer trucks on the highways, and 8.2 million fewer tons of carbon dioxide emitted each year.¹⁰¹ Heavy trucks also wear out highways faster, necessitating more resources and emissions through repairs.¹⁰² And rail is one of the only practical ways to ship some low-margin, high-volume goods essential for climate policy, such as the coal tar and petroleum coke used to make synthetic graphite for electric-vehicle (EV) batteries.¹⁰³ Rail will have to be part of an expanded climate policy, but PSR, and its fixation on short-term profit, demonstrates at least an apathy toward addressing climate change or strengthening domestic manufacturing.¹⁰⁴

C. PSR's Persistence

PSR has persisted in the rail industry because investors have disciplined serious attempts to depart from PSR's strict focus on short-term cost cutting. In the last decade, at three of the four major Class I railroads – CSX, Union Pacific, and Norfolk Southern – activist investors have pushed managers to keep lowering ORs, even at the continued expense of workers and customers. First, at CSX, Paul Hilal's Mantle Ridge fund took a \$1.2 billion stake in CSX and demanded

100. See Agric. Mktg. Serv., *supra* note 52 (“For rural areas that are distant from water transportation and end markets, rail transportation is virtually the only cost-effective shipping alternative available for low-value, bulk commodities.”).

101. Martin J. Oberman, Chairman, Surface Transp. Bd., Speech at the North American Rail Shippers Association Annual Meeting 14 (Sept. 8, 2021), <https://www.stb.gov/wp-content/uploads/NARS-Speech-9-8-21.pdf> [<https://perma.cc/ZYX5-L9S7>] (“[A]n additional 123 [million] tons of global warming CO₂ i[s] pumped into our atmosphere since 2002 just because the [railroads] chose not to maintain their market share as compared to trucks.” (emphasis omitted)).

102. *The Real Cost of Heavier Trucks*, ASS’N AM. R.R.s., <https://www.aar.org/article/real-cost-heavier-trucks> [<https://perma.cc/7QMK-2VZ7>]. Electric trucks would curb trucking emissions but still have significant environmental disadvantages. The Sierra Club points out that electric vehicles “still have the need for batteries with material mined/toxic disposal issues, or rubber tire sourcing causing tropical deforestation, or toxic tire pollution, or any of the myriad problems inherent to road vehicles in general.” *Sierra Club Rail Transportation Statement*, SIERRA CLUB 9 (Aug. 2023), <https://www.sierraclub.org/sites/default/files/2023-08/Rail%20Report%20FINAL.pdf> [<https://perma.cc/5FLW-NUQF>].

103. Longman, *supra* note 11.

104. See *The U.S. National Blueprint for Transportation Decarbonization: A Joint Strategy to Transform Transportation*, *supra* note 96, at 11.

in January 2017 that CSX install Harrison as CEO.¹⁰⁵ Hilal and Harrison did not face much resistance: CSX shareholders quickly agreed, with Harrison reportedly surprised at “the depth of the investor support.”¹⁰⁶ Second, at Union Pacific, despite harsh criticism for its performance during the COVID-19 supply-chain crisis, activist investor Soroban Capital Partners pushed out the western railroad’s CEO, with observers understanding that Union Pacific management was being punished for not lowering its OR enough.¹⁰⁷ Soroban installed their CEO candidate, Jim Vena, who learned how to implement PSR from Harrison earlier in his career.¹⁰⁸

For some time in 2022 and 2023, Norfolk Southern appeared to buck the trend. After the COVID-19 supply-chain crisis, CEO Alan Shaw promised “resilience railroading” reforms, turning away from PSR’s focus on short-term cost reductions and instead toward retaining more workers and equipment.¹⁰⁹ Shaw and Norfolk Southern’s managers argued that less cost cutting, at the risk of a higher OR, would enable the railroad to avoid even costlier delays from having to bring labor and equipment back into service.¹¹⁰ One rail observer commented that Norfolk Southern had “officially stepped out of the shadow that the Cult of the Operating Ratio has cast on the industry for far too long.”¹¹¹

But Norfolk Southern still has not stepped out of the “Cult of the Operating Ratio’s” shadow. By 2024, activist investor Ancora Holdings put \$1 billion into

105. See Matthew Buck, *Why Some Kids Might Get Their Presents Late This Christmas*, WASH. MONTHLY (Nov. 23, 2018), <https://washingtonmonthly.com/2018/11/23/why-some-kids-might-get-their-presents-late-this-christmas> [<https://perma.cc/4LBH-GQ4H>]; see Press Release, CSX, CSX Calls Special Meeting in Light of Extraordinary Mantle Ridge and Hunter Harrison Requests (Feb. 14, 2017), <https://www.csx.com/index.cfm/about-us/media/press-releases/csx-calls-special-meeting-in-light-of-extraordinary-mantle-ridge-and-hunter-harrison-requests> [<https://perma.cc/HN5R-KJTE>].

106. McNish & Benoit, *supra* note 29.

107. See Oberman, *supra* note 5, at 4–6 (criticizing Union Pacific’s performance “since just last August [2023] when its new CEO arrived with Soroban’s short term, OR lowering mandate”).

108. Joanna Marsh, *All Eyes on Vena as He Takes Helm at Union Pacific*, FREIGHTWAVES (Aug. 3, 2023), <https://www.freightwaves.com/news/all-eyes-on-vena-as-he-takes-helm-at-union-pacific> [<https://perma.cc/8RUN-BP3M>].

109. Jeff Stagl, *With Resilience Railroading, NS Seeks to Head in a More Customer-Centric, Always-Solid-Service Direction*, PROGRESSIVE RAILROADING (Mar. 2023), https://www.progressiverrailroading.com/norfolk_southern/article/with-resilience-railroading-ns-seeks-to-head-in-a-more-customer-centric-always-solid-service-direction--68734 [<https://perma.cc/SR9W-XK2D>].

110. Bill Stephens, *Norfolk Southern CEO Alan Shaw’s Winning Formula: Analysis*, TRAINS (Jan. 13, 2023), <https://www.trains.com/trn/news-reviews/news-wire/norfolk-southern-ceo-alan-shaws-winning-formula-analysis> [<https://perma.cc/BH55-AUFB>] (quoting Shaw as saying that “[r]esilience is an investment in long-term shareholder value”).

111. *Id.*

Norfolk Southern,¹¹² then charged the board with “poor judgment” for appointing Shaw, highlighted Norfolk Southern’s OR of nearly 69%, and proposed replacing Shaw and the chief operating officer with a Harrison disciple.¹¹³ After a protracted boardroom fight, Ancora won seats on Norfolk Southern’s board of directors, but not a majority.¹¹⁴ Still, the damage was done: the pressure on Norfolk Southern pushed it to hire a former Harrison student, John Orr, to be its chief financial officer.¹¹⁵ Meanwhile, Shaw was fired after a board investigation into his relationship with Norfolk Southern’s then-chief legal officer Nabanita Nag.¹¹⁶ Investors have thus stepped in, forcefully and consistently, to discipline railroad management for deviating from PSR and its extractive practices.

II. THE PROGRESSIVE VISION, 1887-1976

For much of the twentieth century, U.S. law did not endorse railroads’ prioritization of profit above all. From the late nineteenth century to the 1970s, Congress put in place a Progressive Era approach to regulating the railroad industry that preserved private ownership and profit while also incorporating values and policies such as stability, broad-based development, equality, and access. Created by Congress in the Interstate Commerce Act of 1887,¹¹⁷ ICC became one of the most important agencies in the country’s history, with broad powers over the railroad and trucking industries, among others. The American experience

112. Esther Fung & Lauren Thomas, *Norfolk Southern’s CEO Survived an Activist Attack. Then Came Talk of an Affair.*, WALL ST. J. (Sept. 12, 2024, 11:18 AM ET), <https://www.wsj.com/business/logistics/norfolk-southerns-ceo-survived-an-activist-attack-then-came-talk-of-an-affair-f51a172e> [<https://perma.cc/S74E-CY4R>].

113. *The Case for Leadership, Safety & Strategy Changes at Norfolk Southern, Move NSC Forward*, ANCORA ALTS. 15, 21 (Feb. 2024), <https://ancora.s3.us-west-1.amazonaws.com/The+Case+for+Leadership%2C+Safety+and+Strategy+Changes+at+Norfolk+Southern+.pdf> [<https://perma.cc/3AKH-URKS>]. Former Ohio Governor John Kasich also joined Ancora’s takeover attempt. *Id.* at 13.

114. Josh Funk, *Norfolk Southern Makes Deal with Investors to Prevent Another Fight for Control of the Railroad*, AP NEWS (Nov. 14, 2024, 6:11 PM EST), <https://apnews.com/article/norfolk-southern-ancora-investor-railroad-dffd8de8758c74fb5c2aeb4ddc87186> [<https://perma.cc/6A9P-GKMA>].

115. *Norfolk Southern Appoints Industry Veteran John Orr as Chief Operating Officer*, NORFOLK S. (Mar. 20, 2024), <https://norfolksouthern.mediaroom.com/2024-03-20-Norfolk-Southern-appoints-industry-veteran-John-Orr-as-chief-operating-officer> [<https://perma.cc/3ZJB-ZRZS>].

116. Fung & Thomas, *supra* note 112.

117. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).

with railroad regulation would set a benchmark for the regulation of other network industries.¹¹⁸

This Part recovers the Progressive vision of railroad regulation and emphasizes policy priorities that can be useful in thinking about alternative ways of structuring the railroad industry today. Farmer, small-business, and labor movements of the late nineteenth century pushed ICC to rein in the railroads' outsize power and regulate unfair and discriminatory practices. Attuned to the twin problems of high fixed costs and the extractive forms of discrimination needed to recover them, Progressive Era governments used regulation to advance stability, fair prices, and nondiscrimination. This was a part of the broader attempt by Progressive Era thinkers to place, as K. Sabeel Rahman puts it, the problem of concentrated private power stemming from industrial capitalism to a "common moral purpose: not just to facilitate market transactions or promote efficiency, but to ensure the accountability of private power, and to promote public values such as access, equity, and innovation."¹¹⁹ Recovering this Progressive Era paradigm helps to provide additional normative criteria with which to evaluate deregulation and offers a sense of possibility for how to structure law and regulation to serve plural goals in the future.

A. *The Progressive Era Paradigm and Its Problems*

The Progressive Era paradigm responded to the rise of railroads in the nineteenth century. For a variety of reasons,¹²⁰ railroads in the early and mid-nineteenth century were primarily state- or city-led projects, often envisioned as strengthening ties between communities.¹²¹ Through subsidies, state-granted monopolies, tax exemptions, delegated eminent-domain powers, and land

118. See MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS & UTILITIES: LAW & POLICY 475 (2022) ("Perhaps more than any other industry, railroads have been formative to [network-platforms-and-utilities] law in the United States.").

119. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1633-34 (2018).

120. These reasons include the contingent fact of local governments' investments in canals before railroads, JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 1-3 (2001), interstate competition, RICKS ET AL., *supra* note 118, at 475, and Jacksonianism's distaste for (some forms of) federal action, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: A NEW EDITION FOR OUR PERILOUS TIMES 47, 49 (2022). For a history of railroading with particular emphasis on the relationship between technology, politics, and regulation, see STEVEN W. USSELMAN, REGULATING RAILROAD INNOVATION: BUSINESS, TECHNOLOGY, AND POLITICS IN AMERICA, 1840-1920, at 61-62, 143-45 (2002).

121. ELY, *supra* note 120, at 1-2.

grants, railroads spread and grew in importance.¹²² In the decades after the Civil War, railroads became far more powerful than their antebellum antecedents. Northern railroad capitalists became prominent “Robber Barons,” benefiting from a wave of consolidation in the 1860s and 1870s.¹²³ At the same time, the reach of the railroad network “expanded rapidly,” doubling “from 35,085 miles in 1865 to 70,874 in 1873.”¹²⁴ By 1890, the network would more than double again, extending 163,597 miles.¹²⁵ By the late nineteenth century, railroads had thus amassed nation-spanning power.

The Progressive Era paradigm Congress implemented in 1887 and updated throughout the next three decades addressed two important aspects of the “railway problem,” that is, as the Iowa Board of Railroad Commissioners described it at the time, the challenge of “securing to all shippers equality of opportunity in the use of railway facilities at just and reasonable rates.”¹²⁶ By the late nineteenth century, railroads ran into a dynamic that would continue to trouble them to the present day: the problem of high fixed costs. A railroad’s fixed costs include acquiring and maintaining land, equipment, and track. High fixed costs encourage railroads to price at marginal cost and tolerate running at an overall

122. See, e.g., RICKS ET AL., *supra* note 118, at 478 (citing, for example, the Land Grant Act of 1850, ch. 61, 9 Stat. 466); ELY, *supra* note 120, at 16-19, 43-51; Pacific Railroad Act of 1862, ch. 120, § 1, 12 Stat. 489, 489-90; *Freight Rail & Military Operations*, ASS’N AM. R.R.S., <https://www.aar.org/issue/military> [<https://perma.cc/X9HT-JCCZ>].

123. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 251-54 (2003). Another dimension to the growing railroad problem came from the uneven control over rail networks in the South: southern states looking to rebuild from Sherman’s “March to the Sea” could not turn to federal financing to build a rail network and opposed further state subsidization after the Panic of 1873, culminating in southern railroads being subsumed into northern financiers’ growing interregional networks. See ELY, *supra* note 120, at 66-69; John F. Stover, *Northern Financial Interests in Southern Railroads, 1865-1900*, 39 GA. HIST. Q. 205, 217-18 (1955) (finding that of the twelve major southern railroads, “northern directors [on boards] outnumbered those from the South two to one”).

124. RICHARD WHITE, *RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA* 50 (2011).

125. Louis P. Cain, *Table Df927-955: Railroad Mileage, Equipment, and Passenger Traffic and Revenue: 1890-1980*, in *HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO PRESENT: MILLENNIAL EDITION* (Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch & Gavin Wright eds., 2006), <https://hsus.cambridge.org/HSUSWeb/table/showtablepdf.do?id=Df927-955> [<https://perma.cc/TG7G-LZXX>].

126. OFF. OF THE BOARD OF R.R. COMM’RS, STATE OF IOWA, *SIXTEENTH ANNUAL REPORT OF THE BOARD OF RAILROAD COMMISSIONERS FOR THE YEAR ENDING JUNE 30, 1893*, at 40*h* (Des Moines, G.H. Ragsdale 1893); see also CHARLES FRANCIS ADAMS, JR., *RAILROADS: THEIR ORIGINS AND PROBLEMS* 81 (Cosimo Classics 2005) (1878) (identifying the railroad problem as coming from the fact “that the recognized laws of trade operate but imperfectly at best in regulating the use made of these modern thoroughfares by those who thus both own and monopolize them”).

loss because even some revenue can help cover fixed costs.¹²⁷ “‘Business at any price rather than no business at all,’ was their motto,” historian Richard White writes.¹²⁸ In the nineteenth century, this meant that competition among railroads could be ruinous. Constant undercutting meant that no railroad could charge enough to service all of its liabilities, particularly debt, associated with high fixed costs, ultimately undermining its long-term health.¹²⁹ The classical-political-economy approach of fostering competition, perhaps by chartering another competitor, could not address this problem; it would only exacerbate the ruinous competition by continuing to drive rates down. In the 1870s, railroads engaged in so-called “rate wars,” constantly undercutting one another on price.¹³⁰

Railroads would attempt to recoup their fixed costs but ran into a difficult dynamic to break free of. Tired of warring, the railroads might decide to enter into a pool to allocate markets jointly so that each member could charge a sufficiently high rate without worrying about being undercut by a competitor.¹³¹ Yet pools could be unstable; each member had a strong incentive to renege on their agreement.¹³² Courts also tended to invalidate pools for either exceeding their corporate charters or effecting an illegal monopoly.¹³³

Second, faced with the difficulties of pooling, railroads turned to discriminating among their customers. This discrimination could take several forms. One important form was the preferential rebate. More powerful shippers could negotiate better rates from railroads, who would then make up for lost profits by raising rates on less powerful shippers.¹³⁴ The consequence for corporate power

127. See NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904*, at 46-86 (1985).

128. Richard White, *From Antimonopoly to Antitrust*, in *ANTIMONOPOLY AND AMERICAN DEMOCRACY* 83, 96 (Daniel A. Crane & William J. Novak eds., 2023) (quoting ARTHUR T. HADLEY, *RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS* 71 (1903)).

129. See LAURA PHILIPS SAWYER, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890-1940*, at 76 (2018).

130. Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, in *THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW* 72, 77 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 144 (1991).

131. RICKS ET AL., *supra* note 118, at 482.

132. HOVENKAMP, *supra* note 130, at 146.

133. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* 98-101 (1988) (reviewing common-law decisions on pooling).

134. Dempsey, *supra* note 123, at 253; *Standard Oil Co. v. United States*, 221 U.S. 1, 33 (1910) (noting that Standard Oil used “preferential rates and rebates” from railroads to pressure

was clear, with Ron Chernow explaining that “[t]he proliferation of rebates hastened the shift toward an integrated national economy, top-heavy with giant companies enjoying preferential freight rates.”¹³⁵

Another form of discrimination occurred between “long hauls” versus “short hauls.” Rates to ship goods short distances could be higher for shippers because longer distances allowed for lower per-mile costs. At the same time, railroads often had market power over smaller, local communities and less power over longer distances since shippers tended to have more options. According to Richard White, a historian of railroads and antimonopolism, “Railroads could bully small towns by threatening to move their shops elsewhere, but [they] rarely had the same kind of leverage over large market centers such as Denver, Salt Lake City, or San Francisco.”¹³⁶ Cheaper long-haul rates meant that large cities enjoyed cheaper access to materials while the small, rural towns supplying those cities would struggle to develop out of a specialization in one type of good or commodity.¹³⁷ The uneven application of rates for a service as essential as shipping meant that railroads were picking winners and losers, not only at the firm level but at the community level as well.¹³⁸ In this way, discrimination enacted a regressive form of cross subsidization, with smaller or monopolized communities subsidizing bigger, more competitive metropolises.¹³⁹

Railroads’ responses to high fixed costs put immense political pressure on policymakers to address the industry’s exercises of power. Farmers and small businesses, especially in the Midwest, became dependent on railroads and hated unfair discrimination in setting rates.¹⁴⁰ “Every shipper,” James W. Ely, Jr., explains, “was convinced that someone else was getting a better rate.”¹⁴¹ Because to simply charter a competing railroad would fail to redress the railroad

competitors who were then “forced either to become members of [Standard Oil] or were driven out of business”).

135. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 115 (1998).

136. WHITE, *supra* note 124, at 156.

137. *Id.* at 70.

138. For an insightful argument attributing railroad-rate regulation to more geographically dispersed economic development, from commodity-export-oriented activity to manufacturing, see Noam Maggor, *Escaping the Periphery: Railroad Regulation as American Industrial Policy*, 11 CRITICAL HIST. STUD. 47, 49–50 (2024).

139. See Benjamin Dinovelli, *Universal Service by Regulation* 52–54 (2024) (unpublished manuscript) (on file with author).

140. ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917*, at 182–84 (1999).

141. ELY, *supra* note 120, at 81.

problem,¹⁴² states, and eventually the federal government, turned instead to ICC, arming it with substantive powers.¹⁴³

B. Making a Paradigm: Progressive Era Legislation

To address the immense power of railroads and the tricky policy problems they presented, Congress created ICC. ICC, often called the “first regulatory commission in U.S. history,”¹⁴⁴ implemented the Progressive Era paradigm of regulation: eventually policing discrimination, regulating rates, presiding over entry and exits, and even briefly administering excess-profit-sharing provisions. The Interstate Commerce Act gave ICC substantive power to regulate railroad activity, most notably requiring that railroad rates be posted publicly and be “reasonable and just,” outlawing rebates and other “preference or advantage” to more valuable customers, and prohibiting pools.¹⁴⁵ Congress also gave ICC powers to issue cease-and-desist orders, as well as to require compulsory process from railroads, including mandating financial and operating information.¹⁴⁶ ICC would be made up of five independent commissioners (expanded to eleven by the 1980s but reduced back to five in 1982¹⁴⁷), appointed by the President and confirmed by the Senate, who were protected from removal for six-year terms.¹⁴⁸

An extensive historiography of the Interstate Commerce Act¹⁴⁹ is beyond the scope of this Note. But two elements are relevant here. First, the antimonopoly

¹⁴². See *supra* text accompanying notes 129–130.

¹⁴³. Though states had tried to regulate railroads and other businesses “affected with a public interest,” the Supreme Court’s Commerce Clause jurisprudence forced regulation of the railroad problem to Congress. See WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 115 (2022); see also *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 577 (1886) (holding that the transportation of goods from the interior of one state to another amounts to “commerce among the states”); W.A. Crafts, *Is the Railroad Problem Solved?*, ATLANTIC, July 1887, at 76, 84 (describing how railroad traffic “furnishes by far the largest part of the railroad traffic of the country, and gives rise to the most serious complaints”).

¹⁴⁴. See, e.g., *Interstate Commerce Commission*, FED. REG., <https://www.federalregister.gov/agencies/interstate-commerce-commission> [<https://perma.cc/C4DM-YM5M>].

¹⁴⁵. Interstate Commerce Act, ch. 104, §§ 1–6, 24 Stat. 379, 379–81 (1887).

¹⁴⁶. *Id.* §§ 12, 14–16, 20, 24 Stat. at 383–87.

¹⁴⁷. HENRY B. HOGUE, CONG. RSCH. SERV., R47897, *ABOLISHING A FEDERAL AGENCY: THE INTERSTATE COMMERCE COMMISSION* 12 (2024).

¹⁴⁸. Interstate Commerce Act § 11, 24 Stat. at 383.

¹⁴⁹. For an excellent historiographical discussion, see SANDERS, *supra* note 140, at 179–82, which concludes that the Interstate Commerce Act was a compromise solution between capitalists and farmers, who both proposed more radical solutions. For what it is worth, the corporate-

movement put enormous pressure on politicians in Congress to regulate the railroads. Sanjukta Paul explains that the broader late-nineteenth-century antimonopoly movement “arose in response to the rise of corporate power . . . and the attendant reorganization of existing patterns of economic coordination.”¹⁵⁰ The antimonopoly movement pushed for “democratic participation in the development of industrial capitalism,” as historian Laura Philips Sawyer writes.¹⁵¹ Richard White explains that antimonopolists criticized railroads’ power to “dictate the very terms of all competition,” or pick winners and losers, and to “extort” value beyond that of the service provided.¹⁵² Farmers, small producers and merchants, and workers in the West, Midwest, and South were key constituencies opposing the power and domination of the railroads in the second half of the nineteenth century.¹⁵³

Second, political leaders channeled antimonopoly concerns in debates over the legislation that became the Interstate Commerce Act. Texas Representative John Reagan, for example, warned that railroads were tending toward

complete mastery of our agricultural, mineral, manufacturing, and commercial, indeed of all our material interests[,] of our governments, State and Federal[,] . . . until a few railroads magnates shall own the most of the property of the country, while the masses of the people must be reduced to a condition of serfdom, poverty and vassalage.¹⁵⁴

Fears of a few railroads dominating the rest of the country drove the rhetoric of the time.¹⁵⁵

liberal argument—that railroads captured and shaped the development of regulation in their favor—is plausible and persuasive enough insofar as its proponents argue that railroads shaped legislation in their favor such that the result would have been different if the railroads did nothing. See, e.g., GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 57-61 (1963). But railroads would have preferred a much weaker commission than what the Interstate Commerce Commission (ICC) eventually became. See SANDERS, *supra* note 140, at 188. Many railroads continued to oppose and lobbied against the Interstate Commerce Act and “railroad intellectuals” failed to obtain the minimal solution to excessive competition they sought: “government-enforced pools,” or cartels. See WHITE, *supra* note 124, at 358-59.

150. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 198 (2021).

151. SAWYER, *supra* note 129, at 105.

152. See WHITE, *supra* note 124, at 111-12.

153. See SANDERS, *supra* note 140, at 182-95; WHITE, *supra* note 124, at 110-12, 287-93.

154. SANDERS, *supra* note 140, at 189.

155. This is not to say that politicians who worried about the outsize power of railroads were consistently committed to all forms of egalitarianism. Reagan, the former Confederate official,

As part of a broader push to check the power of large corporations in the Progressive and New Deal Eras, railroad regulation exemplified the public-utility, or NPU, model of regulation. The public-utility model is often contrasted with an antitrust paradigm and entails tolerating some measure of consolidation, due to “economies of scale [or scope or density] or because of social importance of the good [or service] in question, or both.”¹⁵⁶ But the public-utility model and the antitrust movement both originated from the antimonopoly and Progressive criticism of concentrated private power in the railroad, telegraph, and telephone industries.¹⁵⁷

Public-utility law drew on an older framework that imposed special duties on railroads, among other industries, as “common carriers.” Anglo-American law recognized that some businesses, “[w]hether due to scale economies, network effects, or virtual monopoly at the point of sale, . . . are not conducive to robust competition, affording them considerable power over at least some of their users, at least some of the time.”¹⁵⁸ The common law of common carriers required carriers to deal with dependent businesses on nondiscriminatory terms, offer “just and reasonable prices,” and exclude businesses only on reasonable terms.¹⁵⁹ The primary policy reasons for common-law courts to impose special duties were to “promote commerce and prevent the abuse of power.”¹⁶⁰

spoke during a period of racial segregation of passenger service in the South and “consistently defended” railroads’ right to discriminate based on ancestry. WHITE, *supra* note 124, at 356. Other southern critics of railroads in the late nineteenth and early twentieth centuries often sought to restore the power of southern white men ahead of the Republican-led federal government or northern-financier-led railroads. See JACK TEMPLE KIRBY, DARKNESS AT THE DAWNING: RACE AND REFORM IN THE PROGRESSIVE SOUTH 39 (1972). And many elements of labor could be “virulent[ly]” Sinophobic against tens of thousands of Chinese railroad workers. WHITE, *supra* note 124, at 293–305. But the antimonopoly movement and its role in the passage of the Interstate Commerce Act show that policymakers and movements in the Progressive Era advanced an understanding of law that ensured broader-based participation in the exercise of power, at least for white men. Nineteenth-century antimonopoly, flawed as it was, challenged “the inequality of the new social relations of property” and advanced the idea that “the economic system of a democracy had itself to be democratic.” *Id.* at xxxi, 513. In the process, the antimonopoly movement helped legitimate the state structuring of, and participation in, private power for public purposes.

156. Rahman, *supra* note 119, at 1632.

157. See *id.* at 1635–36.

158. Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law of Carriers*, 73 DUKE L.J. 1037, 1049–50 (2024). Note that Ganesh Sitaraman and Morgan Ricks argue only that “falling within this class of industries” is not a “necessary condition for the common law of carriers to apply, but rather that it appears to have been sufficient.” *Id.* at 1050; see also Rahman, *supra* note 119, at 1635–36 (describing the application of the public-utility framework during the “battles over railroad regulation”).

159. See Sitaraman & Ricks, *supra* note 158, at 1050–60.

160. *Id.* at 1061.

The development of public-utility regulation had several advantages over the common law in checking the power of increasingly interstate railroads. When the Senate Select Committee on Interstate Commerce put out the “Cullom Report” on railroad regulation in 1886, the Committee identified several shortcomings of common-law approaches. On one hand, the Committee explained, “[r]ailroads are everywhere recognized as common carriers,” meaning that each railroad must accept all comers, honor the terms it had posted, perform the service safely, and do so without unfair discrimination.¹⁶¹ But the railroads did “not recognize as they should the fact that they sustain a different relation to the public from persons engaged in ordinary business enterprises.”¹⁶² Private enforcement alone would insufficiently protect a shipper’s interest because of the cost of litigation.¹⁶³ And not only was litigation difficult, both as a matter of cost and evidence, but the federal nature of the American constitutional system meant that state-based common-law adjudication chafed against the Commerce Clause.¹⁶⁴ The Supreme Court’s decision in *Wabash, Saint Louis & Pacific Railway v. Illinois* later in 1886 would severely limit the ability of states to regulate the interstate activity of railroads.¹⁶⁵

Recognizing these flaws, the public-utility model at the end of the nineteenth and beginning of the twentieth century sought to harness and update older common-law rules and enshrine them in statute. Public utility, William Boyd argues, was “first and foremost a normative effort directed at ensuring that the governance of essential network industries . . . proceeds in a manner that protects the public from the abuses of market power by providing stable, reliable, and universal service at just and reasonable rates.”¹⁶⁶ As part of this project, the Interstate Commerce Act prohibited “undue or unreasonable preferences” and mandated interconnection access between complementary railroad tracks.¹⁶⁷

In the three decades after ICC’s birth, Congress would go on to update and expand the agency’s powers multiple times. After a trilogy of unfavorable Supreme Court cases in 1897 invalidated or weakened ICC’s power to enforce rates,

161. S. REP. NO. 49-46, at 39 (1886).

162. *Id.* at 40.

163. *Id.*

164. See *id.* at 44 (“[T]he fundamental difficulties arising from the constitutional organization of our dual system of State and National Government preclude the possibility of effective and satisfactory regulation of the business of transportation by the States alone.”).

165. 118 U.S. 557 (1886); see S. REP. NO. 49-46, at 40 (1886); *supra* notes 141-144 and accompanying text.

166. William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1619 (2014).

167. See Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 497, 521 (2023) (quoting Act of Feb. 4, 1887, ch. 104, § 3, 24 Stat. 379, 380).

police discrimination, and supervise pools,¹⁶⁸ Congress responded with corrective legislation that applied common-carrier principles and theories to check the railroads' power by mandating fair, nondiscriminatory terms. First, the Elkins Act of 1903 strengthened the prohibition on preferential rebates as well as the enforceability of publicly filed, open, and enforceable tariffs.¹⁶⁹ The Hepburn Act of 1906 next clarified that ICC could prescribe "just and reasonable [maximum] rates"¹⁷⁰ and declared that "it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates."¹⁷¹ And the Mann-Elkins Act of 1910 elucidated the standard for adjudicating short-haul/long-haul discrimination.¹⁷²

The Transportation Act of 1920 solidified the regulatory regime that would govern, with minor adjustments, until the 1970s. The Transportation Act of 1920 empowered ICC to set *minimum rates*, not only maximums, which could help address rate wars and ruinous competition, and established that railroads had the burden of showing ICC that a rate change was reasonable.¹⁷³ Congress ordered ICC to compose a plan for the railroads to consolidate into a handful of regional oligopolies and gave ICC antitrust powers as well as prior-approval authority over entry and exit into markets so as to modulate the railroads' previous pattern of overexpansion, ruinous competition, and resulting dislocation.¹⁷⁴ Rather than policing only specific bad conduct, Congress in 1920 aimed to structure a national transportation system around principles of fair treatment, nondomination, and open access, while allowing for the financial health of private railroads. For instance, ICC's authority extended to regulating the rates for an *adequate* level of service. A fair rate was determined with reference to "the service

168. *ICC v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co.*, 167 U.S. 479, 511 (1897) (holding that ICC did not have power over railroad rates); *ICC v. Ala. Midland Ry. Co.*, 168 U.S. 144, 169-70 (1897) (weakening the Interstate Commerce Act's prohibition on discrimination); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 315 (1897) (undermining the ability of ICC to supervise pools).

169. Elkins Act of 1903, ch. 708, §§ 1-3, 32 Stat. 847, 847-48.

170. Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 584, 589.

171. *Id.* § 1, 34 Stat. at 584.

172. Mann-Elkins Act of 1910, ch. 309, §§ 8, 12, 36 Stat. 539, 547-48, 551-52.

173. Transportation Act of 1920, ch. 91, §§ 413, 418, 41 Stat. 456, 483-87.

174. See Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1165 (2012) ("The new legislation was preoccupied with the financial health of the industry."); Transportation Act of 1920 §§ 400, 420, 422, 41 Stat. at 477-78, 488, 491.

rendered.”¹⁷⁵ The Transportation Act of 1920 required that ICC regulate rates so that railroads would earn a fair return on their railroad property, conditioned on “honest, efficient, and economical management and reasonable expenditures for maintenance.”¹⁷⁶ ICC explained in 1933 that “the maintenance of adequate and efficient railway transportation service . . . is one of the elements to be considered in measuring the value of the service to shipper.”¹⁷⁷ ICC rate proceedings also included governance of the railroads’ CCO, ensuring that railroads served all comers on reasonable terms.¹⁷⁸ ICC had the power to regulate the terms of the economic transaction between the railroad and shipper, including as to whether the quality of service was adequate and whether the service was impermissibly discriminatory.¹⁷⁹ Applying the common-carrier principles of the common law and updating them for the railroads of their time, Congress enacted a policy of fairness and nondiscrimination to railroad regulation, mandating a legal duty to serve all comers reasonably.

III. THE DEREGULATORY PARADIGM, 1976-PRESENT: PROFITS

The problems that railroads present today—to shippers, consumers, workers, local communities, and the climate—share, at least in part, a common source: the legal structure in which railroads operate. Today’s structure reflects a turn toward empowering private corporate prerogatives in economic regulation. In the railroad context, policymakers prioritized private profits through the promotion of contractual bargaining disciplined by the outcomes of market relations.¹⁸⁰ As this Part shows, the current viability of PSR and the broad harms coming from railroads’ actions are an expected and even intended consequence of deregulation and its legacy of private rate setting, monopolization, and abandonments. Importantly, however, the railroad industry was only “partially” deregulated—the Progressive Era paradigm persists in neglected statutory provisions.¹⁸¹

175. I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE, PART THREE, VOLUME B* 19 (1936).

176. Transportation Act of 1920 § 422, 41 Stat. at 488.

177. SHARFMAN, *supra* note 175, at 206.

178. *Id.* at 421-22.

179. *Id.*

180. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325-26 (1998).

181. The term “deregulation”—in reference to the legal, ideological, and regulatory changes of the 1970s and 1980s—approximates what happened to railroads and other network industries in

This Part situates PSR within the legal regime inaugurated by the Staggers Rail Act of 1980, which deregulated the railroad industry. Deregulation helped the railroad industry recover from financial crises it suffered in the 1960s and 1970s, ultimately allowing the industry to amass extraordinary economic power and enabling the rise of PSR. Deregulation came from statutes and policymakers' ideology, enabling railroads to amass economic power they wield to the benefit of their shareholders. At the same time, this Part emphasizes that the railroads' CCO still exists in the U.S. Code, suggesting that legislators built in a safety valve for future regulators, should the railroads become too powerful again.

A. *Struggling Private Railroads and the Emerging Common Sense*

Railroads struggled in the 1950s and 1960s. Changes in the structure of the country's economic activities, most notably the rise of freight trucking, weakened the industry's financial performance.¹⁸² Increasingly, critics blamed the Progressive Era paradigm for many of these hardships and cited the rise of trucking to argue for the deregulation of many forms of transportation.¹⁸³ Further,

that era: Congress removed some public mechanisms for governing the substantive terms of railroads' operations. And "deregulation" also indicates the ideological understanding of what happened in the 1970s and 1980s, not only in railroading but in economic policy broadly. But "deregulation" as an abstract, ahistorical descriptor suggests the false possibility of market interactions free from public structuring. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) ("[T]he systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom.").

"Deregulation" also risks suggesting that society now lives with fewer constraints, when relevant governing constraints often have not vanished but rather *shifted* toward empowered private actors. This shift risks "obscuring . . . the political nature of the economy and remov[ing] . . . the economy from political critique." See Kate Yoon, Note, *When the Sovereign Contracts: Troubling the Public/Private Distinction in International Law*, 133 YALE L.J. 2101, 2127 (2024). By contrast, the term "Progressive Era paradigm" is adopted from Networks, Platforms, and Utilities scholars and denotes a historically specific set of legal tools, without the connotative baggage of calling the paradigm "regulated." See RICKS ET AL., *supra* note 118, at 497 (calling the twentieth-century approach "the Progressive Era-New Deal system of railroad regulation"). While the term "restructuring" might more accurately convey the "transfer of discretionary authority from public bodies to private actors," as Sandeep Vaheesan has written about electricity "deregulation," this Note will continue to use "deregulation" to refer to the historically specific movement and legal legacy of the 1970s and 1980s. See Sandeep Vaheesan, *The Erosion of Public Control over Public Utilities*, LPE BLOG (Mar. 14, 2019), <https://lpeproject.org/blog/the-erosion-of-public-control-over-public-utilities> [<https://perma.cc/B9JA-LU3U>].

182. See *infra* Section III.A.1.

183. See *infra* Section III.A.2.

the set of policy options grew constrained as political leadership—particularly Presidents from both parties—rejected any move toward greater public ownership to address railroads’ lagging finances.¹⁸⁴ Railroad deregulation became a “common sense” solution.¹⁸⁵

1. *Economic Headwinds*

While the failure of an industry as sprawling, important, and old as the railroad industry had multiple causes, the most important was the rise of freight trucking. The rise of freight trucking in the 1920s meant that railroads had to compete with a mode of transportation that had its base network—roads and eventually the Interstate Highway System—paid for by the federal government, whereas railroads had to pay for their own track.¹⁸⁶ Because starting a trucking company was easier than starting a railroad, many trucking companies were able to focus on winning over some of railroads’ most valuable customers.¹⁸⁷

Other factors also put intense pressure on railroads.¹⁸⁸ The shifting geographic composition of postwar traffic, from the Northeast to the West and South, meant that previously busy railroads lost business while previously quiet railroads struggled to accommodate the influx of traffic.¹⁸⁹ Other factors, such as the poor management of the Penn Central railroad and the persistence of “firemen” who tended to the fires of obsolete steam engines, also contributed to declining profitability, though likely less than the broader structural causes.¹⁹⁰ In total, railroads stagnated. By the late 1970s, more than one-fifth of the nation’s track was run by a bankrupt railroad and one-third of all Class Is were earning

184. See *infra* Section III.A.3.

185. Describing railroad deregulation as “common sense” in the 1970s is not to suggest it was the best course of action but that it became “the common sense of the current moment, and as a result many of its assumptions have been rendered invisible.” Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 71, 85.

186. See MARK H. ROSE, BRUCE E. SEELY & PAUL F. BARRETT, *THE BEST TRANSPORTATION SYSTEM IN THE WORLD: RAILROADS, TRUCKS, AIRLINES, AND AMERICAN PUBLIC POLICY IN THE TWENTIETH CENTURY* 40-48 (2006).

187. See Sam Peltzman, *The Economic Theory of Regulation After a Decade of Deregulation*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 22 (1989), https://www.brookings.edu/wp-content/uploads/1989/01/1989_bpeamicro_peltzman.pdf [<https://perma.cc/SF9T-38NG>].

188. See RICHARD SAUNDERS JR., *MAIN LINES: REBIRTH OF THE NORTH AMERICAN RAILROADS, 1970-2002*, at 18-32 (2003).

189. See Dempsey, *supra* note 174, at 1172; SAUNDERS, *supra* note 188, at 15-17, 19-21.

190. SAUNDERS, *supra* note 188, at 29-31.

negative returns on their capital.¹⁹¹ Railroads' real and financial returns were fractions of those of manufacturing and utility companies.¹⁹²

Regulators, meanwhile, could be slow to adjust rates and rules to protect railroads' financial health. When the Union Pacific and Southern Pacific Railroads sought to save the struggling Rock Island Railroad by buying its assets in 1963, ICC took ten years to issue a nonbinding proposal that the railroads reorganize into a regional oligopoly.¹⁹³ Meanwhile, ICC took four years—far too long, to many observers—to approve the cost-lowering grain “hopper” car.¹⁹⁴ And ICC could be slow to exercise its power over “abandonments,” which allow railroads to stop serving unprofitable or less profitable markets.¹⁹⁵

The sum of these events trapped the railroads in a destructive cycle.¹⁹⁶ Lower revenues resulted in a lower ability to invest in and maintain track and equipment. In 1978, the Department of Transportation wrote that “estimated deferred maintenance over the past decade has accumulated to some \$5.4 billion.”¹⁹⁷ Deteriorating track and equipment result in “slow orders,” or requirements that trains move at slower speeds over rails that cannot handle faster speeds, often due to disrepair.¹⁹⁸ By 1976, nearly one-sixth of the U.S. rail network was under a “slow order.”¹⁹⁹ Slow orders cascade to harm service further; railroads are less able to deliver goods on time and, consequently, often require more workers and worker shifts.²⁰⁰ Unreliable service hurts revenues because shippers faced with

191. *Chronology of America's Freight Railroads*, AM. ASS'N OF R.R.S. 2 (Aug. 2024), <https://www.aar.org/wp-content/uploads/2020/07/AAR-Chronology-Americas-Freight-Railroads-Fact-Sheet.pdf> [<https://perma.cc/3BQN-BMM9>]; U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-90-80, RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980, at 10-11 (1990).

192. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 191, at 10-11 (finding that rates of return on various measures of real and financial investment averaged around 2.5% in the mid- to late 1970s compared with 15% and 12% at manufacturing companies and utilities, respectively).

193. SAUNDERS, *supra* note 188, at 19.

194. *Id.* at 25.

195. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 191, at 12.

196. See SAUNDERS, *supra* note 188, at 5.

197. *A Prospectus for Change in the Freight Railroad Industry: A Preliminary Report by the Secretary of Transportation*, U.S. DEP'T OF TRANSP. 2 (Oct. 1978) [hereinafter *DOT 1978 Report*], https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/15937/1978_A%20PROSPECTUS%20FOR%20CHANGE%20IN%20THE%20FREIGHT%20RAILROAD%20IN.PDF [<https://perma.cc/9DUW-5PDG>].

198. SAUNDERS, *supra* note 188, at 5.

199. *DOT 1978 Report*, *supra* note 197, at 3.

200. See SAUNDERS, *supra* note 188, at 18-21.

unreliable rail service will give more of their business to trucks and less to rail.²⁰¹ By the 1970s, the Department of Transportation estimated that the railroad industry's capital needs from 1976 to 1985 would "exceed funds available from internal sources or private financial markets by \$13 to \$16 billion."²⁰² Historian Richard Saunders Jr. described this phenomenon as "a cataclysmic downward spiral as costs rise, service deteriorates, shippers desert, and revenue plummets."²⁰³

2. *Intellectual Consensus*

Two intellectual movements helped make deregulation palatable to policymakers. First, the generation of industrial-organization (IO) economists, such as Darius Gaskins, and IO-trained lawyers, such as Stephen Breyer, proved influential in establishing intellectual legitimacy for transportation deregulation generally. In her expansive history of the development of the "economic style" in American regulation, Elizabeth Popp Berman writes that "[a] view of efficiency as the purpose of transportation regulation became hegemonic in the world of think tanks and policy advisors."²⁰⁴ A growing generation of conservative and centrist economists had "established ties" with economic policymaking bodies across the executive and legislative branches.²⁰⁵ Those economists "were basically unanimous in their support of transportation deregulation."²⁰⁶ Political scientists Martha Derthick and Paul J. Quirk, researching deregulation in 1985,

201. See GALLAMORE & MEYER, *supra* note 53, at 91 ("Under recognized logistics principles, shipper decisions typically are based on on-time reliability and inventory minimization factors; these are more important than necessarily trying to find the lowest possible absolute level of transportation rates, and they are service qualities for which trucks have competitive advantages over railroads.").

202. DOT 1978 Report, *supra* note 197, at 2. Though the Department of Transportation report came out in 1978, its statutorily required period of focus was to project needs for 1976-1985. *Id.* at vi.

203. SAUNDERS, *supra* note 188, at 5.

204. ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 141-42 (2022).

205. *Id.* at 143-44 ("As future Supreme Court justice Stephen Breyer, a linchpin of this network, later recalled, by this point '[t]hey were all over the place, this group of people interested in deregulation, or lessened regulation.'" (alteration in original) (quoting Interview by James Sterling Young with Stephen Breyer, Assoc. J., U.S. Sup. Ct. 11 (June 17, 2008), https://s3.amazonaws.com/web.poh.transcripts/breyer_o6.2008_taggedtranscript.pdf [<https://perma.cc/J33M-MX3R>])).

206. *Id.* at 146.

argued that “except for the development of this academic critique of policy, [deregulation] . . . would never have occurred.”²⁰⁷

The core assumptions of some of the most influential works demonstrate their limited relevance today. The “basic message” of deregulatory thinkers, Derthick and Quirk explain, was that transportation companies would benefit from “a substantial reduction in government regulation of transportation and heavy reliance on the forces of market competition.”²⁰⁸ Benjamin Dinovelli explains that deregulatory proponents, particularly those from the conservative “Chicago School” of thought, argued that competition would be preferable to regulation, because it would be most cost-effective and better allocate resources to their most profitable use.²⁰⁹ Economists critical of regulation tended to argue that competition was generally preferable to economic regulation and that “most transportation markets are not aptly described as being naturally monopolistic.”²¹⁰ Though railroads may have served some valuable economic-development goals in the nineteenth century, one prominent argument for deregulation declared: “It is questionable wisdom to require private firms to execute public policy at the serious sacrifice of their own financial health.”²¹¹ Those authors claimed that “[r]ailroad regulation developed in large part because of the economic characteristics of the railroad industry and not as an attempt to mitigate income differences or to promote industrial development.”²¹² The multiple values and concerns about private power that proved so powerfully animating in the late nineteenth and early twentieth centuries are nowhere to be found, or at least minimized, in this account. Proponents of deregulation argued that the “only objective” of economic regulation should be the “efficient utilization of the carrier’s investment.”²¹³ A seemingly neutral and descriptive analysis of economic life imported a contestable normative position into the purpose of public policy.

Second, the rising Naderite consumer movement in 1970 charged that ICC’s regulatory approach amounted to collusion with the railroad industry to divvy

207. MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 36 (1985).

208. *Id.* at 35 (quoting JOHN R. MEYER, MERTON J. PECK, JOHN STENASON & CHARLES ZWICK, *THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES*, at vi, 270 (1959)).

209. See Dinovelli, *supra* note 139, at 22–23, 41–42.

210. See, e.g., John R. Meyer, *Competition, Market Structures and Regulatory Institutions in Transportation*, 50 VA. L. REV. 212, 215 (1964).

211. JOHN R. MEYER, MERTON J. PECK, JOHN STENASON & CHARLES ZWICK, *THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES* 184 (1959).

212. *Id.*; see *supra* Part II.

213. MEYER ET AL., *supra* note 211, at 184.

up the nation's markets and drive up consumer prices.²¹⁴ Unlike IO economists, Ralph Nader and his fellow travelers did not always argue that regulation was bad for regulated companies. Instead, they argued that “our unguided regulatory system undermines competition and entrenches monopoly at the public’s expense.”²¹⁵ “[T]he most effective remedy” to “over-regulation,” Nader wrote in 1973 with coauthor Mark Green, “is deregulation.”²¹⁶ Though at odds with the declining financial position of railroads, the Naderite criticism spoke to a generation’s disillusionment with the shortcomings of public action. Together, the dual mobilizations of elite economists and vocal consumer groups reinforced each other to make eroding the railroad regulatory regime seem like the natural answer to the railroads’ financial crisis. Only by letting the railroads serve who they wanted to serve, at privately bargained-for prices, could the country save them.

3. *Political Constraints*

Informed by the coalescing elite view that regulation was counterproductive, Presidents starting with President Truman considered various forms of deregulation.²¹⁷ Faced with struggling railroads and the simultaneous need for continued and broad-based rail service, political leaders could have considered a range of policy options besides deregulation. Perhaps *better* regulation and public financing could have improved railroads’ situations and preserved private ownership by giving railroads the funding they needed conditional on their maintaining service and operational levels.²¹⁸ Nationalization could also have been in order.²¹⁹ Instead, Presidents Ford and Carter ultimately oversaw the creation of major deregulatory legislation with the Railroad Revitalization and Regulatory Reform Act (4R Act) of 1976 and the Staggers Rail Act of 1980. President Ford used the stagflation of the 1970s—a politically toxic combination of high

214. See generally ROBERT C. FELLMETH, *THE INTERSTATE COMMERCE OMISSION, THE PUBLIC INTEREST AND THE ICC* (1970) (criticizing ICC for being too accommodating of railroads and not protective enough of consumers); PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* (2021) (discussing liberal opposition to regulation).

215. Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 871 (1973).

216. *Id.* at 883. But cf. *id.* at 883-84 (reserving that “in certain limited situations, maximum rates might still be necessary”).

217. See ROSE ET AL., *supra* note 186, at 100; SAUNDERS, *supra* note 188, at 60 (“[Nationalization] was repulsive to [Nixon].”).

218. See *infra* Section V.A.

219. See *infra* Section V.C.

inflation and high unemployment—as the impetus to deregulate industries, despite an uncertain connection between inflation and deregulation.²²⁰ Ford was a particularly zealous deregulator. Before the passage of the 4R Act, he gathered “independent regulatory commission chairs,” whom he lectured against interfering in markets, and questioned regulation directly, once commenting, “I don’t understand why we have an Interstate Commerce Commission.”²²¹ Signing the 4R Act, Ford wrote that the law “will remove many unnecessary regulatory restrictions which for too long have hindered the ability of our railroads to operate efficiently and competitively.”²²² Ford also made sure to appoint ICC commissioners based on their “loyalty to his agenda.”²²³

President Carter’s transportation policy resembled Ford’s, and arguably “embraced the deregulation movement even more strongly than his predecessor,” Paul Stephen Dempsey writes.²²⁴ In Carter’s first meeting with his Secretary of Transportation, Neil Goldschmidt, Goldschmidt presented Carter with a list of priorities, and “Carter read the list, then penciled in at the top: ‘1) Trucking deregulation; 2) Railroad deregulation.’”²²⁵ Carter appointed Darius W. Gaskins Jr., who had “enjoyed professional experience in assessing transportation markets and in the politics of achieving administrative regulation,” to ICC.²²⁶ Gaskins and Carter’s two other appointees to ICC, Marcus Alexis and Tad Tantrum, became known as the “Three Marketeers.”²²⁷ And Carter celebrated the passage of the Staggers Rail Act of 1980: “By stripping away needless and costly regulation in favor of marketplace forces wherever possible, this act will help assure a strong and healthy future for our Nation’s railroads and the men and women who work for them.”²²⁸

220. BERMAN, *supra* note 204, at 144.

221. RICHARD NORTON SMITH, AN ORDINARY MAN: THE SURPRISING LIFE AND HISTORIC PRESIDENCY OF GERALD R. FORD 550 (2023).

222. Gerald R. Ford, Statement on the Railroad Revitalization and Regulatory Reform Act of 1976 (Feb. 5, 1976), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD FORD, JANUARY 1 TO APRIL 9, 1976, at 147, 147 (1979). Around the time of the Railroad Revitalization and Regulatory Reform Act, then-Senator Joe Biden introduced a bill in 1976 that would have “abolished” all “major independent Federal regulatory agencies,” in an attempt “to force Congress and the President to look at each agency to determine its efficacy” and “eliminate costly regulation.” 122 CONG. REC. 2213, 2246 (1976) (statement of Sen. Biden).

223. SMITH, *supra* note 221, at 550–51.

224. Dempsey, *supra* note 123, at 333.

225. *Id.*

226. ROSE ET AL., *supra* note 186, at 200.

227. Dempsey, *supra* note 174, at 1183 n.133.

228. Jimmy Carter, Staggers Rail Act of 1980: Statement on Signing S. 1946 into Law (Oct. 14, 1980), in 3 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, SEPTEMBER 29, 1980 TO JANUARY 20, 1981, at 2229, 2229 (1982).

B. Legal Features: Profitability and Competition

ICC and STB did retain some substantive regulatory powers, which are the subject of this Section, as well as some procedural powers. However, three substantive regulatory changes are highlighted here to emphasize the relative powerlessness of ICC and STB after deregulation as compared to before deregulation: contract rates, merger review, and abandonments.

In order to “assist the rail system to remain viable in the private sector,” Congress declared that it was federal policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.”²²⁹ The resulting emphasis has been to allow market competition, railroad preferences, and the interaction of railroad supply and shipper demand to set prices so as to ensure “adequate revenues” for profitability.²³⁰ The 4R Act explicitly told ICC to “make an adequate and continuing effort to assist [railroads] in attaining such revenue levels.”²³¹

Despite policymakers’ deregulatory push, railroad deregulation has always been partial – ICC and STB retain *some* legal authority over railroads’ operations. U.S. rail-transportation policy acknowledges other policies, such as “reasonable rates,” “honest and efficient management,” and “fair wages” as important.²³² One of the most important features, still in the U.S. Code today, is the CCO. ICC and STB still have power to enforce railroads’ duty to provide “service on reasonable request.”²³³ Case law interpreting the CCO suggests an untapped potential for the CCO to begin to rein back in the power of the railroads today.

1. Merger Review and Monopolization

Deregulation fostered consolidation, helping railroads amass the enormous market power that eventually enabled them to implement PSR with little ability for shippers to resist. Railroads had already been consolidating in the late 1950s to try to compete with barges, airlines, and trucks.²³⁴ The 4R Act in 1976 pushed

²²⁹. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101, 94 Stat. 1895, 1897 (codified as amended at 49 U.S.C. § 10101(a)(1)).

²³⁰. 49 U.S.C. § 10101(3), (6), (11) (2018).

²³¹. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 205, 90 Stat. 31, 41 (codified as amended at 49 U.S.C. § 10704(a)(2)).

²³². See 49 U.S.C. § 10101(1), (9), (11) (2018).

²³³. *Id.* § 11101(a) (2018).

²³⁴. SAUNDERS, *supra* note 188, at 124-25.

the trend along by requiring faster timelines for ICC merger review.²³⁵ Additionally, the Staggers Act lowered the substantive legal standard of merger review. The law went from authorizing ICC to reject a merger “not in the public interest” to *requiring* ICC to *approve* a merger “unless it finds that” the merger will produce a “substantial lessening of competition, creation of a monopoly, or restraint of trade.”²³⁶

Railroad deregulation and enforcement produced two merger waves over the subsequent two decades. In 1980, there were forty Class I railroads.²³⁷ By 1985, there were twenty-three.²³⁸ By 2000, there were seven.²³⁹ Today, there are six.²⁴⁰ Historians note that STB in the 1990s “had determined to consolidate the nation’s railroads into several large systems.”²⁴¹ Through the 1990s, ICC and STB approved almost all mergers unless they left only *one* competitor in a market (a monopoly), despite significant research finding a relationship between concentrated markets and higher prices.²⁴² Perhaps the most prominent example of regulatory permissiveness came in Union Pacific’s acquisition of Southern Pacific in 1996, which would have left duopolies or monopolies in many parts of the western United States. A Republican then-commissioner of the Texas Railroad Commission warned, “This merger represents a concentration of railroad power that we have not seen in Texas in over a hundred years.”²⁴³ STB called concerns like those “greatly overstated.”²⁴⁴

235. Railroad Revitalization and Regulatory Reform Act of 1976 § 403, 90 Stat. at 63-64; SAUNDERS, *supra* note 188, at 110-11.

236. Compare Railroad Revitalization and Regulatory Reform Act of 1976 § 403, 90 Stat. at 65 (providing the pre-Staggers Act merger standard), with Staggers Rail Act of 1980, Pub. L. No. 96-448, § 228, 94 Stat. 1895, 1931 (providing the Staggers Act merger standard).

237. Buck, *supra* note 23.

238. ROSE ET AL., *supra* note 186, at 223.

239. *Id.*

240. *Class I Railroads* 101, *supra* note 22.

241. ROSE ET AL., *supra* note 186, at 226.

242. See John E. Kwoka, Jr. & Lawrence J. White, *Manifest Destiny? The Union Pacific and Southern Pacific Railroad Merger (1996)*, in THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 27, 40-46 (John E. Kwoka, Jr. & Lawrence J. White eds., 4th ed. 2004). In an era of permissive antitrust enforcement at the Department of Justice and Federal Trade Commission, the Surface Transportation Board’s (STB’s) policy of allowing most mergers except those that would result in a monopoly would appear to be an even more permissive approach. See Jonathan Jacobson, *The Merger Review Process: What Actually Happens*, YALE SCH. OF MGMT. 19, <https://www.wsgr.com/a/web/182/jacobson-0419.pdf> [<https://perma.cc/SGS5-Z94H>] (observing that mergers from three companies to two in a market will likely be challenged by the antitrust agencies).

243. SAUNDERS, *supra* note 188, at 314.

244. Union Pac. Corp., 1 S.T.B. 233, 369 (1996).

STB's indulgence in mergers ultimately damaged its reputation. The new postacquisition Union Pacific would quickly go on to experience a string of crashes and fires in the summer and fall of 1997.²⁴⁵ By 2000, after Canadian National and BNSF proposed a merger, STB instead imposed a temporary merger moratorium that signaled the end of consolidation in the railroad industry to the present day.²⁴⁶ The agency was aware that it "had been called a shill for the railroads," a charge that became especially embarrassing after high-profile rail service "meltdowns" in the aftermath of unpopular combinations, especially Union Pacific's.²⁴⁷ By the late 2000s, Ackman, Harrison, and Hilal would help the industry wield its consolidated power with the implementation and spread of PSR.

2. *Abandonments*

Abandonments, or ending service routes, exemplify railroad deregulation's prioritization of private profit at the expense of plural stakeholders. Congress started to make abandonments easier in the 1950s,²⁴⁸ but the Staggers Act "greatly expedited the grant of authority to abandon unwanted lines," legal commentators noted.²⁴⁹ The Staggers Act required ICC to let a railroad abandon track unless someone complained within thirty days of the railroad's request.²⁵⁰ Upon complaint, ICC would have at most 135 days to make a decision.²⁵¹ The thinking behind a more permissive abandonment policy was that a greater ability to drop unprofitable routes would help railroads to cover their costs and profit.²⁵² Coupled with deregulation's decimation of rate-review authority,²⁵³ abandonments would work with private contract service "to allow system

²⁴⁵. SAUNDERS, *supra* note 188, at 331.

²⁴⁶. *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1170 (D.C. Cir. 2000). *But see* Press Release, CPKC, Canadian Pacific and Kansas City Southern Combine to Create CPKC (Apr. 14, 2023), <https://investor.cpkcr.com/news/press-release-details/2023/Canadian-Pacific-and-Kansas-City-Southern-combine-to-create-CPKC/default.aspx> [<https://perma.cc/YC5E-TSPD>].

²⁴⁷. SAUNDERS, *supra* note 188, at 329-36, 340-45, 350; *see also W. Coal Traffic League*, 216 F.3d at 1169 (upholding the moratorium).

²⁴⁸. *See* Transportation Act of 1958, Pub. L. No. 85-625, § 5, 72 Stat. 568, 571-72; RICKS ET AL., *supra* note 118, at 532.

²⁴⁹. DANIEL J. SWEENEY, CHARLES J. MCCARTHY, STEVEN J. KALISH & JOHN M. CUTLER, JR., *TRANSPORTATION DEREGULATION: WHAT'S DEREGULATED AND WHAT ISN'T* 28 (1986).

²⁵⁰. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 402, 94 Stat. 1895, 1941-42.

²⁵¹. *Id.*

²⁵². *See* SAUNDERS, *supra* note 188, at 62 (observing that railroads in the early 1970s were looking to abandon thousands of miles of unprofitable track).

²⁵³. *See infra* Section III.B.3.

contraction.”²⁵⁴ In the last fifty years of deregulation, abandonments facilitated railroads cutting the size of the total network nearly in half, from almost 165,000 miles in 1980 to just over 91,000 in 2022.²⁵⁵

ICC’s exercise of its abandonment authority in the 1980s reflects deregulation’s prioritization of railroad profits over continuing service to smaller communities. One of ICC’s key moves was to account for “opportunity costs,” or the economic cost of foregoing other activities, in adjudicating a railroad’s application to abandon a community. In a 1979 policy statement, ICC said that a railroad should be free, like any other business, to “minimize its losses” if a “poor investment decision,” such as serving a small town, doesn’t work out.²⁵⁶ In other words, profits became an explicit and direct consideration for rail service, even though many smaller communities and shippers would be unlikely to produce greater profits than the railroads could get by serving elsewhere. In contrast, shippers and midwestern states advanced a different understanding of railroads as infrastructurally important, arguing “that railroads, as common carriers, occupy a unique place in the corporate world . . . [and] are not free to make decisions regarding how and where to commit their resources based solely on the principle of profit maximization.”²⁵⁷

ICC expanded its 1979 policy statement on opportunity costs and clarified that an important factor was whether a potentially abandoned line could make more money than “other investment opportunities inside or outside of [a railroad’s] own operations.”²⁵⁸ In other words, if a railroad could actually make more money by *not* investing in running trains, it could and should. Another factor for deciding whether to allow an abandonment was whether “alternative rail, truck and barge service” was available.²⁵⁹ Thus, ICC presided over greater abandonments on the understanding that other modes of transportation, especially trucks, could make up for the loss of rail. The succeeding decades witnessed a

254. James M. MacDonald & Linda C. Cavalluzzo, *Railroad Deregulation: Pricing Reforms, Shipper Responses, and the Effects on Labor*, 50 INDUS. & LAB. RELS. REV. 80, 83 (1996).

255. Bureau of Transp. Stat., *System Mileage Within the United States*, U.S. DEP’T TRANSP., <https://www.bts.gov/content/system-mileage-within-united-states> [https://perma.cc/EX77-UKKK].

256. Abandonment of Railroad Lines—Use of Opportunity Costs, 360 I.C.C. 571, 577 (1979); see also *id.* at 575 (showing that ICC sided with railroads, the Department of Transportation, and more populous states, which argued that railroads should be allowed “unfettered use of opportunity costs as a factor in abandonment proceedings”).

257. *Id.* at 573.

258. Tex. & Pac. Ry. Co. Abandonment Between San Martine & Rock House Culberson Cnty., Tex., 363 I.C.C. 666, 674 (1980).

259. Ill. Cent. Gulf R.R. Co. Abandonment Near Kevil & Barlow Ballard & McCracken Cntys., Ky., 363 I.C.C. 729, 736 (1980).

streak of abandonments, with the ICC granting nearly every abandonment request it received, allowing 2,368 miles of track to be abandoned on average each year from 1981 through 1985, for example.²⁶⁰

Undoubtedly, abandonments helped railroads boost their profits by concentrating their service on their most profitable customers. But Ganesh Sitaraman, Morgan Ricks, and Christopher Serkin argue that abandonments also “were devastating for many rural and smaller communities whose economic well-being depended on rail service.”²⁶¹ According to Joseph P. Schwieterman, “By the mid-1990s, railroads had withdrawn from more than 150 communities with populations exceeding 10,000 and from approximately sixty-eight with populations exceeding 20,000.”²⁶² But small communities were not the only victims; medium-sized ones suffered too. Schwieterman writes, “[C]ontrary to the prevailing view that abandonment has eliminated predominantly redundant lines, this phenomenon has left many places with large populations bereft of all rail transportation.”²⁶³

Hundreds of communities lost service in the 1980s. In 1982, the president of the South Dakota Chamber of Commerce argued that deregulation, including of the railroad industry, has “resulted in higher prices and reduced services.”²⁶⁴ The resulting shift to trucking also imposed costs of its own. The U.S. Department of Agriculture (USDA) reported that “abandonment of rail lines and the increased use of [longer] shuttle trains result in increased road maintenance costs in rural areas as traffic is shifted to trucks,” which in turn means that “[t]he

260. See, e.g., INTERSTATE COM. COMM’N, ICC81: NINETY-FIFTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, FISCAL YEAR ENDING SEPTEMBER 30, 1981, at 37 (1982) [hereinafter ICC81] (reporting that ICC granted 139 of 140 requests totaling 2,914 miles of track); INTERSTATE COM. COMM’N, ICC82: 96TH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, FISCAL YEAR ENDING SEPTEMBER 30, 1982, at 38 (1983) (reporting 252 out of 269 requests granted for 1,983 miles of track); INTERSTATE COM. COMM’N, ICC83: 1983 ANNUAL REPORT 40 (1984) (reporting one hundred out of 109 requests granted for 2,281 miles); INTERSTATE COM. COMM’N, ICC84: 1984 ANNUAL REPORT 40 (1985) (reporting ninety-seven out of 108 grants for 2,645 miles); INTERSTATE COM. COMM’N, ICC85: 1985 ANNUAL REPORT 42 (1986) (reporting eighty out of eighty-three grants for 2,015 miles).

261. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1789 (2021).

262. JOSEPH P. SCHWIETERMAN, *WHEN THE RAILROAD LEAVES TOWN: AMERICAN COMMUNITIES IN THE AGE OF RAIL LINE ABANDONMENT*, at xxiii (2004).

263. *Id.* at xiv.

264. Paul Stephen Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445, 464 (1987).

damage caused by the loss of rail service . . . affects rural counties more than urban counties because they have fewer residents to pay for road upkeep.”²⁶⁵

3. (*Lack of*) *Jurisdiction over Contract Rates*

The most consequential element of deregulation was the authorization and encouragement of confidential contracting between railroads and shippers. In the Progressive Era, regulation mandated open rates available to all comers on reasonable terms.²⁶⁶ In contrast, during the deregulatory era, federal law encouraged private, bilateral bargaining between railroads and shippers. This shift from publicly posted prices to private, often confidential, contract rates, was a “radical” change.²⁶⁷ It shielded contracts from regulators’ view and kept information about rail service away from the public.

The Staggers Act split railroad service into two legal types: common and contract carriage.²⁶⁸ A railroad could be acting as a common carrier, meaning that it still had the CCO to serve all comers on reasonable terms. But if a railroad instead entered into a private contract with a shipper, then ICC and STB did not have jurisdiction, and the contractual terms governed.²⁶⁹ Additionally, Congress

265. Ken Casavant, Marina Denicoff, Eric Jessup, April Taylor, Daniel Nibarger, David Sears, Hayk Khachatryan, Vicki McCracken, Marvin Prater, Jeanne O’Leary, Nick Marathon, Brian McGregor & Surajudeen Olowolayemo, *Study of Rural Transportation Issues*, U.S. DEP’T OF AGRIC. AND U.S. DEP’T OF TRANSP. 293 (Apr. 2010), <https://www.ams.usda.gov/sites/default/files/media/RTIFullReport.pdf> [<https://perma.cc/T7WJ-X3E7>]; see also *supra* Section I.B.3 (identifying harms to smaller communities from PSR). Beyond narrowly defined economic well-being, Ann M. Eisenberg has tied the decline of railroad service in rural counties to rural communities’ “[s]ense of [s]tructural [e]xclusion by the [r]egulatory [s]tate,” Ann M. Eisenberg, *Rural Disaffection and the Regulatory State*, 126 PENN ST. L. REV. 738, 791-800 (2022), and described it as an “under-examined player lurking in the background of both the economic and cultural marginalization factors” driving rural alienation, Ann M. Eisenberg, *Economic Regulation and Rural America*, 98 WASH. U. L. REV. 737, 779 (2021) [hereinafter Eisenberg, *Economic Regulation and Rural America*]. Deregulation of infrastructural industries, including the railroads, “literally isolated rural communities, cutting them off from the rest of the country and exacerbating regional financial burdens,” Eisenberg explains. Eisenberg, *Economic Regulation and Rural America*, *supra*, at 779. (“This not only excluded them from national and regional economic activity, but also excised them from the broader cultural ecosystem.”).

266. See *supra* Section II.B.

267. TRANSP. RSCH. BD., NAT’L ACADS. SCI., ENG’G & MED., SPECIAL REPORT 318: MODERNIZING FREIGHT RAIL REGULATION 21 (2015).

268. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 208, 94 Stat. 1895, 1908-09 (codified as amended at 49 U.S.C. § 10709(a), (f)).

269. 49 U.S.C. § 10709(c)(1)-(2) (2018); see also Kevin B. Huff & Kylie C. Kim, *When the Trains Don’t Come: Suing the Railroad*, KELLOGG HANSEN 3 (June 19, 2018), <https://kelloggghansen>

charged ICC and STB with exempting more types of freight from their jurisdiction.²⁷⁰ To speed the process along, the Staggers Act eliminated the requirement of an agency proceeding for an exemption request.²⁷¹ By allowing private bargaining, the Staggers Act empowered railroads to “set rates differentially according to a shipper’s individual circumstances and willingness to pay.”²⁷² In other words, railroad regulation shifted toward a mode characteristic of a broader, neoliberal prioritization of efficiency.²⁷³

The use of individualized contracts pushed shippers “to consolidate shipments [on fewer trips] in order to obtain more favorable rates” and likely contributed to concentrating service along fewer routes and towns.²⁷⁴ Contract usage took off in the 1980s, growing tenfold from 1982 to 1985.²⁷⁵ Contract rates also allowed for more individualized service. So while contracts helped to drive average rates down, the distribution of those rates changed, too.²⁷⁶ Contract rates allowed big retailers, like Walmart, to secure preferential treatment at the expense of smaller shippers.²⁷⁷ The confidential nature of contracting, in particular, helped stymie shippers’ attempts to induce price competition: if shippers did not know what deals their competitors were getting, they couldn’t bargain as effectively. Regardless, the rise of contracting walked back the open nature of Progressive Era regulation intentionally. “We’re going back to 1887,” one shipping-association leader said, by “letting the railroads charge what the traffic will bear.”²⁷⁸

.com/assets/htmldocuments/Kellogg%20Hansen%20Railroad%20Presentation.pdf [https://perma.cc/9PMJ-PB8K] (discussing common- and contract-carriage services and potential claims against railroads). Congress created this two-tier classification system deliberately. See, e.g., S. REP. NO. 96-1430, at 100 (1980) (Conf. Rep.) (observing that the Staggers Act “establishes a separate class of rail service and thereby makes carriers entering into such contracts both common carriers and contract carriers”).

270. 49 U.S.C. § 10505(a) (2018).

271. ICC81, *supra* note 260, at 38-39.

272. TRANSP. RSCH. BD., *supra* note 267, at 20-21.

273. Britton-Purdy et al., *supra* note 20, at 1794-1806.

274. MacDonald & Cavalluzzo, *supra* note 254, at 83.

275. Marc Levinson, *Two Cheers for Discrimination: Deregulation and Efficiency in the Reform of U.S. Freight Transportation, 1976-1998*, 10 ENTER. & SOC’Y 178, 196 (2009).

276. Recall also that rates have gone back up in the past decade, complicating the easy correspondence between use of contracts and lower rates. See *supra* Section I.B.1.

277. Levinson, *supra* note 275, at 199-200.

278. ROSE ET AL., *supra* note 186, at 221. Erika M. Douglas has described the STB’s lackluster efforts to regulate railroad market power as an example of “antitrust abandonment,” or instances where “industry regulators are failing to use their competition enforcement powers for lengthy periods of time, without clear justification.” Erika M. Douglas, *Antitrust Abandonment*,

4. *Partial Deregulation: Common Carriage Retained*

Today, STB lacks jurisdiction over much of the freight traveling by rail. For the most part, if a railroad and shipper are contracting, STB cannot act on their economic terms. In contrast to “contract rates,” “common carriage rates” are still subject to STB jurisdiction.²⁷⁹ However, USDA estimated in 2010 that “75 to 85 percent” of traffic is exempt from STB jurisdiction.²⁸⁰ STB can review rates for reasonableness, but only if (1) a customer complains,²⁸¹ (2) that rate is not a contract rate,²⁸² and (3) the railroad has market dominance, meaning “an absence of effective competition.”²⁸³ Once those conditions are met, STB can decide whether the rate is “reasonable.”²⁸⁴ If the rate is unreasonable, STB can set a different, maximum rate, which must let the railroad earn a “reasonable and economic profit or return (or both) on capital employed.”²⁸⁵ In other words, for the fraction of customers who can get STB review of an unreasonably high rate in the first place, the subsequent legal rule has STB attend to the *railroad’s* financial condition.²⁸⁶ As a result of those conditions and process, there have been only fifty-two rate cases between 1996 and early 2022.²⁸⁷

Despite the dramatic substantive and procedural changes of the 1970s and 1980s, railroad deregulation has always been partial. Although *most* freight is now governed by the private contractual interaction of railroads with shippers with little public-agency oversight, *some* freight must still be served “on

42 YALE J. ON REGUL. 1, 5 (2025). Douglas focuses on STB’s nonexistent use of its power to order open access and minimal review of unreasonable rates. *Id.* at 31-44. A significant reason for STB’s quiescence comes from its lack of jurisdiction over much freight, as Douglas identifies. *See id.* at 38 (observing STB can issue open-access orders only for decreasingly common regulated freight); *id.* at 40 (observing that STB’s rate-review authority applies only to regulated freight).

279. *See* 49 U.S.C. § 11101 (2018); 49 C.F.R. §§ 1300.1-.5 (2024).

280. *See* Casavant et al., *supra* note 265, at 352.

281. *See* 49 U.S.C. § 10704(b) (2018).

282. *See id.* § 10701(b).

283. *See id.* § 10707(a).

284. *Id.* § 10701(d)(1).

285. *Id.* § 10704(a)(1)-(2); *see id.* § 10701(d). STB also must make sure that any rate is “linked, at least ostensibly, to the statutory goal of ensuring revenue adequacy.” TRANSP. RSCH. BD., *supra* note 267, at 105.

286. For more on STB’s rate-review process, *see id.* at 101-45.

287. BEN GOLDMAN, CONG. RSCH. SERV., R47013, THE SURFACE TRANSPORTATION BOARD (STB): BACKGROUND AND CURRENT ISSUES 4-5 (2022).

reasonable request.”²⁸⁸ Congress also granted STB rulemaking power to enforce the CCO.²⁸⁹ The House Committee Report on the Staggers Act offers insight into the purpose and role that the CCO plays in the Staggers Act:

The Committee believes that the common carrier obligation must be retained to prevent railroads from having the ability to serve only their most profitable business. If railroads were to contract only with shippers of the most profitable traffic, and there were no common carrier obligation, the burden of poor service and perhaps higher rates would fall on the shipper with low volume or low value traffic.²⁹⁰

In both the House Committee Report and the text of § 11101(a), one sees the retention of the Progressive Era paradigm’s CCO, motivated by concerns over distribution and economic fairness. The report understands railroads not as purely private businesses that may properly choose “to serve only their most profitable business” but as public services that must serve all comers on reasonable request.²⁹¹ The report acknowledges that without the CCO, smaller shippers would be at a disadvantage.²⁹² In short, the antimonopoly concern over railroad abuses of power persists.

The scope of the remaining CCO suggests that STB may retain power to regulate railroad behavior. Observers note that STB has little authority over contracts and specific exempt commodities, like “bulk” commodities such as salt and scrap metal.²⁹³ Nevertheless, STB also has the power, upon a shipper’s filing of a complaint, to determine whether a “proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the [shipper] under section 11101.”²⁹⁴ In other words, if a contract “unduly impairs” a railroad’s ability to be a common carrier, or provide service upon reasonable request, STB can enjoin the terms to correct that impairment. A railroad can satisfy “reasonable [contractual] commitments . . . before responding to reasonable requests for service,” but if a commitment “deprive[s] a carrier of

288. 49 U.S.C. § 11101(a) (2018) (“A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part shall provide the transportation or service on reasonable request.”).

289. *Id.* § 11101(f).

290. H.R. REP. NO. 96-1035, at 57 (1980).

291. *Id.*

292. *Id.*

293. See, e.g., Francis P. Mulvey & Michael F. McBride, *Railroads’ Common Carrier Obligation: Its Legal and Economic Context*, 87 J. TRANSP. L. LOGISTICS & POL’Y 39, 44 (2020) (“The CCO applies only to regulated traffic; exempt commodities do not fall under the CCO.”).

294. 49 U.S.C. § 10709(g)(2)(A)(i) (2018).

its ability to respond to reasonable requests for common carrier service,” then the contract term is “not reasonable.”²⁹⁵

To be sure, the CCO and the specific statutory provisions outlined here have not been defined in detail. A study from 2020 notes that many, including the “STB itself,” admit[] that the current definition” of the CCO “is vague.”²⁹⁶ But courts have interpreted the CCO over the past decades, providing useful precedent here. The Supreme Court has said that the CCO is “comprehensive and exceptions are not to be implied.”²⁹⁷ Circuit courts generally agree that the statute “leav[es] to [STB] and the courts the task of clarifying, on a case-by-case basis, a more precise definition of ‘reasonable request.’”²⁹⁸ One key principle is that a “railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable.”²⁹⁹ This is because the fundamental logic of the CCO counters an understanding of economic life ordered by a specific type of efficiency, one that “choos[es] policies most responsive to people’s preferences (as reflected by their willingness to pay).”³⁰⁰ Rather, the CCO represents a policy judgment that railroads are not like other businesses and thus do not have the same freedom to choose or reject customers. As a result, other legal observers note, the CCO cannot be limited only to a railroad’s given choices about service.³⁰¹ The CCO can instead require the railroad to *expand* beyond its current offerings.

Finally, the D.C. Circuit in 2013 explained that the substantive content of the CCO derives not only from the common law but also from Congress and

295. *Id.* § 11101(a).

296. Mulvey & McBride, *supra* note 293, at 56.

297. *Am. Trucking Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 407 (1967).

298. *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 911–12 (8th Cir. 2015) (quoting *Nat’l Grain & Feed Ass’n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993)); *see also* *Granite State Concrete Corp. v. Surface Transp. Bd.*, 417 F.3d 85, 92 (1st Cir. 2005) (“STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms.”); *Decatur Cnty. Comm’rs v. Surface Transp. Bd.*, 308 F.3d 710, 719 (7th Cir. 2002) (“The Board’s analysis is eminently reasonable . . . under our deferential standard of review . . .”); *GS Roofing Prods. v. Surface Transp. Bd.*, 143 F.3d 387, 392 (8th Cir. 1998) (“The reasonableness of an embargo involves a fact-specific inquiry and is to be determined on a case-by-case basis.”).

299. *GS Roofing Prods.*, 143 F.3d at 391 (citing *Gen. Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978)).

300. Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1658 (2018).

301. *See, e.g., In re Common Carrier Obligation of Railroads*, STB Ex Parte No. 677, Oral Hearing, Morning Session, at 250 (Apr. 24, 2008) (statement of Steven Strege, N.D. Grain Dealers Ass’n), <https://www.stb.gov/wp-content/uploads/Transcript-2008-04-24-d.pdf> [<https://perma.cc/QZ73-9PSE>] (“If the common carrier obligation is only to distribute fairly the capacity a railroad has, then that puts defining the common carrier obligation in the hands of the railroad and I don’t think that is what we want to do.”).

administrative agencies.³⁰² This means that “common carriage” is not confined to its common-law definition. “[T]he relevant administrative agencies have ‘significant latitude to determine the bounds of common carriage in particular cases.’”³⁰³ Thus, STB still has space to enact antimonopoly policy through the CCO.

* * *

Deregulation loosened constraints on railroad activity and reoriented regulation toward maximizing profit at the expense of shippers, consumers, smaller communities, and the broader public. These changes, more than just helping the railroads’ financial prospects, engendered the serious policy problems now presented by dominant railroads. Contract rates, regional duopolies, and abandonments all vested the remaining railroads with extraordinary power.³⁰⁴ Fewer railroads leaves shippers and workers with fewer competitive options to seek better rates or wages. In turn, the greater pressure railroads can apply on shippers and workers via PSR has troubling consequences for safety, prices, and smaller communities.³⁰⁵

While STB has little ability to structure the contracts railroads and shippers negotiate, it does retain *some* ability to regulate private action. The persistence of the CCO, with its potential to govern even otherwise-private contracts, suggests there may be a new way to think about “partial deregulation.” While the substantive statutes from the deregulatory era loosened public checks on private power, they also preserved a legal tool that STB can use to check railroads’ private power again, if it chooses to. Thus, partial deregulation and the CCO present an uneasy tension between encouraging competition while also maintaining public accountability for private power, tempered though it may be. Addressing the harms fostered by partial deregulation might best start with reinvigorating and expanding the CCO.

IV. ONE PROGRAM FOR CHECKING RAIL POWER

The dueling regulatory approaches outlined in Parts II and III track the different problems that policymakers understood themselves to be responding to.

302. *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 345 (D.C. Cir. 2013).

303. *Id.* (quoting *Cellco P’ship v. FCC*, 700 F.3d 534, 545–47 (D.C. Cir. 2012)); *see also* *Delta Air Lines, Inc. v. Civ. Aeronautics Bd.*, 543 F.2d 247, 259 (D.C. Cir. 1976) (explaining that airlines’ common-carrier obligation (CCO) “depends not only upon their common law responsibilities as common carriers, but also upon the statutory obligations and regulatory powers created by the” substantive statute).

304. *See supra* Sections III.B.1–3.

305. *See supra* Section I.B.

In the late nineteenth and early twentieth century, Congress enacted laws and created institutions that ensured that public actors could participate in the exercise of railroads' infrastructural power.³⁰⁶ By the 1970s, deregulatory proponents responded to low railroad profits and perceived overregulation.³⁰⁷ The factual premises underlying railroad policy have changed dramatically from the 1970s to today. Today, policymakers confront high railroad profits³⁰⁸ and little to no public oversight. Addressing climate change and industrial policy also necessitate expanded rail networks,³⁰⁹ putting pressure on the need to harness railroads' immense economic power for public ends. Add, finally, a practically intractable political stalemate in Congress, and the prospects for fundamental change such as nationalization or reregulation seem bleak.

Against this backdrop, the CCO can help develop any positive agenda. It is currently statutory law, so policy change need not come from the legislative process. And because it has persisted in the U.S. Code, the CCO has the potential to reinvigorate the antimonopoly roots of railroad regulation, fostering in today's otherwise "deregulated" era a legal tool to recalibrate railroad regulation that addresses the new problems of the railroad industry.

This Part argues that existing law can prove useful in addressing the failures of railroad law's partial deregulation and outlines administrative actions that STB could take to begin to develop the CCO. The CCO could address some, but not all, of the ills of PSR described in Part I. Even if the CCO does not solve all of the railroad industry's woes, STB's experience of exercising its power to enforce the CCO could help to unsettle the current regulatory regime, both in gathering the necessary information to make future reform more sophisticated and in demonstrating the democratic potential of alternative economic structurings.

A. A Program for the Surface Transportation Board

STB should identify practices that clearly breach a railroad's CCO and begin rulemaking proceedings to prohibit them. In addition to outlawing specific practices, STB could also enforce the CCO through adjudication, further developing the CCO in adjudicatory fora and building a record of new violations of the CCO

306. See *supra* Section II.B (describing the development of ICC).

307. See *supra* Section III.A.

308. See Section I.A (describing the lucrative PSR implementation).

309. See *supra* Section I.B.4.

that might arise. Such practices, once identified and subjected to a sufficient record of enforcement, could inform future rulemakings.³¹⁰

1. *Rules and Structured Presumptions*

STB could outlaw specific commercial practices railroads use that could violate their CCO.³¹¹ As described in Part I, shippers complain of “demarketing,” where railroads refuse to ship unprofitable or less profitable freight, because the margins are not lucrative enough. STB could establish a rule that railroads *must* find a way to deliver a shipper’s requested freight upon the shipper’s reasonable request under 49 U.S.C. §§ 11101 and 11703.³¹² In particular, 49 U.S.C. § 11703 allows the government to “compel” a railroad already providing service under STB’s jurisdiction to serve someone “at the same rate charged, or on conditions as favorable as those given by the rail carrier, for like traffic under similar conditions to another person.”³¹³

At least two paths are worth considering in a rulemaking. First, STB could limit the scope of the rule to requests within a certain quantitative range of past shipping requests’ volume, time, or location. For example, a rule might provide that if a shipper used to be able to send x amount of freight for $\$y$ with a railroad, then a railroad must be able to meet a shipper’s need within, say, 120% of y per x freight.³¹⁴ If a railroad charges above that set amount, then it would be violating its CCO to serve all comers reasonably. The rule could also trigger STB review of cases where a railroad charges unreasonably excessive fees in addition to its base rate. The precise figure would be determined through the rulemaking

310. This approach resembles the Obama and Biden Administrations’ FCC’s “net neutrality” rules, which both outlaw specific conduct and call for a strong standard to fill the gaps of those rules. See Rebecca R. Ruiz, *F.C.C. Sets Net Neutrality Rules*, N.Y. TIMES (Mar. 12, 2015), <https://www.nytimes.com/2015/03/13/technology/fcc-releases-net-neutrality-rules.html> [https://perma.cc/3E7V-2CDH]; Safeguarding and Securing the Open Internet; Restoring Internet Freedom, 89 Fed. Reg. 45404, 45404 (May 22, 2024) (to be codified at 47 C.F.R. pts. 8, 20) (“The *Report and Order* reinstates straightforward, clear rules that prohibit blocking, throttling, or engaging in paid or affiliated prioritization arrangements, adopts certain enhancements to the transparency rule, and reinstates a general conduct standard that prohibits unreasonable interference or unreasonable disadvantage to consumers or edge providers.”). *But see In re MCP No. 185*, 124 F.4th 993, 997–98 (6th Cir. 2025) (striking down the Open Internet Order on statutory grounds).

311. STB has rulemaking power under 49 U.S.C. § 11101(f) (2018).

312. 49 U.S.C. § 11101(a) (2018).

313. *Id.* § 11703(b).

314. Structured as a bright-line rule, the rule could resemble state anti-price-gouging statutes. See Zephyr Teachout, *Sometimes You Just Have to Ignore the Economists*, ATLANTIC (Aug. 22, 2024), <https://www.theatlantic.com/ideas/archive/2024/08/economists-kamala-harris-price-gouging/679547> [https://perma.cc/TQ85-WXS5].

process and should consider factors such as historical demand, railroad capacity, market structure, and type of freight. Before making such a rule, STB would likely need to exercise its statutory authority to revoke the jurisdictional exemptions for more types of freight, so as to be able to regulate those types of freight at all.³¹⁵ In 2024, Wisconsin Senator Tammy Baldwin sent a letter to STB calling for a “review [of] commodity exemptions,” observing that exempt commodities include “critical raw materials and finished goods, including steel, metal scrap, paper and forest products, automobiles, hydraulic cement, stone, coke, glass and food products.”³¹⁶ Phillip Longman has tied commodities such as those Senator Baldwin highlighted to U.S. industrial policy goals: “For example, making EV batteries in the U.S. requires making synthetic graphite, and making synthetic graphite requires transporting huge volumes of feeder stock like coal tar or petroleum coke”³¹⁷

In place of or as a complement to this proposed reasonable-request rule, STB could implement a burden-shifting framework that would force a railroad to justify its decision not to ship some freight. STB could formulate a legal rule that structures a future adjudication so as to establish a presumption that a railroad must serve any shipper. If a railroad has refused, then the framework could put the evidentiary burden on the railroad to justify the refusal. The presumption would be for the railroad in question to provide the reasonable service requested, with the railroad able to decline only if it makes certain rebuttals, such as physical impossibility. Note that the structured set of legal presumptions here would still be checked by judicial review of STB’s enforcement of the CCO.³¹⁸ And existing

315. See 49 U.S.C. § 10502(d) (2018) (“The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.”); 49 C.F.R. §§ 1039.10–.22 (2024) (listing STB jurisdictional exemptions for goods and materials); see also Joanna Marsh, *Forest Products and Scrap Recycling Rail Shippers Seek Oversight*, FREIGHTWAVES (July 5, 2019), <https://www.freightwaves.com/news/forest-products-and-scrap-recycling-rail-shippers-seek-oversight> [<https://perma.cc/LMP9-9RZF>] (reporting that forest-products and scrap-recycling shippers asked STB to reinstate jurisdiction over the shipping of its products).

316. Letter from Sen. Tammy Baldwin to Robert Primus, Chair, Surface Transp. Bd., Karen Hedlund, Vice Chair, Surface Transp. Bd., Patrick Fuchs, Member, Surface Transp. Bd. & Michelle Schultz, Member, Surface Transp. Bd. 1 (Aug. 2, 2024), https://www.baldwin.senate.gov/imo/media/doc/baldwin_letter_to_stb_on_exempted_commodities.pdf [<https://perma.cc/VY3X-6PEL>].

317. Phillip Longman, *Train Drain*, WASH. MONTHLY (Oct. 29, 2024), <https://washington-monthly.com/2024/10/29/train-drain> [<https://perma.cc/NR3S-HQS2>].

318. See 28 U.S.C. §§ 2321, 2342(5) (2018).

circuit case law supports the principle underlying the proposed rule here, that a railroad is a public privilege unlike standard private businesses.³¹⁹

A second rule promulgated under the CCO ought to address the railroads' PSR-induced cost cutting. For communities suffering from externalities of PSR like longer trains, STB could use the growing understanding that longer trains have greater risks³²⁰ to infer that more dangerous trains undermine stable, reliable service and thus undermine the railroads' CCO. If regulators could tie breakdowns in service to longer trains and PSR, as likely occurred during the COVID-19 supply-chain crisis,³²¹ then STB might have tried using the CCO to address service breakdowns, which would in turn indirectly address harm to workers and communities. If a railroad underinvests in its track, equipment, and labor costs to the extent that its service suffers, as during the COVID-19 supply-chain crisis, then that railroad's actions undermined its CCO to provide service upon reasonable request. STB could create or adopt a measure of railroad capacity and structure a rule such that any unreasonable diminution of capacity coupled with a decline or disruption in service amounts to a violation of the CCO. A rule that looks to objective measures of expenditures could also fit into either the rules-based or presumption-based approach to CCO liability. For example, when Union Pacific shut down its Global III facility outside of Chicago in 2019, undermining its ability to process railcars quickly during the COVID-19 supply-chain crisis,³²² a rule of the type proposed in this Section could have required STB to justify its decision by showing that the shutdown would not have affected its ability to provide service upon reasonable request.

A rules- or presumption-based approach to CCO liability could address the multiple harms laid out in Section I.B. For shippers, a program of administrative rulemaking and enforcement under the CCO could bolster the stability and overall performance of the rail network by checking the ability of railroad executives to underinvest in safety, equipment, and labor. For workers, STB's ability to participate in the governance of rail operations could be a tool for making those operations' working conditions better. If STB can justifiably find that railroads'

319. One can see that understanding in, for example, the Eighth Circuit's declaration that "a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable." *GS Roofing Prods. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998).

320. See *TRANSP. RSCH. BD., NAT'L ACADS. SCI., ENG'G & MED., SPECIAL REPORT 353: LONG FREIGHT TRAINS: ENSURING SAFE OPERATIONS, MITIGATING ADVERSE IMPACTS 3* (2024) (observing a correlation between train length and important derailments and declining to conclude "that the operational demands created by longer manifest trains are being fully controlled"); see also *supra* Section I.B.3 (describing how PSR has encouraged longer trains and connecting longer trains to safety concerns).

321. See *supra* Section I.B.

322. See *supra* note 61 and accompanying text.

practices, such as underinvestment in the rail network and worker safety, undermine their ability to provide service upon reasonable request, then STB can use the CCO to correct those practices. To this end, Senator Baldwin and Kansas Senator Roger Marshall have already proposed legislation that would require STB to factor in the effects of laying off workers and retiring equipment in adjudicating railroads' compliance with the CCO.³²³

In contrast to shipping discrimination and service unreliability, the CCO might be a less appropriate tool to address the plight of smaller communities suffering the effects of abandonment or the externalities of multi-mile-long trains. The CCO is a shipper-oriented measure. To be sure, smaller communities may still benefit from the CCO proposals made here if businesses in those communities seek rail service to their towns because the CCO suggests a statutory orientation to require railroads to provide service.³²⁴ And the CCO could channel direct engagement with democratic concerns over railroad operations by providing a site for articulating alternative policy visions. That engagement might not reverse disinvestment in rural communities singlehandedly, but that engagement could shift further away from STB's prior amenability to abandonments.

Lastly, an expanded use of the CCO could further national climate policies by prodding rail to compete with trucks. A crucial shortcoming of both the Progressive Era paradigm and the deregulatory approach was to neglect the environmental costs of allowing trucking to become the dominant mode of freight transportation. Neither approach operationalized the insight that railroads, by dint of being many multiples more fuel efficient than trucks, *should* be carrying a greater share of the nation's freight than they are now.³²⁵ Today, the United States cannot afford to be indifferent between the two modes of transportation and will need to promote rail transportation actively.³²⁶ The key to using rail to address climate change will be to *expand* the rail network.

2. Premises

For STB to address some of PSR's ills successfully now, its use of the CCO requires accepting several premises. First, STB can meaningfully regulate

323. Reliable Rail Service Act, S. 2071, 118th Cong. § 2(2) (2023). The proposed legislation, although it died in committee, should be understood as clarifying that the otherwise vague language of the CCO should require STB to consider the effect of layoffs and equipment reductions. *Id.* § 2(2)(B)-(C).

324. See 49 U.S.C. § 11101(a) (2018).

325. Cf. *supra* note 181 (criticizing the false neutrality connoted by use of a regulatory/deregulatory dichotomy of rail market structuring and arguing that regulatory choices are between values and priorities as opposed to an absence of choice).

326. See *Sierra Club Rail Transportation Statement*, *supra* note 102, at 4.

enough types of freight under the CCO to mitigate PSR harms. As mentioned, most freight is currently exempt from STB's jurisdiction.³²⁷ But STB can "revoke an exemption," as "necessary to carry out the transportation policy of" 49 U.S.C. § 10101, which lays out the policies of U.S. railroad policy, including "to foster sound economic conditions in transportation."³²⁸ So removing jurisdictional exemptions for some type of freight will likely help STB review a greater range of activity.

Second, using the CCO assumes that STB can create effective remedies to bolster quality service. While the STB has exercised the power to issue injunctions under 49 U.S.C. § 1321(b)(4),³²⁹ creating effective injunctions that compel quality service while being careful not to unduly burden other aspects of a railroad's operations can be challenging. To the extent that there are clear instances of railroad operational decisions that risk undermining the CCO, those would likely be more successful starts at boosting service.

Third, using the CCO to improve service will help shift freight back to trains and away from trucking. There is good reason to think that using the CCO to improve railroads' service will help maintain and even regain market share. Generally speaking, shippers considering logistics providers value "on-time reliability and inventory minimization factors," two transportation economists write.³³⁰ "These are more important than necessarily trying to find the lower possible absolute level of transportation rates"³³¹ Though the economists claim that trucks are better on those factors than railroads,³³² the general principle suggests that if railroads improve their service, they will become marginally preferable than their previous service offering. Further, a survey of supply-chain executives responsible for tens of billions of dollars in logistics spending reported a unanimous "desire to put more freight on rail, given its lower cost, enhanced sustainability, and capacity advantages."³³³ But since railroads have "failed to adapt and

327. See *supra* Section III.B.3.

328. 49 U.S.C. §§ 10101, 10502(d) (2018).

329. *Id.* § 1321(b)(4).

330. GALLAMORE & MEYER, *supra* note 53, at 91.

331. *Id.*

332. *Id.* at 91-92.

333. Adriene Bailey, *Why Reliable Rail Freight Service Is So Elusive*, OLIVER WYMAN (2024) [hereinafter Bailey, *Why Reliable Rail Freight Service Is So Elusive*], <https://www.oliverwyman.com/our-expertise/insights/2024/aug/scheduled-operations-are-key-for-class-i-railroad-growth.html> [<https://perma.cc/Y4GW-ACYF>]; see also Adriene Bailey, *Three Levers to Recapture Growth*, OLIVER WYMAN 4 (Nov. 19, 2020), https://www.oliverwyman.com/content/dam/oliver-wyman/v2/media/2020/nov/Rail_Trends_2020.pdf [<https://perma.cc/A5NU-TS8V>] (describing survey results showing that executives "found truck superior to rail on all attributes of customer experience").

provide reliable, predictable service,” those “[s]hippers are choosing to divert mode-flexible freight to truck.”³³⁴ If STB can use the CCO to improve railroads’ service, it could help make railroads a more compelling option for shippers looking for a better deal and looking to reduce their indirect, “scope 3” emissions.³³⁵

3. *Objections*

Undoubtedly, expansive administrative action will face numerous objections, including, in particular, two types of concerns: statutory and practical. First, some might argue that an expanded use of the CCO is inconsistent with a proper interpretation of the 4R and Staggers Acts, both of which establish a legal regime facilitating greater operational freedom for railroads and much less power for regulators. That argument’s potential merit lies in its consistency with the statutory interpretations advanced in the 1980s and 1990s and outlined in Section III.B. Legislators and regulators let the railroads price and abandon business as they please, for the most part, and eliminated STB jurisdiction over contract activity.³³⁶

However, legislators, in crafting deregulation, also chose to retain the CCO as a guardrail to check railroads’ power. In particular, 49 U.S.C. §§ 11101(a), 10709(g)(2)(A)(i), and 11703(b) maintain federal authority over the CCO and some contracts that might “impair” it.³³⁷ The very circumstances that motivated deregulation—specifically, the poor financial and operational condition of the railroads³³⁸—have changed, even reversed, since the deregulatory period. Given the difference in the present circumstances of the railroads and the persistence of the CCO, statutory intent likely requires that STB act *more* forcefully to ensure that the railroads can both be deregulated *and* also fulfill their CCOs.

The history of the CCO also suggests that its use would survive review under the major-questions doctrine. The doctrine requires that an agency “point to ‘clear congressional authorization’” for actions that find “‘in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’”³³⁹ While the actions proposed here would expand the statutory CCO as a lever for national transportation policy, the government could fairly

334. Bailey, *Why Reliable Rail Freight Service Is So Elusive*, *supra* note 333.

335. See Shelley Welton, *Neutralizing the Atmosphere*, 132 YALE L.J. 171, 185 (2022) (defining “scope 3 emissions”).

336. See *supra* Section III.B.

337. See *supra* Section III.B.4; *supra* notes 294–313 and accompanying text.

338. See *supra* Section III.A.1.

339. *West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

argue that such expansive use would not be “unheralded,” since the statutory CCO has been long “heralded” by circuit courts, legislators, and regulators.³⁴⁰ And the government’s action would not necessarily be a “transformative *expansion*” of its authority, since STB has mandated service before.³⁴¹ A three-judge panel of the Ninth Circuit, which included two Republican appointees, recently explained that merely “restructuring a sector or seeking to regulate a significant portion of the American economy is [not] sufficient by itself to trigger the Major Questions Doctrine” because the underlying inquiry is whether an agency’s action is a “transformative expansion” of an agency’s regulatory authority, not necessarily what the magnitude of the consequences of the agency’s actions will be.³⁴²

Even if the major-questions doctrine does not impede administrative action, the Supreme Court’s broader shift of interpretive authority from agencies to the judiciary might, as seen in *Loper Bright Enterprises v. Raimondo*.³⁴³ In *Loper Bright*, the Supreme Court ruled that an agency’s interpretations of ambiguous statutes do not receive judicial deference, overturning four decades of *Chevron* deference.³⁴⁴ *Loper Bright* presents another potential judicial hurdle to developing the CCO because courts could plausibly interpret the relevant statutory language to preclude attempts to mandate broader network expansion.

However, judicial hostility to STB action may not be a forgone conclusion. Chief Justice Roberts’s majority opinion in *Loper Bright* conceded that the best reading of a statute “may well be that the agency is authorized to exercise a degree of discretion” and that “some statutes . . . empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility,’ such as ‘appropriate’ or reasonable.”³⁴⁵ When that happens, a “reviewing court under

340. See *supra* notes 296-303 and accompanying text.

341. See, e.g., *infra* Section IV.B.3; see also Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV’T L. & POL’Y REV. 47, 74-82 (2022) (arguing that *West Virginia* lays out a two-prong test—whether the agency action is “unprecedented” and whether it is a “transformative change”—which clarifies the applicability of the major-questions doctrine).

342. See *Mayes v. Biden*, 67 F.4th 921, 934 (9th Cir. 2023) (quoting *West Virginia*, 597 U.S. at 724), *vacated on other grounds*, 89 F.4th 1186 (9th Cir. 2023) (mem.).

343. 603 U.S. 369, 412 (2024) (overturning *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). See generally Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017) (identifying and criticizing the “contemporary attack on the administrative state” by conservative groups).

344. *Loper Bright*, 603 U.S. at 412.

345. *Id.* at 394-95 (citations omitted) (first quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); and then quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

the [Administrative Procedure Act] . . . fulfills [its] role by recognizing constitutional delegations.”³⁴⁶ Based on these passages in *Loper Bright*, administrative-law scholar Adrian Vermeule argues that, despite officially overturning *Chevron*, the Court has kept open an “enormous . . . loophole” because a court can still uphold agency action by interpreting the relevant substantive statute as *itself* delegating interpretive discretion to the agency.³⁴⁷

Applied to STB’s CCO enforcement power, *Loper Bright* may still result in a court upholding agency action. Precedent has arguably permitted expanded use of the CCO in new settings, with the Supreme Court before calling the CCO’s “flexibility and adaptability to changing needs and patterns of transportation . . . an essential part of the office of a regulatory agency.”³⁴⁸ The very language in question here, 49 U.S.C. § 11101(a), requiring service on “reasonable request,” is plausibly the kind of language that exemplifies *Loper Bright*’s permissible delegation of interpretive authority. The D.C. Circuit has similarly supported a flexible administrative interpretation of the CCO, reasoning in 2013 that the relevant agency “retained its regulatory authority even when it had previously declined to exercise jurisdiction over the issue in question.”³⁴⁹

4. Case-by-Case Adjudications and Guidance

Finally, STB could supplement any rules it might pass by continuing its pattern of enforcement of the CCO in specific cases. A recent STB decision about the CCO illustrates how STB might build on its CCO adjudications. In 2023, Navajo Transitional Energy Company (NTEC), one of the Navajo Nation’s energy companies, accused BNSF of “preferential treatment of other mines” over NTEC’s mines, alleging that the discrimination had cost NTEC more than \$150 million.³⁵⁰ NTEC asked STB to issue an emergency injunction compelling BNSF

346. *Id.* at 395.

347. Adrian Vermeule, *Chevron by Any Other Name: From “Chevron Deference” to “Loper Bright Delegation,”* NEW DIGEST (June 28, 2024), <https://thenewdigest.substack.com/p/chevron-by-any-other-name> [<https://perma.cc/376E-35H9>]; see also Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 620 (2024) (previewing a potential path for the *Loper Bright* majority to take that would “be seen to overrule *Chevron*, while also largely preserving *Chevron*’s major source of appeal to judges”).

348. *Am. Trucking Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967).

349. *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 344 (D.C. Cir. 2013).

350. Justin Franz, *Coal Company Demands ‘Emergency Service’ from BNSF*, MONT. FREE PRESS (May 5, 2023), <https://montanafreepress.org/2023/05/05/ntec-coal-company-demands-emergency-service-from-bnsf> [<https://perma.cc/AHC9-BKAG>]. The Navajo Nation in the southwest United States is “heavily dependent on fossil fuel extraction to provide revenue for its annual budget.” Noel Lyn Smith, *Navajo Summit Looks at History and Future of Tribe’s*

to transport NTEC coal from its Montana mine to its export facility in British Columbia.³⁵¹ STB granted a preliminary injunction, reasoning in the process that the CCO legal inquiry included considering the voluntariness of the railroad's reduction in service, the railroad's ability to maintain consistent service, the effect on contract shippers of BNSF continuing to provide a previous level of service, the railroad's past service levels, and the shipper's market needs.³⁵² Under STB's injunction, BNSF had to carry at least 4.2 million tons of NTEC's coal for the remainder of 2023.³⁵³

The NTEC order demonstrates the common-law-style reasoning available to STB in its decisions. But the order also shows how STB might build on that reasoning to formulate future policy statements or legislative rules based on the factors it identified in that adjudication.³⁵⁴ A future rule, perhaps developed through further adjudications confirming the soundness of the legal test to meet the CCO's policy of universal access, might codify the factors STB identified. The policy statement or legislative rule could also provide guidance and commentary on the interpretation and consideration of those factors.³⁵⁵ Once established, the policy statement or rule could facilitate additional and more ambitious requests for common-carrier service.

The Supreme Court's skepticism toward agency adjudication need not present an insurmountable hurdle here. The Roberts Court has "embraced" an expansive view of presidential control over agency adjudications, which consequently undermines Congress's ability to channel regulatory action away from

Relationship with Energy, INSIDE CLIMATE NEWS (June 13, 2024), <https://insideclimate-news.org/news/13062024/navajo-nation-energy-summit-tribe-history-and-future> [<https://perma.cc/3RVR-3DDE>].

351. Navajo Transitional Energy Co.—Ex Parte Petition for Emergency Serv. Ord., Docket No. NOR 42178, slip op. at 1 (S.T.B. June 22, 2023), https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1687536795653/51749.pdf [<https://perma.cc/Z8PW-9SCB>].

352. *Id.* at 4 n.6, 5-7.

353. *Id.* at 13. There is an interesting tension between the environmental importance of expanded rail service and the purpose of STB's compelled rail service here: fossil-fuel extraction. A full discussion is infeasible, but I think it is sufficient to guess that an expanded usage of the CCO would, overall, still advance the multiple goals discussed in this Note.

354. See Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 176-84 (2015) (discussing the "benefits and drawbacks" of case-by-case adjudication based on a flexible standard in the net-neutrality context).

355. See generally, e.g., FED. TRADE COMM'N, COMM'N FILE NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Sections5PolicyStatement.pdf [<https://perma.cc/3AL2-LF3S>] (providing guidance on how the Federal Trade Commission interprets and applies Section 5 of the Federal Trade Act).

the judiciary.³⁵⁶ However, STB's enforcement authorities tend to require, or at least involve, judicial enforcement,³⁵⁷ thus limiting the weight of potential criticism that STB agency adjudications might violate the separation of powers.

To further shepherd the fact-intensive and case-specific analysis attending to adjudications of the CCO, STB should issue guidance outlining how it will interpret the CCO. An instructive example is the Federal Trade Commission's 2022 policy statement on its unfair-methods-of-competition authority.³⁵⁸ In that guidance document, the Federal Trade Commission situated its statutory mandate to police unfair methods of competition historically within relevant precedent and provided a framework for evaluating future conduct, with examples.³⁵⁹ An STB guidance document could similarly situate the CCO within the Progressive Era history outlined in Part II, especially as it relates to the CCO's original understanding as an antimonopoly tool. Since the CCO has persisted in American law from at least the nineteenth century to today, its original understanding could prove useful and informative to contemporary statutory interpretation.³⁶⁰

V. DEVELOPING A TWENTY-FIRST CENTURY RAILROAD POLICY

Working within the deregulatory framework might only go so far. The CCO's potential is limited. It would only indirectly address harm to workers by lessening the operational pressure on workers. And given existing jurisdictional, statutory, and ideological constraints,³⁶¹ the CCO may not restructure the nation's political economy, at least not soon enough for climate or industrial policy goals. Thus, changing only the legal and operational obligations of the railroad industry will not solve all the railroad problems of today without addressing the industry's underlying economic structure (especially its competition with trucks) or its requirement to turn a profit for private investors in financial

356. Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. 1013, 1034 (2025); *see also* SEC v. Jarkesy, 603 U.S. 109, 202 (2024) (Sotomayor, J., dissenting) ("Make no mistake: Today's decision is a power grab."); Axon Enter., Inc. v. FTC, 598 U.S. 175, 185 (2023) (holding that the special statutory-review schemes in the Securities Exchange Act and the Federal Trade Commission Act "do not displace district court jurisdiction over . . . far-reaching constitutional claims").

357. *See* 49 U.S.C. §§ 11702-11703 (2018).

358. FED. TRADE COMM'N, *supra* note 355.

359. *Id.* at 2-15.

360. *Cf.* Paul, *supra* note 150, at 206, 220-22, 225-26 (arguing that the original understanding of the Sherman Antitrust Act "supports a core prescription in favor of dispersing economic coordination rights" based on "taking seriously the possibility of an emergent moral logic that is distinct from the sum of its parts").

361. *See supra* Section IV.A.2.

markets who evaluate railroads' profits against other companies in different industries.³⁶² Burdened by unprofitable or low-margin business, railroads might eventually be unable to invest in their networks, and the problems of the 1970s and the 1870s could reemerge.³⁶³ On the other hand, inaction would likely leave the country with the sometimes-disastrous performance of the railroad industry of the last decade.³⁶⁴ A better response then might necessitate more and different mechanisms for public control.

This Part considers three broader policies Congress should consider to strengthen rail policy: reregulation, public options, and nationalization. Unlike the renewed CCO, each of these policy options will require Congress to act. Congress and STB could begin to address the shortcomings of the current deregulatory regime by using the insights of the Progressive Era and deliberating on the proper approach for what a railroad *should* do. Each proposal faces limits of state capacity, judicial resistance, and political will.

A. Reregulation

First, the United States could reregulate the railroad industry using similar tools as the Progressive Era approach. Under this approach, the railroad industry would remain privately owned and operated, but it would be subject to public regulation over terms of dealing, such as rates and service. Reregulation would address many, but not all, of the challenges of the moment. As detailed in Part IV, reregulation could stave off PSR and put in place more sustainable and affordable rail transportation, including by reducing or eliminating the scope for private contracting and returning to a system of open tariffs available on a non-discriminatory basis. More ambitious reregulation could include reintroducing profit-sharing measures, such as the "recapture" clause of the Transportation Act of 1920.³⁶⁵ Reregulation might help restore some form of open price setting on nondiscriminatory terms disciplined by a regulatory body that understands profit as one, but not the most, important goal. But reregulation would likely result in a lighter approach to climate- and industrial-policy needs.

Nonetheless, the Progressive Era paradigm might actually be *more* practical today than in the 1960s and 1970s, when the paradigm was replaced. This

362. See Meyer, *supra* note 210, at 217-18 ("An extremely important fact of life for all private transportation companies in North America and Europe . . . is the fact that they must compete for their supplies of capital and other factors of production against unregulated firms.").

363. See *supra* Section III.A.1 (describing the economic challenges that presented one predicate for deregulation).

364. See *supra* Section I.B.

365. Transportation Act of 1920, ch. 91, § 422, 41 Stat. 456, 489; see also ELY, *supra* note 120, at 247 (describing the clause).

greater practicality comes from the fact that, unlike the railroads of the 1960s and 1970s, the railroads of today are highly profitable.³⁶⁶ Further, though contracting certainly helped drive costs down, many major improvements to railroads' productivity came from technology, such as improved engines, track materials, cars, and more.³⁶⁷ While ICC commissioners have previously slowed down adoption of cost-saving technology,³⁶⁸ that possibility should be seen not as inherent to regulation but as something to account for in designing it. The railroad industry made extensive use of new information and communications technology, including by adopting computers and microprocessor chips to track assets better, maintain and arrange cars, and schedule freight.³⁶⁹

Regulators equipped with twenty-first-century information technology should be able to wield and process operational and financial data better than their Progressive Era predecessors. However, this Note does not argue for a wholesale return to the Progressive Era paradigm. Ensuring that railroads serve plural public interests—such as stability, fairness, safe working conditions, industrial policy, and addressing climate change—suggests exploring alternatives to the current regulatory paradigm. Reregulation could be one option.

B. Public Options

Second, public options—that is, publicly owned railroad companies that would exist, and sometimes compete, alongside private railroads—could complement either continued regulation in the deregulatory paradigm or a renewed Progressive Era paradigm. A public railroad would have serious advantages over the status quo because it could serve communities and types of customers that railroads find unprofitable and could foster competition that provides a benchmark against which regulators could compare private lines' service and operation performance.³⁷⁰

A public option balances providing service directly by the state with preserving private ownership and also can benefit from competition between private owners and the public enterprise. Ganesh Sitaraman and Anne L. Alstott argue that “public options should be considered whenever policy makers want to make use of the power of government to offer universal access to important goods at a

366. See *Railroads Are USA's Most Profitable Industry with a 50% Profit Margin*, *supra* note 8.

367. See GALLAMORE & MEYER, *supra* note 53, at 343-76.

368. See SAUNDERS, *supra* note 188, at 24-25.

369. GALLAMORE & MEYER, *supra* note 53, at 376-95.

370. See RICKS ET AL., *supra* note 118, at 684 (citing GANESH SITARAMAN & ANNE L. ALSTOTT, *THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY* 39, 64 (2019)).

fair price without preempting market competition in the same area.”³⁷¹ Sitaraman and Alstott distinguish between two types of public options: “baseline public option[s],” which, they explain, “provide[] a universal, basic level of service,” and “competitive public options,” which “offer higher quality or lower pricing, but participation is optional.”³⁷²

Creating public rail options could be either baseline or competitive options, depending on the need. In some cases, federal or state authorities could create baseline public options as providers of last resort where privately run railroads are inadequate or nonexistent. For example, Washington state touts its “financially self-sustaining” and growing “Grain Train” program, which provides publicly owned, privately operated rail transportation for Washington grain to reach export facilities.³⁷³ Maryland has a similar program for its Eastern Shore.³⁷⁴ In other cases, governments could foster public enterprise to compete against private railroads.

A prominent success story of a public option is the United States’s ownership and operations of the Consolidated Rail Corporation (Conrail) from 1976 to 1999, which ultimately became profitable in the 1980s while competing alongside privately operated Class I railroads.³⁷⁵ Initially created in the 1970s from the remains of various failed northeastern railroads, the federal government revitalized the rail network such that it became profitable by the advent of the Reagan Administration, which, motivated by conservative “ideological zeal” as one historian put it, subsequently privatized the public railroad in 1987.³⁷⁶ After

371. GANESH SITARAMAN & ANNE L. ALSTOTT, *THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY* 65 (2019).

372. *Id.* at 27.

373. Ron Pate, *2017-2027 Grain Train Strategic Plan*, WASH. STATE DEP’T OF TRANSP. 2-3, 11, 14-16 (Nov. 16, 2017), <https://wsdot.wa.gov/sites/default/files/2021-10/Nov-2017-Grain-Train-2017-2027-Strategic-Plan.pdf> [<https://perma.cc/M4FX-NFH5>]. Thanks to Maddock Thomas for letting me know about the program.

374. See *Presolicitation Report: Optimizing Maryland’s MTA-Owned Freight Rail Lines for Ongoing Rail Service Through Public-Private Partnership*, MD. DEP’T OF TRANSP. 2 (Aug. 13, 2024), https://www.mdot.maryland.gov/OPCP/Presolicitation_Report_Freight_Railroad_2024.pdf [<https://perma.cc/8ZZC-64MT>]. Note that there is some overlap between a government owning the underlying tracks and outsourcing operation of railroad cars on those tracks by private companies. The distinction between public options here and nationalizations in Section V.C, *infra*, is that nationalizations would likely be geographically total and exclusive where the federal government participates – unlike public options, which maintain the possibility for private ownership or operation.

375. See SAUNDERS, *supra* note 188, at 115-20, 232.

376. *Id.* at 236-37; see James Sterngold, *85% U.S. Stake in Conrail Sold for \$1.6 Billion*, N.Y. TIMES (Mar. 27, 1987), <https://www.nytimes.com/1987/03/27/business/85-us-stake-in-conrail-sold-for-1.6-billion.html> [<https://perma.cc/PGE5-MYA9>]. Transportation Secretary

Conrail's privatization, Norfolk Southern and CSX, the two duopolist railroads in the eastern United States, bought Conrail's assets in 1997.³⁷⁷

Granted, much of Conrail's success came from being run like any other private railroad, which meant layoffs and abandonments; when it started operation in April 1976, it took out advertisements in national newspapers declaring, "We are here to make a profit."³⁷⁸ But the example of Conrail at least challenges conventional narratives that the government cannot organize economic activity well, in one sense. Policymakers will have to consider whether a public option would focus on profit, which would replicate the problems of privately owned Class I railroads, or on access and stability, which would not. Regardless, the historical precedent of Conrail and its profitable operation suggests that public ownership need not mean ineffective management.

C. Nationalization(s)

As a final option, nationalization could have significant strengths for national policies of affordable, safe, and expanded rail service. Railroad is a key, infrastructural service that people and businesses need to rely on to reach markets. As a broader service, particularly one with high fixed costs, competition and the threat of new entry may be especially unlikely to discipline private action.³⁷⁹ Public ownership in some form—either of railroads or of only the railroad tracks—would enable government agencies to manage the rail network and set policies more directly.³⁸⁰ Well-executed nationalization could eliminate the

Elizabeth Dole had previously turned down a request for Conrail workers to purchase the firm themselves. SAUNDERS, *supra* note 188, at 233-34.

377. Don Phillips, *Conrail Split in a Merger with CSX*, WASH. POST (Mar. 7, 1997), <https://www.washingtonpost.com/archive/politics/1997/03/08/conrail-split-in-a-merger-with-csx/cb0060d3-6d1d-47e2-b0a2-2805b02059c9> [<https://perma.cc/V9UE-DP8P>].

378. SAUNDERS, *supra* note 188, at 115.

379. Cf. Raúl Carrillo, *Platform Money*, 41 YALE J. ON REGUL. 894, 962-63 (2024) ("Agencies in the United States have long created state-licensed, cheaper, basic versions of critical services to offer an alternative to exploitative private control in markets otherwise immune to competitive pressures.").

380. The experience of the United Kingdom with nationalizing only the tracks suggests that nationalizing the whole rail system, not just the tracks, might be a better choice. In the 1990s, the United Kingdom privatized its rail system, then renationalized its tracks. But a series of accidents led to the deaths of more than fifty people in the late 1990s and early 2000s, with studies of the incidents attributing those accidents in part to a lack of coordination between a nationalized track and private railroads. See Chris Nash & Andrew Smith, *Developments in Rail Regulation in Britain*, in HANDBOOK ON RAILWAY REGULATION: CONCEPTS AND PRACTICE 45, 47-48, 52-53 (Matthias Finger & Juan Montero eds., 2020); see also Philip Georgiadis, Clara Murray & Jim Pickard, *What Next for Britain's Broken Railways?*, FIN. TIMES (Apr. 4, 2024),

existing oligopolies that control rail service and pass those oligopoly profits on to shippers and consumers. Those savings could help drive down supply-oriented inflation and also prevent future inflation caused by supply-chain shocks, to the extent that oligopoly power and PSR practices contributed to supply-chain constraints.

A coalition of railroad workers and other labor and environmental groups argues that a nationalized rail network would better alleviate the short-term financial pressures railroads currently experience, as manifested by the persistence of PSR, and also better coordinate investment in expanding the U.S. rail network.³⁸¹ As opposed to the PSR-dominant status quo, a fully nationalized rail network, the coalition argues, would better “coordinate the movement of freight” by allowing for a single entity to coordinate train movements and could improve productive efficiency, better manage capital investment and planning, better facilitate electrification, and better incorporate worker voice into rail governance.³⁸² Some countries that resemble the United States in geographic size, population, and amount of shipped freight—China, Russia, and India, in particular—have nationalized rail networks.³⁸³

Public ownership of rail could also steer investment and other management decisions toward guaranteeing fair prices, nondiscrimination, and minimum levels of service to more communities. Instead of reducing service and raising rates, as railroads have done, a publicly run network would ideally have different measures of success, like the U.S. Postal Service and the “post office principle,” which historian Richard R. John defined as “access for all, at low cost, without

<https://www.ft.com/content/e2844ae9-dd66-45c3-a747-f84f10078c64> [https://perma.cc/S3C2-HRM3] (observing that since the COVID-19 pandemic, the United Kingdom has undergone a “quiet renationalisation” of its passenger rail service).

381. Thomas, *supra* note 77, at 3, 19–23.

382. *Id.* at 73–75.

383. See *About Us*, CHINA RY. https://wap.china-railway.com.cn/crcwapEnglish/about/aboutUs/201904/t20190408_92993.html [https://perma.cc/XNE5-649M]; Debasish Roy, *Why Isn't the Railways a PSU?*, ECON. TIMES (Feb. 27, 2011, 5:16 AM IST), <https://economictimes.indiatimes.com/why-isnt-the-railways-a-psu/articleshow/7584262.cms?from=mdr> [https://perma.cc/5QJV-6EAY]; see also Kathrin Hille, *Possible Rail Chief Job Move Sparks Kremlin Reshuffle Rumors*, FIN. TIMES (Aug. 17, 2015), <https://www.ft.com/content/1784dd4c-44ff-11e5-af2f-4d6e0c5eda22> [https://perma.cc/EQX2-HDTL] (reporting on the departure of the “head of state-owned Russian Railways”); Russell Pittman, *Railways and Railways Regulations in the United States: Surely You Don't Want Jones Back?*, in HANDBOOK ON RAILWAY REGULATION: CONCEPTS AND PRACTICE, *supra* note 380, at 225, 231 (“The Russian and Chinese railways remain largely unstructured state-owned monopolies, and the Indian railways are completely unstructured . . .”).

regard to the expense.”³⁸⁴ A public network could therefore expand otherwise-unprofitable service and in so doing advance industrial-policy and climate goals, as well as goals of universal access. Workers would also benefit from the government’s ability to pay them without the need to answer to private shareholders. The federal government has actually nationalized the operation of the railroad industry before to achieve national policies that private management could not. During World War I, misallocations of capital, as well as shortages of labor, resulted in President Wilson temporarily nationalizing the operation of the rail network so as to better coordinate the flow of goods to the war front and empty cars back to the nation’s interior.³⁸⁵ Though reversed quickly after the war, national operation proved workable.

Legally, the Takings Clause, which forbids private property from being “taken for public use, without just compensation,”³⁸⁶ would drive up costs if the government does take property as part of a more extensive regulatory regime. The Takings Clause cost alone could be hundreds of billions of dollars. As of the end of 2024, the net book value (which is likely lower than the market value) of the property and equipment of Union Pacific alone — just one of six Class I railroads — was over \$58 billion.³⁸⁷ And the railroad industry would likely oppose any nationalization effort, as would its investors.³⁸⁸ Political leadership of both parties would have to address public skepticism surrounding nationalization. Public ownership’s price tag alone might prove too much for the median policymaker.

384. Richard R. John, *The Founders Never Intended the U.S. Postal Service to Be Managed Like a Business*, WASH. POST (Apr. 27, 2020), <https://www.washingtonpost.com/outlook/2020/04/27/founders-never-intended-postal-service-be-managed-like-business> [https://perma.cc/NUG2-UT8Y].

385. See K. AUSTIN KERR, *AMERICAN RAILROAD POLITICS, 1914-1920: RATES, WAGES, AND EFFICIENCY* 40-44 (1968).

386. U.S. CONST. amend. V. In the event of a taking, the government owes the property owner just compensation in the form of the property’s “fair market value.” See *United States v. Miller*, 317 U.S. 369, 373-75 (1943). To name another legal challenge: agencies and courts will have to classify and reconcile the varying property interests that railroads hold. For an example of this problem, see *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 96-97, 102-05 (2014).

387. Union Pac. Corp., Annual Report (Form 10-K) 61 (Feb. 7, 2025), <https://www.sec.gov/Archives/edgar/data/100885/000010088525000042/unp-20241231.htm> [https://perma.cc/A6PA-6LVK].

388. See, e.g., *Content from the Association of American Railroads: How Deregulation Saved the Freight Rail Industry*, WASH. POST, <https://www.washingtonpost.com/sf/brand-connect/wp/enterprise/how-deregulation-saved-the-freight-rail-industry> [https://perma.cc/SWW9-KWUY] (celebrating deregulation via sponsored content on the *Washington Post* website and touting “[h]istory lessons like these . . . especially if they keep us from repeating the painful mistakes of our past”).

Many of the Populists—the movement of farmers, workers, and merchants whose political pressure was important for securing passage of the Interstate Commerce Act—pushed for nationalization.³⁸⁹ But they did not always, and their changing prescription over time might prove prophetic here. Animated by their conception of “railroads as public highways,” as historian Charles Postel writes, Populists, specifically the Farmers’ Alliance, advocated for state agencies to regulate railroads.³⁹⁰ But as state agencies shied away from reform under the conservative jurisprudence of the era and in the face of political backlash by railroads, populist groups began pushing for government ownership instead.³⁹¹ In the Populist Party’s 1892 platform, the Party said, “We believe that the time has come when the railroad corporations will either own the people or the people must own the railroads” and that

the power of government—in other words, of the people—should be expanded (as in the case of the postal service) as rapidly and as far as the good sense of an intelligent people and the teachings of experience shall justify, to the end that oppression, injustice and poverty shall eventually cease in the land.³⁹²

CONCLUSION

This Note has attempted to show how law, specifically the legacy of the de-regulatory movement of the 1970s and 1980s, has structured and shaped the shortcomings of the railroad industry today. Parts I through III sought to demonstrate how an analytical move “from efficiency to power,” as LPE scholars say,³⁹³ can illuminate the workings and consequences of law. LPE writers have argued that legal scholars and analyses have suffered from “the depoliticization and naturalization of market-mediated inequalities.”³⁹⁴ In particular, LPE scholars point out that legal areas understood to be “about the economy,” including transportation regulation, have prioritized ostensibly neutral, market-centric

389. See WHITE, *supra* note 124, at 331 (“Nationalization became a part of the Omaha platform of the Populist Party in 1891, but it tended, like the Populist Party, to thrive in states where the railroads managed to block or hamstring regulatory reform.”).

390. CHARLES POSTEL, *THE POPULIST VISION* 146–47 (2007).

391. *Id.* at 147–49.

392. Populist Party Platform of 1892 (July 4, 1892), *reprinted by* AM. PRESIDENCY PROJ. <https://www.presidency.ucsb.edu/documents/populist-party-platform-1892> [<https://perma.cc/MG6J-8YND>].

393. See, e.g., Britton-Purdy et al., *supra* note 20, at 1818.

394. *Id.* at 1790.

orderings that “marginalized questions of power” and fairness.³⁹⁵ As a corrective, they call for “center[ing] the power, rooted in state decisions and articulated through law, that constitutes the field of economic life.”³⁹⁶

This Note also qualifies the public-utility revival by noting the institutional difficulties of the regulated-industries era and the real problems the deregulatory regime responded to. The public-utility tradition — “experiencing a new renaissance”³⁹⁷ — highlights legal tools and alternate frameworks as instructive to handling contemporary social-policy issues.³⁹⁸ Much of the renaissance has come about in response to the shortcomings of neoliberal thought, which “helped establish *nonregulation* as the normative economic baseline.”³⁹⁹ But public-utility regulation tends to take private ownership as a given and was historically often a compromise between lighter market structuring and nationalization. Given the policy need to *expand* the railroad network — including to places that may not be profitable, at least not immediately — private markets and market incentives may prove inadequate. None of this is to say that the public-utility idea is unworthy of recovery. In fact, given the persistence of internet-platform power, reasoning about past public-utility law and its potential future application has become only more important.⁴⁰⁰

395. *Id.* at 1801-06, 1818.

396. *Id.* at 1819-20.

397. Jim Rossi & Morgan Ricks, *Foreword: Revisiting the Public Utility*, 35 YALE J. ON REGUL. 711, 713 (2018).

398. See, e.g., NOVAK, *supra* note 143, at 108-45 (describing the public-utility tradition’s development); Rossi & Ricks, *supra* note 397, at 713 (characterizing this renaissance); RICKS ET AL., *supra* note 118, at 1-3 (situating networks, platforms, and utilities in legal curricula); Rahman, *supra* note 119, at 1625 (noting the potential to address concentrated power in private markets); Elettra Bietti, *Experimentalism in Digital Platform Markets: Antitrust and Utilities’ Convergence*, 2024 U. ILL. L. REV. 1277, 1312, 1321-37 (applying public-utility analysis to digital markets); Alison Gocke, *Public Utility’s Potential*, 133 YALE L.J. 2773, 2819-24 (2024) (applying public-utility analysis to environmental regulation); Sitaraman, *supra* note 167, at 500-06 (applying public-utility analysis to “deplatforming” debates); Evelyn Atkinson, *Telegraph Torts: The Lost Lineage of the Public Service Corporation*, 121 MICH. L. REV. 1365, 1402-14 (2023) (applying public-utility analysis to public-service corporations); Jamie Grischkan, *Regulating Bank Mergers: Past and Present*, 2024 U. ILL. L. REV. 557, 563-69, 607-11 (applying public-utility analysis to bank regulation); Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 313-20 (2017) (applying public-utility analysis to energy regulation); Nicholas Bagley, *Medicine as a Public Calling*, 114 MICH. L. REV. 57, 99-105 (2015) (applying public-utility analysis to healthcare markets); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1682-1708 (2014) (applying public-utility analysis to decarbonization).

399. Sitaraman & Ricks, *supra* note 158, at 1066.

400. See Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 134-35 (2024) (discussing common-carrier analogies between telegram companies and online-technology companies used in *Moody v. NetChoice LLC*, 603 U.S. 707 (2024), and identifying a potential disanalogy).

The American experience of railroad deregulation from the 1970s and 1980s to the present demonstrates the shortcomings of prioritizing a narrow and totalizing vision of efficiency over social concerns such as nondomination, fairness, and equality. This Note has illustrated some of the legal foundations of the railroads' business model and the consequences of allowing privately owned railroads to amass power with few democratic checks on that power's exercise. One productive response would take the form of legislation that counteracts that private power. Another would be administrative and judicial engagement with the proper standard by which to implement existing legal tools, like the CCO, that are geared toward fairness and checking common carriers' power.

This Note hopes to push beyond criticism and spur further inquiry into productive reforms. Both an historical approach and, though not the focus here, a cross-sectoral approach could help map out future policy choices and their consequences.⁴⁰¹ Further research, for instance, could distinguish the railroad industry from other traditional public-utility industries such as electricity or telecommunications.⁴⁰²

PSR today presents old and new policy problems to workers, communities, and the climate. However, productive alternatives exist. While state capacity will likely be a long-term problem, the existing statutory scheme provides a way for regulators to strengthen their antimonopoly muscles. Railroads shaped American law in the nineteenth century. Now, railroads are more important than ever to understanding how markets and market structures work—and how they might work better.

401. For scholarship in this vein, see generally Dinovelli, *supra* note 139; and Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

402. One salient distinction is likely the nature of the service provided. For example, electricity providers must provide “a far less differentiated product than transportation services,” which must provide for the capable delivery of a wide range of goods. See USSELMAN, *supra* note 120, at 378. Thanks also to Ben Dinovelli for the insight. Another distinction is related to the nature and complexity of the service provided and thus the ability of the public to hold providers accountable. See ELIZABETH ANDERSON, *HIJACKED: HOW NEOLIBERALISM TURNED THE WORK ETHIC AGAINST WORKERS AND HOW WORKERS CAN TAKE IT BACK* 266–68 (2023) (discussing the limits of outsourcing prison operations to private corporations).