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LEGAL PROBLEMS AFFECTING INTERSTATE TRANSPORTATION AGENCIES

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INTRODUCTION

Informed citizens or current transit operators are very familiar with the litany of practical problems and complaints associated with day-to-day city bus operations. Discourteous drivers, poor schedule adherence, and inadequate public information systems are just a few difficulties surrounding interstate transportation agencies.

In addition to those daily troubles encountered by urban bus riders, transit companies themselves are engulfed in a myriad of crises ranging from bankrupt private companies to higher fares for fiscally shaky New York City's transit system, and to the much less patronized but technologically innovative BART[1] system in San Francisco. It is disturbing that similar problems face interstate transportation agencies as they grapple with (a) conflict of laws issues;[2] (b) equity concerns[3] raised under Title VI of the Civil Rights

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1. The Bay Area Rapid Transit (BART) subway system spent over $4 billion to build an extensive tunnel structure under San Francisco Bay and beneath much of that northern California metropolitan region. Space-age computer technology was utilized to schedule and control BART's new subway cars, to collect and analyze a complex series of transit fares, and to transport approximately 130,000 passengers on a given weekday. The BART structure was completed and opened in 1976.

2. Conflict of laws issues arise in the following situations; (1) A maze of state laws and local ordinances affect most interstate transit operations as one state's license fees or gasoline taxes are paid by fares collected from transit riders in the neighboring states. (2) With every major transit operation in America requiring large public subsidies, local matching funds from one state are used to pay insurance premiums covering accident settlements paid to compensate transit riders injured in another state. (3) Restrictive fiscal strings are attached to capital assistance provided by one state, necessitating the use of farebox revenues generated from operations in the other state so local share matching requirments can be satisfied. This results in the eventual purchase of transit buses and other vehicles with one state's revenues, which vehicles are subsequently used in both states.

3. Most interstate public transit operations receive considerable amounts of federal funds from the U.S. Department of Transportation's Urban Mass Transportation Administration (UMTA). The UMTA is "authorized and directed to effectuate" the enforcement of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1974), which provides in part:

Act of 1964; (c) interestate compact matters;[4] and (d) one-person, one-vote issues.[5]

TRADITIONAL CONFLICT OF LAWS QUESTIONS

Regionalism is still a strong concept attractive to many policymakers in interstate areas. Areawide transportation authorities continue to be proposed[6] as the solution to metropolitan traffic jams and gasoline shortages. Prior to the establishment of additional interstate transportation agencies, urban leaders would do

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No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, *be denied benefits of,* or be subjected to discrimination under any program or activity receiving Federal financial assistance. [Emphasis added.]

Clearly, interstate transit operations receiving such federal aid are therefore bound to distribute their transportation benefits in a non-discriminatory manner.

4. Many interstate compact agencies are empowered to engage in public transportation activities. Some interstate transit agencies (like the Bi-State Development Agency serving the St. Louis region) are wholly dependent on interstate compacts, approved by the affected states and ratified by the United States. Congress, for virtually all their legal authority, revenue bonding, or note issuance powers. The decision-making structure, *i.e.*, the governing board, chief executive, and table of organization of such interstate transit agencies, is authorized and detailed in the interstate compact.

Once such an interstate compact is ratified, the public transit agency is often confronted by the regulations of the Interstate Commerce Commission (I.C.C.). For a short but excellent overview of the I.C.C. by its former General Counsel, see Cerra, *Federal Transportation Law in Your Practice—Beware of Proposed Changes,* 33 J. MO. BAR 108 (March, 1977).

5. Decisions concerning the equitable distribution of transportation benefits are made by the governing boards and management of some interstate transit agencies. Unfortunately, not all transit service decisions are truly equitable. Discrimination often exists in the allocation of transportation benefits. People in one state might benefit from newer, cleaner buses not available on routes in the other state; or, certain groups may benefit from very frequent fixed-route transit service or from personalized door-to-door service provided by "Dial-A-Ride" mini-buses. Further, minority persons may suffer from discriminatory and inferior transit service, whether intentional or de facto.

Conceivably, such discrimination may be caused by the under-representation of minority persons on the governing board or within the management staff, or it may result from a voting imbalance on the governing board. Minority persons in one state may outnumber the total of all persons from the other state within the transit service area; yet, the less populated state may unfairly benefit from equal or greater voting strength on the interstate governing board. Obviously, such a circumstance raises serious "one person, one vote" questions.

6. One of the more interesting proposals along this line was suggested in ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IMPROVING URBAN AMERICA: INFORMATION REPORT M-107 121 (September, 1976).

well to ponder the major legal problems involved in the formation and subsequent operation of a new interstate transportation agency, as conflict of laws issues will prove a problem to such an agency from its inception.

Traditional conflict of laws questions arise quite often for an interstate transit agency involved in numerous traffic accidents. The number and severity of such accidents varies from one transit agency to another, depending upon several different factors, but even the finest interestate transportation agency operating buses and other transit vehicles cannot avoid involvement in some traffic accidents.

Should the victim of one of these accidents wish to bring suit against the transit agency, an issue closely related with conflicts questions will demand resolution: which of the concerned states or the federal government has the proper jurisdiction to try such an action? For instance, when the transit agency exists through an interstate compact authority created pursuant to the compact clause of the United States Constitution,[7] a traffic accident involving that agency may result in a wrongful death action being brought against the agency in the federal district courts.

A Third Circuit Court of Appeals decision, *Yancoskie v. Delaware River Port Authority*,[8] appears to offer some relief for interstate agencies from suits alleging federal jurisdiction. *Yancoskie* was brought by a construction worker's widow whose husband fell to his death while working on an interstate bridge being built for the Delaware River Port Authority. Similarly, it is not difficult to imagine a bus traffic accident on an interstate bridge between the two states involved in the creation of the transit agency. Now, however, whether a wrongful death action or a simple traffic accident, the impact of *Yancoskie* seems to be that interstate agencies cannot be successfully sued by plaintiffs who allege that the incident is a federal question and that jurisdiction lies under 28 U.S.C. §§ 1331 or 1337.[9] Nor, if the *Yancoskie* decision prevails, can plaintiffs

7. Article I, § 10 of the United States Constitution provides in part:

> No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

8. 528 F.2d 722 (3d Cir. 1975).

9. Some actions involving interstate commerce are permitted under 28 U.S.C. § 1337 (1976) without regard to any minimum monetary amount if the actions are found to be "arising under federal law."

contend that actions against interstate compact agencies, established with the consent of Congress,[10] are given federal jurisdiction via the Federal Tort Claims Act.[11] *Yancoskie* indicates that such suits are not available against the federal government simply because it approved the interstate compact agencies. Instead, actions apparently should be brought in state courts against the interstate agencies *per se*.

The theory behind bringing such actions in state courts has been well-established by litigation. Citing the classic conflicts case of *Hess v. Pawloski*,[12] plaintiffs seeking jurisdiction in their friendly native state would argue that buses

> are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights.[13]

No less than a non-resident, the interstate transportation agency is also subject to this jurisdictional standard.

Should a wrongful death action arise against the transportation agency, the statute creating the action will generally determine the appropriate plaintiffs. As might be expected, both the limit on damages and the statute of limitations is also determined by the law of the state where the action arose. Though the mode of transporta-

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10. For an historical analysis of the establishment of interstate compacts, see Frankfurter and Landis, *The Compact Clause of the Constitution—A Study In Interstate Adjustments*, 34 YALE L.J. 685 (1925). *See also* Comment, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416 (1966).

11. 28 U.S.C. §§ 1291, 1346(b), 1402(b), 2401(b), 2402, 2411, 2412, 2671-2680 (1965). *See* Steinbaum, *Federal Question Jurisdiction to Interpret Interstate Compacts*, 64 GEO. L.J. 87 (1975).

12. 274 U.S. 352 (1927). *See also* Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965).

13. 274 U.S. at 356. *But see* Comment, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM.& MARY L. REV. 429 (1976).

tion was different than mass transit, a recent truck-train accident involving a Missouri railroad corporation and a Missouri citizen killed by the corporation's train at a crossing in Texas resulted in the decision of *State ex rel. Broglin v. Nangle*,[14] which is illustrative of this point. The court held that no Missouri interest controlled since Texas law (1) created the wrongful death action, (2) defined appropriate plaintiff beneficiaries, and (3) set the limit on damages.

In addition to bus accidents on interstate bridges and wrongful death actions, conflict of law cases arise as the interstate authority enters into contracts. In such cases, the interstate transportation agency attempts to place limitations on the free exercise of jurisdiction selection by the other contracting party and the courts of a certain state. For example, the Bi-State Development Agency, with half of its Board of Commissioners from Illinois and with roughly twenty percent of its transportation service area in Illinois, uses a standard "governing law" clause in most of its contracts, which simply states that "the contract shall be interpreted under and governed by laws of the State of Missouri." "Governing law" clauses, by which the parties agree to give exclusive jurisdiction to one state, sometimes raise questions of mutuality and coercion regarding the contract. In most cases, actual consent has been found and will suffice as the legal basis for *in personam* jurisdiction if and when the interstate agency would seek a judgment against an out-of-state contractor. However, an interstate transit agency with operations in States *X* and *Y* and a contract specifying *X*'s statutes as governing law might find *Y* courts not bound by this contractual constraint. For instance, say a bus driver from State *X* signed a contract of employment with the transit agency which specified that the laws of State *X* would govern all matters relating to this employment. If the bus driver is killed in State *Y* due to faulty brakes on his bus and his family brings a wrongful death action relying on State *Y*'s statute, limit on damages and statute of limitations, a court of State *X* may follow the example of *State ex rel. Broglin v. Nangle* and apply State *Y*'s statute instead.

Conversely, the governing law specified by the interstate agency and a labor union may control wage or fringe benefit cases. A tragic example follows: one of this writer's first duties after joining an interstate transportation agency was to reach settlement with an insurance firm and secure benefits for a widow of an employee who had taken his own life. Suicide is no defense to payment under

14. 510 S.W.2d 699 (Mo. 1974).

Missouri law[15] and under this particular labor contract, unless the company can show the insured employee intended suicide when he applied for the insurance policy. The insured employee's domicile generally dictates the law to be applied in such cases.

Generally, in workmen's compensation cases,[16] the interstate transit agency's employment contract and the state in which the personnel office is located when employment relationships begin indicate which jurisdiction's law will govern. Yet, if the injury occurs in the other state, or if the employee resides or usually works in the other state, that state will likely seek to apply its own workmen's compensation law with a judicious eye toward protecting its worker citizens and their families against the interstate transit agency.

In another common conflict of laws area, that of multi-state torts, an interstate transportation agency owes a very high standard of care to all its riders.[17] With millions of riders each year, interstate transit companies, as common carriers often subject to control by the Interstate Commerce Commission (I.C.C.),[18] must take cognizance of Prosser's analysis of their potential tort liabilities. Prosser notes that:

> Common carriers, who enter into an undertaking toward the public for the benefit of all those who wish to use their services, must use great caution to protect passengers entrusted to their care; and this has been described as "the utmost caution characteristic of very

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15. MO. ANN. STAT. § 376.620.

16. For typical cases and fact situations, see Steinbaum, *Federal Question Jurisdiction to Interpret Interstate Compacts*, 64 GEO. L.J. 87 (1975); Comment, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976).

17. *See, e.g.*, Philadelphia and Reading R. Co. v. Derby, 55 U.S. (14 How.) 468 (1852).

18. The Interstate Commerce Act of 1887, 49 U.S.C. §§ 1 *et seq.* (1959), forbade excessive or discriminatory rates ane other unfair practices by railroads and created the Interstate Commerce Commission to administer the law. Today the I.C.C.'s authority covers all interstate motor carriers. The carriers regulated by the I.C.C.—such as trains, ships, trucks, buses, pipelines and the companies operating them—fall into two general classes: (1) common carriers, which offer their services to the public generally, and (2) contract carriers, which carry only certain goods or persons. Most interstate transit agencies are classified as common carriers. However, those "[m]otor vehicles used solely for transportation within a single municipality, contiguous municipalities, or a zone adjacent to and commercially part of any municipality" are excluded from the I.C.C.'s regulatory jurisdiction. Cerra, *Federal Transportation Law in Your Practice—Beware of Proposed Changes*, 33 J. MO. BAR 108, 110 (March, 1977). *See* 49 U.S.C. § 303(b)(9) (1963).

careful prudent men," or "the highest possible care consistent with the nature of the undertaking."[19]

Still another conflict and choice of law problem area is raised by the transit agency's ownership of real property. Bus garages, repair shops, loop sites, timed transfer centers, transit malls, auto-intercept facilities and park-ride lots are typical of the kinds of real property owned by such an interstate body. Usually, issues affecting real property will be governed by the law of the state in which the property is located, *i.e.*, the site of the bus facility.[20]

Though such traditional conflict of laws problems are invariably complex, such matters are sometimes the least of difficulties facing an interstate transit agency. Other troublesome transit issues are examined in the following sections.

EQUITY IN INTERSTATE TRANSIT—TITLE VI CONCERNS

Discrimination continues to be a serious problem in the allocation of transportation resources, primarily because the actual, everyday delivery of services is controlled by low-level supervisory personnel who often are insensitive to Title VI[21] matters and the transit needs of minority persons. Assignment of older transit coaches, selection of bus passenger shelter sites, and routing of particular local bus lines are just three examples of areas in which discrimination occurs.

Title VI problems can be acerbated when an interstate transit agency serves minority residents of two different states. Obviously, transit services cost considerably more than farebox revenues generated, and no major interstate or local bus system operates without a subsidy. Additional financial operating assistance usually comes to an interstate agency from at least two different sources: one is Section 5 operating assistance grants authorized under the Urban Mass Transportation Act of 1964,[22] and the other usual subsidy sources are the two or more states involved in the interstate transit operations.

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19. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34 (4th ed. 1971) (footnotes omitted).

20. *See generally* G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 342-53 (3d ed. 1963).

21. 42 U.S.C. § 2000d (1970), prohibits discriminatory practices in federally funded programs.

22. 49 U.S.C. § 1604 (1976), establishes an aid program for urban mass transportation agencies.

Funding through different sources raises enormous equity and Title VI concerns when one state, with a large minority population, pays only a relatively small portion of transit operating costs. Simply put, how can an interstate transportation agency receiving the bulk of its funds from one state provide adequate, equitable transit service to minority persons in another state? The amounts of subsidy from each state and the levels of operating assistance received in relation to farebox revenues generated in each state have a tremendous impact on the planning and service delivery processes.

Imagine that State *X*, with 250,000 minority persons, contributes $30 million in operating assistance to an interstate transit agency. State *Y*, with a minority population of 100,000, contributes only $7 million to the transit agency. How can minority persons in State *Y* receive the same quality and quantity of transit service as minority people in State *X*? To paraphrase questions raised by former UMTA[23] Administrator Patricelli:

> —How accessible are major medical centers and shopping centers in State *X* to transit-dependent minorities and women living in State *Y*?
>
> —Are multiple transfers necessary for these basic trips? Are expensive, non-stop, direct bus lines the only way to equitably serve State *Y*'s minority population?
>
> —Can inner city residents in State *Y* get to the suburbs in State *X* where the majority of jobs exist? Or, are they prevented from obtaining adequate jobs because there is no way to get them there easily and inexpensively?[24]

To answer such questions, the UMTA has funded three studies to develop and refine criteria, qualifications, measures and techniques for Title VI pre-award reviews.[25] This author is Project Director of one such study now being performed in the St. Louis region, encompassing transit service areas in Missouri and Illinois.

Title VI criteria for the St. Louis/Bi-State region relating to the equity of service provided by an interstate transportation agency has now been developed. The term "equity" implies the comparison

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23. The legal powers of the Urban Mass Transportation Administration (UMTA) are detailed in 49 U.S.C. §§ 1601-1612 (1976). Most federal funds to interstate transit agencies are administered and awarded by the UMTA.

24. *Quoted in* Williams, *Public Transportation and the Protection of Civil Rights*, TRANSIT JOURNAL 25 (August, 1976).

25. *Id.* at 27.

of one group with another. In this case, the factor compared is the service offered to the minority and transit-dependent population in contrast to that offered to other residents of the Bi-State service area. Each of the Title VI criteria is being addressed by developing data and analyses through specific measures of performance. These measures of an equitable transit system are listed below:

Criteria	*Measures*
Subsidy	amount of subsidy available per capita, per rider, per service unit (e.g., vehicle mile), per cost unit (i.e., percent of cost that is unsubsidized).
Coverage	zero-car households served (peak).
Transferring	route to route transfer movement requirements (by distance).
Duration	aero-car households served (off-peak, Saturday and Sunday).
Frequency	lines exceeding or failing the standard average rider waiting time.
Fare	per trip, per mile, and by total farebox support indices.
Trip Time	travel time compared to highway travel time.
Trip Speed	trip speed distribution.
Accessibility	accessibility indices (cost and/or time, peak, non-peak).
Accident Exposure	accident rate by garage, route (compared with total vehicle accidents in the same area), and driver experience by garage and route.
Crime Exposure	dot map of location of crimes on buses or at bus stops compared to the ambient rate of crimes against persons.
Vehicle Loading	maximum load count or seats by route and location on the route, and any available data on buses bypassing stops because of overloading.
Waiting Facilities	selective small sample of bus stop and shelter location and condition emphasizing major transfer and load

	locations and stops serving high percentages of elderly and/or handicapped.
Predictability	selective review of existing and new load and schedule adherence checks.
Bus Age	average age of assigned vehicle weighted by the hours of service in peak and non-peak traffic.
Bus Cleanliness	sample of bus cleanliness and physical appearance by garage.
Public Information	review of advertising and public information methods and media used; general review of complaint records and procedures.

Several authors recently noted the importance of distinguishing between a conventional bus system as in the St. Louis interstate region and rapid rail systems elsewhere. The transit service characteristics "have significant influence on the approaches that are suitable for quantifying the benefits."[26] While research methodologies and techniques would probably be similar in analyses of conventional bus or rapid rail systems, the overall study approach is different. For example, compare a legal Title VI review with traditional economic indices:

Title VI Transit Beneficiary	*Traditional Economic Transit Beneficiary*
Minority Persons[27]	Constant Transit Users
Transit Dependents	Nondiverted Auto Drivers
Disabled Persons[28]	Auto Drivers and Passengers
Elderly Persons[29]	Diverted to Transit

Using such indices to measure service to transit dependents, interstate transportation agencies like other governmental entities

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26. Chatterjee and Sinha, *Distribution of Benefits of Public Transit Project*, TRANSPORTATION ENGINEERING J. 511 (August, 1976).

27. In the St. Louis study, minority groups have been defined as Blacks, American Indians and Spanish-speaking population subgroups. The UMTA's Office of Civil Rights has approved this definition.

28. *See* Section 16(d) of the Urban Mass Transportation Act of 1964 as amended, 49 U.S.C. § 1612 (1976).

29. Generally this term applies to those persons 65 years of age or older; no federal statutory definition exists as of May, 1977.

are bound to equal protection standards pursuant to Title VI. Yet transit services, like high school educational services, are rather difficult to measure in terms of equal protection. While invidious discrimination in access and opportunity to utilize transit services must be carefully avoided, this criteria and its actual success in eliminating or avoiding discrimination is often the subject of judicial direction.

In his dissent in *San Antonio Independent School District v. Rodriguez*,[30] Mr. Justice Marshall wondered "how judicially manageable standards are to be derived for determining how much education is 'enough' to excuse constitutional discrimination . . . what level of education is constitutionally sufficient."[31] In an interstate transit agency, one might properly paraphrase Justice Marshall's questions to ask "how much transit service is enough" and "what level of transportation benefits is constitutionally sufficient."

As a lawyer and Project Director of the prototype of St. Louis study, this author continues to adhere to Justice Marshall's dictum that "[t]he Equal Protection Clause is not addressed to the minimal sufficiency, but rather to the unjustifiable inequalities of state action."[32] Consequently, the whole purpose of the Title VI study in the St. Louis region is for outside independent consultants to develop empirical evidence regarding actions by the interstate agency which may later be found to violate the Equal Protection Clause.

Accordingly, measurable standards and judicially manageable standards have been developed in the St. Louis study. Seventeen criteria cited earlier[33] have been developed (though not yet weighed) to assess (1) how much transit service is sufficient; (2) what level of transit service is constitutionally sufficient; (3) what unjustifiable inequalities in transit service now exist; and, (4) what actions should be immediately taken to correct inequity.

Using such criteria, one should properly ask: "Is transit service a sufficient 'fundamental interest' to be protected under the United States Constitution by the Supreme Court?" The Court per Chief Justice Burger held in *Dandridge v. Williams*[34] that plaintiffs' interest in getting welfare money was not fundamental. That same

30. 411 U.S. 1 (1973).
31. *Id.* at 89.
32. *Id.*
33. *See* note 25 *supra* and accompanying text.
34. 397 U.S. 471 (1970).

Court in *Richardson v. Belcher*[35] and *Jefferson v. Hackney*[36] continued to hold social security-related and welfare benefits were not fundamental interests. One could conclude that the majority of justices do not consider food, clothing, shelter or transit service as fundamental for equal protection purposes.

Yet, application of Title VI requirements mandates equal protection. Any interstate transit agency receiving federal funds must, pursuant to Title VI, provide transportation benefits in a nondiscriminatory manner. In the absence of more explicit and definitive legislative or judicial standards for resolving Title VI difficulties, such transit authorities will continue to be plagued with the problem of allocating fairly their funds interstate and still providing reasonable service for all the passengers served.

Further, there seems to be a great deal of merit in mandating "social impact" or Title VI studies as a prerequisite for receipt of federal transit assistance funds. Each interstate transit agency should be required to conduct a Title VI study comparable to the St. Louis prototype analysis. Such a bureaucratic regulation would be similar to environmental impact statements required by the National Environmental Policy Act.[37] The profound impact of federally funded transit operations on transit-dependent and minority persons should be carefully measured prior to any major future expenditures of federal transit funds. The Urban Mass Transportation Act should be amended to include "social impact" statutory language similar to that mandating environmental impact analyses in the National Environmental Policy Act.[38]

FORMATION OF INTERSTATE TRANSIT AGENCIES

In addition to considering fundamental interests, Title VI questions, and different equity problems, those interested in operating interstate service or forming an interstate transportation agency in the late 1970's or 1980's should look back to the case of *Virginia v. Tennessee*.[39] Mr. Justice Field, writing for the Court, asked questions which modern transit planners might ask:

> If, then, the terms "compact" or "agreement" in the constitution do not apply to every possible compact or agree-

35. 404 U.S. 78 (1971).
36. 406 U.S. 535 (1972).
37. 42 U.S.C. §§ 4321-4335 (1973).
38. 42 U.S.C. §§ 4331, 4332 (1973).
39. 148 U.S. 503 (1893).

> ment between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the constitution apply? . . . Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. . . . Compacts or agreements—and we do not perceive any difference in the meaning, except that the word "compact" is generally used with reference to more formal and serious engagements than is usually implied in the term "agreement"—cover all stipulations affecting the conduct or claims of the parties.[40]

Historically, interstate compacts have often been used by adjoining states to improve transportation. In 1921, New York, New Jersey, and the United States joined in a compact to erect the Port of New York Authority. This authority is the planning and administrative agency for the entire port of New York.

This author is most familiar with the legal basis for his own agency, which was carefully modeled after the New York region's interstate compact. On September 20, 1949, a compact was entered into by the states of Missouri and Illinois, which compact has since been amended in certain respects. As presently in force, key portions of the compact follow:

ARTICLE II

To that end the two states create a district to be known as the "Bi-State Metropolitan Development District" (hereinafter referred to as "The District") which shall embrace the following territory: The City of St. Louis and the counties of St. Louis and St. Charles and Jefferson in Missouri, and the counties of Madison, St. Clair, and Monroe in Illinois.

ARTICLE III

There is created the Bi-State Development Agency of the Missouri-Illinois Metropolitan District (hereinafter referred to as the Bi-State Agency) which shall be a body corporate and politic. The Bi-State Agency shall have the following powers:

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40. *Id.* at 519-20.

1. To plan, construct, maintain, own and operate bridges, tunnels, airports and terminal facilities and to plan and establish policies for sewage and drainage facilities;

2. To make plans for submission to the communities involved for coordination of streets, highways, parkways, parking areas, terminals, water supply and sewage and disposal works, recreational and conservation facilities and projects, land use pattern and other matters in which joint or coordinated action of the communities within the areas will be generally beneficial;

3. To charge and collect fees for use of the facilities owned and operated by it;

4. To issue bonds upon the security of the revenues to be derived from such facilities; and, or upon any property held or to be held by it.

In addition to review of just a few of the many powers granted the interstate agency under the Missouri-Illinois interstate compact, those considering interstate transit problems should examine other interstate compacts, which now number well over one hundred formal agreements ratified by Congress. C. Herman Pritchett provided one of the best, most concise historical overviews of the interstate compact formation process. He stated:

> Although congressional consent to interstate compacts is required, there is no set formula as to when and how that approval should be registered. The assent may be given before or after the agreement; it may be explicit, implicit, or tacit. Nor is there any form in which Congress must cast its approval. It may be done by specific statute, by a joint resolution, by ratification of a state constitution which contains such a compact or by means of a compact between Congress and the states involved. Congress may even extend blanket approval to future agreements in certain specified areas.
>
> No case has arisen in which a compact has been held unconstitutional by the Supreme Court. Once a state has formally ratified a compact and the approval of Congress has been obtained, the agreement is binding on the state and all its officers—executive, legislative, and judicial. A state cannot unilaterally declare that a compact is in viola-

tion of its constitution and use this as a basis for withdrawal.[41]

While this historical overview is enormously helpful to those interested in interstate agreements, the more mundane, practical factor of funding also warrants study. An interstate compact agency without sufficient fiscal resources is unable to fulfill its compact purposes, and such a financially weak agency is hardly worthy of emulation or further legal analysis.

FISCAL CONSIDERATIONS

When considering formation of an interstate transit agency, a formal compact seems worthwhile unless very limited and expensive charter operations to the other state are planned. Very large amounts of federal aid now come to interstate compact transit agencies through Section 5[42] of the Urban Mass Transportation Act of 1964, as amended.

Section 5 greatly benefits those interstate transit agencies operating through a single entity. The larger the population, the more Section 5 funds are available to the interstate transportation operator. Key portions of Section 5's statutory language indicate that nearly $4 billion is available for distribution through fiscal year 1980:

> (b)(1) The Secretary shall apportion for expenditure in fiscal years 1975 through 1980 the sums authorized by subsection (c). Such sums shall be made available for expenditure in urbanized areas or parts thereof on the basis of a formula under which urbanized areas or parts thereof will be entitled to receive an amount equal to the sum of
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> (A) one-half of the total amount so apportioned multiplied by the ratio which the population of such urbanized area or part thereof, as designated by the Bureau of the Census, bears to the total population of all the urbanized areas in all the States as shown by the latest available Federal census; and
>
> (B) one-half of the total amount so apportioned multiplied by a ratio for that urbanized area

41. *See* C.H. PRITCHETT, THE AMERICAN CONSTITUTION 109 (1968), referring to West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951), on this particular aspect of his analysis of interstate compact agencies.

42. 49 U.S.C. § 1604 (1976).

> determined on the basis of population weighted by a factor of density, as determined by the Secretary.
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> As used in the preceding sentence, the term "density" means the number of inhabitants per square mile.
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> * * *
>
> (c)(1) To finance grants under this section, the Secretary may incur obligations on behalf of the United States in the form of grants, contracts, agreements, or otherwise in an aggregate amount not to exceed $3,975,000,000.

A recent study by the Northwestern Indiana Regional Planning Commission provides an excellent explanation of the basic provision of the operating assistance portion of this important federal law:

> Operating Assistance—Section 5 of the Urban Mass Transportation Act, as amended, provides money to urbanized areas (urban places of more than 50,000 population) through a formula based on population and population density. The total sum of money which goes to each of these urbanized areas each year may be used for either operating purposes or for capital improvement purposes. How the money is to be utilized is strictly a matter of local option. If the money is used for operating aid, it is on a fifty-fifty basis; if the funds are used for capital improvements it is on an 80 percent federal and 20 percent local basis.
>
> There are a number of provisions that must be met before the money allocated under Section 5 can be used on the local level for either capital or operating purposes. Requirements under Section 5 include civil rights agreements, labor protection clauses, assurance of local matching funds, maintenance of the local financial support efforts based on the average support of the past two years, street traffic managemeent plans, efficiency standards and transit energy conservation plans and programs.
>
> In essence, the operating subsidy is an add-on. A city that has had a maintenance of effort level averaging $100,000 over the past two years is eligible for $100,000 of federal money. The major aim of the subsidy provision of the Act is, therefore, to help in the improvement of service or to help maintain existing fare levels or, perhaps,

lower fares. The subsidy money may be used to cover the expenses of any legitimate operating purpose.[43]

As comparative examples of the distribution of Section 5 assistance, Northwest Indiana recieves a sub-allocation of the total amount allocated on the formula basis to the Chicago-Northwest Indiana region by the UMTA. The allocation within the region is the result of an agreement among participants in the regional transportation planning board. By contrast, in the St. Louis Bi-State Missouri-Illinois compact situation, the interstate transit agency receives funds allocated to urbanized portions of both states. Obviously, if citizens of both states receive adequate and equitable transit service, the economic efficiency through a unified transit system large enough to realize economies of scale is a tremendous benefit to the interstate region. Moreover, administrative effectiveness is greatly improved with unified planning and purchasing.

As highlighted in this section, the fiscal benefits of an interstate transit agency to trasnportation users in a given area are many. Yet, the establishment of such an agency raises the serious constitutional and equitable problem of political accountability. Disparities exist unavoidably throughout any interstate urbanized region served by a transit agency in fiscal resources available for collection, disbursement amounts needed to maintain a satisfactory standard of service, and population density and usage levels. An agency must be carefully organized and operated to effectively work with these variables. The next section will examine the problems involved in governing properly an interstate transit agency and satisfying the constitutional "one person, one vote" principle at the same time.

THE ONE PERSON, ONE VOTE PRINCIPLE APPLIED TO TRANSIT OPERATIONS

Interstate transportation agencies, like regional planning agencies, will soon face legal challenges designed to bring these agencies into compliance with the constitutional "one person, one vote" prinicple. For example, in the St. Louis region the interstate transportation unit is the Bi-State Development Agency,[44] which is

43. Excerpted from NORTHWESTERN INDIANA REGIONAL PLANNING COMMISSION, MASS TRANSPORTATION TECHNICAL STUDY: FISCAL YEAR 1975 (1975). *See also* 49 U.S.C. § 1604 (1976) for greater detail.

44. This is an interstate compact agency which legally emulates the New York Port Authority. Construction of such an interstate compact agency's powers is a

governed by a Board of Commissioners composed of five Missouri and five Illinois residents. The powers of the Bi-State Development Agency are considerable, including (1) eminent domain with the legal concurrence of the municipal body affected, (2) the power to issue revenue bonds, and (3) the authority to engage in activities beyond the scope of operation of an interstate transit system. Such powers are rather comparable to the board powers discussed in *Hadley v. Junior College District.*[45]

A fictitious example perhaps can best illustrate the ramifications of the "one person, one vote" principle as it affects transit services. Say that a given interstate region has a population of almost 2,400,000 people. According to the 1970 census nearly 1,800,000 people, or approximately 75 percent of the region's population, are from one state. Only 555,000 persons are residents of the other state. By agreement between the involved states and approved by the federal government, a transportation agency is established to serve the needs of the entire region.

In this hypothetical situation, the ratio of population has remained stable for at least thirty years before the interstate compact establishing the transit agency was formed. Yet the interstate compact gives residents of the less populous state the same number of votes on the agency's governing board as are allocated residents of the more populous state. The three-to-one population ratio is clearly inconsistent with the equal voting division on the agency's governing board.

Such a governing board's even split along state lines appears to violate the constitutional "one person, one vote" principle, given the three-to-one population split in favor of the larger state. Does the initial consent to the interstate compact by both state legislatures justify such a large deviation from proportionate representation? Does the subsequent congressional ratification of that same interstate compact constitute a legitimate reason for such a huge deviation?

Defenders of such deviations in interstate compact arrangements would rely on Mr. Justice Marshall's majority opinion in *Abate v. Mundt,*[46] arguing that there is and was "a long history of,

federal question according to the holding in Yancoskie v. Delaware Port Authority, 528 F.2d 722 (3d Cir. 1975), and supported by the decision of Petty v. Tennessee-Missouri Commission, 359 U.S. 275 (1959).

45. 397 U.S. 50 (1970).

46. 403 U.S. 182, 186 (1971).

and perceived need for, close cooperation" between the two states, and this particular arrangement is the one most reflective of and suitable for continuing that cooperative effort. On the other hand, proponents of the larger state's interests who feel its vast population majority should be reflected in the composition of the governing board can cite Mr. Justice Brennan's dissent in *Abate*, which responds that it is not clear why such compact history "should alter the constitutional command to make a good faith effort to achieve equality of voting power as near to mathematical exactness as possible."[47] Further, proponents of the state with the substantial population majority would likely cite dictum in the decisions of *Mahan v. Howell*,[48] upholding a 16.4 percent deviation from population equality in voting strength, to the effect that while such a percentage deviation "may well approach tolerable limits, we do not believe it exceeds them."[49] Likewise, in *White v. Regester*,[50] the majority held a maximum deviation of 9.9 percent was "relatively minor" and required no state justification.

What would motivate the majority state's plaintiffs? Since an interstate compact has never been found unconstitutional, what are the prospects for a successful challenge of the board composition of an interstate agency?

The distribution of transit benefits and allocation of federal and non-federal fiscal resources are two potential causes for litigation. If one state consistently contributes less than its fair share of monies, citizens of the other state are unduly burdened for transit services never received. Transit operations in State *Y* could be as frequent, with comparable equipment, with equally skilled drivers, maintenance and supervisory personnel as those provided citizens of State *X*. But if the citizens of State *X* are paying for eighty percent or more of all operating cost, if state *X* is providing a disproportionate share of local monies to match federal capital resources, litigation may result if the evenly divided Board of Commissioners fails to act in rectifying this fiscal imbalance.

Conversely, perhaps the state providing most of the money is receiving most of the benefits—all of the new buses, the bulk of new passenger shelters, and all the new demand-response vehicles.

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47. *Id.* at 189 (Brennan, J., dissenting).
48. 410 U.S. 315 (1973).
49. *Id.* at 329.
50. 412 U.S. 755 (1973).

Under such circumstances, minority persons in the under-served state may bring a Title VI equal protection action.

The important point for planners and appropriate officials to note is that the problems raised in this hypothetical will almost certainly arise during the existence of any interstate transit agency. Distribution of services and fiscal equity are two of the most troublesome problems facing modern transit operators.

In litigating such situations, minority or under-served state plaintiffs would rely on many of the Title VI cases cited earlier in this article. Further, plaintiffs suing for lack of representative voting rights would allege that the existence of "state action" is established through the governmental processes needed to create the interstate transit agency. The concept of "state action" has even been applied to privately-owned transit operators.[51] However, like the "fundamental interest" concept discussed earlier, more recent Burger Court decisions indicate that mere state regulation or licensing of private entities does not constitute state action.[52] Therefore, direct Title VI actions, rather than "fundamental interest" or "state action" suits, appear to offer the best chance of success when bringing equal protection litigation involving an interstate transit agency.

CONCLUSION

The role of the transit industry in today's society is constantly increasing in importance. Several decades ago, when streetcars and trolleys passed out of active use and gasoline was plentiful and inexpensive, the availability and use of transit facilities was at its lowest point. But recently the transit industry has been revived by massive infusions of federal subsidies, especially since the late 1960's. Also, as the energy crisis worsens and private transportation becomes prohibitively expensive or unavailable, new transit agencies may

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51. *See* Burton v. Wilmington Parking Authority, 356 U.S. 715 (1961), wherein state action was found when a private business was deemed an integral part of a public building to public service; Public Utilities Commission v. Pollack, 343 U.S. 451 (1952), in which the fact that a private transit company was regulated by a public agency was sufficient to find state action; and Boman v. Birmingham Transit Company, 280 F.2d 531 (5th Cir. 1960), wherein the state action requirement was satisfied by the existence of an ordinance delegating the authority to regulate passenger seating to the private carrier.

52. *See, e.g.*, Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

have to be formed and the service of existing ones expanded to handle the increased demand. While each transit agency is necessarily unique in its inception and in the special problems of the region it serves, the questions examined in this article are common to all transit operations and are therefore important to both concerned private citizens as well as any organized groups interested in the formation or subsequent evaluation of interstate compact transit agencies.

All the various conflicts and choice of law problems affecting interstate transit agencies in tort litigation and contract formation must be recognized and anticipated. The legal aspects of public fiscal assistance for the regional transit agency and the control exercised over transit operations by the aid disbursing agency cannot be overemphasized. Increasingly, federal aid is becoming the *sine qua non* of public transportation. With those federal dollars come increased legal responsibility to provide equitable service for transit dependent and minority persons protected by Title VI. When new interstate transportation compacts are formed or existing agencies examined, the legal consequences of their voting and funding structures should also be evaluated.

How the future will affect the operation of interstate transit agencies is uncertain. The incidence of conflicts of law cases will probably increase as the transit industry grows. Alternative sources of funding may be necessary as revenues from gasoline taxes shrink. The "one person, one vote" principle could be more strictly applied to interstate transit compact agencies. And the way in which scarce fuel resources are allocated within a transit agency may well become an aditional source of Title VI discrimination suits. It is hoped that the presentation of the basic legal concepts given in this article will help in a small way to resolve the future transit problems as they arise.