

**Back to the Future:
How Transportation Deregulatory Policies
Foreshadow Evolution of Communications Policies**

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The legal regulatory regimes for communication technologies evolve with technological, economic, and social change. In the United States, the evolution of the *legal regulatory regime* for the telecommunications sector is following a trajectory breathtakingly similar to that already traversed by the transportation sector. As both sectors provide infrastructures essential to the nation and share similar economic attributes of networks, technological evolution within each has generated many of the same core issues. By recognizing this historical reality, we can tap valuable experience in transportation policy to better inform prospective policy change in telecommunications under intermodal competition. In this way, future telecommunications policy need not be radical (whether intentionally or not) nor totally untested, thereby enhancing its potential for sustainability.

The efficacy of such a comparative historical evaluation is, however, dependent upon the starting point of analysis. This paper asserts that many other scholars' analyses proceed from an inappropriate temporal point in legal history, thereby masking an appropriate understanding of what legal regimes the period of "deregulation"¹ is evolving from and transforming to. As a result, such analyses have often mischaracterized the evolution of the transportation legal regimes and thereby the implications for telecommunications deregulatory policies. In so doing, such analyses have tended to

¹ The term "deregulation" refers to the transformation since the 1970's of the statutory legal regimes for common carriers and public utilities that shift reliance from monopoly or other legal entry barriers to competition. However, "deregulation" does not mean the total elimination of regulation and exclusive reliance on market transactions. *See, e.g.,* J. Kearney & T. Merrill, "The Great Transformation of Regulated Industries Law," 98 *Columb. L. Rev.* 1323, 1324-1325 (1998).

* The views in this paper are those of the author and do not reflect the views of the Federal Communications Commission, any Commissioners, or staff.

focus primarily on the evolution of legal rules governing the provider-to-provider relationship rather than the provider-to-customer relationship, resulting not only in misleading conclusions for the former but inadequate exploration of the latter.

Given the FCC's continuing efforts to implement the Telecommunications Act of 1996 (TA96) as well as the current pressures for Congress to further revise the Act, there have been a plethora of policy recommendations for further evolution of the communications legal regimes. Furthermore, given that pursuit of deregulatory policies in telecommunications trails those adopted for transportation, many policy recommendations – whether by scholars, industry stakeholders, or politicians – are based on assertions derived, explicitly or implicitly, from an alleged understanding of what has already evolved for transportation industries. However, if such assertions are based on faulty premises, inappropriate – yet avoidable – policies may be adopted.

The purpose of this paper is to analyze the evolution of legal regulatory regimes for transportation industries so as to clarify mischaracterizations of prior analyses that have influenced the assumptions upon which many recent recommendations for telecommunications policy change are based. In this way, this paper seeks to facilitate a more fully informed debate regarding the appropriateness of future policy options for telecommunications and its relationship to the other modes of communication. To this end, the paper is organized as follows.

Section 1 discusses the importance of correctly identifying the original regulatory regime of transportation and telecommunications carriers for purposes of conducting comparative analyses with the recent deregulatory regimes. It shows that many scholars inappropriately characterize the initial statutory –and not the common law – regime as the original regulatory regime. By focusing on changes to the statutory regime with little or no reference to the changes from the underlying common law principles, such analyses mischaracterize the current state of transportation law by, either explicitly or implicitly, asserting the non-existence of common carriage. As a result, such analyses are preoccupied with evaluating regulation governing the provider-to-provider relationship but inadequately exploring regulation governing the provider-to-customer relationship.

Section 2 corrects mischaracterizations of common carriage under transportation deregulation by analyzing the current regime in terms of differences from the original

common law regime. It shows that the current deregulatory regimes still impose common carriage obligations on rail, air, and motor carriers, although in varying ways both across and within transportation modes.

Section 3 further analyzes regulation of the provider-to-customer relationship under transportation deregulation. To serve public utility functions, additional requirements have been imposed on carriers and funding programs have been created. However, some of the funded programs are facing sustainability problems, such as Amtrak and the Essential Air Service Program. It also describes transition problems that relate to litigation of claims against providers on behalf of customers. Examples include the applicability of the filed rate doctrine after detariffing, and the scope of permissible state causes of action.

Section 4 describes developments in the telecommunications regime that are parallel to those that evolved in transportation as described in sections 2 and 3. There is increasing variance as to how common carriage obligations are being applied among providers of new services enabled by digitization and the Internet; the current funding mechanism for federal universal service support fund is generally considered economically unsustainable in the long run; and litigation has already created a conflict among the courts as to the applicability of the filed rate doctrine under detariffing and the extent to which state causes of action are federally preempted. Prior experience under the transportation regime foreshadows outcomes for telecommunications. They include that categorization of services by differentiating characteristics for purposes of applying common carriage obligations will likely continue; that the residualistic nature of the federal universal service programs may also give rise to future political sustainability problems; and that resolution of transition problems associated with the effects of detariffing and the scope of permissible state causes of action will likely require federal legislation. The paper ends with concluding observations for telecommunications policy reform.

1. Correctly Identifying the Original Regulatory Regime for Comparative Analyses

The importance of reviewing the legal history of the regulatory regimes for transportation and telecommunications carriers is to accurately describe the context within which deregulatory policies have, and will continue to be, implemented. Because

policy change is a path dependent and usually incremental process,² an accurate historical context is necessary to understand the legal regimes that deregulatory policies are evolving from as well as evolving to. In other words, the set of feasible deregulatory policy outcomes is constrained by the historical legal trajectory. Furthermore, given the hierarchy of lawmaking mechanisms – from common, statutory, and constitutional law, in ascending order – the implications of deregulatory policies are also affected by the historical legal trajectory. For example, statutory law overrides conflicting common law principles, but the repeal of statutory law reinstates the applicability of common law principles (unless the terms of the statutory repeal specifically provide otherwise).

The overview of the legal history provided in this section³ reveals that the legal principles governing common carriers and public utilities originated under the common law. The common law principles were later codified in state and federal statutes, and augmented by various legal requirements under the oversight of regulatory agencies. Deregulatory policies in recent decades have repealed or modified some aspects of these statutory regimes.

Unfortunately, in describing deregulatory changes and/or making prospective recommendations for future deregulatory change, numerous scholars either explicitly or implicitly characterize the statutory – and not the common law – regimes as the original paradigm from which deregulatory changes have evolved. This section discusses the analytical problems that arise in analyses based on such a misidentification of the original

² Most public policy change is incremental, and major policy change requires the intervention of strong conjunctural forces. See D. Wilsford, “Path Dependency, or Why History Makes it Difficult but Not Impossible to Reform Health Care Systems in a Big Way,” 14 *J. Pub. Pol’y* 251,278 (1994); P. Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* 19 (1986).

³ For a more detailed discussion of the legal history of regulation of common carriers and public utilities summarized in this section, see B. Cherry, *The Crisis in Telecommunications Carrier Liability* 50-57 (1999); B. Cherry, “The Political Realities of Telecommunications Policies in the U.S.: How the Legacy of Public Utility Regulation Constrains the Adoption of New Regulatory Models,” 2003 *Michigan State DCL Law Review* 757, 761-766 (2003a); B. Cherry, “Utilizing ‘Essentiality of Access’ Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets,” 11 *CommLaw Conspectus* 251, 256-257 (2003b). For a detailed discussion of the legal history of transportation law, see P. Dempsey, “Transportation: A Legal History,” 30 *Trans. L.J.* 235 (2003); P. Dempsey, “The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be,” 27 *Transp. L.J.* 367 (2000); J. Basedow, “Common Carriers – Continuity and Disintegration in U.S. Transportation Law, Part I,” 13 *Transp. L.J.* 1 (1983); J. Basedow, “Common Carriers – Continuity and Disintegration in United States Transportation Law, Part II,” 13 *Transp. L.J.* 159 (1984). For brevity, the legal regime for shipping by water is not discussed in this paper as it has its own very complex evolution; however, its inclusion would not alter the conclusions of the analysis in this paper.

paradigm. Focusing on changes to the statutory regime with little or no reference to changes from the underlying common law principles, such analyses mischaracterize the current state of transportation law by, either explicitly or implicitly, asserting the non-existence of common carriage. As a result, such analyses are preoccupied with evaluating regulation governing the provider-to-provider relationship but inadequately exploring regulation governing the provider-to-customer relationship.⁴

1.1. The legal history prior to deregulation

The law of common carriage is based on the English common law of “public callings” that evolved during the Middle Ages. Public callings were undertakings to serve the public, referred to as public employments, as during the period of feudalism most people were engaged in private employment for their feudal lord. By virtue of their *status as public employments*, public callings bore unique obligations under *tort* law to serve upon reasonable request without discrimination, to charge reasonable (“just”) prices, and to exercise their calling with adequate care, skill and honesty. Public callings were also subject to a common law rule of strict liability, except for damages arising from acts of God or of enemies of the king, with severe limitations on the ability to contract out of such tort liability.⁵ These tort obligations reflected a moral imperative of justice in economic exchange to address situations of economic coercion, exploitation and the illegal wielding of bargaining power (not necessarily derived from monopoly power). Public callings included a variety of businesses, such as common carriers, innkeepers, blacksmiths and surgeons. With the decline of feudalism, most businesses came to be governed by the evolving common law of contracts. However, the tort obligations of public callings remained for a few classes of businesses, including common carriers.

⁴ In this paper the term “customer” refers to any person or entity that obtains service for compensation from the provider but does not then use that service to compete with the provider. This meaning is intended to distinguish an enduser customer (whether individual or corporate, large or small) from another provider, so that the terms “provider-to-provider” and “provider-to-customer” are mutually exclusive.

⁵ The common law rule of strict liability for common carriers is well known for those familiar with the history of regulation of transportation common carriers. However, this liability rule has been largely misunderstood by those familiar with only the liability regime that evolved for carriers of telephony. This is because the evolution of the limited liability regime for telephony has been unique, unlike the liability regimes that evolved for carriers of transportation and even telegraphy. As a result, the implications of detariffing are profoundly different for the liability regime of telecommunications carriers as compared to transportation carriers. See B. Cherry (1999a), *supra* note 3; and B. Cherry, “Improving Network Reliability – Liability Rules Must Recognize Investor Risk/Reward Strategies,” in *Rethinking Rights and*

The common law of public utilities that subsequently evolved in the United States during the nineteenth century incorporated the tort obligations of common carriers but also added an affirmative duty to extend facilities to render service, even at non-compensatory rates, demanded by any member of the public with a corresponding barrier to exit.⁶ This affirmative duty to serve has come to be known as a carrier of last resort obligation, and can be viewed as an early form of welfare state regulation.⁷ With the evolution of the common law of public utilities, some businesses are considered both common carriers and public utilities, such as railroads and telephone companies, whereas others are considered only as public utilities, such as gas and electric utilities.

The common law of common carriers is the initial legal regime governing transportation regulation in the United States. With its origins in English common law, it formed the basis of the common law in the American colonies and continued after their independence from Britain. Upon adoption of the U.S. Constitution, it governed the activities of those undertaking to provide transportation services to the public, whether over land or water. Over time, it also constituted the initial legal regime governing the activities of new modes of transportation created by technological innovation, such as steamboats, railroads, motor carriers, and air carriers.

However, during the nineteenth century, common law remedies did not adequately address the economic abuses of large corporations, particularly railroads. In response, many states enacted legislation to provide statutory remedies. Furthermore, given the inability for even state legislatures to adequately monitor and provide timely statutory remedies, some states created administrative agencies – a significant legal innovation – with limited regulatory authority over railroad activities.

Eventually, the growth of corporations' interstate activities were beyond the jurisdictional reach of the states' police powers,⁸ creating pressure for federal economic

Regulations: Institutional Responses to New Communication Technologies (L. Cranor & S. Wildman, eds.) (2003c), pp. 309-333.

⁶ The imposition of the affirmative duty to serve unique to public utilities was usually accompanied by some government grant of privilege, such as eminent domain, and often a monopoly franchise. *See supra* note 3.

⁷ B. Cherry (2003b), *supra* note 3.

⁸ *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886) (holding the state statute regulating railroad transportation unconstitutional, because such transportation was interstate commerce and within the sole control and regulation of Congress under the U.S. Constitution).

regulation. As for railroads, Congress responded in 1887 with enactment of the Interstate Commerce Act (ICA), creating a statutory, industry-specific legal regime to govern the activities of railroad carriers under which regulatory authority was delegated to the first federal expert agency, the Interstate Commerce Commission (ICC). To address certain anti-competitive and monopolistic practices by general businesses, Congress later passed the Sherman Antitrust Act in 1890, the first federal antitrust statute.

During the nineteenth century, there were also innovations in communications technology, namely telegraphy and telephony. Under the common law, both telegraphy and telephony were considered communications carriers and public utilities. As with the railroads, both telegraphy and telephony were gradually brought under the jurisdiction of state agencies - often the same agencies with jurisdiction over railroads. In 1910, Congress amended the ICA to extend the ICC's jurisdiction to the interstate activities of telegraphy and telephony.

In the early twentieth century, further technological innovations created new modes of transportation. The invention of the internal combustion engine eventually led to the mass production of motor vehicles. As with railroads, regulation of motor common carriers originated in the states, but soon confronted limitations due to their lack of jurisdiction over interstate commerce.⁹ In the 1920's, motor carriers became serious competitors of railroads – abetted by state and federal government construction of highway infrastructure – with a greater impact on the railroads' market share of freight as compared to passenger service.

Meanwhile, the invention of airplanes created a new mode of transportation by air. However, unlike railroads and motor vehicles, airplanes were initially used primarily for government purposes, during World War I as military aircraft and post-war to deliver mail for the Post Office. The use of aircraft for commercial passenger service by the private sector developed later, benefiting from the government construction of air terminals and runways to support airmail delivery as well as the revenues derived from freight (including mail) service to subsidize passenger revenues.

⁹ The seminal case in this regard is *Buck v. Kuykendall*, 267 U.S. 307 (1925) (holding unconstitutional a state's refusal to grant a license to an auto stage line, effectively obstructing interstate commerce).

It is the national crisis created by the Great Depression that triggered a new era of federal legislative activity, replicating the statutory regime developed for railroads for application to numerous other industries. The Great Depression engendered a change in regulatory philosophy, stressing the need for stability and growth of essential industries to achieve national recovery. With regard to transportation, Congress enacted the Motor Carrier Act of 1935, adding bus and trucking to the jurisdiction of the ICC,¹⁰ and the Civil Aeronautics Act of 1938, creating the Civil Aeronautics Administration (later the Civil Aeronautics Board) with jurisdiction over air carriers. For communications carriers, Congress enacted the Communications Act of 1934, transferring jurisdiction over telegraphy and telephony from the ICC to a new agency, the FCC. Notably, much of the Communications Act of 1934 was copied verbatim from the ICA.

With the passage of these acts during the 1930's, the federal statutory framework created in 1887 for railroads formed the foundation for the statutory legal regimes of all common carriers, both transportation and communications carriers. These regimes remained firmly entrenched until the 1970's, when Congress enacted various statutes to first address the declining financial health of the railroad industry and then to pursue deregulatory policies.

Overall, these statutory regimes had the following common attributes. The carriers remained privately owned but closely monitored by the relevant federal agency. The statutes codified the common law obligations of nondiscrimination, reasonable prices, exercise of adequate care, and full liability for actual losses.¹¹ However, to provide uniformity in the enforcement of these obligations that was lacking under the common law regime, the statutes imposed a tariffing system. In this regard, carriers were required to file with the agency publicly available tariffs that described the rates, terms, and conditions of service. Carriers were not permitted to deviate from these tariffs in providing services to enduser customers. Furthermore, the prices, terms, and conditions of service in the tariffs were subject to complaint and agency review.

¹⁰ ICC jurisdiction over motor carriers was also intended to establish greater regulatory parity with railroads, which were already bearing the financial stress of intermodal competition.

¹¹ However, there was a subsequent anomalous development of the liability obligations for telephony carriers. *Supra* note 5.

To promote reliability, the statutes required the agency to limit entry and exit in the industry¹² and to regulate rates so that carriers could earn adequate (but not excessive) profits. Furthermore, under the common law, carriers had no obligation to interconnect with the lines of other carriers or to establish through rates for services.¹³ Therefore, to address this gap under the common law, the statutory regimes also imposed such obligations governing carrier-to-carrier relationships.

Finally, agency orders to enforce the statutory provisions – whether the result of the agency’s adjudicatory or rulemakings powers – were subject to judicial review in federal court. Relevant to later discussion in section 3.3, the judicial enforcement of a carrier’s obligation to not deviate from tariffed rates, terms, and conditions is referred to as the *filed rate doctrine*.

In most cases, the states imposed similar statutory regimes to govern carriers’ intrastate activities. As previously discussed, development of state statutory regimes based on agency oversight preceded the federal statutory regimes for railroads, telegraph and telephone carriers. Although always subject to potential claims of unconstitutionality under the Interstate Commerce Clause of the U.S. Constitution,¹⁴ state laws were further constrained by the statutory regimes enacted by Congress under the doctrine of federal preemption. For these, among other reasons, the state statutory regimes contained provisions similar to those in the federal regimes, including tariff and interconnection-related requirements.¹⁵ The coexistence of the federal and state regimes is often referred to as dual jurisdictional regimes.¹⁶

¹² The conditions on entry and exit represent codification of additional obligations that evolved under the common law of public utilities. For those carriers that built their own network infrastructures – railroads and communications carriers – the statutes empowered the agency to require the carrier to extend lines to serve additional customers.

¹³ See J. Speta, “A Common Carrier Approach to Internet Interconnection,” 54 *Fed. Comm. L. J.* 225, 258 (2002).

¹⁴ See *supra* notes 7 and 8.

¹⁵ To be sure, many provisions of the federal statutory regimes were based on the legal innovations developed in the state statutory regimes. However, many states did not enact statutory regimes prior to enactment of the relevant federal statutory regime. In any event, after enactment of the federal statutory regime, states were constrained as to how their regimes were permitted to evolve.

¹⁶ For the analysis in this paper, the early period of state regulation is important for understanding the development of the common law and the innovation of state regulatory agencies. Federal regulation of transportation takes on the primary role with the enactment of statutory regimes, as the federal government has preemption power over the states. With regard to the deregulatory transportation regimes, this paper focuses on current provisions of the federal statutes rather than the states because the change in federal law dominates the transformation of the regulatory regimes. The extent to which federal preemption of the

1.2. Effects of analyses mischaracterizing the original regulatory regime

Notwithstanding the common law origins of the legal regimes governing common carriers and public utilities, many scholars analyze the transformation of transportation and/or telecommunications regulatory regimes under deregulatory policies in terms of the differences from the statutory regimes. In so doing, the statutory regimes are effectively treated, whether explicitly or implicitly, as the original regulatory paradigm.¹⁷ Analyses based on the choice of the statutory, rather than the common law, regime as the original regulatory paradigm have introduced serious analytical problems for both understanding the current state of the law and developing future policy recommendations.

The analytical problems generally arise because the analyses focus on changes from the original statutory regimes but with little or no reference to the underlying common law principles. As a result, there is a preoccupation with changes in the statutory obligations but inadequate evaluation of changes relative to the common law obligations.

The analytical problems have manifested themselves in the following ways. First, given that deregulatory policies have changed various statutory requirements – such as eliminating tariffs and modifying agency authority to set, suspend, or modify rates – some analyses claim that deregulatory transportation regimes have eliminated common carriage. For example, Chen states that “[c]ommon carriage is now a relic of older regimes rather than a living legal concept in transportation.”¹⁸ Others, such as Fine and de Figueiredo,¹⁹ imply the non-existence (or irrelevance) of common carriage obligations by virtue of the assumption that the obligations arose to address monopoly power, and, since deregulatory legislation has eliminated legal barriers to entry, then the obligations no longer (and need no longer) exist. As discussed more fully in section 2, such

states has been extended or retracted under deregulation is itself an important research topic. This paper does briefly discuss some preemption issues in sections 3 and 4, but would it require a much longer paper to adequately explore preemption issues in more detail.

¹⁷ For example, Kearney & Merrill, *supra* note 1, at 1325-1328, explicitly characterize the statutory regimes as the “original paradigm” from which to evaluate the “new paradigm” of regulation evolving from deregulatory policies.

¹⁸ J. Chen, “The Nature of the Public Utility: Infrastructure, the Market, and the Law,” 98 *Nw. U. L. Rev.* 1617, 1653 (2004).

¹⁹ *See, e.g.*, C. Fine & J. de Figueiredo, “Can We Avoid Repeating the Mistakes of the Past in Telecommunications Regulatory Reform?” Working Paper 2005-001, MIT Communications Futures Program, MIT (March 21, 2005) (erroneously characterizes railroads as having been fully deregulated).

assertions as to the non-existence or irrelevance of common carriage under the deregulatory regimes both mischaracterize the current state of transportation law and reflect a failure to appreciate the policy reasons underlying the development of the original common law obligations.

Second, as a result of this tendency to dismiss the relevance of common carriage under the deregulatory regimes, such analyses are preoccupied with evaluating regulation governing the provider-to-provider relationship but devote inadequate attention to regulation governing the provider-to-customer relationship. For example, although claiming to provide a comprehensive analysis of the transformation in regulated industries law, Kearney and Merrill assert that the concept of discrimination cannot exist with the elimination of tariffs in a competitive environment, and then proceed to devote the bulk of their analysis to the transformation of legal requirements governing the provider-to-provider relationship.²⁰

Analogously, moving beyond description of regulatory change to develop policy recommendations, Nuechterlein and Weiser advocate a future deregulatory telecommunications regime that addresses only wholesale regulation.²¹ In justifying this approach, they not only fail to describe the common law origins of common carrier and public utility regulation, but they also make the now familiar analytical error of claiming that the basic retail regulatory framework of the statutory regime can work as intended only if there is very little competition in telecommunications markets.²² In essence, they advocate a regulatory regime with primary reliance on antitrust principles addressing problems of providers' market power – although acknowledging that enforcement would still likely occur under the oversight of an industry-specific agency such as the FCC. This approach suggests that a regime *at the wholesale level*, consisting of ex post remedies based on enforcing general business antitrust principles, be substituted for the historical, ex ante common carriage regime *at the retail level*.²³ Yet, in so doing, they

²⁰ *Supra* note 1, at 1340.

²¹ J. Nuechterlein & P. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* (2005).

²² *Id.* at 45.

²³ Nuechterlein and Weiser also fail to address other difficulties associated with any attempt to transition to their proposed regime. One source of difficulties arises from the political feasibility problems posed by policy path dependence of the common law regimes of common carrier and public utilities. *See* Cherry

fail to discuss problems related to the provider-to-customer relationship that the original common law principles of common carriage evolved to address.²⁴

2. Correcting Mischaracterizations of Common Carriage Under Transportation Deregulation

When the transformation of transportation and/or telecommunications regimes under deregulatory policies are analyzed in terms of differences from the original common law regime rather than the initial statutory regimes, then the analytical problems discussed in section 1.2 become clear. As described in this section, the current transportation regimes still retain many attributes of the original common law regime albeit with significant modifications to the initial statutory regimes. The current regimes still retain a significant degree of industry-specific regulation with agency oversight, and impose common carriage obligations in varying ways among carriers both across and within transportation modes. Therefore, to characterize the current transportation regimes as having eliminated common carriage is grossly inaccurate.

Furthermore, coupling the discussion in this section with that in the following section 3, the shortcomings of analyses that are preoccupied with the provider-to-provider relationship also become clear. In the transportation industries, considerable energies have and continue to be devoted to addressing issues related to the provider-to-customer relationship. Recognizing this reality, familiarity with the problems experienced in the transportation industries could provide valuable insights for anticipating and addressing similar problems that might arise with the pursuit of deregulatory problems in telecommunications. However, by focusing only on the provider-to-provider relationship, the opportunity to benefit from such prior experience is forgone.

(2003a), *supra* note 3. Another is that the federal Robinson-Patman Act, which prohibits discrimination at the retail level, does not apply to services.

²⁴ Proposed model legislation for a new federal communications act, recently released by a working group organized by the Progress and Freedom Foundation, suffers from similar problems. It too proposes a regime based on the application of antitrust principles at the wholesale level, albeit through implementation of an industry-specific agency. *A Digital Age Communications Act: Proposal of the Regulatory Framework Working Group, Release 1.0*, released by the Progress & Freedom Foundation (June 2005). Interestingly, in describing the railroad regulatory regime as a possible model from which to develop model legislation, the working group's report discusses only the statutory regime, relying in part on Kearney & Merrill, *supra* note 1.

2.1. Evolution of the current deregulatory transportation regimes

The current statutory regimes for each transportation mode are lengthy and complex, reflecting the current state of a long, path dependent process of policy change. It is not possible to provide a comprehensive description here. Fortunately, for purposes of this paper, it is sufficient to describe only a subset of them. However, before describing specific statutory provisions, it is important to provide a context for understanding why the transportation regulatory regimes were so dramatically changed.²⁵

As briefly described in section 1.1., the Great Depression triggered a new era of federal government intervention to provide stability and growth for essential industries such as transportation. It is during the New Deal era that air and motor carriers were brought under regulatory regimes similar to that which already existed for railroads.

By contrast, the deregulatory era for transportation policy began in the 1970's during a period of general economic prosperity. By this time, a bipartisan political movement favoring deregulation swept the United States, for which developments in economic theory provided intellectual justification.²⁶

In addition to the shift in political philosophy, there had been significant developments in intermodal transportation competition with substantial economic consequences. In 1956 Congress passed the Federal Highway Act, which dramatically increased government funds to build an interstate highway system. The growth in the national highway infrastructure stimulated the use of motor carriers (trucks and buses) and motor vehicles, thereby facilitating competition for freight and passengers that contributed to the financial decline of the railroads. The rising use of automobiles also competed with motor carrier passenger service. After World War II, passenger air travel took off, which was enabled through use of government-funded infrastructure (e.g. airports and runways). Intermodal competition from air lines also contributed to the decline of the railroads.

In addition, “the simple technique of containerization...caused the most significant technological change in the international transportation of property since the

²⁵ For a more detailed description of the evolution of the deregulatory transportation regimes, *see* Dempsey (2003), Dempsey (2000), Basedow (1983), and Basedow (1984), *supra* note 3.

²⁶ Dempsey (2003), *supra* note 3, at 327-333. Illustrative is the influence of Alfred Kahn, an economist and then Chairman of the CAB, who successfully advocated deregulation of the airline industry.

steam engine replaced the sail.”²⁷ A container is “an interchangeable metal box capable of carrying smaller packages and facilitating the fast and efficient transfer of cargo from one of transportation to another.”²⁸ The implications of containerization were myriad, affecting, among other things, rates, liability, trade patterns, intermodal coordination, and labor. The implications of containerization have been so profound that it is referred to as the “container revolution”²⁹ – similar to the term “information revolution” used to describe the implications of digitization on the communications sector.

The combined effects of containerization and intermodal competition undermined the sustainability of the price structures that had evolved for various transportation modes. For rail and air transportation, revenues from freight and mail services had been used to offset costs of providing passenger service. For buses, revenues from dense routes had subsidized rural routes. Each of these forms of cross-subsidization was no longer economically sustainable. By the 1970’s, both the railroad and airline industries were in financial crisis.

Occurring during a period favoring deregulation, the economic upheavals occurring in transportation were viewed as failures of economic regulation. The political environment, therefore, was predisposed to seek legislative solutions based on increased reliance on competitive markets. With an intensity of legislative activity reminiscent of the New Deal period, Congress enacted deregulatory policies transforming the rail, air, and motor carrier statutory regimes that had been established in the earlier period.

The transformation began with several acts to address financial sustainability problems in the railroad industry. The Rail Passenger Services Act of 1970 created Amtrak, a federally subsidized corporation established to provide long haul intercity passenger service. In the Regional Rail Reorganization Act of 1973, Congress created Conrail, a for-profit corporation owning the bankrupt Northeast Railroads and providing both freight and passenger services.³⁰ The Railroad Revitalization and Reform Act of

²⁷ “Note: Legal and Regulatory Aspects of the Container Revolution,” 57 *Geo. L. J.* 533, 534 (1969).

²⁸ *Id.*

²⁹ *See Note, supra* note 27; E. Schmeltzer & R. Peavy, “Prospects and Problems of the Container Revolution,” 1 *J. Mar. L. & Com.* 203 (1970); W.D. Angus, “Legal Implications of ‘The Container Revolution’ in International Carriage of Goods,” 14 *McGill L. J.* 395 (1968).

³⁰ The Northeast Rail Service Act of 1981 attempted to integrate Conrail’s services into the privately-owned freight railroad system. In 1983, Conrail exited the passenger service market. In 1998, Congress permitted the acquisition of Conrail by Norfolk & Southern Corporation and CSX Corporation.

1976 constituted the first comprehensive attempt to revise the railroad regulatory regime since the ICA of 1887. The major deregulatory reform was completed by the Staggers Act of 1980.

Deregulatory reform was accomplished more quickly for the airline industry. The Air Cargo Deregulation Act of 1977 was enacted first, liberalizing entry for air cargo service after a one-year moratorium to ease the transition for the incumbent companies. The 1977 Act enabled entry by Federal Express, which had previously been denied entry by the CAB to protect passenger carriers enjoying incremental profits from carrying cargo. The deregulatory legislative reform was completed by the Airline Deregulation Act of 1978. The 1978 Act provided for a gradual transition to competition, phasing in elimination of most entry controls by the end of 1981 and domestic rate regulation by the end of 1982. The Act also mandated the abolition of the CAB by the end of 1985.³¹

As for motor carriers, Congress passed both the Motor Carrier Act and the Household Goods Transportation Act in 1980, liberalizing entry and easing rate regulation requirements for trucking companies. Congress later passed the Trucking Industry Regulatory Reform Act of 1994, which eliminated most entry barriers and preempted state regulation of intrastate motor carriers provided in conjunction with air transportation. The Bus Regulatory Reform Act of 1982 liberalized entry, exit and pricing for passenger motor carriers. The ICC was ultimately abolished by the Interstate Commerce Commission Termination Act of 1995.

In addition to regulatory reform on a mode-by-mode basis, Congress also passed legislation to improve coordination and efficiency of the nation's intermodal transportation system. In 1991, Congress passed landmark legislation, the Intermodal Surface Transportation Efficiency Act (ISTEA). Given that the interstate highway system was nearly complete, the ISTEA increased the flexibility of state and local governments to redirect federal highway funds to other transportation modes and to modal connections. Congress reauthorized the ISTEA, due to expire at the end of the fiscal year of 1997, by passing the Transportation Equity Act for the 21st Century in 1998.

³¹ The air carrier statutory regime was later amended in response to the terrorist attacks on September 11, 2001, by the Air Transportation Safety and System Stabilization Act and the Aviation and Transportation Security Act.

In 2000 Congress also passed the Wendell H. Ford Aviation Investment and Reform Act to encourage and develop intermodal connections on airport property.

2.2. Common carriage obligations under transportation deregulation

Each of the major modes of transportation – rail, air, and motor carrier – is still governed by detailed and distinct statutory provisions.³² Each mode, notwithstanding the abolishment of the ICC in 1995 and the CAB in 1978, is under the jurisdiction of one or more federal regulatory authorities. The rail carriers are under the jurisdiction of the Surface Transportation Board (STB) within the U.S. Department of Transportation; motor carriers are under the jurisdiction of both the STB and the Secretary of Transportation; and the air carriers are under the jurisdiction of the Secretary of Transportation and the Federal Aviation Administration.

For each mode common carriage principles are still imposed, although their manner of expression and enforcement varies by mode. Beginning with rail transportation, a rail carrier is expressly defined as a common carrier, whether engaged in the transportation of passengers and/or property (§10102). Furthermore, all rail carriers are required to provide service on reasonable request (§11101), to provide reasonable rules and practices (§10702); and to adhere to varying non-discrimination requirements that vary with the circumstances and attributes of the service provided (§§10701, 10709, and 10741). For rail carriers found to have market dominance by the STB, rates must be reasonable (§10702).³³ Rail carriers no longer file tariffs but may enter into contracts with purchasers of service (§10709). The STB is given general authority to prescribe the maximum rate, classification, rule, or practice to be followed for violations of statutory provisions (§10704). The U.S. Attorney General may bring a civil action on behalf of a customer to compel a rail carrier to provide transportation at the same rates and conditions given to other customers under similar conditions (§11703). Rail carriers are liable for actual loss or injury to property, with various restrictions on the ability to limit such liability (§11706), and liable for damages sustained by a person (§11704).

³² The current federal statutes governing regulation of transportation carriers are contained in Title 49 of the United States Code. The statutory section numbers provided throughout this paper refer to sections under Title 49, unless otherwise specified.

³³ Section 10707 specifies that a necessary but not sufficient condition for a finding of market dominance is that the rate charged by the carrier results in a revenue-variable cost percentage for such transportation which is equal to or greater than 180 percent.

With regard to air transportation, an air carrier is also expressly defined as a common carrier, whether engaged in the transportation of passengers, property, or mail (§40102). No air carrier may discriminate on the basis of race, color, national origin, religion, sex, or ancestry (§40127); and all air carriers are required to provide safe and adequate interstate air transportation (§41702). Additional requirements governing the carrier-to-customer relationship vary by the type of air transportation service provided. In this regard, air carriers of *foreign* air transportation are subject to the greatest degree of regulation. No air carrier of foreign air transportation may subject a person, port, or type of traffic to unreasonable discrimination (§41310); and must file tariffs that contain reasonable prices, classifications, rules, and practices (§§41501, 41504). The Secretary of Transportation is given specific authority to enforce the statutory obligations, including the power to change a price, classification, rule, or practice for foreign air transportation that it finds to be unreasonably discriminatory (§41507). A lower threshold of regulatory oversight applies to domestic air transportation, for which the Secretary of Transportation may prescribe regulations that permit an air carrier to incorporate by reference contract terms into a ticket or other written instrument (§41707). No statutory provisions specifically address air carriers' standard of liability for damages; however, the savings clause provided in sec. 40120(c) has been interpreted by the courts to preserve the federal common law of common carriage with regard to claims for lost or damaged goods and the validity of limited liability provisions.³⁴

As for motor carriers of property or passengers, the general policy of the U.S. Government is, among other things, to “encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices” (§13101(a)(1)(D)).³⁵ Motor carriers are also required to provide service on reasonable request and to provide safe and adequate service, equipment, and facilities (§14101). In general, motor carriers must provide shippers, upon request, with a copy of the rates, classifications, rules and practices applicable to the shipment (§13710(a)(1)); may enter into a contract with a shipper to provide specified services under specified rates and conditions (§14101(b)); but tariffs not required to be

³⁴ See note 58 and accompanying text.

³⁵ This subsection also applies to water carriers, brokers, and freight forwarders.

filed are null and void (§13710(a)(4)). Challenges to the applicability or reasonableness of rates and provisions are considered by the STB (§13710); however, the exclusive remedy for an alleged breach of contract is an action in state court or federal district court (§14101(b)). However, for the movement of household goods and for noncontiguous domestic trade, more stringent requirements apply. When providing transportation service for such purposes, motor carriers are not permitted to enter into contracts but must provide service under tariffs filed with the STB (§13702); and rates, classifications, rules, or practices for service must be reasonable (§13701). For movement of household goods, rates must be available on a nonpreferential basis to shippers (§13704 (a)(2)). Furthermore, for noncontiguous domestic trade, a complaint that a rate is unreasonable must be reviewed and adjusted by the STB according to a statutorily defined “zone of reasonableness” (§13701 (d)).³⁶ Finally, similar to rail carriers, motor carriers are liable for the actual loss or injury to property, with various restrictions on the ability to limit such liability (§14706), and for damages sustained by a person (§14704). For damage or loss of property, civil actions may be brought in state or federal district court; for injuries to persons, a complaint may be filed with the STB or the Secretary of Transportation and a civil action may be brought for enforcement, if necessary.

This overview of selected provisions of current transportation law demonstrates that rail, air, and motor carriers are still statutorily defined as common carriers. Specific elements of the common law obligations – to serve upon reasonable request, without discrimination, at reasonable prices, and with adequate care – are expressly described in varying ways throughout each of the statutory regimes. However, there is considerable variation in their expression and enforcement not only across modes but also among types of carriers or services within modes. For example, greater obligations are imposed on those rail carriers with market dominance, air carriers providing foreign air transportation, and motor carriers engaged in the movement of household goods or in domestic noncontiguous trade. The presumption of full liability, and special limitations

³⁶ A rate is considered reasonable if the aggregate of increases and decreases in a rate is not more than 7.5 percent above, or more than 10 percent below, the rate in effect 1 year before the effective date of the proposed rate.

on the ability to limit such liability characteristically applied to common carriers, is also reflected in varying ways among carriers both across and within modes.³⁷

Therefore, to characterize current transportation regimes as having eliminated common carriage is grossly inaccurate. In addition, to imply the non-existence or irrelevance of common carriage obligations is, at the very least, very misleading.

This does not mean, however, that there is no validity to claims of erosion of common carriage obligations under the deregulatory regimes. However, the accuracy of such claims depends upon the relevant legal regime from which the erosion is asserted to have occurred. For example, one might claim that detariffing constitutes an erosion of common carriage. However such a claim is unambiguously true only if one equates common carriage with tariffing – that is, if the initial statutory regime is the original frame of reference. On the other hand, given that tariffs did not exist under the common law regime, detariffing (assuming no other statutory complications) actually represents a shift back towards the common law regime.

Relative to the common law regime, there are some current statutory provisions that may arguably erode common carriage. For example, some statutory provisions mandate standards limiting the basis for finding rates unreasonable – such as the definitions of market dominance for rail carriers and the zone of reasonable for rates of certain motor carriers – that would not otherwise constrain courts' determinations of unreasonableness under the common law. In addition, the varying statutory descriptions of the common carrier obligations and associated procedural mechanisms and standards for enforcement may, in effect, be more constraining than would otherwise occur under general common law enforcement.

Yet, and perhaps more interesting, are claims that common carriage is eroding by virtue of *de facto*, not *de jure*, deregulation. In other words, although government has not eliminated common carriage as a matter of law, the ability to enforce common carriage obligations is nonetheless eroding as an economic consequence of the enacted deregulatory legislation. In this regard, Dempsey asserts that such *de facto* deregulation

³⁷ The manner in which liability rules have evolved for the various modes of transportation carriers is in itself a very complex topic and beyond the scope of this paper. For a detailed discussion of the evolution of the liability rules for transportation carriers, and a comparison with the evolution of liability rules for telegraph and telephone companies, see Cherry (2003c), *supra* note 4.

of common carriage is occurring for motor carriers.³⁸ Noam asserts that common carriage for telecommunications services will inevitably erode in a competitive environment under intermodal competition unless all providers of competing services are subject to common carriage requirements.³⁹ Similarly, Cherry asserts that intramodal asymmetric regulation of narrowband and broadband services – where the former is legally classified as a common carrier service but the latter is not – will likely lead to *de facto* erosion of common carriage for narrowband services.⁴⁰ However, the problematic analyses described in section 1.2 do not even acknowledge the absence of *de jure* elimination of common carriage in current transportation regimes. Such analyses, at the very least, bear the burden of asserting a claim of *de facto* deregulation and providing compelling justification for such a claim.

3. Further Analyzing the Provider-to-Customer Relationship Under Transportation Deregulation

In addition to the retention of the common carriage obligations described in section 2, the current transportation regimes contain additional requirements and programs that, operating collectively, are intended to meet the nation’s many policy goals. Some requirements do indeed directly address issues arising from the provider-to-provider relationship.⁴¹ Numerous other requirements and programs have been imposed to address the provider-to-customer relationship.

As described in this section, it is clear that Congress does not assume that the mere existence of competition coupled with enforcement of provider-to-provider regulatory requirements will be sufficient to meet the transportation needs of customers.

³⁸ P. Dempsey, “The Deregulation of Intrastate Transportation: The Texas Debate,” 39 *Baylor L. Rev.* 1 (1987); P. Dempsey, “The Experience of Deregulation: Erosion of the Common Carrier System,” 13 *Transportation Law Institute* 121 (1980).

³⁹ E. Noam, “Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?” 97 *Columb. L. Rev.* 955 (1997); E. Noam, “Beyond Liberalization II: The Impending Doom of Common Carriage,” 18 *Telecommunications Policy* 435 (1994).

⁴⁰ Cherry (2003b), *supra* note 3. However, Cherry (2003a), *supra* note 3, also discusses countervailing reasons why the erosion of common carriage for telecommunications services is not likely to be a long-term politically sustainable scenario.

⁴¹ For example, rail carriers may be required to share facilities and to enter into reciprocal switching agreements (§§11102, 11103); and the STB may prescribe their through routes and joint rates (§§10701-10705). Air carriers are required to establish reasonable joint prices as well as reasonable divisions of those joint prices among the participating carriers (§§41501-41502). Similarly, motor carriers of passengers are required to establish reasonable through routes (§13705); and all motor carriers must obtain

Nor does Congress assume that the inclusion of the common carrier obligations described in section 2 will suffice. Rather, as discussed in section 3.1, the federal government has also imposed additional requirements on carriers and created funding programs that serve public utility functions that evolved under the common law. These functions are served by a combination of modest entry and exit requirements imposed on carriers, government ownership of transportation infrastructure and carriers, and universal service subsidy programs for the benefit of targeted groups of customers and geographic areas.

Yet, the efficacy of the common carriage and public utility obligations of the current regimes to meet customers' needs is questionable. As discussed in section 3.2, some of the mechanisms established to fulfill public utility functions encounter recurring sustainability problems that repeatedly require government intervention. Examples are the unsustainability of the current approach to provide intercity passenger rail service by Amtrak, and the long-term inviability of the Essential Air Service Program.

Furthermore, there have been transition problems in implementing the transportation deregulatory regimes that relate to litigation of claims arising under the provider-to-customer relationship. Examples discussed in section 3.3 are confusion as to the applicability of the filed rate doctrine after detariffing, and the ambiguity as to the scope of state causes of action that may be brought on behalf of customers against transportation carriers.

3.1. Public utility obligations under transportation deregulation

As discussed in section 1.1, public utility obligations under the common law augmented common carriage obligations by imposing an affirmative duty to serve. This duty to serve required an obligation to extend facilities to serve customers, even at non-compensatory rates, with a corresponding barrier to exit. As the imposition of a duty to serve was often accompanied by grant of a monopoly franchise, then legal entry barriers were also imposed on the industry.

The current transportation regimes also contain mechanisms that serve public utility functions. As with the common carriage obligations, the manner in which the public utility functions are addressed varies across modes as well as among customer

STB approval of agreements among them to establish, among other things, through routes, joint rates, and division of revenues (§13703).

groups within modes. The public utility functions are addressed through a combination of modest entry and exit requirements, government ownership of transportation infrastructure and carriers, and universal service subsidy programs for the benefit of targeted groups of customers and geographic areas.

For rail carriers, a certificate of public convenience and necessity from the STB is required to construct and operate additional or extensions of railroad lines (§10901). Rail carriers must also file an application with the STB to abandon or discontinue service, which may be granted only if the STB finds that the present or future public convenience and necessity require the abandonment or discontinuance (§10903). Alternatively, within four months after an application has been filed, any person may offer to subsidize or purchase the railroad line that is the subject of the application (§10904). Upon STB approval, the railroad and such person may enter into an agreement regarding the offer of subsidy or purchase, including STB determination of conditions and compensation if necessary (§10904).

In addition to entry and exit requirements, government programs have also been established to better ensure sufficient railroad infrastructure and service. Distinct federal programs provide funding for the construction and maintenance of rail infrastructure and/or provision of rail service to address different needs: to serve local and light-density routes; to provide freight service; to provide passenger service; and to support the development of enhanced, high-speed rail service.

For example, in the Local Rail Service Assistance Act of 1978, Congress authorized the Secretary of Transportation to provide financial assistance to states for rail freight assistance projects to maintain rail lines (§22101), and to make grants to states to fund light density rail line pilot projects when contributions are also provided by the privately-owned rail line (§22301).

In the 1970's, Congress created and funded Conrail, which acquired the rail lines of six railroads that had entered bankruptcy. Conrail rebuilt the tracks and provided rail and freight service, later transferring the non-profitable commuter rail service to state agencies. As Conrail became profitable, the federal government sold its ownership interest in Conrail through a public stock offering in 1987, and returned the Northeast –

Midwest rail freight system to the private sector. In 1998, Norfolk Southern Corporation and CSX Corporation acquired Conrail through a joint stock purchase.

To ensure provision of passenger service that had become unprofitable for privately-owned rail carriers, Congress created Amtrak to provide long haul intercity passenger service. Amtrak receives federal funding through the Congressional appropriations process, as virtually all of Amtrak routes fail to generate operating profits.⁴² Congress has also created programs to fund the provisions of enhanced high-speed rail service.⁴³

For air carriers, separate certificates of public convenience and necessity must be issued by the Secretary of Transportation to provide air transportation, charter transportation, all-cargo (no passenger) air transportation, or foreign air transportation (§41101). Before issuing a certificate the Secretary of Transportation must find that the applicant is fit, willing, and able to provide the service and to comply with the statute and regulations, with an additional finding of public convenience and necessity for foreign air transportation (§41102). A modest exit restriction is also placed on air carriers of foreign air transportation. To end or suspend service, such carriers must provide advance notice – in most cases, 90 days – to the Secretary of Transportation as well as the affected community and state (§41312).

In addition to these entry and exit requirements, the deregulatory reform for air carriers included the establishment of the Essential Air Service Program (§§41731 - 41748). This program is funded by Congress, and, through administration by the Department of Transportation, pays subsidies to air carriers to provide regular air service to small, isolated communities. The program was created to maintain provision of air service to eligible areas that would likely be abandoned, without subsidies, upon industry deregulation.

For motor carriers, registration with the Secretary of Transportation is required to provide service. The Secretary is required to register the applicant if it finds that the

⁴² U.S. General Accounting Office, *Intercity Passenger Rail: Issues for Consideration in Developing an Intercity Passenger Rail Policy*, GAO-03-712T (Washington, D.C.: April 30, 2003), p. 7.

⁴³ Amtrak already provides some high-speed rail service through a federal Northeast Corridor Improvement Program (§§24901 through 24909). Further development of high-speed rail service may occur under the High-Speed Rail Assistance Program (§§26101 through 26105), however, its implementation would require considerably more funding from federal appropriations. GAO-03-712T, *supra* note 42.

person is willing and able to comply with applicable law, safety regulations, and minimal financial responsibility requirements (§13902). A registration requirement is also imposed on freight forwarders (§13903) and brokers (§13904). Exit requirements have not been imposed, although STB approval is required for mergers of motor carriers of passengers (§14303).

Unlike the residual funding of infrastructure for rail carriers, government is the primary funding source for the construction and maintenance of the highway infrastructure for motor carriers and automobiles. As described in section 2.1, Congressional funding of a national interstate highway infrastructure contributed greatly to the development of intermodal competition, and is more recently being directed for projects to facilitate intermodal connections.

Over 60 federal programs have also been created to fund transportation services for certain “transportation-disadvantage” populations. These populations include elderly persons, persons with disabilities, or low-income persons, who lack the ability to provide their own transportation or have difficulty accessing conventional public transportation.⁴⁴

This overview of selected provisions of current transportation law demonstrates that federal statutory requirements are imposed on carriers to serve public utility functions. However, as with the common carriage obligations, there is considerable variation in how the requirements apply across modes. Entry barriers, albeit modest ones, are still imposed for rail, air, and motor carriers. The exit restrictions are most complex for railroads, as discontinuance and abandonment of service may require subsidy or purchase of rail infrastructure. A simple notice requirement to exit is required for foreign air transportation, but no exit requirements are imposed on motor carriers.

Reasonable ubiquity of transportation infrastructure and service is also served in various ways by direct government funding. For air and motor carriers, government assumes the responsibility for construction and maintenance of the physical infrastructure upon which these modes of transportation rely. Government has also taken over the ownership of rail infrastructure in certain areas of the country, and still funds provision of intercity passenger rail service through Amtrak. More recently, government is funding

infrastructure projects that facilitate intermodal connections. Government also provides subsidy programs, with similarities to the universal service subsidy programs characteristic of the telephony industry. The Essential Air Service Program provides subsidies to air carriers to serve certain small or isolated communities. Other programs provide subsidies directly to individuals considered to be transportation-disadvantaged.

3.2 Sustainability problems under transportation deregulation

The efficacy of the common carriage and public utility obligations in the current transportation regimes depends on their sustainability. Cherry and Bauer define sustainable policies as those “rules that are politically adoptable and for which the desired policy goals are reasonably likely to be achievable.”⁴⁵ This definition is intended to address the political feasibility and economic viability constraints on sustainability, both at the time of policy adoption as well as over time. In other words, policies must be politically adoptable; the goals must be reasonably achievable, which includes economic viability of the desired activities; and these conditions must be satisfied simultaneously, both at the time of adoption and over the time period relevant to the goals.

Some of the mechanisms established to fulfill public utility functions under the transportation deregulatory regimes are having recurring sustainability problems. For example, the Government Accounting Office (GAO) has determined that Congress’ current approach to intercity passenger rail service is not sustainable at historical funding levels.⁴⁶ The benefits of intercity passenger rail service include reduced highway and air congestion, pollution, and energy dependence, as well as the option for travelers to use passenger rail systems in the future.⁴⁷ The most significant component of this approach is Amtrak. Amtrak’s financial condition has never been strong, and has been on the verge of bankruptcy several times. In the Amtrak Reform and Accountability Act of 1997,

⁴⁴ U.S. Government Accounting Office, *Transportation-Disadvantaged Populations: Federal Agencies Are Taking Steps to Assist States and Local Agencies in Coordinating Transportation Services*, GAO-04-420R (February 24, 2004).

⁴⁵ B. Cherry & J. Bauer, “Adaptive Regulation: Contours of a Policy Model for the Internet Economy,” paper presented at the *International Telecommunications Society 15th Biennial Conference*, Berlin, Germany (September, 2004), p. 5. See also B. Cherry, “The Telecommunications Economy and Regulation as Coevolving Complex Adaptive Systems: Implications for Federalism,” paper presented at the *32nd Telecommunications Policy Research Conference*, Arlington, Virginia (October, 2004).

⁴⁶ U.S. Government Accounting Office, *Intercity Passenger Service: Congress Faces Critical Decisions in Developing a National Policy*, GAO-02-522T (April 11, 2002), p. 1.

⁴⁷ GAO-03-712T, *supra* note 42, at p. 18

Congress required Amtrak to reach operational self-sufficiency by the end of 2002; yet, Amtrak's financial condition has remained troubled, experiencing one crisis after another.⁴⁸ In 2001, Amtrak determined that it would need \$16 billion (in constant 2000 dollars) in federal capital support from 2001 through 2020 to maintain current levels of service, and an additional \$14 billion during this period to expand and enhance services.⁴⁹ This estimate of \$30 billion contrasts with \$19.6 billion (in constant 2000 dollars) that Amtrak received in both federal capital and operating support for the 20-year period of 1983-2002.⁵⁰ According to the latest GAO report, these dollar amounts do not include an estimated \$70 billion over the next 20 years that would be required to develop high-speed rail corridors.⁵¹

As another example, "Congress has expressed concern that trends in aviation industry and rising costs may jeopardize the [Essential Air Service] program's long-term viability."⁵² Essential Air Service funding has tripled since 1995 from \$37 million in fiscal year 1995 to \$113 million (in constant 2000 dollars) beginning in fiscal year 2002; and the average subsidy per community increased from \$424,000 in 1995 to \$828,000 in 2002.⁵³ GAO's assessment is that future subsidy requirements are likely to increase.⁵⁴ Furthermore, even though subsidies may induce new or additional air service to be provided to a community, past experience illustrates that sustaining such service is difficult once subsidies to air carriers or financial incentives for airport facilities end.⁵⁵

3.3. Transition problems under transportation deregulation

There have been transition problems in implementing the transportation deregulatory regimes that relate to litigation of claims arising from the provider-to-customer relationship. Some of these problems have arisen from judicial interpretation of the deregulatory legislation. A few are discussed here.

⁴⁸ GAO-03-712T, *supra* note 42, at p. 6. This level of funding assumes that state and private support would supplement federal assistance.

⁴⁹ GAO-02-522T, *supra* note 46, at p. 20.

⁵⁰ *Id.* at p. 21.

⁵¹ GAO-03-712T, *supra* note 42, at p. 2

⁵² U.S. Government Accounting Office, *Options to Enhance the Long-term Viability of the Essential Air Service Program*, GAO-02-997R (August 30, 2002), p. 1.

⁵³ *Id.* at p. 6.

⁵⁴ *Id.* at pp. 6-9.

⁵⁵ U.S. Government Accounting Office, *Commercial Aviation: Factors Affecting Efforts to Improve Air Service at Small Community Airports*, GAO-03-330 (January 2003), pp. 3-4

For example, some problems have arisen from judicial interpretation of the effects of detariffing. As discussed in section 1.1, the tariff requirement was created in the initial statutory regimes and not under common law. Judicial enforcement of tariffs, known as the filed rate doctrine, requires that carriers not deviate from rates, terms, and conditions of service properly filed with the appropriate regulatory authority. Historically, the filed rate doctrine had periodically been abused by carriers that negotiated lower rates or more favorable terms and conditions of service to induce customer patronage but then later sought enforcement of the tariffed offering to the benefit of the carrier. This practice has been referred to as undercharge litigation. Despite the harsh result to the customer, courts had enforced the filed rate doctrine in such cases due to the overall benefits to the public of uniformity of treatment provided by the tariffed system.

In the initial deregulatory legislation, Congress retained some tariffing requirements but also provided ability for carriers to negotiate contracts. When undercharge litigation then arose with regard to differences between provisions in contracts as compared to tariffs, the Circuit Courts of Appeals differed as to whether the filed rate doctrine was still applicable.⁵⁶ This conflict was later resolved by the U.S. Supreme Court in *Maislin Industries, Inc. v. Primary Steel*,⁵⁷ holding that the filed rate doctrine was still applicable under the Motor Carrier Act of 1980. This outcome was also problematic for rail carriers as they also remained under ICC jurisdiction. Congress later overturned the result in *Maislin* by effectively repealing the filed rate doctrine for truckers and railroads in the Trucking Industry Regulatory Reform Act of 1994 and the Interstate Commerce Commission Termination Act of 1995.⁵⁸ Except to the extent that existing statutory provisions provide otherwise, the repeal of the filed rate doctrine constitutes a shift back to common law remedies.

Another example are problems that have arisen from ambiguity as to the applicability of federal or state causes of action that may be brought by or on behalf of customers against transportation carriers. Under airline deregulation, Congress retained a

⁵⁶ For a discussion of the relevant cases, see R. Sacasas, "The Filed Rate Doctrine: Casualty or Survivor of Deregulation?" 29 *Duq. L. Rev.* 1 (1990).

⁵⁷ 497 U.S. 116 (1990).

⁵⁸ For a discussion of the filed rate doctrine and its continued applicability after deregulation, see J. Long, "Imports, Etc., Ltd. v. ABF Freight System, Inc.: The Eighth Circuit Confuses Rather Than Clarifies the

savings clause from the Civil Aeronautics Act of 1938, which provided that the Act “shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”⁵⁹ However, Congress also added a federal preemption clause (§41713) that provided, in relevant part, that no state or political subdivision “shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under...this Act to provide air transportation.” The coexistence of the savings and preemption clauses has been the source of controversy in airline litigation.⁶⁰

Thus far, the U.S. Supreme Court has considered two cases, requiring it to interpret the interrelationship of these clauses. First, in *Morales v. Trans World Airlines*,⁶¹ the Court broadly interpreted the preemption clause to preempt a suit by the National Association of Attorneys General for violation of state consumer protection statutes. Later, in *American Airlines v. Wolens*,⁶² the Court established a narrower interpretation of the preemption clause to permit common law claims related to an airline’s alleged breach of its own, self-imposed undertakings. Notwithstanding the guidance provided by the U.S. Supreme Court in these cases, there are still many unanswered questions as to the extent to which and in what circumstances state common law claims are preempted.⁶³ Numerous proposals have been introduced in Congress, collectively referred to as “Passengers’ Bill of Rights”, to address this uncertain state of the law, but none have yet been passed.⁶⁴

Deregulation of the Trucking Industry by Applying the Filed Rate Doctrine,” 33 *Creighton L. Rev.* 305 (2000).

⁵⁹ The current statutory language is found in sec. 40120, which states “[a] remedy under this part is in addition to any other remedies provided by law.” When the savings clause was amended and recodified in 1994, it was considered a non-substantive change. H.R.Rep. No. 103-180, at 276, reprinted in 1994 U.S.C.C.A.N. 818, 1093.

⁶⁰ For a discussion of this problems in airline litigation, see T. Ravich, “Re-regulation and Airline Passengers’ Rights,” 67 *J. Air L. & Com.* 935 (2002); J. Houchin, “Harris v. American Airlines: Flying Through the Turbulence of Federal Preemption and the Airline Deregulation Act,” 51 *U. Miami L. Rev.* 955 (1997).

⁶¹ 504 U.S. 374 (1992).

⁶² 513 U.S. 219 (1995) (the Court also held that claims under the Illinois consumer protection statute were preempted).

⁶³ R. McFarland, “The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers,” 24 *Transp. L.J.* 155 (1997).

⁶⁴ Ravich, *supra* note 58. A shift in emphasis for passenger rights occurred after the terrorist attacks on September 11, 2001. *Id.* at 992-996.

Uncertainties regarding the scope of federal preemption of state common law actions have also arisen for motor carriers providing intrastate transportation of property or passengers, given preemption language in section 14501 that is similar to that of the airlines. Analogously, the applicability of state common law actions against rail carriers related to safety regulation is unclear given the preemption language in sec. 20106.

4. Foreshadowing the Provider-to-Customer Relationship Under Telecommunications Deregulation

As the transportation and telecommunications sectors share similar common law and statutory histories, analysis of the transformation to the transportation deregulatory regime may foreshadow developments in the telecommunications deregulatory regime.⁶⁵ The willingness to embrace this possibility can facilitate development of constructive future policy recommendations for telecommunications regulation.

The analysis in sections 2 and 3 shows that Congress focused considerable attention on the provider-to-customer relationship in transforming the transportation regime through deregulatory policies. Congress did not rely merely on competition and regulation of providers through Sherman Act antitrust law; nor could Congress rely on the Robinson-Patman Act to address issues of discrimination among customers, as the Act does not apply to services. Rather, Congress retained a structure of industry-specific agency oversight and considerable industry-specific requirements. These requirements include retention of common carriage and public utility obligations, but applied in varying ways across and within transportation modes. Congress has also created and financed programs, to build transportation infrastructure and to subsidize the provision of transportation services, which serve public utility functions. Yet some of these programs are having recurring sustainability programs.

Similar developments are already occurring with transformation of the telecommunications legal regime. Recent policy issues under debate include the

⁶⁵ Given page limitations, this paper assumes that the reader is familiar with current telecommunications law under the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the existence of state regulatory statutes. This paper also assumes that the reader has reasonable familiarity with the evolution of the current telecommunications deregulatory regime. For example, the reader should be aware that the removal of legal barriers to entry led to competition, creating economic pressures to rate rebalance and increase reliance on explicit funding programs to replace cross-subsidies in the historical price structure. The reader should also be aware of the development of intermodal competition in communications services due to digitization as well as the Internet.

applicability of common carriage obligations to providers of new services enabled by digitization and the Internet, varying with distinguishing characteristics of the service.

For example, the FCC has declared that cable modem service is not a telecommunications service nor has a telecommunications component subject to common carriage requirements,⁶⁶ which was recently upheld by the U.S. Supreme Court.⁶⁷ The FCC also recently eliminated the requirement that wireline providers offer the transmission component of wireline broadband Internet access service to affiliated or unaffiliated Internet Service Providers (ISPs) on a common carrier basis.⁶⁸

In addition, the FCC is currently examining issues relating to IP-enabled services – that is, services and applications making use of the Internet Protocol (IP), including but not limited to voice over IP service (VOIP).⁶⁹ Among these include the appropriate statutory classification of varying forms of IP-enabled services as telecommunications or information services, whereby only telecommunications services bear common carriage obligations. Under consideration is categorization of IP-enabled services by differentiating characteristics, to which different classifications might apply.⁷⁰ In the meantime, the FCC has released some declaratory rulings regarding specific IP-enabled services. The FCC declared that pulver.com’s Free World Dialup offering is an unregulated information service,⁷¹ but that AT&T’s “phone-to-phone” IP telephony service is a telecommunications service.⁷² One of the significant factors for the differing classifications is that Pulver’s service does not offer any transmission service or transmission capability (a customer must have an existing broadband Internet access service), whereas AT&T’s service does.

⁶⁶ In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002).

⁶⁷ *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. 2688 (2005).

⁶⁸ In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Universal Service Obligations of Broadband Providers, Report and Order*, CC Docket No. 02-33, (adopted August 5, 2005).

⁶⁹ In the Matter of IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004).

⁷⁰ *Id.* at pars. 35-41.

⁷¹ In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service, *Memorandum and Order*, 19 FCC Rcd 3307 (2004).

⁷² In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, *Order*, 19 FCC Rcd 7457 (2004).

As with transportation deregulation, Congress has also created programs to serve public utility functions under telecommunications deregulation. More specifically, in TA96 Congress created the framework for fulfilling universal service goals through explicit funding mechanisms. Federal universal service support is provided under section 254⁷³ for the benefit of low-income customers, for those residing in rural high cost areas, for certain schools and libraries, and for health care providers serving rural areas. Some states have also created their own universal service funds. However, unlike the transportation regime, federal universal service funding is not obtained by Congressional appropriations but from contributions from telecommunications providers. Those eligible carriers receiving funds also have restrictions on exit with regard to the provision of universal service.⁷⁴

It is well established in the political science literature that, in democracies, universalistic programs are more politically sustainable than residualistic (targeted) ones.⁷⁵ This is because the more broadly defined the group of beneficiaries, the broader the support from constituencies for maintaining the existing policy notwithstanding changes in circumstances and attempts at policy retrenchment. As a result, universalistic programs are more politically sustainable even if they are more expensive than residualistic programs. Conversely, programs providing benefits to narrowly targeted groups, although at times initially adoptable and perhaps even more economically efficient than other policy options, are more vulnerable to policy retrenchment and less sustainable over time. Consequently, to improve political sustainability, political scientists advocate reform that focuses on “targeting within universalism” – that is,

⁷³ 47 U.S. Code §254.

⁷⁴ For a detailed discussion of federal universal service under TA96, see B. Cherry & S. Wildman, “Unilateral and Bilateral Rules: A Framework for Increasing Competition While Meeting Universal Service Goals in Telecommunications,” in *Making Universal Service Policy: Enhancing the Process Through Multidisciplinary Evaluation* (Cherry, Hammond, & Wildman, eds.) (1999a), pp. 39-58; B. Cherry & S. Wildman, “Review of Federal Universal Service Policy in the United States,” in *Making Universal Service Policy: Enhancing the Process Through Multidisciplinary Evaluation* (Cherry, Hammond, & Wildman, eds.) (1999b), pp. 167-177.

⁷⁵ See R. Mishra, *The Welfare State in Capitalist Society: Policies of Retrenchment and Maintenance in Europe, North America and Australia* (1990); T. Skocpol, *Social Policy in the United States* (1995); and W. Wilson, *The Truly Disadvantaged* (1987).

reform that addresses the needs of the targeted or disadvantaged groups through programs that include more advantaged groups.⁷⁶

The experience in the transportation industry discussed in section 3 is consistent with this well-known differential in the political sustainability of universalistic as opposed to residualistic programs. For example, the Essential Air Service program is, by definition, a program designed to provide service to a narrowly defined group of beneficiaries – small, isolated communities that had received air transportation service prior to air carrier deregulation. The total amount of funding required from federal government appropriations is actually very small, about \$113 million in 2002, relative to the size of the federal budget and total federal expenditures for transportation infrastructure. Thus, it is more likely that the unsustainability of the Essential Air Service program arises from its political vulnerability as a residualistic program than from the cost of the program itself.

Similarly, although the amount of federal funds necessary to support Amtrak is obviously much greater than for the Essential Air Service program, the unsustainability of Amtrak also appears to arise in large part from its political vulnerability as a residualistic program. This is because intercity passenger rail service plays only a small part in the nation's overall transportation system.⁷⁷ For example, for reasonably comparable periods in 2001- 2002, airlines carried about 1.5 million domestic passengers per day; intercity buses carried about 83,000 passengers per day; but Amtrak carried only about 64,000 passengers per day. By far, the most intercity traffic occurs by automobile.⁷⁸ Therefore, relative to the other sources of intercity passenger travel, Amtrak plays a small role and expectedly would be more politically vulnerable to losing federal funding.

Yet “targeting within universalism” through federal ownership, construction and maintenance of the interstate highway infrastructure has been politically sustainable at much higher funding levels than the residualistic programs. In 1998, the Transportation Equity Act for the 21st Century was enacted, providing \$218 billion in funding for highway and transit programs over the six-year period of 1998-2003, which constituted a

⁷⁶ See, note 75, *supra*; Cherry (2003a), *supra* note 3, at p. 778.

⁷⁷ GAO-03-712T, *supra* note 42, at p. 4.

40 percent funding increase over the prior 6 years under ISTEA.⁷⁹ More recently, on August 10, 2005, President George W. Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which authorizes funding for highways, highway safety, and public transportation totaling \$244.1 billion for the period 2005-2009. That funding of such large sums has not posed sustainability problems is consistent with the expectations of universalistic programs. The funded highway infrastructure supports freight, passenger, and mail service; supports the dominant transportation mode for passengers, which is the automobile; and provides infrastructure for the dominant transportation mode to urban and rural areas.

As for telecommunications, there is concern that the current funding mechanism for federal universal service support under section 254, which is based on contributions from telecommunications providers' interstate revenues, may be *economically* unsustainable in the long-run. In this regard, the FCC is concerned with "...the long-term viability of any revenue-based system...[I]nterstate telecommunications revenues are becoming increasingly difficult to identify as customers migrate to bundled packages of interstate and intrastate telecommunications and non-telecommunications products and services, ... [which] may result in decreases in the assessable revenue base. Increased competition also is placing downward pressure on interstate rates and revenues, which also contributes to the decline in the contribution base."⁸⁰ The FCC is currently considering how to modify the methodology for assessing contributions from interstate telecommunications providers in order to provide greater stability for the fund.⁸¹

Furthermore, as with the Amtrak and Essential Air Service programs, the universal service programs for telecommunications, by definition, serve residualistic groups: low-income customers; customers residing in high cost areas; certain schools and

⁷⁸ Id.

⁷⁹ See D. Brown, "Resource Library: Rural Business May Benefit from Big Transportation Funding Increases," Economic Research Service, U.S. Department of Agriculture, available at www.ruraltransportation.org/library/benefits.shtml.

⁸⁰ In the Matter of Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24,952, par. 3 (2002)(footnotes omitted).

⁸¹ In the Matter of Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9892 (2001); In the Matter of Federal-State Joint Board on Universal Service, *Further Notice of Proposed Rulemaking and Report and Order*, 17 FCC Rcd 3752 (2002); In the Matter of Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24, 952 (2002).

libraries; and health care providers serving rural areas. Yet the Amtrak and Essential Air Service programs have *political* sustainability problems, notwithstanding a different source of funding from federal appropriations. Therefore, some may argue that altering the methodology for assessing contributions from telecommunications providers may improve economic, but not necessarily political, stability for the universal service fund.⁸² Thus, a key insight from the well-known differential in the political sustainability of universalistic as opposed to residualistic programs – already foreshadowed under transportation deregulation – is that, over time, residualistic universal service programs for telecommunications may be politically vulnerable to policy retrenchment.⁸³

In addition to sustainability problems, there have been transition problems in implementing the transportation deregulatory regimes that relate to litigation of claims arising from the provider-to-customer relationship. As discussed in section 3.3., some have arisen from judicial interpretation of the deregulatory legislation. Examples include applicability of the filed rate doctrine under detariffing; and, given a savings clause, the extent of federal preemption of state or common law causes of action that may be brought by or on behalf of customers against carriers.

Similar issues have arisen with telecommunications deregulation. One example incorporates both confusion as to the remaining viability of the filed rate doctrine after detariffing and the scope of federal preemption of state causes of action in light of a savings clause. In this regard, the Seventh and Ninth Circuit Courts of Appeal have rendered conflicting opinions as to the applicability of the filed rate doctrine after detariffing. In *Boomer v. AT&T*,⁸⁴ the Seventh Circuit held that detariffing of obligations under sec. 203 of the Communications Act of 1934 did not alter the fundamental design of the Act nor Congress' objective of uniformity in terms and conditions of service. Rather, the more general (common carriage) requirements of sections 201 and 202 of the Act federally preempted state law challenges to terms of AT&T's consumer service

⁸² For a discussion of the political feasibility constraints on the sustainability of deregulatory policies in telecommunications, such as universal service, see Cherry (2003a), *supra* note 3; B. Cherry, "Regulatory and Political Influences on Media Management and Economics," in *Handbook of Media Management and Economics* (Albarran, Chan-Olmsted, & Wirth, eds.)(2005), pp. 91-111.

⁸³ By contrast, the traditional public utility regime (under the common law as well as the initial statutory regime) has been politically stable because it bears characteristics of welfare state regulation providing more universalistic benefits and resilience against policy retrenchment. See Cherry (2003a), *supra* note 3.

⁸⁴ 309 F.3d 404, 422-423 (7th Cir. 2002).

contracts, notwithstanding the savings clause under section 152.⁸⁵ In *Ting v. AT&T*,⁸⁶ the Ninth Circuit expressly disagreed with the Seventh Circuit's holding in *Boomer*, stating that "save for *Boomer*, no court has ever referred to §201 or §202 in declaring a carrier's tariff immune from state-law challenge. That role had always been reserved for §203 and the filed rate doctrine."⁸⁷ Instead, the Ninth Circuit held that "[b]ecause §§201(b) and 202(a) survived detariffing, the substantive principles of reasonableness and nondiscrimination remain intact. But the same cannot be said of the principle of preemption, which was a product of the filed rate doctrine which, by definition, did not survive detariffing."⁸⁸ Subsequently, in *Dreamscape Design v. Affinity Network*,⁸⁹ the Seventh Circuit disagreed with the Ninth Circuit's interpretation in *Ting* and reaffirmed its conclusion in *Boomer*. As a result, there is now a clear conflict among the Circuit Courts of Appeal as to whether state causes of action, whether under statute or common law, are preempted as a result of detariffing.

As discussed in section 3.3, the experience from transportation deregulation is that resolution of the issue as to the applicability of the filed rate doctrine did not end with a U.S. Supreme Court decision resolving conflict among the Circuit Courts of Appeal, but required further federal legislation. Furthermore, U.S. Supreme Court decisions have not eliminated uncertainties regarding the viability of state actions given the coexistence of federal preemption and savings clauses. However, notwithstanding numerous attempts, federal legislation has not yet been passed to address this issue.

This prior experience suggests that the recurrence of these issues in telecommunications deregulation should not be surprising, and that U.S. Supreme Court decisions may not be sufficient to provide the needed certainty. However, it also suggests that achieving clarity could be more difficult in telecommunications. This is because under *Boomer* the issue of preemption of state claims under detariffing has been conflated with interpretation of the savings clause, whereas in litigation under transportation deregulation these issues had remained distinct and thus far federal

⁸⁵ 47 U.S.C. 152. The historical notes to 47 U.S.C. §152 upon enactment of TA96 provide that "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act amendments."

⁸⁶ 319 F.3d 1126, 1135-1146 (9th Cir. 2003), *cert denied*, 540 U.S. 811 (2003).

⁸⁷ *Id.* at 1138 (citation omitted).

⁸⁸ *Id.* at 1139 (footnote omitted).

legislation has successfully resolved only one of them. It may be necessary to first decouple the issue of the legal effect of detariffing⁹⁰ from interpretation of the savings clause – thereby mirroring the evolution in the transportation regime – which could be accomplished either by U.S. Supreme Court decision or by federal legislation. However, achieving greater clarity as to the scope of permissible state causes of actions preserved by the savings clause will likely be a more complex and time-consuming endeavor. It would likely require federal legislation, and that, as under the transportation regime, may be difficult to obtain given the breadth of the effects on consumer rights in general.⁹¹

Concluding Observations for Telecommunications Policy Reform

The experience of deregulatory reform in transportation suggests that further reform in telecommunications requires a focus on both wholesale regulation and retail regulation. In this regard, policy debate needs to be refreshed by an understanding of the common law obligations that preceded the statutory regime – and would remain in effect even upon simple repeal of the Communications Act of 1934 –and the purposes they were intended to serve. For these reasons, considerable attention still needs to be focused on issues affecting the provider-to-customer relationship.

Experience in transportation deregulatory reform also suggests that the balance of industry-specific and general business requirements on providers needs to be carefully weighed. A comprehensive framework of industry-specific requirements as well as industry-specific agency oversight may remain for a considerable period of time.

It is well established in the political science literature that, in democracies, residualistic programs are more vulnerable to policy retrenchment than universalistic programs. The experience of deregulatory reform in the transportation industry is consistent with this political reality. For telecommunications, the FCC is concerned with the long-term viability of the current revenue-based funding mechanism for the universal

⁸⁹ ___ F.3d. ___ (7th Cir. 2005).

⁹⁰ To resolve the issue as to the legal effect of detariffing is more complex for telecommunications than transportation, given the destabilizing effect on the liability regime for the former and not the latter. See note 5, *supra*.

⁹¹ Illustrative is the controversy over adoption of a telecommunications consumer bill of rights in California. In 2004 the California Public Utilities Commission adopted a consumer bill of rights, but then suspended it in early 2005 pending further review. Decision 05-01-058, *Order Modifying Decision 04-05-057*, 2005 WL 391368 (Cal. P.U.C.)(2005). In 2005, numerous bills were introduced in the California legislature to codify the bill of rights, but none have been enacted.

service programs created under section 254 of TA96. However, the lesson from transportation deregulation is that the residualistic nature of the universal service programs may also give rise to future political sustainability problems.

It is also noteworthy that the container revolution differentially affected transportation of freight and passengers, leading to bifurcation of regulatory requirements for transportation of cargo as opposed to persons. Perhaps some analogous form of differential sets of requirements may need to evolve in telecommunications due to differential effects of digitization – between narrowband and broadband services may be a possibility.

Finally, transition problems in implementing telecommunications deregulation will inevitably occur. Litigation sufficiently significant to eventually reach the U.S. Supreme Court will likely not be confined to disputes among providers but also include cases involving the rights of customers. However, as with transportation, clarity of legal principles may take decades to resolve.