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Motor Carrier Act of 1980: Toward Compensating Trucking Companies for the Loss of the Monopolistic Value of Their Operating Rights

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I. Introduction

The Motor Carrier Act of 1935[1] initiated federal regulation of motor carriers[2] engaged in interstate or foreign operation on public highways and vested those regulatory powers in the Interstate Commerce Commission (ICC or Commission).[3] The Act required carriers to acquire operating rights from the ICC before beginning operations.[4] The ICC automatically issued operating authority to carriers in bona fide operation on June 1, 1935, over the route or routes or within the territory for which they applied, without requiring any further proof of eligibility.[5] The reluctance of the Commission to grant new authority, however, so curtailed competition in the trucking industry that holders of operating rights were assured a quasi-monopoly in their authorized territories.[6]

Subsequent amendments to the Act permitted transfers of

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1. Pub. L. No. 74-255, 49 Stat. 543 (codified with amendments in scattered sections of 49 U.S.C. §§ 10101-11916) (1976 & Supp. III 1979).

2. *Id.*, § 203(a)(16), 49 Stat. at 545, in which the term "motor carrier" was defined as both a common carrier by motor vehicle and a contract carrier by motor vehicle.

3. *Id.* § 202(b), 49 Stat. 543.

4. Section 209(a) required contract carriers to acquire a permit before beginning operations. A contract carrier is "any person . . . which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation." *Id.* § 203(a)(15), 49 Stat. 544-45.

Section 206(a) required a common carrier to obtain a certificate of public convenience and necessity before beginning operations. A common carrier is "any person who or which undertakes whether directly or by a lease or any other arrangement to transport passengers or property . . . for the general public in interstate or foreign commerce by motor vehicle for compensation . . . . " *Id.* § 203(a)(14), 49 Stat. 544.

Section 203(b) exempted some motor carriers from the requirement of certification. Those exempted were farm trucks, school buses, taxicabs, hotel buses, newspaper distributors, and vehicles carrying agricultural commodities, fish, and livestock.

5. *Id.* §§ 206(a), 209(a), 49 Stat. 551-53.

6. Anderson, Jerman & Constantin, *Railroad versus Motor Carrier Viewpoints on Regulatory Issues*, 45 ICC Prac. J. 294, 295 (1978); Hayden, *Teamsters, Truckers and the ICC: A Political and Economic Analysis of Motor Carrier Deregulation*, 17 Harv. J. Legis. 123, 130 (1980); Moore, *The Beneficiaries of Trucking Regulation*, 21 J.L. & Econ. 327, 329-30 (1978).

rights from one carrier to another,[7] and an active market developed for the purchase, sale, and lease of existing rights.[8] The operating rights became valuable assets, and carriers often used them as collateral to finance capital investments and expansions.[9] In January of 1980, the regulated industry claimed to hold rights valued between three and six billion dollars.[10]

On July 1, President Carter signed the Motor Carrier Act of 1980,[11] which significantly deregulated the trucking industry. Congress had designed the legislation to stimulate competition among motor carriers by lifting ICC restrictions on the issuance of operating authority.[12] Trucking companies holding operating rights prior to the new Act maintain that those rights are now worthless.[13] The House Committee on Public Works and Transportation expressed its intention to monitor the effect of the 1980 Act on the value of operating rights held by trucking companies and, if the rights are devalued, to compensate those companies for their losses.[14]

The Financial Accounting Standards Board mandated that, for accounting purposes, the affected companies immediately charge off against income the unamortized costs of the operating rights.[15] Several companies also deducted the value of the rights as losses for income tax purposes.[16] The Wall Street Journal reported that "[t]he big motor freight hauling concerns are gearing for a battle with the Internal Revenue Service."[17] The issue is whether present tax law will allow a motor carrier, in computing taxable

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7. 49 U.S.C. § 312(b) (1976); 49 C.F.R. § 1132 (1979).

8. Hayden, *supra* note 6, at 134; *Trucking Concerns Face Battle with IRS on Writing Off Their Operating Rights*, Wall St. J., Sept. 26, 1980, at 8, col. 3.

9. Anderson, Jerman & Constantin, *supra* note 6, at 303.

10. Hayden, *supra* note 6, at 133-34; Moore, *supra* note 6, at 343.

11. 49 U.S.C.A. §§ 10101-11914 (West Supp. 1980).

12. H.R. Rep. No. 1069, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. Code Cong. & Ad. News 4109, 4111.

13. Baker, *Reality Takes the Wheel*, Forbes, Oct. 27, 1980, at 133; Wall St. J., *supra* note 8.

14. H.R. Rep. No. 1069, *supra* note 12, at 4109, 4119.

15. 4 AICPA Professional Standards (Accounting) (CCH) AC §§ 6071.03-.25 (1980) (discussing FASB Statement No. 44); Miller, Analysis and Explanation of FASB Statement 44 Accounting for Intangible Assets of Motor Carriers, 1 Miller's Comprehensive GAAP Guide Update (1980). The statement requires separation of interstate operating rights from other intangible assets and a charge to income of the unamortized costs as an extraordinary item on financial statements for fiscal periods ending after December 15, 1980. AICPA Professional Standards (Accounting) (CCH) AC at §§ 6071.03-.08.

16. The Tennessean, Oct. 22, 1980, at 21, col. 5. Other companies, however, do not want to write off their rights since the effect would be to alter drastically their debt-to-equity ratio. Baker, *supra* note 13, at 134.

17. Wall St. J., *supra* note 8.

income, to deduct from gross income the loss of the monopolistic aspect of its operating rights. The Commissioner of Internal Revenue (Commissioner) and the Tax Court have disallowed such deductions in similar cases.[18] In the leading case[19] confronting the identical issue of deductibility of the loss of a monopolistic right in the area of motor carrier deregulation, the Court of Appeals for the Ninth Circuit held that the monopolistic right was a "thing" created by statute and that the loss was not deductible because the taxpayer had no "vested interest in a law entitling him to insist that it shall remain unchanged for his benefit."[20]

This Note examines the historical background and nature of the operating rights acquired by the trucking companies, with emphasis on those rights issued to a common carrier by the ICC and represented by a certificate of public convenience and necessity (certificate). The Note then examines and analyzes the tax law and the judicial response to attempts by taxpayers to deduct from gross income the loss of a monopolistic right. Finally, the Note explores alternate theories for compensating trucking companies for their losses and concludes with a recommendation of the most equitable method of compensation.

II. Historical Background

A. *The Motor Carrier Act Prior to 1980: Acquisition and Nature of Certificates of Public Convenience and Necessity*

The 1935 Motor Carrier Act authorized the Commission to issue a certificate of public convenience and necessity to a qualified carrier

> if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service . . . will be required by the present or future public convenience and necessity.[21]

In *Pan-American Bus Lines*[22] the ICC developed guidelines for determining whether to grant a certificate to an applicant. Competitors had protested the issuance of a certificate to Pan-American, and the Director of the Bureau of Motor Carriers had

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18. *See* Part III, Section B *infra*.

19. Consolidated Freight Lines, Inc. v. Commissioner, 101 F.2d 813 (9th Cir.), *cert. denied*, 308 U.S. 562 (1939).

20. *Id.* at 814.

21. Pub. L. No. 74-255, § 207(a), 49 Stat. 551-52 (1935).

22. 1 Fed. Carr. Cas. ¶ 7001, at 3 (1936).

denied Pan-American's application.[23] The Commission, in reversing the Director's decision, first explained that the words "convenience" and "necessity" must be given separate and distinct meanings,[24] and that the word "necessity" should be liberally construed[25] in deciding whether "the present or future public convenience and necessity" actually requires the applicant's service.[26] Accordingly, the Commission developed the following considerations:

> whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with a new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.[27]

In applying these guidelines to Pan American's application, the Commission noted that the Motor Carrier Act did not proscribe competition within reasonable bounds and that, in the area in which Pan-American intended to operate, competition might serve a useful public purpose.[28] The Commission also considered the fact that Pan-American's proposed route was not the principal route of the protestants and that the protestants had demonstrated no evidence of harm.[29]

Although the Commission granted operating authority to Pan-American Bus Lines, the guidelines developed in that case proved to be quite restrictive in subsequent years.[30] The applicant bore the burden of proof of eligibility for a certificate,[31] and if any existing carrier protested issuance of a certificate the Commission usually denied the application.[32] The Commission had the power to terminate, suspend, amend, change, or revoke certificates,[33] or to issue temporary certificates with no guarantee that it would subsequently grant a permanent certificate.[34] Certification became, in effect, a franchise that not only assured motor carriers of "a continuing right to provide service and protection from competition which

23. *Id.*
24. *Id.* at ¶ 7001.05 (citing *In Re* Atlanta & St. A.B. Ry., 71 I.C.C. 784 (1922)).
25. Pan-American Bus Lines, 1 Fed. Carr. Cas. ¶ 7001.05, at 3 (1936).
26. *See* text accompanying note 21 *supra*.
27. Pan-American Bus Lines, 1 Fed. Carr. Cas. ¶ 7001.05, at 3 (1936).
28. *Id.* at ¶ 7001.08.
29. *Id.*
30. Hayden, *supra* note 6, at 126; Moore, *supra* note 6, at 340.
31. *See* text accompanying note 80 *infra*.
32. Wall St. J., *supra* note 8.
33. Pub. L. No. 74-255, § 212(a), 49 Stat. 555 (1935).
34. 49 U.S.C. § 310(a) (1976).

can be wasteful and may provide no public service, as long as they provide the . . . duties of a common carrier," but also improved their ability to obtain financing.[35] In assessing the impact of the 1935 Act, the Tax Court commented that federal regulation had changed the character of the motor freight industry by establishing higher standards of service and by eliminating those carriers who did not choose to meet the standards.[36]

Since 1935 the statute has expressly stated that a certificate does not "confer any proprietary or property rights in the use of the public highways,"[37] but the certificate itself has been characterized as property.[38] The acquisition of a certificate met the Supreme Court's definition of "capital investment,"[39] and carriers could therefore capitalize its cost.[40] If a trucking firm acquired the certificate directly from the ICC, the book value of the certificate was simply the legal cost incurred in completing the application procedures.[41] If, however, the company purchased the rights from an existing company, the cost and the book value were much greater.[42] The market value of existing operating rights prior to 1980 was estimated to be approximately fifteen to twenty percent of the annual revenues generated by their authorized traffic.[43]

B. Deregulation of the Motor Carrier Industry

Initial efforts to deregulate the trucking industry were aborted in the early seventies when Congress failed to pass deregulatory legislation introduced by President Ford's administration.[44] In the

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35. Anderson, Jerman & Constantin, *supra* note 6, at 302-03.

36. East Texas Motor Freight Lines v. Commissioner, 7 T.C. 579 (1946).

37. Pub. L. No. 74-255, § 207(h), 49 Stat. 552 (1935).

38. *See* Part III, Section B *infra*.

39. La Belle Iron Works v. United States, 256 U.S. 377 (1921). The requirements of a capital investment are "the laying out of money or money's worth and the acquisition of something of permanent use or value in the husiness." *Id.* at 388.

40. Rev. Rul. 70-248, 1970-1 C.B. 172. *See* Richmond Television Corp. v. United States, 354 F.2d 410 (4th Cir. 1965); Hampton Pontiac, Inc. v. United States, 294 F. Supp. 1073 (D.S.C. 1969). *See also* M. MILLER, MILLER'S COMPREHENSIVE GAAP GUIDE § 21.01 (1980).

41. Moore, *supra* note 6, at 340.

42. *Id.*

43. NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 197-224 (1979) [hereinafter cited as REPORT]; Hayden, *supra* note 6, at 134. Moore states that the value of the certificates is equal to the discounted present value of the future rents generated from having the license. Moore, *supra* note 6, at 340.

44. Hayden, *supra* note 6, at 144 (citing H.R. REP. No. 10909, S. 292a in H.R. Doc.

mid-seventies, however, the opposition of certain carriers to ICC rule changes foreshadowed the subsequent controversy over deregulation. The Commission had extended the boundaries of exempt commercial zones and terminal areas by changing the rules for determining those boundaries.[45] Long-line carriers generally supported this modification of trucking regulation, but short-haul carriers strenuously opposed the change because entry of new carriers into their territory devalued their certificates.[46] The Commission itself recognized that in many cases the new rules would "substantially diminish" the pecuniary value that short-haul carriers attached to their operating certificates.[47]

Several short-haul carriers filed petitions to challenge the rulemaking authority of the ICC and to ask the courts to set aside the ICC report and order that adopted the new rules.[48] The Court of Appeals for the Ninth Circuit combined and reviewed petitions from several circuits.[49] The carriers contended that the Commission's broadening of exempt areas was "individual in impact and condemnatory in purpose," that the Commission in effect had revoked their certificates, and that each carrier affected by the change in rules was entitled to adjudicatory proceedings.[50] The court held that the Commission was authorized by statute to impose general conditions on the exercise of privileges granted by the certificates[51] and that rulemaking rather than adjudicatory proceedings was appropriate.[52] The Commission had solicited economic data and opinions from a variety of sources in determining whether to extend the boundaries of the commercial zones, and the court weighed this factor heavily in affirming the Commission's report and order. The court also determined that expansion of the exempt areas would promote rather than frustrate the goals of the

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No. 307, 94th Cong., 1st Sess. 8 (1975)).

45. Short-Haul Comm. v. United States, 572 F.2d 240 (1978) (reviewing *Ex Parte* No. MC-37 (Sub. No. 26); Commercial Zones and Terminal Areas, 128 M.C.C. 422 (1976)). The original Motor Carrier Act at § 203(b)(8), 49 Stat. 546 (1935), presently codified at 49 U.S.C. § 303(b)(8) (1976), exempted carriers in commercial zones from certification by the ICC.

46. Baker & Greene, *Commercial Zones and Terminal Areas,* 10 TRANSP. L. J. 171 (1978).

47. Short-Haul Comm. v. United States, 572 F.2d 240, 248 (1978) (citing *Ex Parte* No. MC-37 (Sub. No. 26), Commercial Zones and Terminal Areas, 128 M.C.C. 422 (1976)).

48. *Id.* at 241.

49. *Id.*

50. *Id.* at 243. The carriers argued that these adjudicatory proceedings must follow the procedural formalities of 5 U.S.C. § 554 (1976).

51. 572 F.2d at 244.

52. *Id.* at 243.

National Transportation Policy.[53]

In the late 1970s, the ICC took further steps toward deregulation by liberalizing entry restrictions.[54] The Commission limited the standing of firms to protest entry applications[55] and discarded the second and third parts of the test established in *Pan-American Bus Lines*[56] by requiring protesting carriers to show that granting an applicant's request for operating authority threatened them with more than "mere revenue loss"[57] and by dropping the requirement that an applicant prove that existing carriers could not perform the proposed service.[58] Subsequent to these actions, a Report of the National Commission for the Review of Antitrust Laws and Procedures[59] gave added support to the Carter administration's big push toward deregulation.[60] The Report recognized recent deregulatory measures taken by the ICC[61] but, nevertheless, charged that obtaining operating authority from the ICC was often long and costly,[62] that "carriers were often prohibited from using the most direct route between two points, thus causing delays in shipment and additional wasted fuel,"[63] and that the regulatory scheme included a broad antitrust immunity.[64]

The House Committee on Public Works and Transportation (Committee) studied motor carrier deregulatory legislation for

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53. *Id.* at 247-48. The National Transportation Policy is set forth in the preamble to the Interstate Commerce Act, 49 U.S.C. preceding §§ 1, 301, 901 & 1001. In those provisions it declares that the Act shall be administered "to promote safe, adequate, economical, and efficient service"; to "foster sound economic conditions in transportation and among the several carriers"; "to encourage the establishment and maintenance of reasonable charges for transportation services, . . . without . . . unfair or destructive competitive practices"; and "to encourage fair wages and equitable working conditions."

54. Hayden, *supra* note 6, at 145; Kahn, *Abolition of the Trucking Exemption: Pros and Cons*, 48 ANTITRUST L.J. 555 (1979), *reprinted in* 47 I.C.C. Prac. J. 154 (1980).

55. Protest Standards in Motor Carrier Application Proceedings, 43 Fed. Reg. 60,277 (1978); *see* Hayden, *supra* note 6, at 146.

56. *See* text accompanying note 27 *supra*.

57. Liberty Trucking Co., 130 M.C.C. 243, 1978 FED. CARR. REP. (CCH)(CASES) ¶ 36,872, *aff'd and clarified*, 131 M.C.C. 573, 1979 FED. CARR. REP. (CCH)(CASES) ¶ 36,894. *See* Hayden, *supra* note 6, at 145.

58. *Ex Parte* No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,296 (1979); *see* H.R. Rep. No. 1069, *supra* note 12, at 4121; Hayden, *supra* note 6, at 146.

59. REPORT, *supra* note 43, at 197; *see* Kahn, *supra* note 54, at 555-63.

60. Hayden, *supra* note 6, at 144; Remarks on Signing S. 2245 into Law, 16 WEEKLY COMP. OF PRES. DOC. 1261 (July 7, 1980).

61. REPORT, *supra* note 43, at 198; *see* Kahn, *supra* note 54, at 555.

62. REPORT, *supra* note 43, at 204-07.

63. *Id.* at 206-07.

64. *Id.* at 197.

more than a year before the Motor Carrier Act of 1980 was passed.[65] Deeming regulatory mechanisms of the Motor Carrier Act "outmoded and archaic,"[66] the Committee professed its aim to have the industry better serve the public by increasing competition and by reducing unnecessary federal regulation.[67] The Committee considered deregulation of the trucking industry as "one of the most complex issues ever undertaken by this Committee."[68] A primary concern of the legislators was the devaluation of the operating rights of regulated carriers as a result of deregulatory legislation.[69] The Committee recommended that the Committee on Ways and Means hold oversight hearings on the effect of deregulation and consider appropriate tax relief legislation if the rights were, in fact, devalued.[70]

During the eighteen months preceding July 1, 1980, proregulation journalists and neutral observers issued a steady stream of gloomy forecasts concerning the effects of passage of deregulatory legislation.[71] The writers maintained that deregulation would immediately reduce to zero the value of operating rights,[72] and that, unless the Teamsters consented to a downward adjustment of wages in their contracts, many firms would face bankruptcy.[73] Despite these critical attacks, and despite opposition from both labor and management in the trucking industry,[74] Congress passed the Motor Carrier Act of 1980,[75] and President Carter signed the Act into law on July 1.[76]

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65. H.R. REP. No. 1069, *supra* note 12, at 4109.

66. *Id.* at 4110. Regulated carriers comprised less than 50% of the industry in 1979. Seventeen thousand firms with annual revenue of $41.2 billion were in operation under the authority of the ICC. *Id.*

67. *Id.* at 4111.

68. *Id.* at 4109.

69. *Id.* at 4119.

70. *Id.*

71. *See* Anderson, Jerman & Constantin, *supra* note 6; Farris, *The Case Against Deregulation in Transportation, Power, and Communications*, 45 ICC PRAC. J. 306 (1978); Hayden, *supra* note 6; Kahn, *supra* note 54; Moore, *supra* note 6; Mosher, *Trucking Deregulation—An Idea Whose Time Has Almost Gone?*, 11 NAT'L L.J. 817 (1979).

72. Hayden, *supra* note 6, at 138.

73. Baker & Greene, *supra* note 46, at 185; Farris, *supra* note 71, at 330; Hayden, *supra* note 6, at 138-39. Hayden distinguished trucking deregulation from airline deregulation by noting that airlines are "price sensitive" and that profits increased because rate reductions caused more passengers to fly. *Id.* at 138. *See Teamsters Refuse to Reopen '79 Contract But May Urge Concessions by Some Locals*, Wall St. J., Sept. 15, 1980, at 16, col. 2.

74. Hayden, *supra* note 6, at 139.

75. 49 U.S.C.A. §§ 10101-11914 (West Supp. 1980).

76. *See* Remarks on Signing S. 2245 into Law, *supra* note 60, at 1263. Senator Howard

The new Act retains the requirement of certification by the ICC before a common carrier can engage in interstate or foreign transportation on the public highways.[77] The Act authorizes the issuance of a certificate to a person

> if the Commission finds—(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and (B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need.[78]

The Commission must continue to give each application individual consideration, but the new act nullifies the guidelines of *Pan-American Bus Lines.*[79] The Act requires the ICC to issue operating authority to any applicant unless it "finds, *on the basis of evidence presented by persons objecting to the issuance of a certificate,* that the transportation to be authorized . . . is inconsistent with the public convenience and necessity."[80] Thus, the burden of proof of inconsistency with the public interest is shifted from the applicant to the protestant.[81] Since the intent of the legislation is to enable new carriers to enter the industry and existing carriers to expand their services,[82] the Act explicitly forbids the Commission from giving any consideration to the effect of issuance of a certificate on the "diversion of revenue or traffic from an existing carrier."[83]

No longer does a certificate of public convenience and necessity grant a monopoly to its holder. New applicants for certificates should experience little difficulty in obtaining operating authority.

Cannon, the Senate Commerce Committee Chairman, announced that passage of the bill constituted a victory that belonged "to a unique coalition of consumers, shippers, industries, and public interest groups" that "covered the entire political and economic spectrum," and that "all shared the belief that less regulation and more competition are essential to the future development of a sound transportation system." *Id.* at 1263. President Carter predicted that the new legislation would help control inflation, save gasoline, and provide "an opportunity to use the free enterprise system of our country in its most effective form." *Id.* at 1261-62. The President claimed that deregulation of the airline industry had made it more competitive, more profitable, and more efficient. He said, "A year ago . . . people then said that it was impossible to pass a trucking deregulation bill because of the powerful political forces involved and the controversial nature of this kind of legislation." *Id.* at 1261.

77. 49 U.S.C.A. § 10921 (West Supp. 1980).

78. *Id.* § 10922(b)(1) (West Supp. 1980).

79. *See* text accompanying note 27 *supra.*

80. 49 U.S.C.A. § 10922(b)(1) (West Supp. 1980) (emphasis added).

81. H.R. Rep. No. 1069, *supra* note 12, at 4111.

82. *Id.*

83. 49 U.S.C.A. § 10922(b)(2)(B) (West Supp. 1980).

Consequently, no real reason exists for buying a certificate from another carrier, and the three to six billion dollar active market for the purchase, sale, and lease of operating rights seems to have been destroyed. As a result, the trucking industry seeks compensation for the loss in value of its operating rights.

III. Income Tax Law: The Loss of Monopolistic Rights

Taxpayers have experienced the loss of valuable monopolistic rights in a variety of different circumstances. At various times legislative, judicial, or private action has destroyed these monopolistic rights, which were created either by the government or by private entities. Taxpayer attempts to secure compensation for their losses vis-à-vis the income tax laws have usually resulted in litigation. This part of the Note first analyzes the Internal Revenue Code (Code) and the Treasury Regulations (Regulations) applicable to losses suffered by taxpayers. The Note then examines the holdings and the rationale of the courts and the Internal Revenue Service (IRS) when taxpayers claimed losses of monopolistic rights in connection with various businesses and industries.

A. *The Code*

Since 1913 the IRS has allowed corporations, in computing taxable income, to deduct from gross income "*all* losses actually sustained within the year and not compensated by insurance or otherwise."[84] The amount deductible when the loss involves depreciable property is the "adjusted basis" of that property.[85] Losses of depreciable property resulting from obsolescence or sudden termination of useful value of the property are deductible pursuant to the provisions of Treasury Regulations sections 1.167(a)-8 and 1.167(a)-9.[86] Section 165(a) is applicable to losses involving nondepreciable and nonamortizable property.[87] The amount of the deduction is the cost of the item or property.[88]

In order to qualify as a capital asset,[89] an item must first be classified as "property." Courts have categorized monopolistic

84. Tariff of 1913, ch. 16, § II G(b), 38 Stat. 172 (1913) (current version at I.R.C. § 165(a))(emphasis added).
85. I.R.C. §§ 1011, 1012, 1016.
86. *See* Treas. Reg. §§ 1.165-2(b), (c) (1960).
87. Treas. Reg. § 1.165-2 (1960).
88. I.R.C. §§ 165(b), 1011, 1012.
89. I.R.C. § 1221.

rights as "things"[90] and as "expectations"[91] rather than as property. For tax purposes, however, the definition of property is more liberal, and both the Code[92] and the cases[93] indicate that the item lost does not have to meet the technical definition of property in order to be deductible. Generally, intangible assets are not depreciable for income tax purposes unless the useful life of the asset is ascertainable and definitely limited or unless the intangible asset has value in the production of income for only a limited period of time, the duration of which can be estimated with reasonable accuracy.[94] Intangible rights represented by a motor carrier's certificate of public convenience and necessity are not amortizable[95] or depreciable under the tax laws unless granted only temporarily.[96] For tax purposes, they are probably classified as capital assets.[97] Apparently, then, a loss involving a certificate would be deductible under section 165(a) in the amount of its cost.

The language of section 165(a) is broad on its face, but Treasury Regulations, Revenue Rulings, and court decisions narrow its scope. In order to be deductible under section 165(a), a loss must be bona fide, "evidenced by closed and completed transactions, fixed by identifiable events, and . . . actually sustained during the taxable year."[98] According to judicial interpretation, the taxpayer

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90. Consolidated Freight Lines, Inc. v. Commissioner, 101 F.2d 813, 814 (9th Cir. 1939).

91. Parmalee Transp. Co. v. United States, 351 F.2d 619, 624 (Ct. Cl. 1965).

92. The word "property" is not used in I.R.C. § 165(a), in Treas. Reg. § 1.165-1(a) (1969), governing the allowance of the deduction, or in Treas. Reg. § 1.165-1(b) (1964), explaining the nature of the loss allowance.

93. *See* text accompanying notes 129-31 *infra*.

94. Treas. Reg. § 1.167(a)-3 (1960). If the asset could qualify as an "organizational expense," then the cost of the asset might be amortizable pursuant to I.R.C. § 248.

95. 4 J. Mertens, Law of Federal Income Taxation § 23.124 (rev. vol. 1980), states that the term "amortization" is normally "employed to describe the loss in value due to the passage of time." For accounting purposes, the costs of operating rights have been amortizable since 1970. 4 AICPA Professional Standards (Accounting)(CCH) AC §§ 9499-9501 (1980); Miller, *supra* note 40, at 21.02.

96. Treas. Reg. § 1.167(a)-3 (1960). *See* Rev. Rul. 70-248, 1970-1 C.B. 172 (cost of renewable liquor license not depreciable since its life cannot be estimated with any degree of certainty); Rev. Rul. 67-113, 1967-1 C.B. 55 (cost of acquiring permanent certificates of public convenience from the Civil Aeronautics Board not amortizable unless temporarily issued). For analogous cases dealing with the ability to amortize intangible rights, see Houston Chronicle Publishing Co. v. United States, 481 F.2d 1240 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); Commissioner v. Indiana Broadcasting Corp., 350 F.2d 580 (7th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); Laird v. United States, 391 F. Supp. 656 (N.D. Ga. 1975); D.J. Campbell Co. v. United States, 370 F.2d 336 (Ct. Cl. 1966); Nachman v. Commissioner, 12 T.C. 1204 (1949).

97. *See* notes 39-40 *supra* and accompanying text.

98. Treas. Reg. § 1.165-1(b) (1977).

must have parted with something for tax purposes.[99] A decline, diminution, or shrinkage in value of an asset while it is still a part of the business and is being used in the business does not constitute a deductible loss.[100] A deduction is allowed when the asset becomes completely worthless.[101] Regulation 1.165-1(b) mandates that "substance and not mere form govern in determining a deductible loss."[102]

Regulation 1.165-2 limits section 165(a) by allowing for obsolescence deductions only in the case of nondepreciable property.[103] "Obsolescence" includes a "loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property, in a case where such business or transaction is discontinued or where such property is permanently discarded from use therein."[104]

Revenue Ruling 56-600[105] is also pertinent to the question of whether the loss of the monopolistic right acquired with a certificate of public convenience and necessity may be deductible pursuant to section 165. In that Ruling the Treasury determined that the costs of acquiring and developing permanent air routes were capital expenditures that could be written off only when a route was abandoned and not merely when operations were suspended.

B. *The Cases*

A 1907 Supreme Court decision, *Tracy v. Ginzberg*,[106] provides an appropriate background for the examination of the common law

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99. Citizens Bank v. Commissioner, 252 F.2d 425 (4th Cir. 1958); Fairmont Foundry, Inc. v. Commissioner, 42 B.T.A. 1087 (1940).

100. 5 J. MERTENS, *supra* note 95, § 28.14; Reporter Publishing Co. v. Commissioner, 201 F.2d 743, 744 (10th Cir.), *cert. denied*, 345 U.S. 993 (1953). *See* Treas. Reg. § 1.165-1(b) (1977).

101. George Frietas Dairy, Inc. v. United States, 582 F.2d 500 (9th Cir. 1978)(deduction allowed when abandonment of private quota system rendered the quotas worthless); Hobbs v. Commissioner, B.T.A.M. (P-H) ¶ 32,081 (1932)(deduction allowed for abandoned oil leases); Fuller v. Commissioner, 11 B.T.A. 1025 (1928)(deduction allowed when bus operating rights declared void).

102. *See* Ungar v. Commissioner, 204 F.2d 322, 324 (2d Cir. 1953).

103. Prior to January 15, 1960, when the regulation was adopted, § 165 applied to obsolescence losses of both depreciable and nondepreciable property. [1981] 2 STAND. FED. TAX REP. (CCH) ¶ 1535.01.

104. Treas. Reg. § 1.165-2(a) (1960).

105. 1956-2 C.B. 171.

106. 205 U.S. 170 (1907). The case was decided before the Congress enacted the income tax law in 1913, but later tax cases rely upon the principles of law enunciated in tbe opinion.

relating to tax deductions for the loss of a valuable monopolistic right. Tracy brought suit against Ginzberg, a trustee in bankruptcy, to recover $3,000, the cost of a liquor license.[107] Tracy alleged that Ginzberg had procured the police commissioners' cancellation of the license.[108] The lower court rendered judgment for Ginzberg and the Supreme Judicial Court of Massachusetts affirmed the decision.[109] On appeal to the United States Supreme Court, Tracy argued that the police commissioners and the state courts had deprived him of property without due process of law in violation of the fourteenth amendment.[110] In attempting to classify his cancelled license as a property right, Tracy argued that "[t]he word property is legally understood to include every class of acquisitions which a man can own or have an interest in," and that "a privilege," like a franchise, "is intangible property, and is recognized and protected as property."[111] While acknowledging that Massachusetts courts had indeed recognized liquor licenses as property rights,[112] the Court held that Tracy had not been deprived of property without due process of law because "the expectation called a right or property was of the board's creation and therefore subject to the limitations which the board imposed."[113]

1. The Liquor License Cases

The Prohibition Act of 1918[114] abolished state-issued liquor licenses and forced the IRS to confront taxpayers' claims for losses of monopolistic rights as deductions from gross income. The IRS and the courts began to develop a body of law governing those loss deductions. The established custom of licensing boards in many cities and states was to issue annual licenses only to those holding

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107. *Id.* at 171-72.
108. *Id.* at 172.
109. *Id.* at 173.
110. *Id.* at 177.
111. *Id.* at 175.
112. *Id.* at 172.
113. *Id.* at 177. In making a determination that the state court had not deprived the petitioner of property without due process of law, the Court defined such a deprivation as "an arbitrary exercise of power, inconsistent with 'those settled nsages and modes of proceeding existing in England before the emigration of our ancestors,'" and then held that the state court in *Tracy* had not departed from those usages or modes of proceeding. *Id.* at 178 (quoting Den v. Hoboken Land & Improvement Co., 17 U.S. (18 How.) 272, 277 (1855)). The Court explained that if they had decided otherwise, "every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of." 205 U.S. at 178.
114. Ch. 85, 41 Stat. 305 (1919).

licenses for the previous year.[115] Holders paid a fee each year for the license itself, but severe limitations on the number of liquor licenses issued and the free transferability of existing licenses increased the value of the renewal rights accruing to the holder of a license far above the annual fee.[116]

Zakon v. Commissioner,[117] the first liquor license case to be reviewed by the Board of Tax Appeals (Board), involved the purchase of a liquor license by Zakon in 1911 from another individual for $11,000. When that annual license expired, Zakon exercised his renewal rights, obtained a license in his own name, and began a business that he continued until 1919.[118] After the enactment of the prohibition legislation, Zakon claimed a loss of $35,000, the fair market value of the license, under either section 214(a)(4)[119] or section 214(a)(8).[120] The Commissioner disallowed the deduction under both sections.

In examining the disallowance, the Board emphasized that, because officials routinely issue a new license to the transferee of a license holder, "the [new] holder of such a license had an asset which had a value entirely separate and distinct from the right to conduct the business of a liquor dealer for the remainder of the year for which such license was issued."[121] Citing *Tracy v. Ginzberg,* the Board held that Massachusetts recognized the "intangible right which appertained to the ownership of the annual license as a property right," and that, since his rights were rendered worthless in 1919, Zakon was entitled to a loss for income tax purposes in the amount of the cost of the license.[122] According to the Board, the applicable code section was 214(a)(4) (current section 165).[123] The court implied that if the renewal rights could not be classified as property rights under state law, then the rights would not be deductible. The Note will refer to this dichotomization of the bundle of rights appertaining to a license as the "separate and apart theory." This theory divides the bundle of rights into the

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115. Zakon v. Commissioner, 7 B.T.A. 687 (1927).

116. *Id.* at 688.

117. 7 B.T.A. 687 (1927).

118. *Id.*

119. Ch. 18, 40 Stat. 1057, 1067 (1919)(current version at I.R.C. § 165).

120. *Id.* (current version at I.R.C. § 167).

121. 7 B.T.A. at 689.

122. *Id.* at 690.

123. The Board stated that § 214(a)(8) was not the proper code section because the record showed no evidence of exhaustion, wear, tear, or obsolescence of the license prior to 1919. *Id.*

value attributable to the renewal rights (monopolistic rights) and the value attributable to the right to conduct the business.

McAvoy v. Commissioner[124] illustrates clearly the *Zakon* dichotomization of the bundle of rights acquired by the purchaser of a liquor license. In *McAvoy* the Board of Tax Appeals considered *Zakon* controlling in deciding to allow petitioner a deduction for the loss of saloon license renewal rights in 1919. Unlike *Zakon,* however, the taxpayer in *McAvoy* purchased and owned only the renewal rights for saloon licenses and not the licenses themselves.[125] Prior to 1917 the McAvoy Company, a Chicago brewery, had purchased the renewal rights of 131 saloon licenses.[126] The city then issued the licenses to saloon operators who would agree to purchase the brewery's product.[127] When McAvoy's renewal rights lost all their value in 1919, the company claimed the cost of the renewal rights as deductions from gross income under code sections 234(a)(4) and 234(a)(7) of the Revenue Act of 1918.[128] The Commissioner disallowed the loss "since the petitioner did not own property which it lost when prohibition became effective."[129] This rationale forced the Board, upon McAvoy's appeal, to consider the question whether renewal rights absent ownership of the actual license constituted "property" for income tax purposes. The Board concluded that "[w]hile that which petitioner lost may not conform to some technical definition of property, it cannot be denied that the petitioner acquired something of value which it subsequently lost."[130] Emphasizing the substance of the issue over the form, the Board stated that "[p]etitioner paid substantial amounts for these assets, and this investment was lost when prohibition became effective and their [the assets'] use or value to it ceased to exist."[131]

Justice Holmes expounded upon the effects of the Prohibition

124. 10 B.T.A. 1017 (1928).

125. *Id.* at 1021. *See* Best Brewery v. Commissioner, 16 B.T.A. 1354 (1929).

126. 10 B.T.A. at 1018-19. A corporation could not legally hold a liquor license in its own name. *Id.* at 1021. Therefore, each seller licensee assigned the rights to an employee of the brewery who then, upon expiration of the license period and payment of the annual renewal fee, reassigned the license to a saloon selected by the corporation. *Id.* at 1019.

127. *Id.* at 1021. The City of Chicago approved and, in fact, facilitated this practice of purchasing and assigning renewal rights among those who had some interest in the liquor business. City officials recognized that the practice would avoid the loss of fees that would ordinarily result from the lapsing of saloon licenses. *Id.* at 1019.

128. Ch. 18, 40 Stat. 1078 (1919) (current versions at I.R.C. §§ 165, 167).

129. 10 B.T.A. at 1021.

130. *Id.*

131. *Id.*

Act on the liquor manufacturing industries and tax deductions of losses incurred by breweries in two companion cases, *Clarke v. Haberle Crystal Springs Brewing Co.*[132] and *Renziehausen v. Commissioner.*[133] Federal prohibition legislation terminated the businesses of both breweries, and both claimed losses for obsolescence of goodwill under section 234(a)(7).[134] In concluding tbat Congress could not have intended to compensate for such a loss by using the words "exhaustion and goodwill,"[135] Justice Holmes said that "[i]t seems to us plain . . . that when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government . . . . "[136]

In a subsequent case, *Gambrinus Brewery Co. v. Anderson,*[137] the IRS relied upon *Clarke* and *Renziehausen* for the proposition that no deductions could be allowed for losses caused by the Prohibiton Act. Thus, the Commissioner denied Gambrinus Brewery Company's deduction for an obsolescence loss on its buildings after prohibition terminated the company's business.[138] The case ultimately reached the Supreme Court, and the Court used the opportunity to dilute the strong language of its two earlier opinions by limiting the cases to the denial of a deduction for the obsolescence of goodwill.[139] Accordingly, the Court allowed Gambrinus' deduction of the tangible asset.[140]

Even after *Gambrinus* some uncertainty existed concerning the deductibility of losses of intangible property resulting from the enactment of prohibition legislation. *Elston Co. v. United States*[141] involved a company's attempt to recover corporate income taxes paid for the year of 1919. Prior to 1918 the brewery had purchased renewal rights of 382 liquor licenses for $258,575.70, and it claimed deductions for the loss in that amount under code sections 202(a)[142] and 234(a)(4).[143] The Court of Claims observed that the

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132. 280 U.S. 384 (1930). The Court was reviewing the judgment of an appellate court.
133. 280 U.S. 387 (1930). This case came to the Court from the Board of Tax Appeals.
134. Ch. 18, 40 Stat. 1078 (1919) (current version at I.R.C. § 167).
135. Clarke v. Haherle Crystal Springs Brewing Co., 280 U.S. 384, 386 (1930).
136. *Id.* Justice Holmes also asserted that "it is incredible that Congress . . . should have meant to enable parties to cut down their taxes on such grounds because of an amendment to the Constitution . . . . " *Id.* at 387.
137. 282 U.S. 638 (1931).
138. *Id.* at 638-39.
139. *Id.* at 641-42.
140. *Id.* at 645.
141. 21 F. Supp. 267 (Ct. Cl. 1938).
142. Ch. 18, 40 Stat. 1060 (1919) (current version at I.R.C. §§ 1011, 1012, 1016).
143. Ch. 18, 40 Stat. 1078 (1919) (current version at I.R.C. § 165).

renewal rights of saloon licenses were income-producing assets[144] that were recognized as property by trustees in bankruptcy and by the federal courts.[145] The Court then held that when "new legislation directly or indirectly makes the continued profitable use of the property impossible" and that property must be prematurely discarded from use in the business, then a loss is allowable under section 234(a)(4).[146] Again, as in *McAvoy*, the loss involved only the monopolistic aspects of the licenses since the brewery did not hold the licenses to operate the saloons.

2. The Leading Transportation Case: *Consolidated Freight*

In *Consolidated Freight Lines, Inc. v. Commissioner*[147] a federal court first addressed the question of whether a deduction from gross income may be taken for an alleged loss of a monopoly in the field of transportation for hire. The State of Washington had begun to regulate intrastate motor carriers pursuant to a 1921 statute by issuing or withholding certificates of public convenience and necessity.[148] The state automatically issued certificates to all carriers in operation on January 15, 1921, and it immediately approved applications for operating authority in new territory where no other company operated.[149] Competitive lines later seeking authority, however, could obtain certificates only when the existing line failed to provide satisfactory service.[150] The effect of the legislation was to grant monopolies to the original carriers in each territory and to perpetuate the monopoly in successors who acquired the certificates from the original carriers.[151]

Consolidated Freight Lines had purchased a certificate from another company for $84,388.98.[152] In 1934 the Washington legisla-

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144. Elston Co. v. United States, 21 F. Supp. 267, 274 (Ct. Cl. 1938).

145. *Id.*

146. *Id.* at 273 (quoting Article 143 of Regulations 45, promulgated for the administration of the 1918 Act). The court, in granting Elston Company a refund, stated that "[c]areful search discloses no case in which the Supreme Court or any other court . . . has held that a loss claim similar to the one involved here is not deductible." *Id.*

147. 101 F.2d 813 (9th Cir.), *cert. denied,* 308 U.S. 562 (1939).

148. *Id.* at 813.

149. *Id.*

150. *Id.*

151. Consolidated Freight Lines, Inc. v. Commissioner, 37 B.T.A. 576 (1938). The certificates could be inherited, assigned, leased, sold, and mortgaged; they were taxable as personal property. *Id.* at 582.

152. Consolidated Freight Lines, Inc. v. Commissioner, 101 F.2d 813, 813 (9th Cir. 1939).

ture destroyed by statute[153] the exclusive characteristics of the rights created under the 1921 act by allowing the state to issue certificates to competing lines.[154] In its income tax return for the year 1934, Consolidated Freight Lines deducted a loss in the amount of $84,388.98, claiming that the destruction of the monopolistic rights rendered its certificate worthless.[155] The IRS disallowed the deduction and the company appealed. The Board of Tax Appeals considered *Gambrinus, Zakon, McAvoy,* and *Elston* and admitted that the facts of those cases were very similar to the facts at hand.[156] The Board, however, distinguished *Consolidated Freight* from the liquor license cases by emphasizing that in the latter cases the entire businesses had been destroyed.[157]

The Board refused to find that the monopolistic feature of the certificate had a value "separate and apart" from the operation of the business.[158] Instead, the Board described the bundle of rights acquired by a certificate holder as a "complete enmeshing of the monopolistic and operating aspects of the certificate."[159] This theory, referred to as the "enmeshing theory" in this Note, precluded allowance of the deduction because the taxpayer suffered only a diminution in the value of the certificate. The Board affirmed the Commissioner's decision, but then curiously offered some hope to pre-1934 certificate holders by remarking that "[a]ssuming . . . the monopolistic features of the certificates . . . had some value apart from the operative rights . . . the petitioner has not shown what part of cost is attributable separately to those features," and "[h]ence it has not established its basis for gain or loss."[160] The inconsistency of this observation with the Board's "enmeshing the-

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153. Ch. 55, Extraordinary Sessions Laws of 1933, p. 138 (1934).

154. 37 B.T.A. at 578.

155. 101 F.2d at 813.

156. 37 B.T.A. at 581. The Board quoted Elston Co. v. United States, 21 F. Supp. 267, 274 (Ct. Cl. 1938):

> [T]he renewal rights of saloon licenses in [*Zakon* and *McAvoy*] . . . as in the instant case, were income producing assets, subject to purchase, sale and assignment, separate from the business itself. They were assignable assets distinct from the business. In tbis respect they were in the same category with patents, contracts, and franchises.

37 B.T.A. at 582.

157. *Id.* The court pointed out that *Elston* does not "stand for the allowance of deductions in respect of licenses where the business goes on despite a change in some feature or characteristic of the license." *Id.*

158. *Id.* at 581.

159. *Id.* The Board reasoned that, if the carrier did not satisfactorily serve the public, the state could issue a certificate to another carrier and thereby destroy the monopoly. *Id.*

160. *Id.* at 582.

ory" has led to confusion in subsequent cases.[161]

After Consolidated Freight Lines appealed, the Ninth Circuit again scrutinized and then dichotomized the nature of the rights acquired with a certificate of public convenience and necessity. Rejecting the Board's "enmeshing theory," the court determined that the monopoly was not an element of the certificate, but instead was a "thing" conferred by statute.[162] Because renewal rights for saloon licenses also fit this unique classification as "things" conferred by statute, the way was clear for the court to follow *Zakon* and *McAvoy*. Ignoring the liquor license cases, however, the court chose instead to follow different precedent: "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."[163] For that reason, and because the 1934 statute left the certificate itself unchanged vis-à-vis the "separate and apart theory," the court upheld the Board's disallowance of the deduction without accepting its reasoning.[164]

Since 1939 courts have cited *Consolidated Freight* as the leading case when a taxpayer claims a deduction for loss of a monopolistic right. The courts have not always understood the two theories of the nature of these rights, the "enmeshing theory" and the "separate and apart theory," but application of either theory results in disallowance of a deduction for the taxpayer.

3. The Aftermath of *Consolidated Freight*

During World War II, as a result of the purchase of National Candy Company's going business, Chase Candy Company acquired valuable monopolistic rights to purchase and use government-rationed sugar and chocolate.[165] When the government discontinued sugar rationing, Chase Candy Company sued to recover corporate income taxes allegedly overpaid, claiming that the amount paid for the sugar purchase rights, $971,026 out of a total purchase price of $425,000,000, should be deductible from gross income.[166] The company proffered three alternative theories in support of the deduction. First, it argued that the cost of the sugar purchase rights was

161. *See* text accompanying notes 171, 175 & 202 *infra*.

162. Consolidated Freight Lines, Inc. v. Commissioner 101 F.2d 813, 814 (9th Cir. 1939).

163. *Id.*, (citing New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917), and Second Employers' Liability Cases, 223 U.S. 1, 50 (1911)).

164. 101 F.2d at 814.

165. Chase Candy Co. v. United States, 126 F. Supp. 521 (Ct. Cl. 1954).

166. *Id.* at 521-22.

deductible under section 23(a)(1)(A) as an ordinary and necessary business expense.[167] Second, the company maintained that the monopolistic rights had a separate value of $971,026 that was allowable as a loss upon property becoming worthless or abandoned under section 23(f).[168] Last, Chase Candy argued that the cost of the rights should be deductible as depreciation under section 23(l)(1).[169] The court, however, stated flatly that the amount paid "did not include the thing which was destroyed"[170] and disallowed the deduction.

In a dissenting opinion, Judge Madden disregarded the theoretical form over substance analysis and, in support of the deduction, reasoned that

> [i]f, in fact, one has paid for a license or franchise, whether he has paid for it to a city or state, or to an owner of a business to which the right is appurtenant because of some "grandfather" provision in the applicable laws, he is out the money, and if, by reason of a cbange in the laws, be loses the monopoly granted by tbe license or franchise, I see no reason why his true status should not be recognized by the tax authorities.[171]

In 1945 the Supreme Court held that the Associated Press (AP) bylaws that granted exclusive membership in the AP and the exclusive right to AP services in a community were illegal under the Sherman Act.[172] Soon thereafter, Associated Press members attempted to deduct losses of monopolistic rights on their income tax returns, arguing that their memberships had become worthless. In *Reporter Publishing Co. v. Commissioner*[173] the taxpayer reduced the book value of its AP membership and claimed a deduction for tax purposes in the amount of the reduction.[174] The Court of Appeals for the Tenth Circuit relied upon but apparently misread *Consolidated Freight* and refused to consider the monopolistic right as separate from the membership.[175] Applying the "en-

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167. *Id.* at 522. The court rejected this argument because the amount paid was "more analagous to a capital outlay than to an ordinary and necessary business expense." *Id.* at 524.

168. The court reminded the petitioner that the *Consolidated Freight* court had rejected such a line of reasoning. The court explained that the monopoly was conferred by statute. *Id.* at 525.

169. *Id.* The court dismissed this argument without discussion.

170. *Id.* at 526. The court noted that "plaintiff's situation is similar to that of the taxpayer in Consolidated Freight Lines." *Id.*

171. *Id.* (Madden, J., dissenting).

172. Associated Press v. United States, 326 U.S. 1 (1945).

173. 201 F.2d 743 (10th Cir.), *cert. denied,* 345 U.S. 993 (1953).

174. *Id.* at 744.

175. *Id.* at 745.

meshing theory" of the Board in *Consolidated Freight,* the court determined that the destruction of the AP monopoly resulted only in a diminution in the value of the memhership.[176] Because plaintiff still used the AP membership to receive services, the court refused to allow the deduction.[177]

The taxpayer in *New York Sun, Inc. v. Commissioner*[178] used a different approach in claiming its loss of the AP monopolistic right.[179] The *Sun* had carried the membership on its books in an account captioned "Franchise, Circulation and Goodwill."[180] After the Supreme Court invalidated the monopolistic provisions of the AP bylaws, the newspaper company contended that the franchise consisting principally of the AP membership was a separate and distinct intangible asset and that the full cost of the membership was deductible as a loss for tax purposes even though the *Sun* continued to use the membership in its business.[181] The Tax Court rejected the *Sun*'s theory and held that the loss was not deductible.[182]

If the courts had applied fully the "separate and apart theory" and the reasoning of *Consolidated Freight* to these Associated Press cases, they could have sustained the loss deductions because a private entity and not a statute created the right of monopoly. The AP cases were distinguishable from *Consolidated Freight.* Arguably, the newspapers had a vested interest in their AP memberships. The implication of the AP cases is that whether a monopoly is created by statute or by a private entity, no person has a vested right in any monopoly "entitling him to insist that it shall remain unchanged for his benefit." Because the courts applied the "enmeshing theory," however, they never actually reached the question of whether a taxpayer has a vested interest in the monopoly; instead, they denied the loss deduction on the basis of "a mere diminution in value of an asset."

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176. *Id.*

177. *Id.*

178. 27 T.C. 319 (1956).

179. *Id.* at 329. The petitioner contended that he claimed his loss not because of the Supreme Court decision hut because the AP voluntarily eliminated the initial charge for an AP membership. *Id.*

180. *Id.* at 320.

181. *Id.* at 326.

182. *Id.* at 328-30. The court recognized that the *Sun* had lost valuahle rigbts to receive payment from new members and to use the membership for purposes of obtaining credit, but commented that the membership "did not become worthless within the intendment of the statute and the regulations." *Id.* at 329.

If the courts' reasoning in the Associated Press cases departed from the theory advanced by the Ninth Circuit in *Consolidated Freight,* the Court of Claims had the opportunity to set the jurisprudence back on course in *Parmalee Transportation Co. v. United States.*[183] Since 1853 Parmalee Transportation Company and its predecessor in interest[184] had held by informal arrangements the exclusive privilege of providing baggage and passenger transfer service for the eight railroads operating in Chicago.[185] The arrangements with the railroad had a book value of $1,322,819.05.[186] When the railroads terminated the arrangements in 1955 and gave a competitor the exclusive right to the transfer service, Parmalee wrote off the $1,322,819.05 and, claiming an ordinary loss under section 165, sued for a refund of taxes paid.[187]

In opposing the deduction, the government revived the argument that the taxpayer's loss did not involve "property" for purposes of the Code. Utilizing a word from *Tracy v. Ginzberg* without citing the case, the government maintained that Parmalee had a mere "expectancy" that railroads would continue the exclusive arrangements.[188] The court agreed that the taxpayer had an expectancy in the continuation of the exclusive arrangements, but it accused the government of adopting an "unduly formalistic" viewpoint and of failing "to take account of the breadth of the concept of 'property' in tax law."[189] Distinguishing *Parmalee* from *Consolidated Freight,* the court reasoned that this "expectancy" was different from that created by statute, that it approached being a property right, and that it should be considered "property" for income tax purposes.[190]

183. 351 F.2d 619 (Ct. Cl. 1965). Instead, the *Parmalee* court cautioned in a footnote that "[a]lthough a substantial portion of this opinion relates to the issue of whether the claimed loss is deductible under the tax laws, we stress that this is *dicta only* and will have no collateral estoppel effect in any other forum." *Id.* at 621 n.1 (emphasis added).

184. After a 1934 liquidation of the Parmalee Company, the Parmalee Transportation Company succeeded to the business and carried the excess book value over tangible assets in an account entitled "Intangible Assets." *Id.* at 622.

185. *Id.* at 621. Parmalee had a written contract with only one of the railroads. *Id.*

186. *Id.* at 622.

187. *Id.* at 622-23.

188. *Id.* at 623. In support of this analysis, the government proffered the following three arguments: first, unlike franchises, patents, and licenses, the arrangements were not readily assignable; second, the exclusive arrangements could be granted only by railroads; and last, because the taxpayer had paid nothing for the exclusive arrangements, the intangible assets were actually "good will" that cannot be deducted as a loss when it is destroyed. *Id.* at 623.

189. *Id.* at 623.

190. *Id.* at 624.

The court distinguished *Parmalee* from *Consolidated Freight* and *Chase Candy Co.* by noting that, in those cases the taxpayers had tried to assert the existence of a property right in a state-created monopoly.[191] The court observed that "[t]here can be little doubt that no person has a vested interest in a public law which entitles him to insist that it not be changed."[192] Finally, the court noted that Consolidated Freight Lines and Chase Candy Company had continued to operate their businesses after statutes abolished their monopolistic rights, while Parmalee was completely excluded from the business.[193] The court determined that the loss was allowable although it was not deductible in the year 1955.[194]

In 1966, in *Beatty v. Commissioner*,[195] the Tax Court considered an Arizona taxpayer's claim for a section 165 deduction of the amount paid for a liquor license. Beatty had purchased the license both as an investment[196] and for the purpose of operating a liquor business.[197] Shortly thereafter, in order to curtail speculation in liquor licenses, the Arizona legislature amended the liquor laws to preclude any assignment, transfer, or sale of licenses unless the owner transferred the entire business in a "bona fide bulk sale," and to authorize issuance of additional licenses.[198] If a license remained inactive for six months, it would revert to the state, which could then issue it to someone else.[199] Beatty claimed that the amendment rendered his license worthless, and he deducted a $25,000 loss on his 1961 income tax return.[200] The Commissioner denied the deduction. On appeal Beatty argued *Zakon*'s "separate and apart theory,"[201] but the court, influenced by the Board's deci-

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191. *Id.* The courts deciding the AP cases did not find this factor to be significant.

192. *Id.* (citing New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917)). The court qualified the statement in the following footnote: "Elston [sic] . . . would have been an altogether different case had the Prohibition laws not been involved, but rather had the City of Chicago issued two or three times the number of licenses—or abolished the licensing system." (citation omitted) *Id.* at 624 n.3.

193. *Id.* at 624.

194. *Id.* at 629.

195. 46 T.C. 835 (1966).

196. Arizona had limited the number of licenses issued and had required the holders of the liquor licenses to renew them annually upon payment of a renewal fee. Because this practice enhanced the value of license renewal rights and because the rights were freely transferable, liquor licenses were often purchased as investments. *See id.* at 841.

197. *Id.* at 836.

198. *Id.* at 837.

199. *Id.*

200. *Id.* at 838.

201. Beatty based his arguments on *Zakon, Consolidated Freight,* and four Arizona cases. The four state cases were cited to support his contention that the liquor license em-

sion in *Consolidated Freight,* rejected that theory and insisted that the taxpayer had suffered a mere diminution in the value of his license because he was still using the liquor license in his business.[202] Therefore, it affirmed the Commissioner's disallowance of the loss.[203]

Beatty offered one new argument that courts had not considered in other cases involving the loss of monopolistic rights. He suggested that his case was distinguishable from *Consolidated Freight* by quoting the following statement from that opinion: "[T]here is no showing that the certificates were bought and sold like shares of stock or bonds which are so often held by the owner for income or appreciation without thought of his engaging in the business."[204] Because the liquor licenses were traded like shares of stock or bonds, Beatty argued that the language in *Consolidated Freight* supported his deduction.[205] The court quelled that argument by pointing out that Beatty was not a "pure investor."[206] The court, however, did expressly leave open the question of whether "a 'pure investor' who bought a liquor license for speculative purposes might be treated differently."[207]

Tax law regarding deductions from gross income for the loss of monopolistic rights has been firmly settled in the forty years since *Consolidated Freight.* A court will not allow a deduction for the loss of a monopolistic right if legislative or judicial action destroys the monopoly and if the taxpayer retains any other use of the underlying license.[208] If a taxpayer holds only the monopolistic characteristic of the license and the monopoly is destroyed, then a

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bodied valuable property rights separate and apart from the license to do business and that those rights could be enforced against a third party. The court noted that local law does not control a taxpayer's right to a deduction for federal tax purposes. *Id.* at 839.

202. *Id.* Additionally, the court pointed out that the severing of the monopolistic rights from the license itself would soon nullify the rule of "mere diminution" because every taxpayer would separate his assets into their different purposes and write off the cost of each element if that purpose was destroyed. *Id.* at 841-42 (citing Louisiana Land & Exploration Co., 7 T.C. 507, 518 (1946), *aff'd,* 161 F.2d 842 (5th Cir. 1947).

203. The court based its decision on the ground that there was no closed transaction. 46 T.C. at 839-40. *See* Treas. Reg. § 1.165-1(b) (1964).

204. 46 T.C. at 841 (quoting Consolidated Freight Lines, Inc. v. Commissioner, 37 B.T.A. 576, 580-81 (1938).

205. 46 T.C. at 841.

206. *Id.* The court analogized Beatty's case to *Reporter Publishing Co.,* in which "continued use [of the asset] negated any claim of worthlessness." *Id.* at 840.

207. *Id.* at 841.

208. If a private entity destroys the monopolistic right, a deduction may be allowed. *See* notes 183-94 *supra* and accompanying text.

court may allow the deduction of the loss.[209] Undoubtedly, in 1980, both the IRS and the Tax Court would take the position that trucking companies could not claim a section 165 deduction for the loss of the monopolistic right acquired with a certificate of public convenience and necessity.

IV. Theories for Compensating Deregulated Carriers

A. *Compensation Within Present Tax Law*

A deregulated carrier could argue various theories in support of its claim for a deduction for the loss of its operating rights. A farfetched notion would be to donate the certificate to a qualified charity and to deduct the contribution pursuant to section 170.[210] More realistically, however, a trucking company that claims a loss pursuant to section 165 might prevail on appeal in a circuit that has not ruled on the issue of the deductibility of the loss of a monopolistic right, or in a district court refund suit with a jury trial, or in a court presided over by a "Madden-type judge."[211] Taxpayers who have argued for the deductibility of the losses of monopolistic rights have presented various ingenious arguments in the past. The trucking companies must now construct new theories or alter the focus of some of the old arguments to convince a jury or a judge that the deduction should be allowed. The "substance over form" requirement of Regulation section 1.165-1(b) provides one favorable option to the taxpayer. This part of the Note considers plausible arguments that support the allowance of a section 165 deduction for trucking companies within the present income tax law.

Under the "enmeshing theory," the taxpayer could argue that the basic nature of a certificate of public convenience and necessity has changed. Although the taxpayer could capitalize the cost of the certificate at the time of acquisition, the certificate is now worthless *as a capital asset*. Accordingly, the cost should be written off the books for all purposes, including tax purposes.

In the alternative, the taxpayer could utilize the "separate and apart theory." As the *Consolidated Freight* court found, the monopolistic right is a separate "thing" conferred by statute. The leg-

209. *See* Elston Co. v. United States, 21 F. Supp. 267 (Ct. Cl. 1939); McAvoy v. Commissioner, 10 B.T.A. 1017 (1928).

210. The company would then make application to the ICC for another certificate.

211. *See* text accompanying note 171 *supra*.

islature may change the statute at will or on "a whim."[212] The value of this "thing" was contingent upon a continuation of the ICC's restrictive policy in granting certificates. The Court denied the deduction in *Consolidated Freight* because it found that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. . . ."[213] That rationale can and should be challenged. The statement originated in a nineteenth century Supreme Court decision, *Munn v. Illinois*.[214]

In *Munn* petitioners operated a grain storage warehouse. The state of Illinois enacted legislation in 1871 that required licensing of public warehouses and set a maximum fee for the storage of grain.[215] In 1872 the state filed charges against Munn and Scott for operating a public warehouse without a license and for charging a rate higher than the statutory maximum for the storage and handling of grain.[216] The warehouse owners contended that, under the common law, the owner of property is entitled to reasonable compensation for its use, and that the amount of reasonable compensation is a question for the judiciary, not for the legislature.[217] The Court agreed that the judiciary must determine what is reasonable if the legislature has not enacted statutes governing the amount of compensation.[218]

Because the warehouse owners had established their business before the adoption of the regulations, they claimed that the legislation deprived them of property without due process of law.[219] The Court then enunciated the principle that "a person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other."[220] Conceding that the government cannot take away without due process property rights created by the common law, the Court asserted that "the law itself may be changed at the

212. *See* note 221 *infra* and accompanying text.

213. 101 F.2d at 814 (quoting New York Cent. R. R. v. White, 243 U.S. 188, 198 (1917). A question that arises is whether the holders of liquor licenses had a vested right in the law that required one who operated a liquor business to be licensed.

214. 94 U.S. 113 (1876).

215. *Id.* at 116.

216. *Id.* at 117-18.

217. *Id.* at 133-34.

218. *Id.*

219. *Id.* at 119-20.

220. *Id.* at 134.

will or even at the whim of the legislature . . . ."[221] The Court defined the issue as whether a state could regulate the charges for storage of grain[222] and answered in the affirmative, but the Court failed to address the question of whether the state must pay compensation if the regulation deprives the owner of property. Munn had only questioned the constitutionality of the state's regulation; he had not claimed a fifth amendment taking of property without just compensation.[223] The dissenting opinion insisted that the state could take a citizen's property only if it pays just compensation.[224]

In *Consolidated Freight* the court essentially followed *Munn* by holding that the state could regulate private industry that is affected with a public interest.[225] The court, however, failed to reach the critical question posed implicitly by the taxpayer: whether the state must compensate a citizen if the state changes a law and the change results in the citizen's loss of property. Future courts might be willing to answer that question in the affirmative by determining that compensation is due the taxpayer for property loss (a monopolistic right) resulting from the Motor Carrier Act of 1980. Such a determination could result in a section 165 deduction from gross income in computing taxable income for the year of 1980. If a court does not allow compensation in the form of a reduction in taxes, a trucking company might consider a fifth amendment taking action in district court.

B. *Just Compensation for a Fifth Amendment Taking*

The fifth amendment guarantees that "private property shall not be taken for public use without just compensation."[226] Several days before the President signed the Motor Carrier Act of 1980, the Supreme Court, in *Agins v. City of Tiburon*,[227] held that a determination that government action constitutes a taking is, "in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[228] The modification of trucking regulation will cost formerly regulated trucking companies, at a minimum, the

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221. *Id.*
222. *Id.* at 123. *See also* Farris, *supra* note 71, at 312-18.
223. *See* Part IV, Section B *infra*.
224. 94 U.S. at 145 (Field, J., dissenting).
225. 101 F.2d 813 (9th Cir.), *cert. denied*, 308 U.S. 562 (1939).
226. U.S. CONST. amend. V.
227. 447 U.S. 255 (1980).
228. *Id.* at 260.

amounts paid for operating rights. The question then is whether the companies or the public at large should bear this cost. This part of the Note first examines "takings clause" law and then applies the law to the changes effected by the 1980 Act in the value of certificates of convenience and necessity.

1. "Taking" Law

Courts have never developed a definite formula for determining whether government action results in a taking for which the property owner must be compensated.[229] Justice Holmes noted in *Pennsylvania Coal Co. v. Mahon*[230] that the judgment of the legislature is given the greatest weight but that any citizen who feels that the legislature has exceeded its power may bring a taking action.[231] In *Mahon* a coal company had sold the surface of real property for residential use while retaining mining rights, but the Pennsylvania legislature later enacted a statute that prohibited mining beneath houses.[232] The taking claimant contended that the measure was in reality "not legislation" but "robbery under the forms of law."[233] The Court determined that a property owner was entitled to compensation when, as a result of the government action, the extent of diminution in property value reached "a certain magnitude."[234] Because this holding went beyond any case previously decided by the Court, and because the mining rights were rendered worthless, the Court held that the passage of the statute effectuated a compensable taking.[235] The vagueness of the "diminution in value" test developed in *Mahon* has prompted the Supreme Court to cover takings clause actions with the standard assurance that the Court's determination of whether a taking requiring compensation has occurred will depend upon the facts and circumstances of each case.[236]

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229. *See generally* Agins v. City of Tiburon, 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

230. 260 U.S. 393 (1922).

231. *Id.* at 413.

232. *Id.* at 412-13.

233. *Id.* at 397 (citing Loan Assoc. v. Topeka, 87 U.S. (20 Wall.) 655 (1874)).

234. 260 U.S. at 413.

235. *Id.* at 416. The separation in ownership of the mining rights from the balance of the fee simple was critical to the Court's finding that a taking had occurred. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1230 (1967).

236. 260 U.S. at 413; *accord*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104,

In *United States v. General Motors Corp.*,[237] a 1945 case involving the taking of a leasehold interest, the Court identified the critical issues in a taking claim as follows: first, whether the "thing" claimed to have been taken by government action is appropriately classified as a "property interest" protectible under the takings clause; second, whether a "taking" has actually occurred; and third, the amount of "just compensation" if a taking of property has indeed occurred.[238] The Court broadly defined "property" for purposes of the takings clause as "every sort of interest the citizen may possess."[239] In determining whether a taking had occurred, the Court focused on the extent of the former owner's deprivation rather than on the government's use or destruction of the property.[240] The Court concluded that if the effects of government action are so complete as to deprive the owner of all or most of his interest in the subject matter, then a taking has occurred.[241] In response to the third issue of determining "just compensation," the Court found that, in order to put the property owner in as good a position as if the property had not been taken, the government must pay market value.[242] In more recent decisions the Court has stated that the amount of compensation depends upon "basic equitable principles of fairness,"[243] that the amount is the "full monetary equivalent,"[244] and that "the amount . . . is for judicial rather than legislative determination."[245]

The threshold question critical to this Note is whether the "thing" claimed to have been taken by the government action is appropriately classified as a protectible "property interest." The Supreme Court has never expressly labeled a license or a monopolistic right a property right.[246] Massachusetts elevated a liquor license to the status of "property,"[247] and several states have held

123 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

237. 323 U.S. 373 (1945).

238. *Id.* at 377-80.

239. *Id.* at 378. The Court rejected the definition of property as the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *Id.* at 377.

240. *Id.* at 378.

241. *Id.*

242. *Id.* at 379.

243. United States v. Fuller, 409 U.S. 488, 490 (1973).

244. United States v. Reynolds, 397 U.S. 14, 16 (1970).

245. Cahill v. Cedar County, 367 F. Supp. 39, 44 (N.D. Iowa 1973), *aff'd mem.*, 419 U.S. 806 (1974).

246. *See* text accompanying notes 111-13 *supra*.

247. Tracy v. Ginzberg, 205 U.S. 170, 172 (1907).

that a franchise is "property" for purposes of a compensable taking.[248] Some states, however, do not define "property" in liberal terms. The Delaware courts maintain consistently that a "mere" license or permit is not a property right in either the constitutional or legal sense of the word.[249] When the holder of a state-issued certificate of public convenience and necessity brought a taking action to recover compensation for the loss of bus routes, the court denied the claim.[250] The court discussed the distinction between a certificate or license that can be amended or revoked at will by a grantor and a franchise that springs from a contract between the sovereign power and a private citizen for valuable consideration and then concluded that the certificate does not represent a property right.[251] The fact that the certificate was not transferable was important to this decision.[252]

In *Penn Central Transportation Co. v. New York City*[253] the Court reviewed the significant factors that have shaped the jurisprudence of the fifth amendment takings clause: the economic impact of the government action on the claimant, the character of the government action, and the reason for the government action. The Court observed that a finding of a taking is more probable when the government action has greatly "interfered with distinct investment-backed expectations" of the claimant, when the government has physically invaded the property,[254] and when the action is taken to promote a uniquely public purpose.[255] The transportation

248. United States v. Puget Sound Power & Light Co., 147 F.2d 953 (9th Cir. 1944)(franchise to erect and maintain power line poles and wires is personal property); City of Tucson v. El Rio Water Co., 101 Ariz. 49, 415 P.2d 872 (1966)(franchise is property for which compensation must be paid); *In re* Fifth Ave. Coach Lines, Inc., 22 N.Y.2d 613, 241 N.E.2d 717, 294 N.Y.S.2d 502 (1968), *remittitur amended,* 24 N.Y.2d 773, 247 N.E.2d 861, 300 N.Y.S.2d 41 (1969), *appeal after remand,* 34 App. Div. 2d 930, 312 N.Y.S.2d 592 (1970)(franchise is protected both by state and federal constitutions against substantial curtailment or destruction by government without payment of fair compensation). *Contra,* Citizens Utilities Co. v. Metropolitan Sanitary Dist., 25 Ill. App. 3d 252, 322 N.E.2d 857 (1974)(termination of franchise or permit that by its terms is revocable does not deprive owner of property that is constitutionally compensable).

249. Donovan v. Delaware Water & Air Resources Comm'n, 358 A.2d 717 (Del. 1976); Artesian Water Co. v. State Dept. of Highways & Transp., 330 A.2d 432 (Del. 1974); Greater Wilmington Transp. Auth. v. Kline, 285 A.2d 819 (Del. Super. 1971).

250. 285 A.2d at 823.

251. *Id.*

252. *Id.* The certificate "is personal in its character, is not transferable and does not pass by succession." *Id.*

253. 438 U.S. 104, 123-28 (1978).

254. *Id.* at 124.

255. *Id.* at 128.

company claimed that the city's statutory restrictions on the development of Union Station effected a fifth amendment taking requiring the payment of compensation.[256] In making the decision that a compensable taking had not occurred, the Court applied the same "diminution in value" test espoused in *Mahon,* but shifted the focus of the inquiry from the value of property *taken from* the owner to the value *remaining with* the owner after the government action. The Court then held that, although the restrictions promoted a public purpose, the property owner retained a reasonable beneficial use of the landmark site and that the law actually enhanced the owner's economic position.[257]

The holding in *Andrus v. Allard*[258] reflects the stringency of this new "reasonable beneficial use" test. In *Allard* the Court considered a government challenge to a district court's holding that Department of Interior regulations prohibiting the commercial transfer of certain species of birds effectuated a taking of property.[259] The appellees were engaged in the trade of Indian artifacts composed partially of feathers from birds protected by the regulations.[260] The Court first reiterated the right of the government to regulate and adjust private property rights for the public good, "subject only to the dictates of 'justice and fairness,' "[261] and then applied the "reasonable beneficial use" test developed in *Penn Central* to the facts of the case. In reversing the district court's finding of a taking, the Court considered significant the fact that the regulations compelled no surrender of the artifacts and involved no physical invasion of the property.[262] Because the regulations restricted only one method of disposing of the artifacts, the Court found that the restriction destroyed only one "strand" of the bundle of property rights possessed by the artifact owners and that the appellees retained the rights to possess and transport their property and to donate and devise the birds.[263] In the Court's

256. *Id.* at 107.
257. *Id.* at 138.
258. 444 U.S. 51 (1979).
259. *Id.* at 55.
260. *Id.* at 54.
261. *Id.* at 65 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). The Court stated that resolution of the conflict between private property rights and the public interest required not only the exercise of judgment but also the application of logic. 444 U.S. at 65.
262. *Id.*
263. *Id.* at 66. The Court suggested that the appellees charge admission to an exhibit of the artifacts. *Id.*

opinion, "the simple prohibition of the sale of lawfully acquired property in this case [did] not effect a taking."[264] The regulations, however, probably did not seem so "simple" to the appellees whose livelihood depended upon the ability to sell the artifacts. The effect of the Court's decision in *Allard* reinforces the appropriateness of Justice Holmes' warning in *Mahon* that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[265]

Assuming that operating rights are protectible "property," a trucking company could have met the pre-*Penn Central* "diminution in value" test for determining whether a compensable taking had occurred, for the entire bundle of rights acquired with a certificate of convenience and necessity lost most of its value when Congress enacted the 1980 legislation for the public benefit. With the advent of the "reasonable beneficial use" test, however, trucking companies face an uphill battle in proving that a compensable taking is the result of the new Motor Carrier Act. Favorable to the trucking companies, however, is the Court's continuing assurance[266] that it will decide each case upon its own particular facts and circumstances.

2. Application of the Law

A carrier seeking compensation for a fifth amendment taking of property may base a persuasive argument upon the recent Supreme Court pronouncement that the finding of a taking is essentially a finding that the public, and not a private business, should bear the burden of an exercise of state power in the public interest.[267] Congress initiated regulation of the motor carrier industry in 1935 in an attempt to alleviate chaotic conditions within the public transportation industry.[268] In exchange for operating authority, trucking companies agreed to meet standards imposed by the ICC.[269] The companies fulfulled their obligations, regulation was

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264. *Id.* at 67-68.

265. 260 U.S. 393, 416 (1922).

266. *See* text accompanying note 236 *supra*.

267. *See* text accompanying notes 227-28 *supra*. This statement, in effect, seems to echo Justice Holmes' comment in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), that the ultimate question in a takings case is who should pay for the change resulting from the government action.

268. Hayden, *supra* note 6, at 128.

269. Pub. L. No. 74-255, § 207(a), 49 Stat. 551-52 (current version at 49 U.S.C.A. § 10922 (West Supp. 1980)); *see* text accompanying note 21 *supra*.

successful, and in 1980 a congressional committee remarked that the industry was "a healthy industry that has effectively competed with other freight-hauling modes."[270] The nation's leaders, however, determined that deregulation of the industry was necessary and that it would be in the public interest.[271] The benefits of deregulation will inure to the public as did the benefits of regulation. Therefore, the trucking companies may argue that the general public should bear the cost of this deregulation. A court should also consider the fact that the legislature intended for deregulated carriers to be compensated for any loss in value of their operating rights.[272] Although legislators suggested tax relief legislation as a method of compensation, the House Committee on Public Works and Transportation did not rule out just compensation for a taking of property.[273]

In constructing legal theories to support a finding of a compensable taking of a trucking company's property, courts must again consider the nature of the bundle of rights acquired with a certificate of public convenience and necessity. If the monopolistic right is an asset separate and apart from the right to engage in interstate or foreign operation on public highways, and if the monopolistic right alone is a property interest protected under the fifth amendment, then a carrier might recover "just compensation" for a taking under the "reasonable beneficial use" test. Just as the mining rights were rendered worthless in *Mahon*,[274] the Motor Carrier Act of 1980 totally destroys the monopolistic right. The right can be distinguished from revocable franchises[275] and from a nontransferable certificate,[276] which have been denied status as compensable property.

If the monopolistic right is considered to be only one strand in the bundle of rights acquired with the certificate (the enmeshing theory), the trucking company must contend with the harsh rule of

270. H.R. REP. No. 1069, *supra* note 12, at 4110.

271. *See* Remarks on Signing S. 2245 into Law, *supra* note 60, at 1263; 125 CONG. REC. S3075-7 (daily ed. Mar. 21, 1979) (remarks of Senator Kennedy); *Senators Clashing on Trucking Bill*, N.Y. Times, Jan. 25, 1979, § D, at 1, col. 1.

272. H.R. REP. No. 1069, *supra* note 12, at 4109, 4119.

273. *Id.*

274. *See* text accompanying notes 230-36 *supra*.

275. *See* notes 33 & 111-13 *supra*. The certificate held by a moter carrier may be revoked only if the carrier fails to comply with ICC regulations, rules, and orders. Pub. L. No. 74-255, § 212(a), 49 Stat. 555 (1935).

276. *See* text accompanying notes 250-52 *supra*.

Allard[277] in order to prevail. Admittedly, the effect of deregulation on the trucking companies is similar to the effect of the prohibitive regulations in *Allard*. Like the artifact traders, the carriers lost a valuable intangible right. Under the *Allard* approach, however, the focus is on the property *retained* by the claimant. Prior to promulgation of the regulation by the Department of the Interior, the artifact traders owned tangible property, whereas the trucking companies owned only intangible property rights represented by a certificate prior to the Motor Carrier Act of 1980. After promulgation of the regulation, however, the traders retained *all* of their tangible property—a fact considered significant by the *Allard* Court. After passage of the Motor Carrier Act, the trucking companies retained only a part of the property—the right to operate the business. Thus, the carriers' cases may be distinguishable from *Allard* in that respect.

Courts should also give weight to the fact that a trucking company has outstanding investment loans backed by the operating rights. The Court's observation in *Penn Central*[278] that a taking will more likely be found when the government action has "greatly interfered with distinct investment-backed expectations" of the claimant is favorable to carriers. Not only did the lifting of restrictions on the granting of operating authority interfere with investment-backed expectations of the trucking companies, but the operating rights "taken" by the government also propped up those investments in many cases.

The carriers should emphasize the Supreme Court's assurance that "justice and fairness"[279] and "judgment . . . [and] logic"[280] govern a determination of whether a compensable taking has occurred. Since courts decide cases on an ad hoc basis, some carriers may recover in a taking action while other carriers may not be able to establish that a taking has occurred.

C. *Tax Legislation*

The House Committee on Public Works and Transportation recommended that appropriate relief for the carriers might lie in the enactment of new tax legislation.[281] In order to compensate

277. *See* text accompanying notes 258-64 *supra*.

278. *See* text accompanying notes 253-57 *supra*.

279. 438 U.S. 104, 124 (1978). It has been suggested that the only test for compensability should be the test of fairness. Michelman, *supra* note 235, at 1172.

280. 444 U.S. 51, 65 (1979).

281. H.R. Rep. No. 1069, *supra* note 12, at 4119.

fully for the trucking industry's losses, the legislation would have to authorize a credit in the amount of the cost of the operating rights.[282] A bill introduced in Congress on September 18, 1980, proposes a deduction, to be phased in over three years, in the amount of the greater of the "aggregate adjusted value" of the operating rights or $50,000.[283]

This Note suggests that the appropriate compensation is a tax deduction and that the proper amount of the deduction is the cost of the operating rights, since cost is consistent with other code provisions allowing deductions in the amount of the basis (cost) or adjusted basis of the asset lost.[284] This deduction would then equalize treatment of trucking companies and similarly situated taxpayers who suffer losses involving capital assets or property used in their trade or business.

V. Conclusion

The general public may derive all of the benefits promised by proponents of motor carrier deregulation,[285] but either the legislature or the judiciary should compensate the trucking companies for the loss in the value of their operating rights. Compensation pursuant to the fifth amendment takings clause could result in a revenue loss to the government in the amount of the market value of the rights. Thus, the least costly form of compensation for the government is a tax deduction from gross income in the amount of the cost of the rights. This deduction could be made available under the current law. The time has come for the courts to recognize the flaw in *Consolidated Freight*—the decision did not reach the heart of the issue before the court. A Supreme Court ruling would be necessary, however, in order to effect a change in the position of the Internal Revenue Service on the allowance of losses of monopolistic rights under section 165. Consequently, this Note proposes that, in the interest of time and equity, Congress should provide compensation immediately in the form of new legislation authorizing a special tax deduction in the amount of the cost of the asset. Trucking companies could take the deduction in the year subsequent to enactment of the legislation. Unless Congress or the judiciary compensates the trucking industry for its losses, the Motor

282. A deduction would reduce taxable income subject to the taxable rate, but would not compensate the trucking companies for the total cost of the operating rights.

283. H.R. 8148, 96th Cong., 2d Sess. (1980).

284. *See* note 88 *supra;* I.R.C. § 1011.

285. *See* notes 76 & 271 *supra.*

Carrier Act of 1980 treads close to robbery.[286]

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286. *See* text accompanying note 233 *supra*.