

For Once, A Defense of Amtrak: Do Market Participants With Regulatory Authority Violate Due Process?

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For Once, A Defense of Amtrak: Do Market Participants With Regulatory Authority Violate Due Process?

Blayne Justus Yudis*

The National Basketball Association (“NBA”) regulates American professional basketball. After acquiring the New Orleans Hornets in 2010, the NBA temporarily became both the league regulator and a franchise owner. As owner, the NBA vetoed a trade that would have sent the Hornets’s best player to another team. Was the NBA acting out of self-interest when it blocked the trade? In other words, was its trade block fair?

Federal Courts have recently dealt with this issue in Association of American Railroads v. U.S. Department of Transportation. Following a decade of litigation, the D.C. Circuit Court of Appeals decided that granting Amtrak regulatory authority violates due process because it is a self-interested market participant.

This note argues that the D.C. Circuit’s decision to invalidate Amtrak’s regulatory power based on a finding of self-interest was error. The market history of private passenger rail service and

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Amtrak's statutory purpose demonstrate that Amtrak, like the NBA, serves to protect its industry, rather than compete against private participants. Public entities should not be exposed to judicial inquiries of self-interest. However, if they are, federal courts should adopt a more rigorous analysis than the one (or lack thereof) employed by the D.C. Circuit.

Ultimately, the outcome in American Railroads is concerning because it exposes public regulatory bodies to constitutional challenges based on self-interest without regard to public or private status. Public regulators' functionality and the public's confidence in their neutral status is now at risk.

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I. INTRODUCTION: THE NBA AND THE NEW ORLEANS HORNETS

In the summer of 2010, the New Orleans Hornets' All-Star point guard, Chris Paul, declared to ESPN that he was open to being traded if

the Hornets could not contend with elite teams.¹ It is fairly common for superstar athletes to express frustration with their lackluster teams, but Paul's wish came at an unusual time for the New Orleans Hornets and the NBA.

The Hornets moved to New Orleans after problems began to develop for the team in Charlotte, North Carolina.² Despite relative success in Charlotte, the Hornets' attendance fell, its financial situation worsened, and an attempt to finance a new arena in Charlotte fell through.³ Following the move to New Orleans in 2002, the team experienced some success but failed to become a consistent playoff contender.⁴ Due to continued financial losses and poor attendance, longtime owner George Shinn unsuccessfully attempted to sell his stake in the franchise.⁵ Multi-billionaire Larry Ellison claimed to have offered Shinn \$350 million for the team, but Ellison could not match the winning bid.⁶

In December of 2010, the NBA acquired the Hornets for \$50 million less than Ellison's offer.⁷ It seemed that the NBA was determined to take control of the franchise for months before the actual sale: there were reports that Ellison planned to move the battered franchise to San Jose, and the NBA had already made a big effort to keep the team in New Orleans after Hurricane Katrina hit a few years prior.⁸ In fact, before the NBA Board of Governors' vote approving the sale, then-NBA Commissioner David Stern stated that the NBA's purchase of the team "remain[ed] the best chance for the franchise to remain in [sic] New Orleans in the long term."⁹ After approving the sale, the NBA owned one of its member franchises for the first time in league history.¹⁰ Yet other sports leagues' acquisitions of their participating franchises had occurred in the past. The National Hockey League acquired the Phoenix Coyotes

¹ Ken Belson & Howard Beck, *Debt Escalating, Hornets Are Purchased by N.B.A.*, N.Y. TIMES (Dec. 6, 2010), <https://www.nytimes.com/2010/12/07/sports/basketball/07hornets.html>.

² *See id.*

³ *Id.*

⁴ *See id.*

⁵ *Id.* at 1.

⁶ Dashiell Bennett, *Larry Ellison Confirms He Tried to Buy the New Orleans Hornets, but was Beaten Back by the NBA*, BUS. INSIDER (Jan. 7, 2011, 8:24 AM), <https://www.businessinsider.com/larry-ellison-confirms-he-tried-to-buy-the-new-orleans-hornets-but-was-beaten-back-by-the-nba-2011-1>.

⁷ *Id.*

⁸ *Id.*

⁹ Belson & Beck, *supra* note 1.

¹⁰ *NBA planning to buy out Hornets owner*, ESPN (Dec. 7, 2010), <http://www.espn.com/nba/news/story?id=5892227>.

and Major League Baseball owned the Montreal Expos for several years before moving the team to Washington.¹¹

The NBA's acquisition, however, was different. It started when the NBA stated in response to criticism of the acquisition that it would not review the Hornets' "franchise-altering decisions."¹² But following another disappointing season, the Hornets constructed a multi-team trade that would have sent Paul to the Lakers—certainly a franchise-altering decision.¹³ Commissioner Stern then stunned the league by vetoing the trade.¹⁴ He issued a statement asserting that he made the decision "to protect the interests of the Hornets" because "all decisions [would be] made on the basis of what is in the best interests" of the team.¹⁵

The shock in response to the NBA's veto of a trade between two teams is rooted in a principle of fairness: one competitor acting in self-interest should not wield regulatory authority over other competitors in the same market.¹⁶ The NBA sets rules and regulations that bind each member franchise.¹⁷ This authority makes the NBA the regulator of a specific market in which franchises, acting as self-interested competitors, directly compete with each other for championships, talent, and market share. So, why was the NBA—regulator and owner—allowed to veto Chris Paul's trade to the Lakers? This issue was recently explored in federal court.

In *Association of American Railroads v. U.S. Department of Transportation*, a federal court prohibited Amtrak from using its statutorily delegated regulatory power.¹⁸ This note examines the question explored in this litigation: is a market participant's regulatory authority *inherently* unfair?¹⁹ Federal courts have conclusively held regulatory

¹¹ Belson & Beck, *supra* note 1.

¹² *See id.*

¹³ Howard Beck, *N.B.A. Reopens to Business as Unusual*, N.Y. TIMES (Dec. 9, 2011), <https://www.nytimes.com/2011/12/10/sports/basketball/nba-basketball-roundup.html>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See infra* p. 18 and note 104.

¹⁷ *NBA Board of Governors approves rule changes for 2018-19 season*, NBA COMMUNICATIONS (Sept. 21, 2018), <http://pr.nba.com/nba-board-of-governors-approves-rules-changes-for-2018-19-season/>.

¹⁸ *See generally* Ass'n of Am. R.R.s. v. Dep't of Transp., No. 11-1499 (JEB), 2017 WL 6209642, (D.D.C. Mar. 23, 2017) (declaring Section 207 of the Passenger Rail Investment and Improvement Act of 2008 void and unconstitutional because it gives Amtrak—a market participant—regulatory power, which violates the Fifth Amendment's Due Process Clause).

¹⁹ *Id.*

authority under these circumstances inherently unfair under the Fifth Amendment's Due Process Clause.²⁰

This note's central assertion is that market participants' regulatory authority is not inherently unfair. An examination of Amtrak's statutory purpose and the market history of American passenger rail service refutes the notion that Amtrak acts in self-interest. Instead, Amtrak acts to ensure the continued vitality of the rail passenger service industry, much like the NBA acts to protect and maintain the competitiveness of the league.²¹

Part II of this note examines the history of rail passenger service in America in order to understand Amtrak's purpose.²² Part III details: (a) the statutory overhaul to Amtrak's regulatory structure brought on by the Passenger Rail Investment and Improvement Act of 2008 ("The 2008 Rail Act");²³ and (b) the *American Railroads* litigation, which has been coined a "legal donnybrook"²⁴ between Amtrak and the private freight operators as a result of the 2008 Rail Act. Part IV argues that Amtrak is not self-interested nor does it compete with freight operators. At a minimum, the Supreme Court should have reviewed *American Railroads* and engaged in a broader inquiry into Amtrak's purported self-interest than the inquiry initiated by the D.C. Circuit.²⁵ Part V concludes that the outcome of the *American Railroads* saga is wrong, despite Amtrak's historically poor performance. Now that the Supreme Court has denied certiorari, other public entities may now be exposed to constitutional due process claims challenging their authority to regulate.

²⁰ *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 896 F.3d 539 (D.C. Cir. 2018) (affirming the district court's constitutional holding but limiting the extent of the constitutional violation so as to invalidate only one provision of Section 207 of the Passenger Rail Investment and Improvement Act of 2008), *cert. denied*, 139 S.Ct. 2665 (2019). Going forward, I will only use the shorthand "*American Railroads*" within the text to refer to the D.C. Circuit's 2018 decision.

²¹ I acknowledge the distinction between the NBA, a private entity, and Amtrak, a public entity. However, this analogy is valid to the extent that the NBA's regulatory motives—like Amtrak—underlying its acquisition of the Hornets does not evidence self-interested, competitive behavior. *See* discussion *supra* pp. 2-3. Yet the public/private distinction is important to the legal question of fairness under Fifth Amendment's Due Process Clause. *See* discussion *infra* Section IV.B.

²² Amtrak was created by statutory authorization in 1970. Rail Passenger Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1330.

²³ Pub. L. No. 110-432, 122 Stat. 4848 § 207(a) (2008).

²⁴ *Ass'n of Am. R.Rs.*, 896 F.3d at 541.

²⁵ *See infra* p. 21.

II. REGULATORY ENTITIES' MARKET PARTICIPATION IS NOT ALWAYS MOTIVATED BY SELF-INTEREST: MARKET HISTORY AND STATUTORY PURPOSE

Oftentimes, debt-laden owners of sports franchises force their teams into bankruptcy, leading to months of “awkward financial revelations and courtroom showdowns.”²⁶ In December of 2010, it was likely that the NBA was well-aware of the bad publicity associated with financially struggling franchises and how that could lead to franchises being sold at discounted prices.²⁷ By buying the Hornets, the NBA could avoid exposing the franchise to bad publicity, possible relocation, and discounted sales prices.²⁸ So, the NBA purchased the team because the value of keeping the Hornets in New Orleans was greater to the team—and the NBA—than Ellison’s purported offer.²⁹ Moreover, Stern rejected the Chris Paul trade so that the franchise could remain competitive in New Orleans.³⁰ The NBA’s actions and Stern’s comments demonstrate that the NBA acquired the Hornets and rejected the Chris Paul trade for the benefit of the league as a whole, not out of self-interest.

Like the NBA, other regulatory entities may enter a market to maintain the viability of one competitor for the benefit of the entire market.

A. *Rail Passenger Service in America From 1900-1970*

In 1900, major railroad executives were celebrities.³¹ Fueled by technological developments that led to improvements in track and equipment, the railroads helped link the country from east coast to west coast.³² By the turn of the century, American railroading had reached its “zenith”: a traveler on a first-class train at that time could expect to find “good food, a library, a barber shop, and the company of prominent

²⁶ See *supra* note 1.

²⁷ Earlier in 2010, retired Hall-of-Famer Michael Jordan purchased the Charlotte Bobcats for \$25 million less than the amount previous owner Robert L. Johnson paid for the franchise in 2002 due to bad publicity. *Id.*

²⁸ *Id.*

²⁹ Responding to rumors that a private investor would buy the team and relocate it, Stern said that the league’s purchase of the team was the best chance of keeping the Hornets in New Orleans “in the long term.” *Id.*

³⁰ *Id.*

³¹ DAVID C. NICE, AMTRAK: THE HISTORY AND POLITICS OF A NATIONAL RAILROAD 1, 1 (JAMES J. GOSLING ET AL. EDS., 1998).

³² *Id.*

individuals from the worlds of business, politics, and entertainment.”³³ To contemporaries, the railroad was “an institution.”³⁴

In fact, the institution was flush with cash. Between 1901 and 1905, Pennsylvania Railroad had *purchased* more than \$110 million³⁵ worth of stocks and acquisitions in competing lines. The rail passenger train industry “appeared to occupy a secure place in society,” or so it seemed.³⁶

Following a peak in 1916 of U.S. railroad expansion, the U.S. Railroad Administration nationalized the railroads in response to America’s entry into World War I.³⁷ By the time the government relinquished control back to the private operators, the railroads’ physical plants had deteriorated considerably.³⁸ Beginning in the 1920s, the railroads began to experience a long-term decline in passenger train service through the 1960s. In the late 1920s, the United States had approximately 20,000 passenger trains in service and more than 200,000 miles of passenger train routes.³⁹ By 1966, that figure had reduced by more than two-thirds,⁴⁰ and by 1970 only 450 passenger trains remained in service.⁴¹ Additionally, passenger volume dramatically declined: the number of passenger miles traveled by train fell by nearly 80 percent from 1920 to 1970.⁴²

The decline in U.S. passenger rail service occurred for various reasons. As early as the late 1930s, passenger train companies were losing more than \$200 million annually, and after World War II those losses increased to more than \$700 million in 1957.⁴³ Of course, few private-sector markets can endure financial losses of that magnitude for very long, let alone forty years.⁴⁴

Technological improvements in automobile design and highway engineering gave automobile travel a “convenience and flexibility” that railroads were unable to match, such that passenger trains represented an

³³ JOSEPH R. DAUGHEN & PETER BINZEN, *THE WRECK OF THE PENN CENTRAL* 43 (1971); Nice, *supra* note 31.

³⁴ DAUGHEN & BINZEN, *supra* note 33.

³⁵ See *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 8, 2019) (the 1905 figure is equivalent to \$3.064 billion in 2017 purchasing power based upon an average annual inflation rate of 3.02% per year during 1905–2017).

³⁶ NICE, *supra* note 31, at 2.

³⁷ DAUGHEN & BINZEN, *supra* note 33, at 44.

³⁸ *Id.*

³⁹ NICE, *supra* note 31, at 2.

⁴⁰ *Id.* (citing PATRICK DORIN, *AMTRAK TRAINS AND TRAVEL* 8 (1st ed. 1979)).

⁴¹ Of the remaining 450 in service, roughly 100 of them were in the process of being discontinued. NICE, *supra* note 31, at 2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

“outmoded technology” by the early 1970s.⁴⁵ More importantly, the improvements in rival transportation industries were supported by public subsidies that were absent in the railroad industry. According to one estimate, national, state, and local governments contributed net subsidies of approximately \$150 billion for highways and \$40 billion for air travel between 1920 and 1978.⁴⁶ Due to superior convenience and public funding of rival modes of transportation, it was evident that passenger rail service would not survive as a private market in America for much longer.

B. *The Fall of a Titan: The Penn Central*

By the 1960s, as railroad executives grew increasingly unwilling to bear financial losses, it seemed that passenger rail service’s death was imminent.⁴⁷ Citizens and officials began to express alarm over the problems that might result from excessive reliance on road and air transportation.⁴⁸ Although some analysts argued that the decline of passenger rail service was simply the natural result of market forces, others were alarmed at “the prospect of a nation without passenger trains.”⁴⁹ It was presciently argued that total reliance on road and air transportation posed environmental problems because both require enormous amounts of land for roads, airports, parking, and service facilities.⁵⁰ Another argument viewed rail service as critical to national security.⁵¹

Yet private passenger rail service’s demise was inevitable. From 1961 to 1966 annual passenger train losses stabilized at just under \$400 million per year.⁵² Then, in 1967, the U.S. Post Office decided to remove virtually all first-class mail from passenger trains, and losses jumped to over \$460 million.⁵³ Pennsylvania Railroad and New York Central responded by

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* (citing DORIN, *supra* note 40, at 11).

⁴⁷ *Id.* at 5, 8. Based on the frank comments of one railroad executive, it was evident that the industry was intentionally trying to drive passengers away: “God damn all passengers on a short haul, anyway . . . if . . . I have to carry passengers I’ll make it so uncomfortable, inconvenient, and disagreeable for them that they’d wish they never bought a two-bit ticket.” *Id.* at 5 (citing LUCIUS BEEBE, MIXED TRAIN DAILY 59 (4th ed. 1961)).

⁴⁸ NICE, *supra* note 31, at 8.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.*

⁵¹ According to David Nice, this view was rooted in the intersection of transportation and national security. *Id.* (“During World War II, U.S. railroads demonstrated an impressive ability to move huge quantities of freight and passengers with comparatively limited resources Relying increasingly on road and air transportation, the United States has committed itself to a nearly total dependence on oil, in huge volumes, for both passenger and freight transportation.”).

⁵² *Id.* at 4.

⁵³ *Id.*

merging to create The Penn Central Transportation Company (commonly known as “Penn Central”) on February 1, 1968.⁵⁴ This venture lasted for 871 days.⁵⁵ On June 21, 1970, Penn Central went broke in what was at the time the largest bankruptcy filing in the history of the United States.⁵⁶ It was cataclysmic:

This single bankruptcy caused the nation and its business and political leaders to take a fresh look, not only at railroads, but at mergers in general and, more importantly, at the future of the country’s transportation industry. The collapse of the Penn Central raised questions about conglomerates and diversification programs; about the role of boards of directors and how they function, or fail to function; about the inherent conflicts of interest that arise as a result of incestuous, interlocking directorates between financiers who supply money, managers who borrow money, and brokers who traffic with both; about the relationship between big government and big business. And about the condition of American capitalism.⁵⁷

On July 22, 1970, four trustees were appointed to recruit new management to operate Penn Central’s \$4.5 billion complex.⁵⁸ At the time it went broke, the Penn Central’s long-term debt obligations totaled \$2.6 billion, almost \$1 billion of which was due to creditors by 1974.⁵⁹ Following the fall of the Penn Central, the passenger rail service market was in disarray, but help was on its way.

C. The Rail Passenger Service Act of 1970

Initial pleas to the government called for public subsidies for passenger rail service, supplemented with a publicly-owned pool of passenger equipment to help meet operating costs and capital costs.⁶⁰ The Nixon Administration, however, was concerned that an “outright subsidy to private firms could lead to a never-ending financial commitment that

⁵⁴ DAUGHEN & BINZEN, *supra* note 33, at 3–6.

⁵⁵ *Id.* at 12.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 62 n.4.

⁶⁰ NICE, *supra* note 31, at 8.

might escalate enormously over time.”⁶¹ In response, the Department of Transportation called for creating a semipublic corporation, Railpax, which would operate passenger trains with modest public funding.⁶² That proposal was enacted by Congress, and President Nixon signed the legislation into law on October 30, 1970,⁶³ in part because it offered lower costs to the federal government than a direct subsidy program.⁶⁴

In its authorizing statute, Railpax was renamed “Amtrak” and was given contradictory objectives: it was mandated to make a profit, but also required to maintain nationwide service, which required continued use of unprofitable routes.⁶⁵ Both objectives likely reflected lingering issues that afflicted private passenger rail service. Amtrak’s profit requirement likely stemmed from the conflict of interest arising out of the “incestuous, interlocking directorates” of the private railroad companies.⁶⁶ Due to these conflicts of interest, Penn Central only had \$13.3 million in cash on the day of its merger,⁶⁷ despite owning real property in New York City valued at more than \$400 million in 1970.⁶⁸ Additionally, Amtrak’s requirement to maintain nationwide service was likely a response to the policy of the private railroad companies, that seemed bent on actively driving passengers away from service.⁶⁹

Despite its contradictory objectives, the 1970 law gave Amtrak broad authority to “own, manage, operate, or contract for the operation of intercity trains”⁷⁰ in order to “fully develop the potential of modern rail service in meeting the Nation’s intercity passenger transportation requirements.”⁷¹

⁶¹ *Id.*

⁶² *Id.*

⁶³ NICE, *supra* note 31, at 9.

⁶⁴ *Id.* (citing Oliver Jensen, American Heritage History of Railroads In America 289 (1975)).

⁶⁵ *Id.*

⁶⁶ DAUGHEN & BINZEN, *supra* note 33, at 12.

⁶⁷ *Id.* at 206.

⁶⁸ *Id.* at 16.

⁶⁹ *See* NICE, *supra* note 31, at 5 (“Some of the railroads did little to advertise their services. They seemed to be trying to drive passengers away.”).

⁷⁰ Amtrak’s broad authority can be traced at least in part to the trend of Congress at the time, which sought to create federal agencies aimed at combating broad public issues. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 334 (West Acad. Publ’g, 7th ed. (2016)); 23 U.S.C. § 401 (1970); 84 Stat. 2086 (1970); 15 U.S.C. § 2051 (1973); 26 U.S.C. § 651 (1970) (within six years, Congress created the National Highway Traffic Safety Administration (1966), the Environmental Protection Agency (1970), the Occupational Safety and Health Administration (1970), and the Consumer Product Safety Commission (1972)).

⁷¹ 84 STAT. 1330, 1332 (1970).

Congress recognized that Amtrak—out of necessity—would have to rely on track systems owned by the private railroads in order to perform its operations.⁷² So, Congress required the private railroads to allow Amtrak to use their tracks and facilities at mutually-agreed upon rates as a condition of relief from the private railroads’ common-carrier duties.⁷³ Crucially, Amtrak’s passenger rail service was granted “preference over [private] freight transportation in using a rail line, junction or crossing.”⁷⁴ Affected private rail carriers, however, were granted a right to seek relief from Amtrak’s preference over the tracks.⁷⁵

In order to effectuate Amtrak’s statutory preference, Congress authorized Amtrak to make agreements with the private rail carriers and regional transportation authorities to “use facilities of, and have services provided by, the carrier or authority on which the parties agree.”⁷⁶ If the parties could not come to an agreement on terms, Congress authorized the Surface Transportation Board to order that facilities be made available and “proscribe reasonable terms and compensation for using the facilities and providing the services.”⁷⁷

III. ASSOCIATION OF AMERICAN RAILROADS V. U.S. DEPARTMENT OF TRANSPORTATION

A. *Amtrak Acquires Regulatory Authority: The 2008 Rail Act*

Since Congress’ creation of Amtrak nearly fifty years ago, Amtrak has been constantly criticized for policy decisions, alleged mismanagement of public subsidies, and has faced challenges that threaten its existence.⁷⁸ Much of this criticism stems from the flawed system baked in to Amtrak’s statutory framework. Specifically, the private freight operators are required to share their tracks with Amtrak, which inherently poses challenges because it pits Amtrak and the private freight operators in a vicious cycle. Freight railroads are reluctant to sideline their slower-moving trains to let Amtrak’s passenger trains pass because keeping their

⁷² Ass’n of American R.Rs. v. U.S. Dep’t of Transp., 135 S.Ct. 1225, 1229 (2015).

⁷³ *Id.* (citing 45 U.S.C. §§ 561, 562 (1970 ed.)).

⁷⁴ 49 U.S.C. § 24308(c) (2015).

⁷⁵ *Id.*

⁷⁶ 49 U.S.C. § 24308(a)(1) (2015).

⁷⁷ *Id.*

⁷⁸ *See generally* JOSEPH VRANICH, END OF THE LINE: THE FAILURE OF AMTRAK REFORM AND THE FUTURE OF AMERICA’S PASSENGER TRAINS 10-11 (2004) (describing, among other missteps, Amtrak’s particular mistakes over the years as “bowing to political pressure” in adding failed routes and Amtrak’s “insensitiv[ity]” to the changing preferences for modes of transportation).

own timetables is taking on “increasing importance” in the shipping business.⁷⁹ So when the private freight operators do not let Amtrak’s trains pass, Amtrak officials complain that their own notoriously unreliable trains are delayed because there is no enforcement of the federal law that gives Amtrak rail precedence over the freight operators.⁸⁰ As the two parties go back and forth on who is to blame, passengers are left wondering why their trains are delayed for hours at a time.⁸¹

After years of calls for reform, a train collision in 2008 prompted Congress to respond.⁸² Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act in 2008.⁸³

The 2008 Rail Act tried to break the vicious cycle between Amtrak and the private freight operators resulting from the original 1970 deal. The 2008 Rail Act “jointly” granted Amtrak and the Federal Railroad Administration (“FRA”) authority to “develop new or improve existing metrics and standards for measuring the performance and service quality of intercity passenger train operations” in consultation with the private freight operators.⁸⁴ If metrics and standards could not be developed within 180 days, the law authorized “any party involved” to petition the Surface Transportation Board to appoint an arbitrator to assist the parties through binding arbitration.⁸⁵ Once metrics and standards were promulgated, the law provided that, “[t]o the extent practicable, Amtrak and its host rail carriers [the private freight operators] shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.”⁸⁶

⁷⁹ See Ted Mann, *Train War Goes Off the Rail – And Onto Twitter*, WALL STREET J., (Mar. 17, 2019), <https://www.wsj.com/articles/amtrak-and-freight-railroad-clash-over-tweets-and-train-delays-11552836755>.

⁸⁰ This back-and-forth has led Amtrak to take to Twitter to tell riders when trains are delayed because they are stuck behind freight trains. In response, the private freight operators have threatened a lawsuit. *See id.*

⁸¹ *See id.*

⁸² Ashley Halsey III, Ten years after crash that pushed Congress to mandate life-saving train technology, one-third of nation’s rail network remains without, WASH. POST (Sept. 12, 2018), https://www.washingtonpost.com/local/trafficandcommuting/ten-years-after-crash-that-pushed-congress-to-mandate-life-saving-train-technology-one-third-of-nations-rail-network-remains-without/2018/09/10/67a3ae58-aaf9-11e8-8a0c-70b618c98d3c_story.html?utm_term=.1b553e05d59b.

⁸³ Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4907; *Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 135 S.Ct. 1225, 1229 (2015) (citing Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207(a), 122 Stat. 4907, 4916).

⁸⁴ Passenger Rail Investment and Improvement Act § 207(a).

⁸⁵ *Id.* § 207(d).

⁸⁶ *Id.* § 207(c).

B. *The Legal Donnybrook: Lead Up to the Due Process Challenge*

In March 2009, Amtrak and the FRA invited public comment on proposed metrics and standards pursuant to the 2008 Rail Act.⁸⁷ The Association of American Railroads (“AAR”), an industry trade group representing the major private freight railroads, derided the measures because it claimed that certain aspects of the proposal would create an “excessive administrative and financial burden [on the freight operators].”⁸⁸ The AAR and its members submitted comments concerning the increased expenses associated with expanding and maintaining the needed track capacity required by the proposal, which they would be required to account for in subsequent agreements with Amtrak over shared rail-use.⁸⁹ Despite these concerns, the final version of the metrics and standards were issued in May 2010 without significant change.⁹⁰

AAR responded by filing suit in federal district court in Washington, D.C.⁹¹ The trade group argued that Section 207 of the 2008 Rail Act was unconstitutional for two reasons: (1) Section 207 violates the nondelegation doctrine by placing legislative and rulemaking authority in the hands of a *private* entity (Amtrak) that participates in the industry it attempts to regulate; and (2) Section 207 violates the Fifth Amendment’s Due Process Clause by vesting government power in Amtrak, an “interested private party.”⁹²

On appeal, the D.C. Circuit held that Section 207 unconstitutionally delegated authority to Amtrak because it is a private entity.⁹³ The Supreme Court, however, vacated this ruling and held that Amtrak acted as a public entity in jointly issuing metrics and standards with the FRA, thereby

⁸⁷ *Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013) (citing Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432, 74 Fed.Reg. 10,983 (Mar. 13, 2009)). The standards address Amtrak’s financial performance, consumer satisfaction surveys, and the percentage of passenger trips to and from underserved communities. *See Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 135 S.Ct. 1225, 1230 (2015).

⁸⁸ *Ass’n of American R.Rs.*, 721 F.3d at 670.

⁸⁹ *Id.* at 669–670 (citing Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, 75 Fed. Reg. 26,839 (May 11, 2010)).

⁹⁰ *Ass’n of American R.Rs.*, 135 S.Ct. at 1230.

⁹¹ *Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 896 F.3d 539, 542–43 (D.C. Cir. 2018).

⁹² *Ass’n of American R.Rs.*, 135 S.Ct. at 1230 (emphasis added).

⁹³ *Ass’n of American R.Rs.*, 896 F.3d at 543 (citing *Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 668 (D.C. Cir. 2013)).

resolving the nondelegation challenge.⁹⁴ The Supreme Court then remanded the case back to the D.C. Circuit to address the due process challenge.

C. A “Neat” Syllogism

On remand, the D.C. Circuit held that Section 207 was also unconstitutional because the authority it delegated to Amtrak violated the Fifth Amendment’s Due Process Clause. The D.C. Circuit fit their argument into a seemingly neat syllogism:

We agree with the freight operators. Our view of this case can be reduced to a neat syllogism: if giving a self-interested entity regulatory authority over its competitors violates due process (major premise); and [Section 207] gives a self-interested entity regulatory authority over its competitors (minor premise); then [Section 207] violates due process.⁹⁵

To satisfy the minor premise, the D.C. Circuit concluded that Amtrak is an “economically self-interested actor”⁹⁶ because it “competes [with freight railroads] for scarce resources (train track) essential to the operation of both kinds of rail service.”⁹⁷ Notably, the D.C. Circuit reasoned that Amtrak could still be “economically self-interested”⁹⁸ even though the Supreme Court declared that Amtrak was a public entity for delegation purposes.⁹⁹ The D.C. Circuit analyzed Amtrak’s statutory obligations “to be operated and managed as a for-profit corporation”,¹⁰⁰ to make agreements “designed to maximize its revenues and minimize Government subsidies”,¹⁰¹ and other financial incentives built into its statutory scheme. Based on these provisions, the D.C. Circuit concluded that Amtrak’s economic self-interest is “undeniable.”¹⁰²

Due to Amtrak’s self-interest, the D.C. Circuit held that Section 207’s delegation of regulatory authority to Amtrak violated “one theme above

⁹⁴ *Ass’n of American R.Rs.*, 135 S.Ct. at 1232–33 (“Amtrak was created by the Government, is controlled by the Government, and operates for the Government’s benefit.”).

⁹⁵ *Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016).

⁹⁶ *Id.* at 23.

⁹⁷ *Id.* at 23 n.1.

⁹⁸ *Ass’n of American R.Rs.*, 821 F.3d at 32.

⁹⁹ This conclusion implies that public entities can act with economic self-interest. *See* discussion *infra* Section IV, pp. 20–21.

¹⁰⁰ 49 U.S.C. § 24301(a)(2) (2012).

¹⁰¹ *Id.* § 24101(d).

¹⁰² *Ass’n of American R.Rs.*, 821 F.3d at 32.

all others [that] has dominated the Supreme Court's interpretation of the Due Process Clause: fairness."¹⁰³ This theme is explained in the *Carter Coal* private delegation doctrine:

The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function . . . [because] one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.¹⁰⁴

Based on the *Carter Coal* fairness principle, the D.C. Circuit held that it was not fair for Amtrak, an economically self-interested entity, to exercise regulatory authority over the private freight operators.¹⁰⁵

The extent of the constitutional violation was initially determined in the District Court for the District of Columbia,¹⁰⁶ which chose to reject the argument that severing Section 207(d)'s arbitration provision alone would remedy the constitutional violation. Instead, the district court struck down Section 207's entire statutory scheme—including both Amtrak's joint authority to promulgate metrics and standards and the binding arbitration provision.¹⁰⁷

On appeal, the D.C. Circuit walked back the district court's order by severing only the arbitration provision and upholding the validity of the rest of the statute.¹⁰⁸ In support, the D.C. Circuit reasoned that the Constitution would not prohibit Amtrak from "exercising some measure of joint control with a disinterested governmental agency, as long as that other agency's duty to protect the 'public good' could check Amtrak's

¹⁰³ *Id.* at 27.

¹⁰⁴ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)); *see also* *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Eubank v. Richmond*, 226 U.S. 137, 143 (1912).

¹⁰⁵ *Ass'n of American R.Rs.*, 821 F.3d at 31.

¹⁰⁶ *Ass'n of American R.Rs. v. Dep't of Transp.*, 896 F.3d 539, 544 (D.C. Cir. 2018).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 551.

self-interest and prevent unfair harm to its competitors.”¹⁰⁹ Because Section 207(d) allows Amtrak—on its own—to request the appointment of a Surface Transportation Board arbitrator,¹¹⁰ the arbitrator could bind all parties to final metrics and standards over the objections of the private freight operators and the Surface Transportation Board.¹¹¹ Therefore, the “straw that broke the camel’s back” was the binding arbitration provision because it stripped the FRA of the independent ability to prevent Amtrak from promulgating measures that promoted its own self-interest.¹¹²

IV. A BROADER SELF-INTEREST INQUIRY OR PUBLIC/PRIVATE STATUS

The *American Railroads* litigation ended with more questions than answers. What about the challenged delegation of regulatory power triggers a due process violation?¹¹³ Must Congress merely delegate authority to a private entity, whose self-interest is implied, or must authority be given to an entity, either of public or private, whose self-interest is demonstrated in fact?¹¹⁴

In *Carter Coal*, the Supreme Court held that the private body’s delegated authority violated due process, but the Court also presumed that official bodies are disinterested.¹¹⁵ The D.C. Circuit’s 2016 decision destroyed that presumption when it concluded that Amtrak is self-

¹⁰⁹ *Id.* at 545 (quoting *Ass’n of American R.Rs.*, 821 F.3d at 29 (D.C. Cir. 2016)).

¹¹⁰ *See supra* note 85.

¹¹¹ *Ass’n of American R.Rs.*, 896 F.3d at 545 (citing *Ass’n of American R.Rs. v. Dep’t of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016)).

¹¹² *Id.*

¹¹³ These questions, in part, can also be attributed to *Carter Coal*’s confusing nature. *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 973 (2014) (explaining that whether the D.C. Circuit was correct on an issue in an earlier stage of the *American Railroads* litigation depends in large part on whether *Carter Coal* is categorized as a delegation case or a due process case (or both)).

¹¹⁴ Nondelegation challenges can be categorized into two different types. The public nondelegation doctrine relies on the concept of separation of powers as a check on Congress from making standardless delegations to administrative agencies, whereas the private nondelegation doctrine “sounds more in the Due Process Clause” because delegating power to members of an industry to regulate their competitors “lacks the neutrality due process demands.” *See* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 153 (2000).

¹¹⁵ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, *presumptively disinterested*, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”) (emphasis added).

interested despite its public status.¹¹⁶ Only once, in *Carter Coal*,¹¹⁷ had the Supreme Court confronted a private delegation challenge on due process grounds, but the D.C. Circuit decided to extend the *Carter Coal* principle because it underwent an analysis of self-interest, despite Amtrak's public status.¹¹⁸ Instead, the D.C. Circuit could have upheld Amtrak's regulatory authority based on its public status, which carries with it a presumption of disinterest under *Carter Coal*.

This section addresses the following two issues: (A) if courts are going to inquire into whether an entity is "self-interested" for legal purposes, that inquiry should be more rigorous than the inquiry engaged in by the D.C. Circuit Court in its 2016 decision; and (B) if the entity is public, private delegation challenges to its regulatory authority should be precluded by virtue of its public status and not analyzed for badges of self-interest.

A. *An Incomplete Self-Interest Inquiry: Amtrak is Not Self-Interested and Does Not Compete With Freight Operators*

Even if the D.C. Circuit's choice to engage in an analysis of Amtrak's self-interest was valid, its conclusion was misguided. The court primarily cited Amtrak's for-profit obligation to maximize revenues and minimize government subsidies as support for Amtrak's self-interest.¹¹⁹ However, market history for the passenger rail industry suggests that the purpose of Amtrak's for-profit obligation was to avoid devastating the industry with bankruptcy.¹²⁰

Before 1970, Penn Central had a dangerously low amount of cash on-hand despite its massive amount of assets.¹²¹ Combined with a good-faith obligation,¹²² Amtrak's for-profit obligation was likely created to ensure

¹¹⁶ See *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016).

¹¹⁷ *Id.* ("The abstract legal question at the heart of this case is whether it violates due process for Congress to give a self-interested entity rulemaking authority over its competitors. The Supreme Court has confronted the question only once [in *Carter Coal*].").

¹¹⁸ *Id.* at 32.

¹¹⁹ *Id.*

¹²⁰ See discussion *supra* Section II.

¹²¹ See DAUGHEN & BINZEN, *supra* note 33, at 12, 206-07 ("[Penn Central's holdings] would be roughly equivalent to the man who owned a \$45,000 house, drove a \$5,000 car, but had *less than a dollar* in his bank account.") (emphasis added). Penn Central was like a "proud but aging widow secretly selling off her jewelry and silver to keep up appearances, to keep the suitors knocking at her door." *Id.* at 206.

¹²² Despite a for-profit obligation, Amtrak officials are likely held to a presumption of good faith in execution of their duties. See *CTIA—The Wireless Ass'n v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008) ("And we have long presumed that executive agency officials will discharge their duties in good faith.") (citing *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007)); *but cf.* Alexander Volokh, *Privatization and The Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 176-87 (2012) (arguing that

that it remained liquid. At the time of its bankruptcy, the Penn Central owed money to 100,000 creditors but only had \$13 million cash on hand.¹²³ With this history fresh in mind, Congress likely wanted to ensure that Amtrak would not run into the same issue as the Penn Central. Therefore, the for-profit obligation was not likely created to incentivize Amtrak to act in self-interest, but rather to protect the industry from devastating bankruptcies that were so cataclysmic that “the condition of American capitalism” was called into question.¹²⁴

Furthermore, Amtrak does not likely “compete” with freight operators. In a footnote in its 2016 order, the D.C. Circuit concluded that Amtrak is in competition with private freight railroads because—although they do not compete for passengers—they *do compete for scarce resources* (i.e. train track) essential to the operation of both kinds of rail service.¹²⁵ Yet there is no consensus among economists in defining the term “competition.”¹²⁶ The lack of consensus may be attributed to the fact that “defining the market and defining competition are not the same.”¹²⁷ The D.C. Circuit’s footnote acknowledges that Amtrak and the private freight operators compete for train track, but it does not assert that they compete for passengers or freights.¹²⁸ However, whether Amtrak is in competition with the freight operators largely depends on how the market is defined. If the market is defined by “railroad use,” then Amtrak and the private freight operators are likely in competition, but if the market is defined by “passenger rail service” or “freight operation service,” there is likely no competition between the two.

The D.C. Circuit also implied in its footnote that Amtrak and the private railroad operators “compete” because they share the same railroad track,¹²⁹ even though there is a view that rivalry should define economic competition.¹³⁰ But does “rivalry” include competition over scarce

the view that public employees’ motivations are bound by “official duty” is overly optimistic because they may in fact act selfishly or arbitrarily).

¹²³ See DAUGHEN & BINZEN, *supra* note 33, at 207.

¹²⁴ See *id.* at 12.

¹²⁵ Ass’n of Am. R.Rs. v. Dep’t of Transp., 821 F.3d 19, 34 n.1 (D.C. Cir. 2016).

¹²⁶ Maurice E. Stucke, *Reconsidering Competition*, 81 *MISS. L.J.* 107, 111 (2011).

¹²⁷ E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 *U. PITT. L. REV.* 771, 774 (1984).

¹²⁸ See *Ass’n of Am. R.Rs.*, 821 F.3d at 34 n.1.

¹²⁹ *Id.*

¹³⁰ Stucke, *supra* note 126, at 114 (quoting STANLEY N. BARNES ET AL., *THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 318 (1955) (“[O]ne conception of competition is ‘the self-interested and independent rivalry of two or more private competitors.’”). Moreover, within the antitrust context, there are calls to permanently define competition by rivalry. Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 *NEB. L. REV.* 209, 211 (1996) (“Rivalry as competition is sound economics because contemporary studies indicate that promoting rivalry will

resources? Merriam-Webster defines competition in terms of rivalry as “the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.”¹³¹ Indeed, even legal dictionaries espouse a rivalry theme in their definitions of competition by emphasizing competition for business from the same third parties rather than competition for scarce resources.¹³²

Under the rivalry definition of competition, the D.C. Circuit’s conclusion that Amtrak is self-interested is wrong because Amtrak and the freight operators do not “compete” for the same business from the same third parties.¹³³ They share railroad track in order to serve different parties, and Amtrak’s proposed metrics and standards are designed to help it better service passengers, not the freight operators’ consumers.¹³⁴ The metrics and standards it promulgates may burden freight operator’s administrative and financial costs, but that burden only occurs because of the agreements both parties are obliged by statute to sign.¹³⁵

That is not to say that Amtrak’s metrics and standards may *affect* the freight operators costs, but under the rivalry definition of competition the metrics and standards do not evidence competition between Amtrak and the freight operators because they are not vying for the same business from the same third parties. To conclude that Amtrak does compete with the freight operators—by virtue of the metrics and standards indirectly affecting the freight operators’ costs—is to upend “eighty years of consistent definitional precedent” defining competition as rivalry.¹³⁶

B. Public/Private Status

Even if the D.C. Circuit’s analysis of Amtrak was sufficiently comprehensive, its choice to undergo that analysis was error because the

increase the internal efficiency of firms, spur innovation, and help develop world-class competitive industries.”)

¹³¹ *Id.* at 114 (quoting *Competition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/competition> (last visited Nov. 1, 2011)).

¹³² *Competition*, BLACK’S LAW DICTIONARY (10th ed. 2011) (“[Defining ‘Competition’ as] the struggle for commercial advantage; the effort or action of two or more commercial interests to obtain *the same business from third parties.*”) (emphasis added).

¹³³ *See Ass’n of Am. R.Rs.*, 821 F.3d at 34 n.1.

¹³⁴ *See Ass’n of American R.Rs. v. U.S. Dep’t of Transp.*, 135 S.Ct. 1225, 1230 (2015).

¹³⁵ Rail Safety Improvement Act of 2008, Pub. L. No. 110–432, § 207(c), 122 Stat. 4848 (2008).

¹³⁶ Gerla, *supra* note 130, at 212 (citing *United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 89 (1912)); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945); *United States v. Koppers Co.*, 202 F. Supp. 437, 446–47 (W.D. Pa. 1962); *United States v. Bethlehem Steel Co.*, 168 F. Supp. 576, 592 (S.D.N.Y. 1958); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), *aff’d*, 347 U.S. 521 (1954)).

Supreme Court previously held that Amtrak is a public entity.¹³⁷ Under *Carter Coal*, public bodies are presumed disinterested.¹³⁸ The *Carter Coal* presumption proves a more workable rule than the D.C. Circuit's 2016 analysis if the regulatory state is to function properly.¹³⁹ This may explain why the D.C. Circuit, in the second round of appeals, chose not to affirm the lower court's decision to invalidate all of Section 207 of the 2008 Rail Act. Doing so, as the D.C. Circuit was likely well-aware, would render any degree of delegated regulatory authority to market participants facially invalid as a violation of due process. In effect, this would overrule *Carter Coal* by declaring that private delegations of regulatory authority are outright unconstitutional, regardless of public or private status. By walking back the district court's invalidation of Section 207 in its entirety, the D.C. Circuit's 2018 order reflects this concern.¹⁴⁰

The D.C. Circuit chose only to remove the binding arbitration provision.¹⁴¹ This walk-back was clearly not based on fairness, as the court acknowledged that the constitutional problem was not that Amtrak exercised some role in formulating the proposed metrics and standards.¹⁴²

Alternatively, the D.C. Circuit's 2018 order was based on accountability.¹⁴³ Amtrak could constitutionally exercise some measure of

¹³⁷ *Ass'n of American R.Rs. v. U.S. Dep't of Transp.*, 135 S.Ct. 1225, 1232–33 (2015); see also *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (holding that Amtrak is a public entity in the First Amendment context). However, the D.C. Circuit justified its choice to engage in a self-interest inquiry of Amtrak by reasoning that the public/private distinction is unrelated to, and has no effect on, whether an entity is economically self-interested or not. See *Ass'n of American R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 32 (D.C. Cir. 2016) (“[C]oncluding ‘Amtrak is not an autonomous private enterprise’ is not the same as concluding it is not economically self-interested.”) (citation omitted).

¹³⁸ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

¹³⁹ *But see Ass'n of American R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016) (citing Volokh, *supra* note 113 (“Wherever Amtrak may fall along the spectrum between public accountability and private self-interest, the ability—if it exists—to co-opt the state's coercive power to impose a disadvantageous regulatory regime on its market competitors would be problematic.”)).

¹⁴⁰ The D.C. Circuit was also concerned with judicial restraint in constitutional adjudication. See *Ass'n of American R.Rs. v. U.S. Dep't of Transp.*, 896 F.3d 539, 549–50 (D.C. Cir. 2018) (choosing to sever Section 207's arbitration provision instead of affirming the District Court's invalidation of the entire statute because severability is presumed in constitutional adjudication).

¹⁴¹ See generally *Ass'n of American R.Rs.*, 896 F.3d at 539 (severing Section 207's binding arbitration provision—so as to eliminate Amtrak's ability to exercise regulatory authority over the private freight operators without the FRA's approval—as the proper constitutional remedy and upholding the constitutionality of the rest of the statute).

¹⁴² *Id.* at 545.

¹⁴³ The D.C. Circuit was also concerned with accountability in an earlier stage of the case. See *Ass'n of American R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013); see also Volokh, *supra* note 113, at 972 (“One purpose [for the private-public distinction] is accountability: a private delegation dilutes democratic accountability,

regulatory authority “as long as [the FRA’s] duty to protect the ‘public good’ could check Amtrak’s self-interest and prevent unfair harm to its competitors.”¹⁴⁴ By relying on accountability,¹⁴⁵ the D.C. Circuit concluded that the “key” to curing the issue was simply eliminating the arbitration provision.¹⁴⁶ Therefore, Amtrak could still possess some degree of regulatory authority since the constitutional remedy did not require “completely walling Amtrak off from any role at all” in the regulatory process.¹⁴⁷

The D.C. Circuit’s decision is still concerning for other public entities, however, because the court still upheld the due process violation despite its remedial walk-back.¹⁴⁸ Like Amtrak’s near-monopoly over public passenger rail service, the United States provides a statutory monopoly for mail through the United States Postal Service (“USPS”).¹⁴⁹ Like private freight operators, private market participants like FedEx and the United Parcel Service (“UPS”) are subject to USPS’s decisions. For example, USPS has the authority to shape the definition of the types of packages that can be included in its protected domain through size and weight restrictions.¹⁵⁰ When USPS shapes that definition, it is not only determining the types of packages it may service, but also indirectly determining the types of packages that UPS and FedEx may not service. The final outcome of the *American Railroads* litigation is troubling because private competitors like UPS and FedEx may be able to challenge USPS’s ability to define its services based solely on the fact that its definitions indirectly affect their service capacity. Despite USPS’s constitutional status,¹⁵¹ private competitors would be equipped with a constitutional due process claim, which they could use to potentially paralyze USPS’s functions.

That is not to say that USPS does not engage in any anti-competitive practices that may justify challenges from private market participants

because when power is delegated to a private organization, the government is no longer blamed for the organization’s decisions.”).

¹⁴⁴ *Ass’n of American R.R.s.*, 896 F.3d at 545 (quoting *Ass’n of American R.R.s. v. Dep’t of Transp.*, 821 F.3d 19, 29 (D.C. Cir. 2016)).

¹⁴⁵ *Id.* at 548 (“[T]he relevant constitutional question . . . is whether the Administration can ‘check’ Amtrak’s self-interests . . . [and] not whether it can speak for a different self-interested group.”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 545, 548.

¹⁴⁸ *See generally id.* at 541.

¹⁴⁹ D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 B.Y.U. L. REV. 1713, 1772 (2009).

¹⁵⁰ *Id.*

¹⁵¹ U.S. CONST. art. I, § 8, cl. 7.

under applicable anti-trust laws.¹⁵² USPS retains other forms of authority that may affect private market participants, including the power of eminent domain and self-zoning.¹⁵³ It also engages in cross-subsidization practices, which are considered anti-competitive.¹⁵⁴ The issue resulting from *American Railroads* is that subjecting public institutions to constitutional challenges based on self-interested behavior may have the negative effect of undermining public confidence in governmental bodies,¹⁵⁵ let alone styming their ability to regulate their target industries.

The potential to undermine public confidence and paralyze functionality counsels strongly against elevating private market participants' claims to constitutional status. After *American Railroads*, however, private competitors can challenge public entities' authority without having to overcome state immunity under anti-trust law.¹⁵⁶ Now, constitutional claims will be allowed where anti-trust claims may have

¹⁵² See generally *North Carolina State Bd. Of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015) (Federal Trade Commission filed complaint alleging that the North Carolina State Board of Dental Examiners' concerted action to exclude non-dentists from the market for whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the federal Trade Commission Act).

¹⁵³ See Sokol, *supra* note 149.

¹⁵⁴ Mark B. Solomon, *USPS, Rivals and Mailers Knock Heads over Alleged Cross-Subsidy of Products*, D.C. VELOCITY (Mar. 5, 2015) <https://www.dvelocity.com/articles/20150305-usps-rivals-and-mailers-knock-heads-over-alleged-cross-subsidy-of-products> (explaining cross-subsidization: when USPS does not "provide enough information about its costs to prove [that it] is covering each product's expenses from its corresponding revenue stream . . . in effect, 'robbing Peter to pay Paul.'"). However, there have been recent attempts to mitigate USPS's anticompetitive behavior. The Postal Accountability and Enhancement Act, 39 U.S.C. § 409 (e) (1) (B) (2006) (subjecting the USPS to antitrust laws); 39 U.S.C. § 3622 (b) (9) (2006) (attempting to curb USPS' cross-subsidization behavior by creating the Postal Regulatory Commission, which requires allocation of "the total institutional costs of the Postal Service appropriately between market-dominant and competitive products.").

¹⁵⁵ See John West & Michael Gruen, *A Better Path for East Midtown*, 23 CITY L. 25 (2017) (explaining that public confidence is undermined when government is casted as a "self-interested marketer" rather than as a "disinterested arbiter seeking a balance among interests"); see also Leo E. Strine, Jr., *Duty & The Death Penalty*, 21 WIDENER L. REV. 1, 26 (2015) ("[I]t is that fidelity to duty that makes our system of government both more legitimate and accountable. When public officials recognize their duty to fulfill their specific role and put that duty ahead of self-interest, they promote the public's confidence and respect in their government, and thus in its legitimacy.").

¹⁵⁶ Under the "State Action" doctrine, regulation by the state is immune from antitrust liability. *Volokh, supra* note 113, at 984 (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982)). However, because agencies tend to stretch the doctrine, depending on their degrees of privacy, they can be considered private even if they otherwise look public. *Id.*

otherwise sufficed.¹⁵⁷ In effect, the D.C. Circuit's holding seems to have heralded in a new constitutional anti-trust doctrine under the guise of due process. In theory, however, keeping due process and anti-trust doctrinally distinct is important, especially since the remedy for a successful constitutional claim is statutory invalidation or severability, whereas under an anti-trust claim the remedy is typically limited to treble damages.¹⁵⁸

To avoid these concerns, *Carter Coal*'s distinction between public and private status should govern. Constitutional challenges against Amtrak, USPS, and other public entities that simultaneously participate in and regulate a given market are better preserved under *Carter Coal* because it explicitly presumes that government entities are disinterested.¹⁵⁹ Under this presumption, private market participants would be effectively barred from bringing anti-trust challenges clothed in constitutional claims. In the long run, the small cost of subjecting private challengers to the state immunity doctrine under anti-trust law preserves public regulatory entities' functionality and the public's confidence in their neutrality.

V. CONCLUSION: THE LIGHT AT THE END OF THE TUNNEL

Eventually, Chris Paul got what he wanted. On December 14, 2011, the Hornets dealt Paul to the Los Angeles Clippers in exchange for Eric Gordon, Chris Kama, Al-Faroug Aminu, and a first-round draft pick.¹⁶⁰ Commissioner Stern said that he never allowed other owners' opinions or the consideration of other teams' market size to influence where Paul would end up because his only focus was on getting the best deal for the Hornets.¹⁶¹ Hornets general manager Dell Demps was especially excited about the deal:

"With this trade, we now have three additional players who were among the top eight draft picks in their respective drafts as well as our own first round pick and Minnesota's first round pick," Demps said in a statement released by the team. "Aminu is a young talent with a

¹⁵⁷ *Id.* at 984, 999 (explaining that an antitrust violation, once state action immunity is overcome, may be easier to prove because of "structural factors like the competitive relationship between the regulators and the regulated parties").

¹⁵⁸ *See generally* Ass'n of American R.R.s. v. U.S. Dep't of Transp., 896 F.3d 539 (D.C. Cir. 2018); *see also id.* at 984.

¹⁵⁹ *See* *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

¹⁶⁰ *Clippers land Chris Paul from Hornets*, ESPN (Dec. 14, 2011), https://www.espn.com/los-angeles/nba/story/_/id/7353870/los-angeles-clippers-new-orleans-hornets-agree-chris-paul-trade.

¹⁶¹ *Id.*

bright future, Gordon is a big-time scorer and one of the best (shooting) guards in the league and Kaman is a proven center and former All-Star . . . We will field a competitive team and our future looks great."¹⁶²

On April 13, 2012, it was announced that Tom Benson, owner of the National Football League's New Orleans Saints, purchased the Hornets from the NBA for \$338 million.¹⁶³ As of February 2019, the team is worth \$1.2 billion.¹⁶⁴ The NBA did its job.

Amtrak's story, on the other hand, has been anything but a fairy tale. Historically, it is an enterprise with negative net worth, unable to run itself in a business-like fashion.¹⁶⁵ Indeed, it has a history of making often "appalling" decisions, such as opening a Wisconsin train line that often ran empty, losing more than a thousand dollars for *each passenger* it carried.¹⁶⁶ However, much of Amtrak's fiscally dubious decisions may be attributed to its statutory mandate to maintain nationwide service irrespective of profitability.¹⁶⁷

Still, despite the inefficiencies stemming from its prior decisions and statutory requirements, there may still be proverbial light at the end of the

¹⁶² *Id.*

¹⁶³ *Saints owner Benson buys Hornets from NBA*, NBA NEWS (Apr. 13, 2012), <https://web.archive.org/web/20151117214948/http://www.nba.com/2012/news/04/13/hornets-sale.ap/index.html>.

¹⁶⁴ *New Orleans Pelicans*, FORBES (last visited Dec. 14, 2019), <https://www.forbes.com/teams/new-orleans-pelicans/#4f5674634c2e>.

¹⁶⁵ VRANICH, *supra* note 78, at 8.

¹⁶⁶ *Id.* (citing Richard P. Jones, *Amtrak to Serve Lake Geneva*, MILWAUKEE J. SENTINEL (June 13, 2000) at 2B). Amtrak's "chaotic" fiscal performance even had one of its own officers questioning its existence over twenty years ago. See Jackie Spinner, *Amtrak's CFO is Well Acquainted with Fiscal Chaos*, WASH. POST (July 31, 1995), https://www.washingtonpost.com/archive/business/1995/07/31/amtraks-cfo-is-well-acquainted-with-fiscal-chaos/a61e549c-890d-460c-8f59-47e18c7fcef8/?utm_term=.b43eeac8e227 ("I think there's two questions: 'What's the future of passenger rail in America?' There is a completely separate question, which is, 'What's the future of Amtrak?' You can imagine a brilliant future with passenger rail with Amtrak gone.).

¹⁶⁷ Amtrak has recently stated that it loses money on long-distance, cross-country routes. See Ted Mann, *Amtrak, Seeking to Break Even, Sees Some Light at the End of the Tunnel*, (Nov. 8, 2019), https://www.wsj.com/articles/amtrak-seeking-to-break-even-sees-some-light-at-the-end-of-the-tunnel-11573223401?emailToken=d5f1d7b06299136e1a4620fb473003f2gANzoL9iArHJBNUd72EBh0XKSldoY3vrdqTwk/8O7aeV2lYKhvwUDidniiueuVL/PkQOKLIMgMBOor40RY1+LizgpJYGoUZ2PBdLWMbyUPYvuW5nTCLfNA7WxChZSdHIqTYLa5YAikb2KSrgDOrm6ZA%3D%3D&reflink=article_copyURL_share.

tunnel for Amtrak.¹⁶⁸ Various new improvements to its infrastructure alongside improved fiscal performance stand as reminders to Amtrak's true, statutory purpose: the protection and revitalization of American passenger rail service, not competition against private freight operators.

If public regulatory bodies are subjected to self-interest inquiries under due process challenges, statutory purpose and market history are critical to understanding their purpose and behavior. However, the implication of such challenges is that they elevate anti-trust theories to constitutional status at the expense of public regulators' functionality and the public's perception of their neutrality. Amtrak's fate has been sealed,¹⁶⁹ but the constitutional gate is now open. There will likely be more of these types of due process challenges going forward.¹⁷⁰

Despite the final outcome in *American Railroads*, other federal circuit courts should adopt the public-private distinction under *Carter Coal* instead of engaging in the D.C. Circuit's self-interest analysis of public regulators. Under the *Carter Coal* regime, public entities with regulatory structures similar to Amtrak will not suffer the same fate.

¹⁶⁸ *Id.* (explaining that Amtrak is close to breaking even for the first time in its nearly fifty-year history as rising ridership and cost cuts continue a multi-year improvement in its financial performance).

¹⁶⁹ *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 896 F.3d 539 (D.C. Cir. 2018), *cert. denied*, 139 S.Ct. 2665 (2019).

¹⁷⁰ USPS is certainly a potential target due to its anti-competitive practices. Sokol, *supra* note 149 (“[On USPS’ cross-subsidization practices:] An FTC report estimates that the value of government subsidies that the USPS allocates to competitive products by virtue of its government status to be in the range of \$38 million to \$113 million.”) (citing FED. TRADE COMM’N, *Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors* 57 (2007), <http://www.ftc.gov/os/2008/01/080116postal.pdf>).