

**BACK ON TRACK: HOW “AMTRAK JOE” BIDEN CAN OVERCOME  
THE LEGAL MORASS WHICH WILL ATTEMPT TO DERAIL HIS  
RAILROAD REVOLUTION**

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*In November of 2020, a known train enthusiast was elected to the Oval Office: President Joe Biden. With this leadership in mind, is the United States finally going to create a healthy and functioning passenger rail system? For years, passenger rail has declined in usage as other modes of transportation, mainly automobiles and airplanes, have become the preeminent movers of people in the United States. However, given the economic and environmental advantages of passenger rail, it can still fill a niche in the transportation market. This Article proposes a number of actions that President Biden can take to improve passenger rail utilization and its quality in the United States. In the short-term, steps must be taken to put Amtrak, the national rail carrier, on the path to sustainability. Following that, the Biden administration must fundamentally alter the way new rail infrastructure projects are funded and planned in order to make the significant long-term improvements required to achieve a passenger rail revolution.*

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I. INTRODUCTION

In November of 2020, Joe Biden was elected the 46<sup>th</sup> President of the United States<sup>1</sup> and, as a result, possibly America’s best-known train-lover now sits in the Oval Office.<sup>2</sup> Shortly after becoming a Senator in 1972, President Biden began riding the Amtrak train every day from his office in Washington, D.C. to his home in Wilmington, Delaware to spend the evenings with his sons who had just lost their mother and sister in a fatal car accident.<sup>3</sup> Over his 36-year Senate career, President Biden made this 220 mile round trip an estimated 7,000 times.<sup>4</sup> As a result, it is hardly hyperbolic to

<sup>1</sup> Katie Glueck, *Joe Biden is Elected the 46th President of the United States*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/07/us/politics/joe-biden-is-elected-the-46th-president-of-the-united-states.html> [https://perma.cc/2XFT-GY4T].

<sup>2</sup> See Joe Biden, *Why American Needs Trains*, HUFFPOST, [https://www.huffpost.com/entry/why-america-needs-trains\\_b\\_412393](https://www.huffpost.com/entry/why-america-needs-trains_b_412393) [https://perma.cc/T2SE-L28J] (last updated May 28, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

say that Amtrak allowed President Biden to be both a Senator and a single father to his young bereaved sons.<sup>5</sup> In light of this, it is no wonder the President obtained the affectionate moniker of "Amtrak Joe."<sup>6</sup> Furthermore, President Biden has carried this love of trains into his current Presidency.<sup>7</sup>

Although President Biden has a strong emotional connection to Amtrak, his advocacy for American passenger rail is based on more than his sentimentality. In a 2010 opinion piece in the Huffington Post called "Why America Needs Trains," then-Vice President Biden waxed poetically about the impact of his rail commute on his life.<sup>8</sup> In the piece he claimed that the Amtrak professionals represented a surrogate family to him and the frequent trips provided him with "an understanding of—and a respect for—the role of rail travel in our society and our economy."<sup>9</sup> But following this, President Biden provided his true rationale for his tireless advocacy on behalf of Amtrak when he concluded by saying "[s]upport for Amtrak must be strong—not because it is a cherished American institution, which it is—but because it is a powerful and indispensable way to carry us all into a leaner, cleaner, greener 21<sup>st</sup> century."<sup>10</sup>

Unsurprisingly, President Biden has made re-developing and expanding America's aging rail infrastructure a major part of his presidency's first term agenda. As part of his "Build Back Better Plan," which seeks to revitalize the country and the economy, Biden

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<sup>5</sup> See *id.*

<sup>6</sup> Katherine J. Igoe, *Where Did "Amtrak Joe," Joe Biden's Nickname, Come From?*, MARIE CLAIRE (May 4, 2020) <https://www.marieclaire.com/politics/a32363173/joe-biden-amtrak-joe-meaning/> [<https://perma.cc/44QL-D63S>].

<sup>7</sup> President Biden reportedly planned to take the Amtrak train from Wilmington to Washington, yet again, ahead of his inauguration, but was forced to change his plans due to security concerns. Jeff Zeleny et al., *Biden No Longer Raking Amtrak to Inauguration Amid Security Concerns*, CNN, <https://www.cnn.com/2021/01/13/politics/biden-amtrak-inauguration-security/index.html> [<https://perma.cc/4QDG-6SX2>] (last updated Jan. 13, 2021).

<sup>8</sup> Biden, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

said he will “[s]park[] the second great railroad revolution.”<sup>11</sup> However, daunting challenges may impede the realization of this dream.

America’s passenger rail network is dominated by a single government-backed corporation, Amtrak,<sup>12</sup> which is unprofitable,<sup>13</sup> rarely punctual,<sup>14</sup> in conflict with private rail companies,<sup>15</sup> and encumbered by politicians and regulators who determine its routes and funding.<sup>16</sup> Moreover, there are many industries, with vested interests in preventing an increase in the utilization of passenger rail, who will be willing to fight.<sup>17</sup> These adversarial industries include oil and gas, airlines, automakers, freight rail carriers, and the numerous members of the automobile and airplane manufacture supply-chains.<sup>18</sup>

To resolve these issues in face of what will likely be bitter and sustained opposition, the Biden administration must take significant action to achieve the desired revolution. In the short term, the financial sustainability and consumer-appeal of Amtrak must be enhanced to ensure that the nation’s passenger rail future will be built on a stable foundation. This can be done by resolving the

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<sup>11</sup> See THE BIDEN PLAN TO BUILD A MODERN, SUSTAINABLE INFRASTRUCTURE AND AN EQUITABLE CLEAN ENERGY FUTURE, <https://joebiden.com/clean-energy/> [https://perma.cc/94PT-Q66X] (last visited May 1, 2021).

<sup>12</sup> See AMTRAK, *Historic Timeline*, <https://history.amtrak.com/amtraks-history/historic-timeline> [https://perma.cc/manage/create?folder=57801] (last visited May 1, 2021).

<sup>13</sup> Jasmine Kim, *Amtrak has Lost Money Every Year Since 1971. Here’s Why Train Tickets are so Expensive.*, BUS. INSIDER (Mar. 27, 2019, 5:00 PM), <https://www.businessinsider.com/amtrak-why-so-expensive-america-train-system-2019-3?r=US&IR=T> [https://perma.cc/4KVN-T6P8].

<sup>14</sup> See Devin Leonard, *Amtrak CEO Has a Plan for Profitability, and You Won’t Like It*, BLOOMBERG BUSINESSWEEK (Nov. 20, 2019, 11:21 AM), <https://www.bloomberg.com/news/features/2019-11-20/amtrak-ceo-has-no-love-lost-for-dining-cars-long-haul-routes> [https://perma.cc/GHR6-3QB3].

<sup>15</sup> See *id.*

<sup>16</sup> See *About STB*, SURFACE TRANSP. BD., <https://prod.stb.gov/about-stb/> [https://perma.cc/4AVA-TGW9]. See also Leonard, *supra* note 14.

<sup>17</sup> See CNBC, *Why The US Has No High-Speed Rail*, YOUTUBE (May 7, 2019), [https://www.youtube.com/watch?v=Qaf6baEu0\\_w](https://www.youtube.com/watch?v=Qaf6baEu0_w) [https://perma.cc/E5L5-ZPDV] (last visited May 1, 2021).

<sup>18</sup> *Id.*

disputes between Amtrak and the freight carriers in Amtrak's favor and by backing a plan for Amtrak's self-sustainability put forward by its former CEO, Richard Anderson. Meanwhile, to make significant changes that will dramatically shape passenger rail utilization in the long term, the Biden administration must alter the way new rail projects are funded by maintaining greater federal planning control oversight, while also aggressively and liberally employing eminent domain to acquire the land necessary for new rail lines.

This Article analyzes the current state of American rail infrastructure development and the numerous challenges that have stunted the growth and promoted the decay of America's rail network, with an emphasis on the political, legal, and regulatory issues, and how President Biden may ameliorate these issues to realize his rail revolution. Section II addresses the current state of the American rail network. Section III discusses the advantages of passenger rail, as well as recent projects, and how legal and regulatory problems have impacted the projects' success. Section IV analyzes President Biden's plan to revitalize the U.S. rail network and expands on this Article's specific recommendations for achieving the plan's desired purpose.

## II. THE CURRENT STATE OF AMERICAN RAIL

The rail network in the United States is a product of both private and public efforts, over decades, that have built out this critical piece of strategic and economic infrastructure.<sup>19</sup> The rail system now exists within a complex ecosystem of private rail companies, who own much of the existing track, publicly-funded but privately operated entities, that dominate the passenger rail market, and federal and state regulators, who ensure that this critical asset serves the public interest.<sup>20</sup> This is the morass that the Biden administration is wading into.

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<sup>19</sup> See *American Railroads in the 20th Century*, NAT'L MUSEUM OF AM. HIST, <https://americanhistory.si.edu/america-on-the-move/essays/american-railroads> [https://perma.cc/3Z8M-XVFH] (last visited May 1, 2021).

<sup>20</sup> Leonard, *supra* note 14.

*A. Growth, Decline, and Centralization – A Brief History of the American Rail System*

From the beginning, the federal government has had a significant role in developing the nation's rail network. On May 10, 1869, a golden spike was driven into the Utah ground, marking the completion of the transcontinental railroad and a milestone in an era of mass-mobility of people and freight utilizing a growing American rail system that had begun in the 1830s.<sup>21</sup> This achievement, which connected America's coasts and enabled the rapid settlement of the Western territories, was made possible by federal land donations directly to railroad corporations, authorized by the Railroad Act of 1862.<sup>22</sup>

While freight traffic on America's railroads increased over the decades, passenger traffic subsided following its zenith during World War II as new modes of transportation, predominantly cars and airplanes, became the preeminent people movers.<sup>23</sup> In the 1960s, many of America's private railroads were struggling financially.<sup>24</sup> Passenger trains increasingly became dilating money pits for the floundering railroads.<sup>25</sup> These woes were only compounded by federal regulators at the Interstate Commerce Commission ("ICC"), an agency with purview over ticket prices and routes at the time, who were unwilling to allow railroads to cease traffic along any of the passenger rail routes, and therefore reduce regional access to passenger rail, without significant delay and extensive hearings.<sup>26</sup> To save the railroads from the financial albatross of running the unprofitable passenger routes and to maintain passenger rail service to many American communities, Congress passed the Rail Passenger Service Act in 1970,<sup>27</sup> creating the National Railroad

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<sup>21</sup> SURFACE TRANSP. BD., *supra* note 16.

<sup>22</sup> *See id.*; Railroad Act, ch. 120, 12 Stat. 489 (1862).

<sup>23</sup> NAT'L MUSEUM OF AM. HIST., *supra* note 19.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327 (1970) (codified as amended at 49 U.S.C. § 24301-16).

Passenger Corporation—"Amtrak"—to take over passenger routes.<sup>28</sup>

Amtrak is a taxpayer-subsidized, for-profit corporation whose majority shareholder is the federal government, and is subject solely to federal law.<sup>29</sup> It maintains a near-monopoly on passenger rail service in the United States and serves forty-six states, the District of Columbia, and three Canadian provinces.<sup>30</sup> Amtrak's Board of Directors is composed of ten members, of whom, two are the President of Amtrak and the U.S. Secretary of Transportation, and eight are other members appointed by the President of the United States with the advice and consent of the U.S. Senate.<sup>31</sup> The Board is often comprised of former politicians, regulators, lobbyists, and once included President Biden's youngest son, Hunter Biden, who was nominated for a five-year term by President Bush in 2006.<sup>32</sup>

After the passage of the Rail Passenger Service Act, twenty of the twenty-six private railroads offering passenger service at the time joined Amtrak.<sup>33</sup> This represented a dramatic government-backed centralization of the passenger rail network. Moreover, this effective bailout of the private railroads and passenger rail takeover is demonstrative of the extremely hands-on role that the federal government plays in the American rail system.

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<sup>28</sup> "Amtrak, the national rail operator, connects America in safer, greener and healthier ways. *Amtrak Facts*, AMTRAK, <https://www.amtrak.com/about-amtrak/amtrak-facts.html> [<https://perma.cc/6WQL-32AA>] (last visited May 1, 2021). With 21,000 route miles in 46 states, the District of Columbia and three Canadian provinces, Amtrak operates more than 300 trains each day — at speeds up to 150 mph — to more than 500 destinations. *Id.* Amtrak is the operator of choice for state-supported corridor services in 17 states and for four commuter rail agencies." *Id.* See NAT'L MUSEUM OF AM. HIST., *supra* note 19.

<sup>29</sup> See AMTRAK, FY 2019 COMPANY PROFILE 2 (2019), <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/Amtrak-Corporate-Profile-FY2019-033120.pdf> [<https://perma.cc/F4GK-K89F>]; Pub. L. No. 91-518 Stat. 84.

<sup>30</sup> See AMTRAK, *supra* note 28.

<sup>31</sup> *Id.*; 49 U.S.C. § 24302(a). The President of Amtrak is a non-voting member of the Board. *Id.*

<sup>32</sup> Andrew Glass, *A Younger Biden Goes the Extra Miles for Amtrak*, POLITICO (Feb. 2, 2007, 4:22 PM), <https://www.politico.com/story/2007/02/a-younger-biden-goes-the-extra-miles-for-amtrak-002672> [<https://perma.cc/5S7Q-RXBY>].

<sup>33</sup> Kim, *supra* note 13.

### *B. The Regulatory Environment*

Consistent with the active role that the federal government plays in the American rail sector, there is a veritable alphabet soup of three letter federal agencies that influence the operation of trains in this country. Primary among these federal regulatory bodies is the Federal Railroad Administration (“FRA”), which was created along with its parent cabinet-level department, the Department of Transportation (“DOT”), in 1966.<sup>34</sup> As emphasized in its platform, “[t]he [FRA’s] mission is to enable the safe, reliable, and efficient movement of people and goods . . . .”<sup>35</sup> The FRA fulfills its responsibilities “primarily through issuance, implementation, and enforcement of safety regulations; selective investment to develop the rail network across the country; and research and technology development.”<sup>36</sup>

Crucially, the FRA implements the President’s intercity passenger rail policy.<sup>37</sup> The FRA “has conducted studies and demonstrations, provided oversight, and administered federal grants to the nation’s intercity passenger rail system under the High-Speed Ground Transportation Act of 1965 and the Rail Passenger Service Act of 1970 . . . .”<sup>38</sup> Within the FRA, the Office of Railroad Policy and Development oversees infrastructure investment and the implementation of statutory policy regarding intercity and high-speed passenger rail.<sup>39</sup>

Amtrak maintains a close relationship with federal regulators at the FRA and the greater DOT.<sup>40</sup> As mentioned *supra*, one of Amtrak’s Board of Directors is always the Secretary of

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<sup>34</sup> See *About FRA*, FED. R.R. ADMIN., <https://railroads.dot.gov/about-fra/about-fra> [<https://perma.cc/H9C4-C3HL>] (last updated Oct. 7, 2019).

<sup>35</sup> *Id.*

<sup>36</sup> *Rail Network Development*, FED. R.R. ADMIN., <https://railroads.dot.gov/rail-network-development/rail-network-development> [<https://perma.cc/K99L-77SD>] (last updated Nov. 1, 2019).

<sup>37</sup> *Passenger Rail*, FED. R.R. ADMIN., <https://railroads.dot.gov/rail-network-development/passenger-rail/passenger-rail> [<https://perma.cc/62FS-ZFMR>] (last visited May 1, 2021).

<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> *Id.*

<sup>40</sup> See *Amtrak*, FED. R.R. ADMIN., <https://railroads.dot.gov/passenger-rail/amtrak/amtrak> [<https://perma.cc/W7HD-3XQT>] (last visited May 1, 2021).



Transportation or her designee.<sup>41</sup> Moreover, the FRA provides analytical support to the Secretary of Transportation, or her designee, and administers the federal grants that maintain Amtrak's budget.<sup>42</sup> Since 2003, the increasing necessity of federal funding has led the FRA to take greater oversight over Amtrak.<sup>43</sup>

Aside from the FRA, the regulatory body that has the greatest influence on American rail operations is the Surface Transportation Board ("STB"). The STB "is an independent federal agency that is charged with the economic regulation of various modes of surface transportation, primarily freight rail."<sup>44</sup> Furthermore, the STB is a quasi-judicial body, and the successor agency to the aforementioned, and intransigent, ICC, and therefore, "has jurisdiction over railroad rate, practice, and service issues and rail restructuring transactions, including mergers, line sales, line construction, and line abandonments."<sup>45</sup> The agency consists of five members serving five-year terms and provides a forum to resolve disputes within its jurisdiction.<sup>46</sup>

In 2015, Congress passed the Surface Transportation Board Reauthorization Act, which expanded the STB's role and ensured its independence.<sup>47</sup> In the bill, Congress excised the STB from DOT and charged the agency with the additional duty to "investigate issues of national or regional significance" within its jurisdiction.<sup>48</sup> Following a dispute or an intrinsic investigation, the STB has the ability to award damages, appealable to the "appropriate judicial circuit for a de novo review."<sup>49</sup> Altogether, the STB's "role adjudicating and mediating rate, service and access disputes

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> SURFACE TRANSP. BD., *supra* note 16.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*; *Board Members*, SURFACE TRANSP. BD., <https://prod.stb.gov/about-stb/board-members/> [<https://perma.cc/W8FJ-U8WA>] (last visited May 1, 2021).

<sup>47</sup> *Legal Resources*, SURFACE TRANSP. BD., <https://prod.stb.gov/resources/legal-resources/#legislation> [<https://perma.cc/K5KE-75JG>] (last visited May 1, 2021); Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2231 (2015).

<sup>48</sup> *Id.*

<sup>49</sup> Surface Transportation Board Reauthorization Act of 2015.

between railroads and their customers” is indicative of the highly regulated nature of the America’s rail ecosystem.<sup>50</sup>

### C. Amtrak and its Challenges

Amtrak has now existed within this highly-regulated market for fifty years and serves 500 communities nationwide, including 150 rural communities.<sup>51</sup> Arguably, Amtrak’s greatest success was its acquisition of the dilapidated rail lines between Washington, New York, and Boston from the bankrupt Penn Central Railroad in 1976, which now host the country’s only high-speed rail service—the Acela service—the fastest trains in the country which travel up to 150 miles per hour (“mph”).<sup>52</sup> Amtrak’s three busiest stations by ridership lie along this route: New York, Washington, and Philadelphia.<sup>53</sup> These trains typically run on-time,<sup>54</sup> and in 2019 Amtrak earned \$642 million in ticket revenue from the route Acela service alone.<sup>55</sup> In total, Amtrak grossed \$534 million in total profit across all of the route’s services.<sup>56</sup>

This success contributed greatly to Amtrak’s \$3.5 billion overall revenue in 2019, but Amtrak also incurred \$4.9 billion in capital and operating expenses in the same year.<sup>57</sup> While this deficit is outwardly alarming, Amtrak points out that it was able to recover 99.1% of its operating costs.<sup>58</sup> Additionally, Amtrak has also stated in their defense of their financial deficit that “[n]o country in the world

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<sup>50</sup> *Freight Rail Economic Regulation 101*, ASS’N OF AM. R.R., <https://www.aar.org/campaigns/economic-regulation-101/> [<https://perma.cc/TS9J-PT5V>] (last visited May 1, 2021).

<sup>51</sup> *Today & Tomorrow*, AMTRAK, <https://history.amtrak.com/amtraks-history/amtrak-today> [<https://perma.cc/5JQH-U96Y>] (last visited May 1, 2021).

<sup>52</sup> *Id.* See also AMTRAK, FY 2019 COMPANY PROFILE, *supra* note 29, at 5.

<sup>53</sup> AMTRAK, FY 2019 COMPANY PROFILE, *supra* note 29, at 5.

<sup>54</sup> Leonard, *supra* note 14.

<sup>55</sup> AMTRAK, FY 2019 COMPANY PROFILE, *supra* note 29, at 5.

<sup>56</sup> Leonard, *supra* note 14.

<sup>57</sup> *Id.*

<sup>58</sup> *National Fact Sheet FY 2016*, AMTRAK, <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/National-Fact-Sheet-FY2016-0717.pdf> [<https://perma.cc/47SW-5UR9>] (last visited May 1, 2021).

operates a passenger rail system without some form of public support for capital costs and/or operating expenses.”<sup>59</sup>

However, ultimately, Amtrak cannot conceal the fact that the corporation has lost money every single year of its existence.<sup>60</sup> Contributing significantly to Amtrak’s financial woes are the long-distance routes operated at a yearly operating loss of \$543 million in 2018, which eclipses the profits made on the successful Northeast corridor routes.<sup>61</sup> Moreover, these long-distance trains operated according to schedule only forty-three percent of the time in 2018.<sup>62</sup> Both the tardiness and unprofitability of the long-distance routes are products of two major systemic problems that Amtrak is facing: (1) antagonistic relationships with private railroads, and (2) the inherent difficulty of maintaining a successful passenger rail system in the United States as compared to other countries.<sup>63</sup>

Amtrak’s first major problem is its relationship with the purely private railroads. Unlike in the Northeast corridor, where Amtrak owns most of the track and controls dispatching along it, the long-distance routes are mostly owned by freight companies.<sup>64</sup> For example, Amtrak operates on 6.9 million miles of rail owned by Burlington Northern Santa Fe Railway, and 6.1 million miles of rail owned by Union Pacific Railroad.<sup>65</sup> In defiance of Amtrak’s desires, these freight companies give their slow-moving behemoths priority over the Amtrak passenger trains competing for use of these rails.<sup>66</sup> When Amtrak was created to take over the passenger service from these same private railroads, in an action that effectively amounted to a bailout by Congress, these private rail operators, who now primarily traffic in freight, agreed to give Amtrak “preference [over]

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<sup>59</sup> *Id.*

<sup>60</sup> Kim, *supra* note 13.

<sup>61</sup> Leonard, *supra* note 14.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; Megan McArdle, *Why the United States Will Never Have High-Speed Rail*, WASH. POST (Feb. 12, 2019), <https://www.washingtonpost.com/opinions/2019/02/13/why-united-states-will-never-have-high-speed-rail/> [<https://perma.cc/9DH2-URW2>].

<sup>64</sup> *Id.*

<sup>65</sup> *National Fact Sheet FY 2016*, AMTRAK, *supra* note 58, at 3.

<sup>66</sup> Leonard, *supra* note 14.

their tracks.”<sup>67</sup> This suggestions that freight trains are supposed to pull over to a side track to allow Amtrak passenger trains to get by.<sup>68</sup> However, due to a dispute over what “preference” means, in practice, freight operators who control dispatching along their own tracks have typically compelled Amtrak trains to idle while the freight leviathans pass.<sup>69</sup>

Regulators at the FRA and Amtrak wanted to ameliorate the problem by establishing performance standards, but the freight industry’s primary trade organization, the Association of American Railroads (“AAR”), pushed back.<sup>70</sup> The President of the AAR told Congress that as a result of the increase in freight cargo, it would be unreasonable to ask the freight haulers to pull over and let Amtrak trains pass.<sup>71</sup> Amtrak believed that the refusal of the freight carriers to accommodate Amtrak’s trains violated existing law.<sup>72</sup> Amtrak argued that the correct statutory interpretation required Amtrak trains to be given “absolute priority” over the tracks.<sup>73</sup> The FRA performance standards were meant to resolve this dispute through compromise, but the AAR persistently used the courts to try and block the enactment of any standards concerning Amtrak trains.<sup>74</sup> Consequently, the Supreme Court of the United States was asked twice to resolve disputes stemming for AAR litigation.<sup>75</sup> Notably,

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<sup>67</sup> *Id.*

<sup>68</sup> Leonard, *supra* note 14.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> William P. Byrne et. al, *Biden’s “Second Great Railroad Revolution”: STB Impact*, HOLLAND & KNIGHT (Jan. 2, 2021), <https://www.hklaw.com/en/insights/publications/2021/01/bidens-second-great-railroad-revolution-stb-impact> [<https://perma.cc/EK26-GL2N>] (“The freight roads have long maintained that the term ‘preference’ falls far short of Amtrak’s interpretation as ‘absolute priority.’”).

<sup>74</sup> 49 C.F.R. § 273 (2020); Leonard, *supra* note 14.

<sup>75</sup> Leonard, *supra* note 14; *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 56 (2015) (holding that performance metrics and standards are not invalid because Amtrak is not a private entity but a government entity), *cert. denied*, 139 S.Ct. 2665 (2019).

this contentious and long-drawn-out legal battle is made somewhat humorous by the fact that Amtrak is itself a member of the AAR.<sup>76</sup>

After more than a decade of litigation, the issue finally culminated on November 16, 2020, when Amtrak won a significant victory as the FRA instituted a final rule that “requires Amtrak and its host railroads to certify Amtrak schedules and sets an on-time performance minimum standard of 80% for any two consecutive calendar quarters.”<sup>77</sup> The FRA “rule finally provides [Amtrak with] a potential enforcement mechanism,” to ensure the greater punctuality of their trains on privately owned tracks.<sup>78</sup> Moreover, this ruling empowers the STB to investigate allegations of noncompliance and if the STB “finds that the poor performance was attributable to a failure to provide Amtrak passengers with preference over freight trains, damages and other relief can be awarded.”<sup>79</sup> This is a major “victory” for Amtrak, but it remains unclear whether the freight carriers will abide by this rule or continue to fight it in court and before the STB on a case-by-case basis.<sup>80</sup> What is clear is that the relationship between Amtrak and the freight carriers remains sour.<sup>81</sup>

The second significant, systemic issue faced by Amtrak, which is perhaps even more challenging than its factious relationships with the other members of the industry, is the simple truth that the United States is not optimally populated for a successful train network.<sup>82</sup> Many countries with successful passenger rail networks such as

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<sup>76</sup> See Leonard, *supra* note 14.

<sup>77</sup> Press Release, U.S. Dep’t of Transp., FRA Publishes Final Rule Establishing Metrics and a Minimum Standard to Measure the Performance and Service Quality of Intercity Passenger Rail (Nov. 16, 2020), <https://railroads.dot.gov/sites/fra.dot.gov/files/2020-11/fra1620.pdf> [<https://perma.cc/VQX9-J5WW>].

<sup>78</sup> *Amtrak Statement on FRA Metrics and Standards Final Rule*, AMTRAK (Nov. 16, 2020), <https://media.amtrak.com/2020/11/amtrak-statement-on-fra-metrics-and-standards-final-rule/> [<https://perma.cc/XHG7-8288>].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Leonard, *supra* note 14. See *Amtrak Statement*, AMTRAK, *supra* note 78; *Freight Rail Economic Regulation 101*, ASS’N OF AM. R.R., <https://www.aar.org/campaigns/economic-regulation-101/> [<https://perma.cc/TS9J-PT5V>] (last visited May 1, 2021).

<sup>82</sup> McArdle, *supra* note 63.

China, Japan, and France have major population centers that are much closer together than those in the United States.<sup>83</sup> This is important because passenger rail is best suited for travelers who want to travel an intermediate distance, a goldilocks distance, where it is faster to skip the road traffic and stoplights that cars face, and also faster to forego the airport security and taxi time that planes face.<sup>84</sup>

In the regions of the country where rail travel makes the most sense due to the distance between major population centers, for instance, the Texas Triangle and the Northeast, construction is prohibitively expensive.<sup>85</sup> To build new track, the land between City 1 and City 2 would have to be purchased, and given the wealth of the United States, that land would be expensive.<sup>86</sup> For those unwilling to sell, government intervention would be required to acquire the land through eminent domain, but Americans living along a proposed route could utilize eminent domain appeals to impede any progress of a new rail line.<sup>87</sup> Furthermore, much new track construction is necessary. In order to utilize faster trains that could attract new consumers or obtain tracks not owned by the freight industry, America needs to build straighter, more modern tracks that eliminate the possibility of dangerous turns, for dangerous turns would be inevitable if faster trains operating at greater speeds were deployed on the current aging and meandering network of U.S. tracks.<sup>88</sup> The result is effective paralysis.

In spite of all of these challenges, Amtrak remains resilient. When the Trump administration proposed halving the federal subsidy for Amtrak in 2018,<sup>89</sup> a bipartisan Congress defiantly responded by instead providing Amtrak with two billion dollars.<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *See* AMTRAK, FY 2019 COMPANY PROFILE, *supra* note 29, at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *Id.*

<sup>89</sup> Alan Levin, *Trump's Budget Would Cut Federal Amtrak Spending in Half*, BLOOMBERG (Feb. 12, 2018), <https://www.bloomberg.com/news/articles/2018-02-12/federal-amtrak-spending-would-be-cut-in-half-under-trump-budget> [<https://perma.cc/BB2X-YZVD>].

<sup>90</sup> Leonard, *supra* note 14.

While Senators from rural states fight to maintain service to their communities, Amtrak's former CEO, Richard Anderson, planned to make Amtrak financially self-sustaining by emphasizing profitable routes like the Northeast Corridor and phasing out the ruinous long-distance routes.<sup>91</sup> However, while these battles are significant, they are paltry in comparison to those that will need to be fought in order to dramatically expand Amtrak or build a modern passenger rail network comparable to that of countries like China, Japan, and France.<sup>92</sup>

### III. THE BENEFITS OF PASSENGER RAIL AND EFFORTS TO CREATE AN AMERICAN HIGH-SPEED RAIL SYSTEM

While American passenger rail utilization is on a recent ebb, an increasingly vocal faction within the American body politic is pushing for a renewal of the prominent role of passenger trains in American society.<sup>93</sup> These rail proponents look across the oceans at the expansive rail networks of Asia and Europe and ask: why is the United States so far behind?<sup>94</sup> These advocates, which includes the authors of the "Green New Deal," the controversial and possibly revolutionary series of public policy proposals intended to drastically curb the effects of climate change, often point to the many benefits of passenger rail over other forms of transportation in support of the argument that now is the time for a rail resurgence.<sup>95</sup> As a result of this advocacy, and overall changing attitudes toward passenger trains,<sup>96</sup> multiple states and the federal government under the Obama administration began fighting significant battles to build

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> The Editorial Board, *Making the Case for High Speed Rail*, N.Y. TIMES (Aug. 12, 2014), <https://www.nytimes.com/2014/08/13/opinion/making-the-case-for-high-speed-rail.html> [<https://perma.cc/3BCX-KVXC>] (last updated Feb. 13, 2019).

<sup>94</sup> See McArdle, *supra* note 63.

<sup>95</sup> Umair Irfan, *America's Trains Are a Drag. The Green New Deal Wants to Fix That*, VOX, <https://www.vox.com/2019/2/8/18215774/green-new-deal-high-speed-train-air-travel> [<https://perma.cc/7ZYK-MFN9>] (last visited May 1, 2021).

<sup>96</sup> CNBC, *supra* note 17.

out the existing rail system and to create a modern high-speed passenger rail network.<sup>97</sup>

*A. The Argument for Expanding the Nation's Passenger Rail Network*

Currently, train travel represents the transportation mode for only around 1% of all long-distance trips of greater than fifty miles<sup>98</sup> taken by Americans.<sup>99</sup> For 90% of long-distance trips, Americans use cars.<sup>100</sup> For the remaining long-distance trips, 7% use planes and 2% use buses.<sup>101</sup> Simply, passenger rail is currently far less popular than other modes of personal transportation. This lack in popularity is particularly disappointing given passenger rail's great potential. As a result, the federal government should take steps to increase utilization of passenger trains because of passenger rail's potential to (1) appeal broadly across income groups, (2) benefit the environment, (3) fill a gap between car and air travel with more convenient travel times, and (4) provide modest pricing for consumers.

First, passenger rail appeals to all walks of society.<sup>102</sup> While other modes of transportation are utilized at different rates corollary to median household income, "[t]here is no difference across income levels in the percentage of long-distance trips made by train."<sup>103</sup> Therefore, investments in long-distance passenger rail will likely positively and more equitably impact Americans across income groups.

Second, increasing usage of passenger rail could have significant environmental benefits. The 2016 U.S. Department of Energy Data Book found that "Amtrak is 33 percent more [energy]

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<sup>97</sup> *Id.*; see also Leonard, *supra* note 14.

<sup>98</sup> Long distance trip is defined as a trip longer than 50 miles from the originating point to the furthest destination. *Long Distance Transportation Patterns: Mode Choice*, BUREAU OF TRANSP. STATS. (Dec. 22, 2011), [https://www.bts.gov/archive/publications/america\\_on\\_the\\_go/long\\_distance\\_transportation\\_patterns/entire](https://www.bts.gov/archive/publications/america_on_the_go/long_distance_transportation_patterns/entire) [<https://perma.cc/Q49W-M266>] (using data taken from National Household Travel Survey (NHTS) conducted in 2001 and 2002).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> BUREAU OF TRANSP. STATS., *supra* note 98.

<sup>103</sup> *Id.*



efficient than traveling by car and 12 percent more [energy] efficient than domestic airline travel on a per-passenger-mile basis.”<sup>104</sup> Less energy used means less carbon dioxide will be emitted producing the energy.<sup>105</sup> This efficiency is a part of a global trend.<sup>106</sup> Trains carry 8% of the world’s motorized passengers and 7% of the world’s freight, yet trains use only 2% of the energy consumed by transportation.<sup>107</sup> This would likely improve further with modern trains and better-constructed routes.<sup>108</sup> A study in the Journal of Advanced Transportation found that the current train route from London to Marseille, a distance of around 610 miles, produces only 36 kilograms of emitted carbon dioxide per passenger as opposed to the 311 kilograms per passenger emitted by flying the same distance.<sup>109</sup> Similarly, the train from Paris to Barcelona emits 11 kilograms of carbon dioxide per passenger while a plane flying the same distance would emit 238 kilograms.<sup>110</sup> For a typical European car to emit similar amounts of emitted carbon dioxide per person to a typical European domestic train, that car would need to contain four passengers.<sup>111</sup> However, the Eurostar high-speed rail line emits

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<sup>104</sup> AMTRAK, AMTRAK FIVE YEAR SERVICE LINE PLANS 9 (2019), <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/businessplanning/Amtrak-Service-Line-Plans-FY20-24.pdf> [https://perma.cc/6MNZ-7WZH].

<sup>105</sup> *Sources of Greenhouse Gas Emissions*, ENV’T PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions#:~:text=The%20largest%20source%20of%20greenhouse,electricity%2C%20heat%2C%20and%20transportation.&text=Approximately%2063%20percent%20of%20our,mostly%20coal%20and%20natural%20gas> [https://perma.cc/KFA3-RAE3] (last visited May 1, 2021).

<sup>106</sup> Irfan, *supra* note 95.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Matteo Prussi & Laura Lonza, *Passenger Aviation and High Speed Rail: A Comparison of Emissions Profiles on Selected European Routes*, J. ADVANCED TECH. (July 27, 2018), <https://www.hindawi.com/journals/jat/2018/6205714/> [https://perma.cc/W8N2-5PMZ].

<sup>110</sup> Irfan, *supra* note 95.

<sup>111</sup> *Climate Change: Should You Fly, Drive, or Take the Train?*, BBC (Aug. 23, 2019), [https://www.bbc.com/news/science-environment-49349566#:~:text=Train%20virtually%20always%20comes%20out,included\)%2C%20according%20to%20EcoPa ssenger.&text=Diesel%20trains'%20carbon%20emissions%20can%20be%20twice%20those%20of%20electric%20ones](https://www.bbc.com/news/science-environment-49349566#:~:text=Train%20virtually%20always%20comes%20out,included)%2C%20according%20to%20EcoPa ssenger.&text=Diesel%20trains'%20carbon%20emissions%20can%20be%20twice%20those%20of%20electric%20ones) [https://perma.cc/8CTF-JKL2].

almost seven times less carbon dioxide per passenger than the typical European domestic train.<sup>112</sup> Overall, these facts demonstrate the clear advantage that rail has over flying and cars, as well as the advantage of high-speed rail over slower rail systems, in terms of reducing carbon dioxide emissions, and therefore combatting climate change.

Third, passenger rail has the potential to be a better option for travelers in terms of convenience. As mentioned *supra*, trains provide the best option, in terms of speed of travel, for travelers who want to go a distance too far for cars but not far enough for planes. However, that “goldilocks zone” may be increasing as trains get faster and therefore more appealing. While the Acela train can go up to 150 mph, in reality, it averages between 65 and 68 mph over its route in the Northeast corridor due to stops and poor track infrastructure.<sup>113</sup> Contrast this with trains in China, Spain, Germany, Saudi Arabia, France, Italy, South Korea, and Japan where trains can go faster than 200 mph and maintain high speeds throughout the journey.<sup>114</sup> Should the Acela route increase in speed to that of rail lines already existing in these countries, it would be competitive with airplanes in terms of total travel time on the D.C. to New York route (once airport security and commute to the airport are factored in).<sup>115</sup> According to another study in the *Journal of Advanced Transportation*, “[t]ravel time is most critical in determining the competitiveness between the [high-speed rail] and air transport,” and therefore “shorter travel time will attract more passengers.”<sup>116</sup> Consequently, an increase in speed will cause decreasing travel times which will bring new passengers.

Fourth, along busy routes where high-speed rail and flying provides travelers with similar total traveling time, the train is often cheaper. The Paris to Lyon train is around \$75 while the flight

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; CNBC, *supra* note 17.

<sup>114</sup> *Climate Change*, BBC, *supra* note 111; CNBC, *supra* note 17.

<sup>115</sup> *Climate Change*, BBC, *supra* note 111.

<sup>116</sup> Xiaoqian Sun et al., *Air Transport versus High-Speed Rail: An Overview and Research Agenda*, J. OF ADVANCED TECH. (May 25, 2017), <https://www.hindawi.com/journals/jat/2017/8426926/> [<https://perma.cc/V6WE-QXQ5>].

between those two French cities costs closer to \$115.<sup>117</sup> Planes do not appear to beat high-speed rail in terms of cost and travel time until the one-way distance exceeds 620 miles, roughly the distance between Los Angeles and Salt Lake City.<sup>118</sup> Many similar routes in the United States are within the goldilocks zone for high-speed rail's benefits to make it preferable to flying for consumers.

Altogether, these advantages of passenger rail demonstrate the significant public benefit that can be reaped from an improved national passenger rail network. As a result, what remains is the challenge of how to build this network and ultimately deciding how to pay for it. As the analysis of recent efforts to improve the national passenger rail system will demonstrate, the challenge appears herculean.

*B. Current and Recent Efforts to Spur Development of American High-Speed Rail*

Given the benefits, it is evident why there is a groundswell of demand for high-speed rail. A 2015 TechnoMetrica survey found that sixty-three percent of Americans, and seventy-one percent of Americans between the ages of eighteen to forty-four, said they would be likely to use high-speed rail if it were built in the United States.<sup>119</sup> However, a better rail system has proven to be a white whale for successive Presidential administrations as well as private groups who see a profitable niche in the transportation market.

In 1964, the United States first considered the idea of creating a high-speed rail network modeled on the systems taking root in Japan and Europe.<sup>120</sup> In 1965, Congress set aside \$90 million in the High-Speed Ground Transportation Act<sup>121</sup> to develop and

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<sup>117</sup> Irfan, *supra* note 95.

<sup>118</sup> *Id.*

<sup>119</sup> CNBC, *supra* note 17.

<sup>120</sup> *High-Speed Rail Timeline*, FED. R.R. ADMIN., <https://railroads.dot.gov/passenger-rail/high-speed-rail/high-speed-rail-timeline> [<https://perma.cc/5JXW-APML>].

<sup>121</sup> High-Speed Ground Transportation Act of 1965, Pub. L. No. 89-220, 79 Stat. 893 (1965).

demonstrate emerging high-speed rail technologies.<sup>122</sup> The next major step forward came in 1992 when the FRA designated five potential intercity high-speed rail corridors where high-speed rail could best operate in this country.<sup>123</sup> This would later be expanded to ten in 2000.<sup>124</sup> Ultimately, however, this early period of efforts by the FRA and the federal government was mostly preliminary and consisted of studies and reports.<sup>125</sup>

The Obama administration, with the help of then-Vice President Biden, took an important step forward toward a high-speed rail future in President Obama's first term by passing two critical pieces of legislation. The first was The Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), which created a system by which states could create new rail infrastructure plans that would serve as the basis for federal rail investment in the state.<sup>126</sup> The law also created the basis for the Amtrak performance standards which were repeatedly challenged by the AAR.<sup>127</sup> The second was The American Recovery and Reinvestment Act of 2009 ("ARRA"), which used the PRIIA framework to disperse more than \$8 billion in available funds through DOT to spur high-speed rail development.<sup>128</sup> The distribution has primarily been overseen by two subsequent DOT programs, the High-Speed Rail and Transportation

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified in scattered sections of 49 U.S.C.).

<sup>127</sup> *Id.*; *Amtrak Statement on FRA Metrics and Standards Final Rule*, AMTRAK (Nov. 16, 2020), <https://media.amtrak.com/2020/11/amtrak-statement-on-fra-metrics-and-standards-final-rule/> [<https://perma.cc/FA39-NYCD>]; *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43 (2014) (holding that performance metrics and standards are not invalid because Amtrak is not a private entity but a government entity); *Ass'n of Am. R.R.s v. Dep't of Transp.*, 139 S.Ct. 2665 (2019) (writ of certiorari denied).

<sup>128</sup> American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, Title XII, 123 Stat. 115, 208; U.S. DEP'T TRANSP., *SHOVEL WORTHY: THE LASTING IMPACTS OF THE AMERICAN RECOVERY AND REINVESTMENT ACT ON AMERICA'S TRANSPORTATION INFRASTRUCTURE* 5 (2016), <https://www.transportation.gov/sites/dot.gov/files/docs/American%20Recovery%20and%20Reinvestment%20Act%20Final%20Report.pdf> [<https://perma.cc/7GFL-KXC8>].

Investment Generating Economic Recovery program and its successor, the Better Utilizing Investments to Leverage Development Transportation Discretionary Grants program.<sup>129</sup>

Following the passage of these two major pieces of legislation, FRA's Office of Railroad Policy and Development released their High-Speed Rail Strategic Plan in 2009.<sup>130</sup> The plan called for an ambitious program akin to the development of the American air and highway transportation networks.<sup>131</sup> Similar to the development of these networks, the high-speed rail plan would utilize a partnership between states, the federal government, and private industry.<sup>132</sup> The plan was to:

[(1) P]rovide grants to complete individual projects that are "ready to go" with preliminary engineering and environmental work completed[;]

[(2) e]nter into cooperative agreements to develop entire phases or geographic sections of corridor programs that have completed corridor plans and environmental documentation, and have a prioritized list of projects to meet the corridor objectives . . . [; and]

[(3) e]nter into cooperative agreements for planning activities using non-ARRA appropriations funds, in order to create the corridor program and project pipeline needed to fully develop a high-speed rail network.<sup>133</sup>

Overall, the scheme was for the federal government to fund projects that were shovel-ready with the ARRA \$8 billion initial investment by Congress, while providing oversight and planning for creating a national network and leaving much of the actual implementation to states, as the PRIIA framework stipulated.<sup>134</sup>

The plan acknowledged many of the aforementioned problems for creating a national high-speed rail network.<sup>135</sup> These include a brain drain of experts and rail engineers over the past decades as a result of limited investment in rail, the fiscal constraints of state

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<sup>129</sup> Adam Wald, *Planes, Trains, & Automobiles: Regulating the Transportation Technologies of Tomorrow*, 26 B.U.J. SCI. & TECH. L. 379, 383 (2020).

<sup>130</sup> *High-Speed Rail Strategic Plan*, FED. R.R. ADMIN. (Apr. 2009), <https://railroads.dot.gov/elibrary/high-speed-rail-strategic-plan> [https://perma.cc/84HC-WSZD].

<sup>131</sup> Wald, *supra* note 129.

<sup>132</sup> *High-Speed Rail Timeline*, FED. R.R. ADMIN, *supra* note 120.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

partners, frosty relationships with private railroads (who own much of the existing track), the need for multi-state partnerships to operate lines that cross state lines, and new high-speed rail safety standards to be overseen by the FRA.<sup>136</sup>

These issues aside, the Obama administration's plan represented a major devolution of responsibility for creating a new and improved rail system to the states and localities and also heavily prioritized funding projects that were "shovel ready."<sup>137</sup> This very federalist, hands-off, and inflexible approach has predictably been unsuccessful in promoting an improved national rail system.<sup>138</sup> Despite the distribution of over \$11 billion during President Obama's tenure, the biggest win for rail enthusiasts was upgrades to Amtrak's Acela program.<sup>139</sup>

The cause of the failure appears to have been political disputes between DOT and governors.<sup>140</sup> In 2010, following the election of Republican Scott Walker as governor of Wisconsin, the new governor tried to reallocate \$810 million of ARRA funding, which had been set aside for a high-speed rail line from Madison to Milwaukee, to fund improvements to roads and bridges.<sup>141</sup> The DOT refused the reallocation request, and the money was forfeited by Wisconsin.<sup>142</sup>

In 2011, Republican Governor Rick Scott of Florida turned down \$2.4 billion in funds for a high-speed rail project between Tampa and Orlando, which he called a "spending boondoggle."<sup>143</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> U.S. Dep't of Transp., *Shovel Worthy: The Lasting Impacts of the American Recovery and Reinvestment Act on America's Transportation Infrastructure* (2016), <https://www.transportation.gov/sites/dot.gov/files/docs/American%20Recovery%20and%20Reinvestment%20Act%20Final%20Report.pdf> [<https://perma.cc/7GFL-KXC8>].

<sup>138</sup> Wald, *supra* note 129, at 384.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *High-Speed Rail Timeline*, FED. R.R. ADMIN, *supra* note 120; Wald, *supra* note 128.

<sup>142</sup> Wald, *supra* note 129, at 384.

<sup>142</sup> *Id.* at 385.

<sup>143</sup> *Id.* at 384 (citing Jennifer Grzeskowiak, *High-Speed Rail Struggles to Build Steam*, AM. CITY & COUNTY, Apr. 2011, at 22; Michael Cooper, *How Flaws*

This refusal allowed private investors to move in and establish the “Brightline” between West Palm Beach and Miami.<sup>144</sup> Although the Brightline is much slower than the shelved federally funded alternative, the Brightline began service in 2018, has \$3 billion invested already,<sup>145</sup> and has plans to extend service to Orlando and Tampa.<sup>146</sup>

Similar to the Wisconsin model, Republican Governor-elect of Ohio, John Kasich, conditioned acceptance of ARRA funding on reallocation to support other infrastructure projects.<sup>147</sup> This money had been earmarked for the “Ohio Hub” high-speed rail project connecting Cleveland, Columbus, Dayton, and Cincinnati.<sup>148</sup> As a result of Governor-elect Kasich’s actions, Ohio, just like Wisconsin, forfeited \$400 million from ARRA.<sup>149</sup>

However, Republican-controlled states were not the only ones unable to take advantage of the ARRA investment windfall. Despite being awarded \$2.2 billion in ARRA funding, California’s high-speed rail project connecting the north and the south of the state has mostly been shelved by Democratic Governor Gavin Newsom after similarly facing political issues.<sup>150</sup> The Trump Administration’s cancellation of a \$929 million grant did not help,<sup>151</sup> but poor planning was ultimately the downfall of the project.<sup>152</sup> The main issue was that stakeholders demanded that the high-speed rail line

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*Undid Obama’s Hope for High-Speed Rail in Florida*, N.Y. TIMES (Mar. 11, 2011), <https://www.nytimes.com/2011/03/12/us/12rail.html>.

<sup>144</sup> Wald, *supra* note 129, at 384.

<sup>145</sup> *Id.* at 384–85.

<sup>146</sup> *Brightline Florida*, BRIGHTLINE, <https://www.gobrightline.com/florida-expansion> [<https://perma.cc/S7TC-LM9E>] (last visited May 1, 2021).

<sup>147</sup> Wald, *supra* note 129, at 384–85.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 386.

<sup>150</sup> Ralph Vartabedian, *California’s Scaled-back High-speed Rail Plan Faces Doubts amid Financial Crunch*, L.A. TIMES (Sept. 8, 2020), <https://www.latimes.com/california/story/2020-09-08/newsom-bullet-train-faces-financial-crunch> [<https://perma.cc/AFG5-HA55>].

<sup>151</sup> *Id.*

<sup>152</sup> Matthew Yglesias, *California High-speed Rail and the American Infrastructure Tragedy, Explained*, VOX (Feb. 15, 2019), <https://www.vox.com/policy-and-politics/2019/2/15/18224717/california-high-speed-rail-canceled> [<https://perma.cc/48SS-BNJ4>].

service their communities, incentivizing local California politicians to “get . . . ‘win[s]’ . . . at the expense of” the project’s goals, budget allocations, and timetable.<sup>153</sup> There is some hope that the project could be revitalized in the future, but in the meantime private groups are moving in, like Brightline, and want to build a Brightline westbound from Los Angeles to Las Vegas.<sup>154</sup> Across the country efforts to build highspeed rail have mostly stalled.<sup>155</sup>

ARRA also failed in part because the act prioritized projects which were almost “shovel-ready,” rather than providing an incentive for states to create highspeed rail plans.<sup>156</sup> The law contained a July 10, 2009 deadline for pre-applications to the FRA, which was only six months after the bill’s passage.<sup>157</sup> Given the complexity of these projects, this simply was not enough time. Texas, for example, was a victim of this expeditious timeframe after failing to complete the paperwork in time.<sup>158</sup>

Overall, the PRIIA and ARRA regimes were not capable of delivering the highspeed rail network that was pledged. Additionally, although new private passenger rail companies have some promise, their scope and ambition are unlikely to deliver at the scale desired for many years at least.

### C. Congressman Moulton’s Proposal

Despite the failure of the Obama administration to spur the development of a national highspeed rail network, some believe the post-COVID-19 pandemic economic recovery presents an opportunity for a new push to develop high-speed rail.<sup>159</sup> These

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<sup>153</sup> *Id.*

<sup>154</sup> *Brightline West*, BRIGHTLINE, <https://www.gobrightline.com/west-coast-expansion> [<https://perma.cc/K4PY-65LP>].

<sup>155</sup> Yglesias, *supra* note 152; Wald, *supra* note 129, at 384.

<sup>156</sup> Joshua Rogers, *The Great Train Robbery: How Statutory Construction May Have Derailed an American High Speed Rail System*, 2011 U. ILL. J.L. TECH. & POL’Y 215, 229 (2011).

<sup>157</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 208 (2009) (codified in scattered sections of the U.S.C.).

<sup>158</sup> Rogers, *supra* note 156, at 230.

<sup>159</sup> THE OFF. OF SETH MOULTON, AMERICAN HIGH-SPEED RAIL & REBUILDING THE U.S. ECONOMY 3 (2020), <https://moulton.house.gov/imo/media/doc/>



optimists include Congressman Seth Moulton, a representative of Massachusetts, who worked on a private Texas high-speed rail program before running for Congress.<sup>160</sup> In May of 2020, Congressman Moulton produced a white paper advocating for his vision for high-speed rail in the United States.<sup>161</sup> He believes that the enormous expense required to build a project of this magnitude could now be justified more easily than previously by framing it as a massive economic recovery measure, as well as a program to spur economic growth akin to the building of the interstate highway system by President Eisenhower.<sup>162</sup>

In his white paper, Congressman Moulton provides a blueprint for building the American high-speed rail network of the future.<sup>163</sup> The plan recommends that the United States: (1) massively increase dedicated high-speed rail infrastructure funding, increase the predictability of this funding over time, and ensure that the funding is more strategically spent; (2) “[e]stablish a long-term framework” for funding high-speed rail that incentivizes investment by state and local governments, the federal government, and the private sector; (3) amend existing statutes with a standardized definition of high-speed rail and create federal high-speed rail standards and regulations; and (4) “[i]ncentivize freight railroads to” give high-speed rail lines the right of way.<sup>164</sup> Overall, these recommendations demonstrate an acknowledgement of the failures of the Obama-era efforts to generally and strategically fund high-speed rail projects.<sup>165</sup> However, some additional scrutiny should be given to his second proposal, incentivizing local government and especially private investment.<sup>166</sup>

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American%20High%20Speed%20Rail%20and%20Rebuilding%20the%20US%20Economy%20-%20202.pdf [https://perma.cc/VD39-7XUV].

<sup>160</sup> *Meet Seth.*, SETH MOULTON FOR CONG., <https://sethmoulton.com/meet-seth> [https://perma.cc/YGG4-WMR5] (last visited May 1, 2021).

<sup>161</sup> THE OFF. OF SETH MOULTON, *supra* note 159.

<sup>162</sup> *Id.* at 1–3, 7.

<sup>163</sup> *Id.* at 21.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at 21.

To fund his ambitious high-speed rail project, Congressman Moulton advocates for incentivizing private sector contribution “by prioritizing [the funding of high-speed rail] projects where at least 20% of funds are non-federal and allowing non-federal funds to come from private sources, not just from state and local governments.”<sup>167</sup> To ensure that multiple projects have at least twenty percent private and local funding, the Congressman proposes two legislative changes.<sup>168</sup>

First, Congressman Moulton would amend 26 U.S.C. § 142 to increase the national limitation on the Highway or Surface Freight Transfer Facility private activity bond (“PAB”) limits “from \$15 billion to \$30 billion.”<sup>169</sup> PABs are tax-exempt loans that are issued by, in this case, the federal government to attract private investment to publicly beneficial projects by providing private investors with capital with low borrowing costs.<sup>170</sup> Doubling the national Highway or Surface Freight Transfer Facility PAB limit should dramatically increase investment in this economic sector as it makes acquiring capital to invest in rail infrastructure cheaper to borrow.

Second, Congressman Moulton would make changes to the Railroad Rehabilitation & Improvement Financing (“RRIF”) program by amending 45 U.S.C. § 822 to allow PABs to count toward the twenty percent private funding requirement.<sup>171</sup> The RRIF program, established by the Transportation Equity Act for the 21st Century,<sup>172</sup> allows DOT to “provide direct loans and loan guarantees up to \$35.0 billion to finance development of railroad infrastructure” and is available to local governments, private entities, and government-backed corporations like Amtrak.<sup>173</sup> These funds may

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<sup>167</sup> *Id.* at 4.

<sup>168</sup> *Id.* at 27.

<sup>169</sup> *Id.*

<sup>170</sup> James Chen, *Private Activity Bond (PAB)*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/privateactivitybond.asp> [<https://perma.cc/WPR2-QQCK>] (last updated Feb. 24, 2020).

<sup>171</sup> See THE OFF. OF SETH MOULTON, *supra* note 159, at 27.

<sup>172</sup> Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 (1998) (codified in scattered sections of 45 U.S.C. 822).

<sup>173</sup> *Railroad Rehabilitation & Improvement Financing (RRIF)*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/buildamerica/financing/rrif/railroad->

be used to “[a]cquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, . . . [d]evelop or establish new intermodal or railroad facilities; [and] [r]eimburse planning and design expenses” among other things.<sup>174</sup> RRIF loans are very advantageous to developers as they are low interest, can have up to a thirty-five year repayment period, and are deferrable for five years.<sup>175</sup>

Overall, the general framework of Congressman Moulton’s proposal for funding high-speed rail development is unsurprising given his background working for a private high-speed rail developer.<sup>176</sup> However, if twenty percent of the funding of major high-speed rail projects currently being considered comes from private and local sources, this would leverage an additional \$38 billion for high-speed rail development and planning. This plan, therefore, provides a compelling vision for how high-speed rail development can be funded.

Ultimately, the recent release of the Moulton Plan demonstrates that high-speed rail, and passenger rail generally, remains a major topic in the public policy discourse. Despite the expensive failures during the Obama administration, high-speed rail remains on the docket. The issue would benefit from presidential leadership. However, it is not yet clear whether President Biden will support Congressman Moulton’s plan or prefer a new, competing strategy.

#### IV. HOW TO BUILD THE AMERICAN RAIL SYSTEM BACK BETTER

Just like Congressman Moulton, President Biden apparently also sees an opportunity in the present COVID-19 economic downturn to justify a revitalization of the U.S. passenger rail system as an economic recovery measure.<sup>177</sup> Efforts to improve the passenger rail system are a feature of President Biden’s “Build Back Better

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rehabilitation-improvement-financing-rrif [<https://perma.cc/2DLM-UPT2>] (last updated Oct. 30, 2020).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> SETH MOULTON FOR CONG., *supra* note 160.

<sup>177</sup> See *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future*, BIDEN FOR PRESIDENT, <https://joebiden.com/clean-energy/> [<https://perma.cc/8Q5W-3HJU>] (last visited Feb. 14, 2021).

Plan.”<sup>178</sup> Unfortunately, the proposal contains only a few sentences about his ideas for building up America’s rail network, but those sentences provide a general outline for how it may be accomplished.<sup>179</sup>

Sparking the second great railroad revolution. Biden will make sure that America has the cleanest, safest, and fastest rail system in the world—for both passengers and freight. His rail revolution will reduce pollution, connect workers to good union jobs, slash commute times, and spur investment in communities that will now be better linked to major metropolitan areas. To speed that work, Biden will tap existing federal grant and loan programs at the U.S. Department of Transportation, and improve and streamline the loan process. In addition, Biden will work with Amtrak and private freight rail companies to further electrify the rail system, reducing diesel fuel emissions.<sup>180</sup>

Under this scheme, it appears that President Biden will utilize “existing federal grant and loan programs,” probably ARRA, and streamline the existing loan process by likely making changes to PRIIA, while attempting to work with freight companies who own most of the track that Amtrak uses.<sup>181</sup> However, given the history of ARRA and PRIIA, as well as the fraught relationship between Amtrak and the freight companies described *supra*, this may not be sufficient to achieve a “revolution.”

In order to achieve a “rail revolution,” President Biden should instead take four steps: (1) abolish the PRIIA and ARRA funding structure and centralize all high-speed rail projects under Amtrak with local and state participation, rather than local and state control; (2) unleash Amtrak’s use of eminent domain; (3) reinterpret the term “preference” in the Rail Passenger Service Act of 1970 to make sure existing Amtrak trains’ routes are not forced to idle as languid, gargantuan freight trains take the right of way; and (4) endorse former Amtrak CEO Richard Anderson’s plan for the self-sufficiency of Amtrak.

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

A. *Abandon the Current High-Speed Rail Funding and Grant Structure in Favor of Centralization*

With much of the ARRA funding distributed<sup>182</sup> and the law's intent that the funding merely acts as a down-payment to kickstart the development of high-speed rail,<sup>183</sup> Congress needs to set aside more money to make a high-speed rail revolution possible. Currently, according to the Congressional Budget Office, "in 2017 the federal government spent \$45.8 billion on highways, \$4.4 billion on water transportation and navigation, \$16.7 billion on aviation, \$12.3 billion on mass transit and \$4.7 billion on rail (of which \$1.495 billion was for Amtrak's federal grant)."<sup>184</sup> Congress needs to commit to funding passenger rail at a rate comparable to other forms of transportation, or perhaps at a greater rate, in order to emphasize rail transport, a mode of transportation that represents a lower contribution to climate change.<sup>185</sup> On December 9, 2020, Congressman Moulton, building upon his proposal from May of 2020 discussed *supra*,<sup>186</sup> introduced a bill on the floor of Congress called the American High-Speed Rail Act, which called for \$205 billion in spending over five years to spur high-speed rail development.<sup>187</sup> This is in the ballpark of the level of funding that the Biden administration should seek from Congress.

However, in order for any additional money to be spent more efficiently than the ARRA funds, President Biden needs to entirely reevaluate the loan and grant system with an emphasis on centralization under federal control. This will likely require repealing PRIIA's federalist structure and advancing a new

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<sup>182</sup> Vartabedian, *supra* note 150; Press Release, U.S. Dep't of Transp., *supra* note 77.

<sup>183</sup> Press Release, U.S. Dep't of Transp., *supra* note 77.

<sup>184</sup> *Stakeholder FAQs*, AMTRAK, <https://www.amtrak.com/about-amtrak/amtrak-facts/stakeholder-faqs.html> [<https://perma.cc/4UR9-X359>] (last visited May 1, 2021).

<sup>185</sup> *See, e.g.*, Irfan, *supra* note 95.

<sup>186</sup> THE OFF. OF SETH MOULTON, *supra* note 159.

<sup>187</sup> Press Release, The Off. of Seth Moulton, Moulton, Boyle and Delbene Introduce the American High-Speed Rail Act (Dec. 9, 2020), <https://moulton.house.gov/press-releases/moulton-boyle-and-delbene-introduce-the-american-high-speed-rail-act> [<https://perma.cc/MXU4-YDVS>] [hereinafter American High-Speed Rail Act Press Release].

legislative funding program. Following that action, the question would then be: what is to replace the old funding programs? While Congressman Moulton's plan to revamp funding is innovative and compelling, his emphasis on funding high-speed rail projects developed by states and private actors, which is likely heavily influenced by his experience as a private sector high-speed rail developer,<sup>188</sup> may not be sufficiently revolutionary as it is in essence following the same public-private-federal-state partnership scheme employed by the Obama administration.<sup>189</sup> Therefore, in contrast to the Obama administration PRIIA and ARRA plan and Congressman Moulton's proposal, this Article suggests that the Biden administration should instead push for a truly revolutionary high-speed rail funding program, a development and spending program that is centralized under the direct planning oversight of the federal government that engages Amtrak as the primary operating partner. This would create an expanded, relevant, national, high-speed passenger rail carrier under the Amtrak operating structure.

In broad strokes, the model for this new American rail system would be the French rail network.<sup>190</sup> Similar to Amtrak, the French national passenger rail carrier, the government owned Société Nationale Des Chemins De Fer Français ("SNCF"), was created by legislative action in 1937 by merging the country's "five leading rail companies."<sup>191</sup> SNCF now operates one consolidated rail system throughout the country and has been a pioneer in the high-speed rail sector since beginning operation of their first high-speed train in 1967.<sup>192</sup>

Centralizing the development of a high-speed rail system under Amtrak would be consistent with an ongoing trend to consolidate the passenger rail system. This shift, incepted along with the Amtrak

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<sup>188</sup> SETH MOULTON FOR CONGRESS, *supra* note 160.

<sup>189</sup> Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified in scattered sections of 49 U.S.C.).

<sup>190</sup> *Our History*, SOCIÉTÉ NATIONALE DES CHEMINS DE FER FRANÇAIS, (June 24, 2019), <https://www.sncf.com/en/group/history/two-centuries-history> [<https://perma.cc/BCG8-JWXY>].

<sup>191</sup> *Id.*

<sup>192</sup> *See id.*

era following the passage of the Rail Passenger Service Act of 1970, led to the consolidation of much of the private passenger rail system under central federal oversight.<sup>193</sup> Moreover, centralization would avoid the problems of politics and disparate interests that appear to have perpetually stalled the high-speed rail projects in Florida<sup>194</sup> and Ohio.<sup>195</sup> Furthermore, centralization would also remove planning authority from states, which failed in the case of California,<sup>196</sup> and vest operational and planning power in Amtrak and federal authorities who have already succeeded in the northeast corridor despite massive hurdles.<sup>197</sup> Additionally, an Amtrak-centric development plan would have the added benefit of creating positive economies of scale over resources that would make building a national high-speed rail system more feasible. This includes centralizing procurement of materials under one roof and allowing Amtrak to build up a reservoir of talented engineers whose expertise will be fungible across projects. Equally important, by putting the national rail network under a single roof there will be greater opportunity for interconnectedness and the sharing of tracks and stations similar to metro systems like those in New York and Boston.<sup>198</sup> This would be ideal for consumers. An interconnected unified system will allow a passenger to crisscross the country using one ticket and change intercity trains almost as easily as changing New York City subway trains. Finally, a program with Amtrak at the helm will also have greater accountability to the President since the Secretary of Transportation, now Pete Buttigieg, sits on its board<sup>199</sup> and federal regulators at the FRA are already intimately

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<sup>193</sup> Rail Passenger Service Act.

<sup>194</sup> Wald, *supra* note 129, at 384.

<sup>195</sup> *Id.* at 386.

<sup>196</sup> Vartabedian, *supra* note 150.

<sup>197</sup> Leonard, *supra* note 14.

<sup>198</sup> METRO. TRANSIT AUTH., <https://new.mta.info/> [<https://perma.cc/9QAD-8ADH>] (last visited May 1, 2021); MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, <https://www.mbta.com/schedules/subway> [<https://perma.cc/AFM3-ARC3>] (last visited May 1, 2021).

<sup>199</sup> *About FRA*, FED. R.R. ADMIN., *supra* note 34; *Secretary of Transportation Pete Buttigieg*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/meet-secretary/secretary-pete-buttigieg> [<https://perma.cc/P79S-CLEY>] (last visited May 1, 2021).

involved in Amtrak oversight.<sup>200</sup> This would allow the Biden administration and future presidential administrations to ensure developments are focused in corridors promoting maximal utility.

Funding Amtrak directly is also preferable to Congressman Moulton's private-public partnership plan. First, the Moulton Plan would raise around \$38 billion from non-federal sources,<sup>201</sup> but this amount is dwarfed in comparison to the level of federal funding he himself proposed to fully develop a national high-speed rail system, close to \$205 billion.<sup>202</sup> Is \$38 billion worth the loss of total control and devolution of some critical responsibilities that would accompany private partnership? This is a value judgement. However, it is the opinion of this Article that given the magnitude of the project and the long-term thinking that should be on the forefront of an effort of this scale, \$38 billion, less than the amount that this country spends on highways in one year,<sup>203</sup> is not worth the trade-offs. Second, Amtrak is a better partner than private investors because Amtrak combines the best of the public and private sectors. Amtrak is a for-profit corporation;<sup>204</sup> therefore, Amtrak is susceptible to market forces and has the financial incentive to operate efficiently, but also has stability provided by federal government backing.<sup>205</sup> Purely private investors are not as predictable and stable as the government and are therefore less preferable in such a large and risky project. Finally, there is no time to wait. Delays have derailed previous high-speed rail projects,<sup>206</sup> and consequently the possibility that the government will sit on their hands waiting for projects with sufficient non-federal private investment is unwelcome. In contrast to this, Amtrak has an existing structure with engineers, industry experts, and employees,<sup>207</sup> that

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<sup>200</sup> *Id.*

<sup>201</sup> THE OFF. OF SETH MOULTON, *supra* note 149, at 4.

<sup>202</sup> American High-Speed Rail Act Press Release, *supra* note 187.

<sup>203</sup> *See Stakeholder FAQs*, AMTRAK, *supra* note 184.

<sup>204</sup> AMTRAK, FY 2019 COMPANY PROFILE, *supra* note 29, at 3.

<sup>205</sup> *See id.*

<sup>206</sup> Yglesias, *supra* note 152.

<sup>207</sup> *Careers at Amtrak*, AMTRAK, <https://careers.amtrak.com/> [<https://perma.cc/P75Q-Z4MH>] (last visited May 1, 2021) ("Amtrak employs more than 20,000 diverse energetic professionals in a variety of career fields through the United States."). Career categories include: railroad operations, customer service, skilled



needs only to be expanded as opposed to built from scratch following the securement of funding.

As an example of what a centralized high-speed rail funding and planning program could look like, this Article proposes that the Biden administration provide conditional funding, secured through legislation passed by Congress, to Amtrak to develop a massive expansion of its rail network, including high-speed rail lines in the corridors set out by the FRA in 2000.<sup>208</sup> The funds would be contingent on a project-by-project basis on Amtrak finding support and financial contributions from state and local governments. This avoids the problems of PRIIA's regime of loans and grants that relied on appropriations to, and vests authority over project management in, states.<sup>209</sup>

Additionally, the Biden administration should prioritize Amtrak projects that require Amtrak to buy, build, and maintain its own track and stations. Only if this is not possible, then should agreements be made to lease track from states and private carriers—but then only as a stop-gap measure. Major corridors should not be constructed without ample planning and agreements in place with states to provide substantial financial contribution and cooperation. Ultimately, starting from scratch with a centrally controlled infrastructure will require an immense investment. But in the long-term, this investment will limit conflicts with states and private rail carriers, while creating the straight and modern tracks that, along with a lack of competition for use of the tracks, will enable Amtrak trains to move faster and be more punctual.<sup>210</sup>

Altogether, this emphasis on centralized control may seem out of place within the American federal government structure and overall market-based transportation ecosystem. Nevertheless, given the massive infrastructure costs and fore-planning needed to pull off a healthy, competitive, and relevant passenger rail network, a

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trades people, engineering and mechanical professionals, corporate professionals, and more. *Id.*

<sup>208</sup> *Rail Network Development*, Fed. R.R. ADMIN., *supra* note 39.

<sup>209</sup> Passenger Rail Investment and Improvement Act of 2008.

<sup>210</sup> CNBC, *supra* note 17; Leonard, *supra* note 14.

different approach is justified. American passenger rail should be more like our system of highways than our airports.

*B. Empower the Federal Government to Use Eminent Domain to Build New Rail Infrastructure*

Within the world community, the clear leader in rapid infrastructure development is China.<sup>211</sup> Incidentally, their efforts are thoroughly centralized.<sup>212</sup> Possibly as a result, China's recent high-speed rail development has been stunning, as the country has built almost 29,000 kilometers of high-speed rail track over the last twenty years.<sup>213</sup>

One of the primary reasons why China has accomplished this is because the Chinese government already owns the land and does not need to purchase it from private owners.<sup>214</sup> The United States, however, does not have that luxury and must therefore use various means to acquire private land for major infrastructure projects.<sup>215</sup> In order for Amtrak to build a centralized national high-speed passenger rail network and achieve this lofty goal, Amtrak must be given the best tools the federal government can provide, including greater power to use eminent domain to forcibly acquire, if necessary, land on which to build new tracks.

Eminent domain allows the government to seize property to convert it to a public use in return for just compensation.<sup>216</sup> Power to use eminent domain comes from the takings clause of the Fifth Amendment which states, "nor shall private property be taken for public use, without just compensation."<sup>217</sup> In *Kelo v. City of New London, Connecticut*,<sup>218</sup> the Supreme Court extended the federal government's power of eminent domain by confirming that general benefits stemming from improving economic development justified

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<sup>211</sup> CNBC, *supra* note 17.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> CNBC, *supra* note 17.

<sup>217</sup> U.S. CONST. amend V.

<sup>218</sup> *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

the use of eminent domain.<sup>219</sup> Typically federal agencies use eminent domain when:

- (1) A landowner is unwilling to sell at any price;
- (2) The acquiring federal agency and the landowner cannot agree on value;
- (3) Defects in record title prevent a landowner from conveying clear title; or
- (4) [when o]ne or more landowners may be missing or unidentifiable.<sup>220</sup>

At the federal level, eminent domain cases are typically handled by the U.S. Department of Justice's ("DOJ") Land Acquisition Section.<sup>221</sup> The legal process of eminent domain has roughly a four-step process. First, the government tries to identify and make contact with individual landowners, a process that can be especially difficult in rural areas where land records are incomplete.<sup>222</sup> Second, the government must request to survey the land—a request that may be denied by the landowner.<sup>223</sup> For example, while attempting to acquire land for former-President Trump's border wall, DOJ had to file nearly fifty lawsuits just to request permission to survey the land.<sup>224</sup> Third, government lawyers would then need to file a Declaration of Taking, pursuant to the Declaration of Taking Act, in U.S. District Court.<sup>225</sup> Fourth, and finally, the two parties litigate the issues of whether the taking is justified and whether the amount of compensation is just.<sup>226</sup>

Historically, the federal government has long used eminent domain to construct new railroad tracks; the transcontinental

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<sup>219</sup> *Id.* at 485.

<sup>220</sup> *Anatomy of a Condemnation Case*, U.S. DEP'T OF JUST. <https://www.justice.gov/enrd/anatomy-condemnation-case> [<https://perma.cc/3WRQ-SV2Z>] (last visited May 1, 2021).

<sup>221</sup> *Id.*

<sup>222</sup> John Burnett, *Acquiring Private Land is Slowing Trump's Border Wall*, NPR (Dec. 20, 2019) <https://www.npr.org/2019/12/20/789725311/acquiring-private-land-is-slowing-trumps-border-wall> [<https://perma.cc/6H43-ZBL5>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> U.S. DEP'T OF JUST., *supra* note 220; Declaration of Taking Act, 40 U.S.C. § 3114.

<sup>226</sup> U.S. DEP'T OF JUST., *supra* note 220.

railroad is a key example.<sup>227</sup> To accomplish a comparable improvement in modern rail infrastructure to the historic transcontinental railroad, the liberal use of eminent domain will be critical. The Biden administration must take three steps to facilitate widespread use of eminent domain.

First, there are legislative changes that could facilitate greater use of eminent domain as a tool for the nation's rail network. For example, the Biden administration can push Congress to amend the laws regarding who Amtrak is allowed to acquire land from in an eminent domain action.<sup>228</sup> Existing law states that "Amtrak may acquire by eminent domain . . . interests in property . . . necessary for intercity rail passenger transportation, except property of a rail carrier, a State, a political subdivision of a State, or a governmental authority."<sup>229</sup> Congress must amend this provision in order to allow Amtrak to use eminent domain to acquire track from private carriers. This should compel cooperation with private carriers, and therefore ensure that the public benefit of high-speed rail will not take the back seat to freight carriers' profits.

Second, the Biden administration will need to push DOJ to act aggressively and use eminent domain with alacrity to clear the way for these revolutionary infrastructure projects. Somewhat ironically, President Biden's land acquisition tactics should be modeled on those of the defeated incumbent, President Trump.<sup>230</sup> In order to build President Trump's promised border wall along the southern U.S. border, the Trump administration acted swiftly to acquire more than 135 tracts of private land, which included 5,275 acres.<sup>231</sup> Many of these acquisitions were the product of agreements with the landowners, but President Trump's DOJ also filed 109 eminent

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<sup>227</sup> *Supreme Court's Kelo Decision and Potential Congressional Responses: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R.*, 109th Cong. 53 (2005) (statement of Jerrold Nadler, Rep., N.Y.).

<sup>228</sup> 49 U.S.C. § 24311(a)(1)(A).

<sup>229</sup> *Id.*

<sup>230</sup> See Camilo Montoya-Galvez, *New Report Details Trump Effort to Seize Thousands of Acres of Private Land for Border Wall*, CBS NEWS (Nov. 24, 2020), <https://www.cbsnews.com/news/trump-border-wall-plans-private-land-seizure/> [https://perma.cc/7N29-KW27].

<sup>231</sup> *Id.*

domain suits between January of 2017 and August of 2020, and had plans to file 100 more.<sup>232</sup> Overall, the Trump Administration's work to acquire land for the border wall demonstrates the level of aggression as well as the time required for the government to acquire the large amounts of land necessary for major infrastructure projects. In order for the Biden administration to move as quickly through this byzantine process, dozens of personnel will need to be reallocated to ensure that these eminent domain actions, some of which could become lengthy, begin as soon as possible.

Third, to conduct as many eminent domain actions and land purchases at once, the Biden administration should allocate the funds set aside for land acquisition at the beginning of the process. This is necessary for the Land Acquisition Section which requires its client federal agency to "establish that Congress has . . . appropriated funding for the acquisition," along with the assurance that Congress has statutorily "granted authority to the agency to acquire property for a public purpose," prior to the initiation of condemnation cases.<sup>233</sup>

Ultimately, the eminent domain process is slow and involves many points for landowners to litigate and slow down the acquisition of necessary land.<sup>234</sup> Pushing hard and throwing additional lawyers and money at the issue is required. Meanwhile, statutory changes may be needed to expedite the eminent domain process as much as possible.

### *C. Give Amtrak the Right of Way*

Presently, before Amtrak can build its own new track infrastructure, Amtrak must have true "preference" over the track leased from private freight carriers. Amtrak's "Crescent" train, which travels daily from New York to New Orleans, was on time only 28.7% of the time in 2019, in large part due to traveling over

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<sup>232</sup> *Id.* As of November 2020 the Trump administration still had 991 tracts of land to acquire. *Id.*

<sup>233</sup> *Id.*; U.S. DEP'T OF JUST., *supra* note 220.

<sup>234</sup> Camilo Montoya-Galvez, *supra* note 230; U.S. DEP'T OF JUST., *supra* note 220.

rails owned by the freight carrier Norfolk Southern.<sup>235</sup> In order for Amtrak to build up its reputation as a desirable method of transportation in the short-term, this prioritization of freight carriers must change. The Biden administration must enforce performance standards with the private freight carriers.

This issue has come to the fore recently, as mentioned *supra*, with the FRA ruling which created performance standards desired by Amtrak and feared by the AAR.<sup>236</sup> Following this, Amtrak released the following statement:

Amtrak believes our customers deserve to arrive on time. A dozen years ago Congress agreed and passed a law calling for a minimum standard for on-time performance and allowing for railroads to be investigated – and possibly fined – if freight trains are prioritized ahead of passengers. This landmark rule establishes a minimum standard that 80% of Amtrak customers on a given train should arrive at their destination within fifteen minutes of their scheduled arrival.<sup>237</sup>

However, Amtrak's exaltation soon turned to grim resolve as it stated:

While this rule finally provides a potential enforcement mechanism for on-time performance—if the Association of American Railroads doesn't try to block the rule's implementation again—more must be done to build a world-class passenger rail network. We will continue to ask Congress to allow Amtrak to enforce its right to preference over freight transportation that is already the law—just like any other company can defend itself when its rights are being violated.<sup>238</sup>

Among other things, this statement is an acknowledgment that Amtrak's fight with the railroads is not over.

The Biden administration must stand with Amtrak. First, Amtrak needs continuing legal support for the performance standards

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<sup>235</sup> AMTRAK FACT SHEET FISCAL YEAR 2019 STATE OF NORTH CAROLINA, AMTRAK (2019), <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/statefactsheets/NORTHCAROLINA19.pdf> [<https://perma.cc/V9D6-BJT9>].

<sup>236</sup> *Amtrak Statement on FRA Metrics and Standards Final Rule*, AMTRAK (Nov. 16, 2020), <https://media.amtrak.com/2020/11/amtrak-statement-on-fra-metrics-and-standards-final-rule/> [<https://perma.cc/FA39-NYCD>].

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

created by the FRA and authorized by PRIIA.<sup>239</sup> FRA regulations and STB decisions are subject to judicial review, and the industry groups have shown an ongoing willingness to litigate in order to prevent new regulations from going into effect.<sup>240</sup> Second, President Biden needs to appoint members to the STB who will favor Amtrak passengers over freight carriers, particularly a new STB chair amenable to expanding rail regulations needs to be appointed. Currently, the STB chair, Ann Begeman, a Republican, will need to be replaced, for her official term ended in December of 2020.<sup>241</sup> Although STB matters are not typically very partisan, generally Republican STB majorities have been more reticent to expand regulations than Democratic majorities.<sup>242</sup> The other four members of the board have terms that will not soon expire, but President Biden can effectively put his thumb on the scale on Amtrak's behalf by replacing the STB chair.<sup>243</sup> In the short term, these steps will likely ensure that Amtrak's hard-won performance standards remain in place and are enforced.

For a long-term solution to the conflict between Amtrak and the freight carriers, the Biden administration needs to push Congress to pass legislation that will enforce Amtrak's right to have "preference" over the rails as Amtrak has requested.<sup>244</sup> Another solution would be to finally sue the private carriers before the STB in order to gain official recognition of Amtrak's interpretation of "preference," an action that many in his administration will push for.<sup>245</sup> Amtrak believes that "preference" should mean "absolute priority" and only an action before the STB will ensure that that

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<sup>239</sup> Press Release, U.S. Dep't of Transp., *supra* note 76; Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified in scattered sections of 49 U.S.C.).

<sup>240</sup> *See, e.g.*, Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 71 (2014) (holding that performance metrics and standards are not invalid because Amtrak is not a private entity, but a government entity); *cert. denied*, 139 S.Ct. 2665 (2019).

<sup>241</sup> Byrne, et. al, *supra* note 73.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Byrne, et. al, *supra* note 73.

<sup>245</sup> *Id.*

interpretation is adopted.<sup>246</sup> Overall, in order for Amtrak to be the financially sustainable partner for a future national passenger and high-speed rail network, Amtrak must be given the right of way over the tracks.

*D. Endorse Former Amtrak CEO Richard Anderson's Vision for Amtrak*

On April 15, 2020, Amtrak CEO, Richard Anderson, handed the reigns of the national carrier to his successor William Flynn.<sup>247</sup> However, Mr. Anderson's vision for a financially sustainable Amtrak that emphasizes intercity routes where trains have a competitive advantage against cars and planes, and decreases service along the costly long-distance routes, remains viable.<sup>248</sup> The Biden administration must use its influence over Amtrak to implement this lasting policy.

President Biden has multiple avenues of influence over Amtrak to make this possible. He can appoint members to Amtrak's Board who support Richard Anderson's vision. President Biden can also ask the Secretary of Transportation, Pete Buttigieg, to support this policy with any remaining PRIIA and ARRA funds.<sup>249</sup> Finally, President Biden can nominate members of the STB Board who would support long-distance route suspensions.<sup>250</sup> This last step is

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<sup>246</sup> *Id.*

<sup>247</sup> Patrick McGeehan, *Amtrak, Struggling to Keep Trains Running, Chooses a New Leader*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/03/02/nyregion/amtrak-ceo-william-flynn.html> [<https://perma.cc/CE7V-Q527>].

<sup>248</sup> Leonard, *supra* note 14.

<sup>249</sup> PRIIA funding is already being used to support this policy by financially supporting improvements to the ACELA program in the Northeast Corridor. See Wald, *supra* note 128, at 384; American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, Title XII, 123 Stat. 115, 208 (2009); U.S. DEP'T OF TRANSP., SHOVEL WORTHY: THE LASTING IMPACTS OF THE AMERICAN RECOVERY AND REINVESTMENT ACT ON AMERICA'S TRANSPORTATION INFRASTRUCTURE (2016), <https://www.transportation.gov/sites/dot.gov/files/docs/American%20Recovery%20and%20Reinvestment%20Act%20Final%20Report.pdf> [<https://perma.cc/7GFL-KXC8>]; Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified in scattered sections of 49 U.S.C.).

<sup>250</sup> See *About STB*, SURFACE TRANSP. BD., <https://prod.stb.gov/about-stb/> [<https://perma.cc/4AVA-TGW9>] (last visited May 1, 2021). See also Leonard, *supra* note 14.



critical given how the STB's predecessor body, the ICC, helped bankrupt private passenger railroad in the mid-20<sup>th</sup> century by refusing to allow route closures without extensive hearings.<sup>251</sup> These steps are necessary, though they may dishearten the many Americans with emotional ties to the long-distance routes and face opposition in Congress.<sup>252</sup> A financially stable Amtrak is critical in order to provide a suitable partner for future high-speed rail expansion.

## V. CONCLUSION

The American passenger rail system has always required extensive leadership and funding by the federal government. In order to achieve a "railroad revolution," President Biden must provide federal leadership yet again. Past efforts to build an expanded passenger rail system with high-speed rail corridors have failed in part because they devolved too much power over the projects to the states. That mistake should not be repeated and project planning authority as well as funding must be centralized, while utilizing Amtrak as a partner in all future passenger rail projects. As part of all future projects, additional resources must be provided to ensure the aggressive and continued usage of eminent domain actions, which are required to obtain the necessary land for large infrastructure development at the national level. Additionally, although Amtrak has struggled to be self-sustaining, when free from many encumbrances, such as perpetual conflicts with private railroads, Amtrak has shown it can run an effective, reliable, and appealing rail corridor, as it has exemplified in Northeastern United States. The Biden administration must free Amtrak from as many encumbrances as possible to ensure the short-term viability of the national carrier. This includes cutting costly long-distance routes and addressing the challenges presented by private carriers.

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<sup>251</sup> NAT'L MUSEUM OF AM. HIST., *supra* note 19.

<sup>252</sup> Leonard, *supra* note 14.

Ultimately, in concert, these actions will represent a “rail revolution” in the United States.<sup>253</sup>

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<sup>253</sup> See *The Biden Plan to Build a Modern, Sustainable Infrastructure and An Equitable Clean Energy Future*, BIDEN HARRIS, <https://joebiden.com/clean-energy/> [<https://perma.cc/94PT-Q66X>].