The Toll Road Not Taken: Could the One Option Less Used Make a Difference?

October 16, 2011

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Introduction

The United States has developed a growing infrastructure-financing crisis. Potholes, deteriorating bridges, and cracked pavements are everywhere, regardless of geographical location, climate, or population density. A rapidly aging transportation infrastructure, a growing demand for transportation, soaring infrastructure costs, and a lack of systematic planning to account for these multiple trends all contributed to the crisis. The federal gasoline tax rate of 18.4 cents per gallon has not been adjusted for inflation or increased in almost twenty years and will not be changed in the near future due to the current challenging economic environment. As a result, many states are seeking innovative and creative financing strategies to meet these modern challenges.

Courts in states like California have responded pragmatically to the crisis by opening the door to road tolling in various forms. This shift in states’ attitudes toward toll roads comes after a half-century period following the 1956 Highway Act during, which courts in some states held to restrict public roads from being tolled. However, not all states have been willing to validate the legal authority to use tolls as a method of financing transportation facilities. For example, Missouri courts have taken a categorical approach toward tolling in their jurisprudence that continues to raise doubts about the legality of tolling within the state. These differing state court approaches toward toll roads could substantially affect the future financial viability of a state’s transportation infrastructure.

This article argues that unless state constitutions or statutes explicitly forbid tolling, the courts should not categorically prohibit this valuable transportation-financing tool. Tolling once benefited national transportation, and now selective tolling of certain state highways could again be a valuable part of transportation infrastructure financing.

Infrastructure Financing Crisis

The current infrastructure-financing crisis is motivating investigations into alternative and supplementary financing models to the current Highway Trust Fund (HTF) financing model. In 2005, the federal transportation legislation charged the National Surface Transportation Infrastructure Financing Commission with the task of analyzing future highway and transit financing needs and alternative approaches to financing transportation infrastructure.¹ The Commission had fifteen members who represented state and local government, industry, financial institutions, public policy organizations, and law firms.² The Commission’s recommendations appeared in a 2009 report to the Secretary of Transportation and several congressional committees, including the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, the Committee on Transportation and Infrastructure of the House, and the Committee on Banking, Housing, and Urban Affairs of the Senate.³

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² Id. § 11142(c).
³ Id. § 11142(h).
This report cited a failure to understand and to act on “the costs of deferred investment in our surface transportation infrastructure, especially in the face of an aging infrastructure, a growing population, and an expanding economy” as root causes of the current transportation-financing problem. The slow degradation that resulted from deferred infrastructure maintenance and investment made this problem worse, bringing to mind the proverbial phrase “out of sight, out of mind.” There were certainly cases of catastrophic infrastructure failures like the I-35W bridge collapse in Minnesota, but more frequently, only small recurring signs like cracks, rutting, and potholes were overtly obvious. Less obvious evidence of neglect of infrastructure maintenance include less than good condition on half of the federal-aid highways, structural deficiencies on more than one quarter of national bridges, and marginal and poor conditions on roughly one quarter of the national bus and rail assets.

While the infrastructure deteriorated, the transportation demand rose rapidly. From 1980 to 2006, the total number of miles traveled by automobiles and trucks increased by 97% and 106%, respectively, while the total number of highway lane miles grew by only 4.4%. The traffic congestion cost the nation’s 439 urban areas $87.2 billion per year due to lost time, wasted fuel, and vehicle wear and tear. Around the time of the 1956 Highway Act, which created the interstate system, sixty-five million vehicles had traveled 600 billion vehicle miles; by 2007, there were 240 million vehicles and three trillion vehicle miles of travel. Meanwhile, the transportation infrastructure only grew by 15%.

The Commission pointed to the inadequacy of the fuel-tax-based federal Highway Trust Fund (“HTF”) financing model for the deteriorating federal-aid highway infrastructure. HTF was inadequate because the use of the infrastructure was underpriced—the cost of providing transportation services was less than the taxes and fees generated. The unique HTF model that gave birth to our magnificent National System of Interstate and Defense Highways could not keep the system viable in the long term. The HTF

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5 The I-35W collapse was not just about inadequate maintenance and increased traffic loads; the National Transportation Safety Board identified the initiating event as the gusset plate “had inadequate capacity . . . in the original as-designed condition.” Nat’l Transp. Safety Bd., Highway Accident Report: Collapse of I-35W Highway Bridge 149 (2007), available at http://www.dot.state.mn.us/i35wbridge/ntsb/finalreport.pdf.
6 Nat’l Surface Transp. Infrastructure Fin. Comm’n, supra note 4, at 3.
7 Id. at 2–3.
10 Id.
12 Id. at 4.
13 Id. at 34.
revenue streams did not increase at the same rate as construction costs, and so the purchasing power of revenues has declined by 33% over the past fifteen years.\textsuperscript{14} The increase in fuel efficiency and the development of alternative fuel vehicles further eroded the HTF.\textsuperscript{15} However, a vehicle fleet composed of larger and heavier vehicles like the ever popular sports utility vehicles sometimes counterbalanced the increase in fuel efficiency.\textsuperscript{16}

### Background on Tolling Trade-Offs

The following summary of the trade-offs between the tolling model and taxes/fees model explains the context for the discussions on the history of transportation-financing legislation and legal case studies. One oft-cited advantage of tolling is the direct link between the amount of highway use and the toll charges.\textsuperscript{17} In contrast, registration and licensing fees are annual assessments and are not tied directly to miles traveled. Gas taxes are only loosely tied to miles traveled because of significant differences in fuel efficiency among different vehicles. Most pavement design manuals based on empirical Federal Highway Administration (“FHWA”) studies consider the direct correlation between the amount and type of traffic (i.e., 18-kip equivalent single axle loadings) and pavement deterioration.\textsuperscript{18} Thus, with tolling, vehicles could be charged by the total vehicle weight and axle distribution, which correlates with the amount of wear and tear the vehicle causes on the roads. This is not trivializing the environmental impacts on road deterioration like freeze-thaw cycles, but these factors have greater prevalence in the beginning of the life of pavement while traffic factors have greater impact throughout and especially at the end of the useful life.\textsuperscript{19} There is also a philosophical justification for linking the amount of use with the charges. The justification is called the benefit principle of taxation: consumers of government services should be taxed in proportion to the benefit they receive.\textsuperscript{20}

Tolling is also more economically efficient than the current HTF model. The HTF model involves a subsidy, because the revenue generated through fuel taxes do not cover the full cost of transportation which includes infrastructure maintenance, operations, incident management, congestion costs and other externalities.\textsuperscript{21} The subsidy does not promote economically efficient traveling decisions because such decisions do not minimize overall travel costs. Though tolling does not require congestion pricing, it is an option unavailable to the HTF model. Congestion pricing through tolling captures the impact of peak period travel because such travel costs more due to delays, greater fuel usage and

\begin{itemize}
\item \textsuperscript{14} Id. at 41.
\item \textsuperscript{15} Id. at 34.
\item \textsuperscript{16} Id. at 41.
\item \textsuperscript{17} See id. at 126–27.
\item \textsuperscript{18} See, e.g., AM. ASS’N OF STATE HIGHWAY AND TRANSP. OFFICIALS, AASHTO GUIDE FOR DESIGN OF PAVEMENT STRUCTURES I-8 (1993).
\item \textsuperscript{19} Id.
\item \textsuperscript{20} ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 216 (Edwin Cannan ed., Methuen & Co. 5th ed. 1904) (1776).
\item \textsuperscript{21} NAT’L SURFACE TRANSP. INFRASTRUCTURE FIN. COMM’N, supra note 4, at 136–37.
\end{itemize}
emissions, and higher incident management costs. The advances in toll collection and enforcement technologies are another advantage commonly mentioned, although even with new technology, the cost for tolling is still higher than HTF collection. With the advent of electronic toll tags, tolls could be collected even at highway speeds. Automated enforcement technology also helps to reduce operation costs while eliminating the physical “turnpike.” The modern controlled access highways and automated enforcement solve the rampant problem of shunpiking or toll evasion faced by early toll roads when travelers steered horses off the main road to evade toll gates. A final advantage is the ability to capture out-of-state travelers who might not pay for in-state fees and gasoline taxes, but this could be construed as merely shifting and not augmenting funding.

The influential arguments against tolling that the Bureau of Public Roads discussed in 1939 will be outlined in a separate section. The following are additional disadvantages of tolling that the Bureau either did not raise or only tangentially raised. First, tolling amounts to paying twice because drivers have already paid fees and taxes. However, fees and taxes do not fully pay for the benefits received, and the two payments go to financing different benefits. For example, the toll roads operated by the Transportation Agency Corridors in California use fuel taxes to maintain and patrol the roads, and use tolls to fund the operating expenses and repay the principal and interest on revenue bonds. Some believe that traveling is a right and that roads are public goods, and as such they should be “free.” However, those people confuse the right to free transportation with the constitutional rights that guarantee citizens to move freely between states, to visit another state, or to enjoy state benefits after relocation.

Market demand and operational issues are also relevant. One argument is that tolling is only practical in densely populated regions or high-demand intra-city corridors. However, 52% of the current toll road miles are in rural areas like Kansas or Oklahoma. One operational disadvantage of tolling is that even with modern toll collection systems, costs range from six cents to fifteen cents per toll transaction without capital costs, while fuel taxes only cost about 1% of gross revenue to collect. Some people worry about the balkanization of the national network from differing funding mechanisms across the network and the negative impact on interstate commerce. One possible consequence is

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22 Id. at 127.
23 Id.
26 NAT’L SURFACE TRANSP. INFRASTRUCTURE FIN. COMM’N, supra note 4, at 149.
28 NAT’L SURFACE TRANSP. INFRASTRUCTURE FIN. COMM’N, supra note 4, at 142.
30 Nat’l Surface Transp. Infrastructure Fin. Comm’n, supra note 4, at 129.
31 Id. at 149–50.
32 Id. at 142–43.
the route diversion that could occur on non-tolled routes not designed to handle the transferred demand.\(^{33}\)

Equity issues are sometimes raised, such as the possibility that lower income households could not afford toll facilities.\(^{34}\) However, on SR 91 in Los Angeles, the toll road facilitates commutes to more affordable housing, which results in a net increase in the standard of living. Also, fuel taxes and fees account for a greater proportional share of the lower-income household budget, and newer hybrid vehicles that contribute less to HTF are priced out of reach of lower-income households.\(^{35}\) The trucking industry also believes that it would be unfairly disadvantaged because rates would be much higher for trucks than for passenger vehicles.\(^{36}\)

Some people oppose the private nature of toll roads, believing them to be “another evil manifestation of corporate monopoly.”\(^{37}\) Some may also be uncomfortable with the exercise of eminent domain on toll projects.\(^{38}\) However, toll roads often involve some sort of public-private partnership or at least public input in granting franchises, so roads are located where a non-tolled road would have been if public funding were available.\(^{39}\) Toll roads are sometimes embroiled in controversy over environmental issues,\(^{40}\) but environmental issues are part of any transportation project and no less controversial on non-tolled roads. Finally, many raise the issue of political feasibility due to public opposition,\(^{41}\) but this argument actually works in favor of allowing tolling to be part of the political discussion and not categorically excluded via judicial mandate.

**Early History of Toll Roads**

The modern experimentation with private toll roads has enormous precedent in nineteenth century America, when at least 2,000 companies operated toll roads.\(^{42}\) Between 1806 and 1838, the first federal interstate road, was constructed from Maryland to Illinois, known as the Cumberland Road—or the National Pike.\(^{43}\) The twists and turns in the history, political figures, and political issues surrounding the Cumberland Road were many and complicated. However, the first federal road built with federal funding

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33 Id. at 143.
34 Id. at 147.
35 See id.
36 Id. at 144.
37 KLEIN & FIELDING, supra note 24, at 14.
38 Id. at 17–18.
40 See, e.g., Laguna Greenbelt v. U.S. Dep’t of Transp., 42 F.3d 517 (9th Cir. 1994).
41 See Kenneth A. Small & Jose A. Gomez-Ibanez, Road Pricing for Congestion Management: The Transition from Theory to Policy, in TRANSPORT ECONOMICS: SELECTED READINGS 289 (Tae Hoon Oum et al. eds., Harwood Academic Publishers 1997).
42 KLEIN & FIELDING, supra note 24, at 1.
became a tolled public road and was ceded to the states. Further, when federal appropriations could not suffice to keep the road in good condition, the federal government turned to tolling as an option of maintaining the roads, which the states implemented. Thus, tolling was the lifeline of the highway and not a harmful diversion of funds. Finally, though there was some controversy over tolling, the main controversy was about federalism and a lack of clarity as to who possessed the authority to toll: the federal government or the states.

The nineteenth century turnpikes were concentrated in the Northeast, which contained roughly 73% of all turnpikes in the 1850s. Some Midwest states like Missouri, Illinois, Michigan, and Iowa also had turnpikes. Missouri had around 4% of the nation’s turnpikes. Early toll roads were private corporations, but some government entities held stock in them. However, they were more than just private corporations, because the benefits were not only the modest dividends but also value in transportation and resulting land use. Toll roads were also highly regulated such that toll rates were fixed, and generous toll exemptions were granted by states for travel to church services, family business, and town meetings. Despite the fact that early travel patterns were more localized, the economic impact of transportation and, specifically, toll roads was enormous. Toll roads enabled towns to become viable trade destinations and provided the advantage in contests of land values. Thus, toll roads took on a public character; they were community projects brought about by the public spirit and sometimes even social pressure. However, from the early years to the modern times, there have always been naysayers who were suspicious of corporations, concerned with lack of equity, and, more recently, accustomed to paying fuel taxes and not tolls.

Federal Legislation Changed the Financing Landscape

In 1939, Congress directed the Bureau of Public Roads to conduct a feasibility study of building transcontinental superhighways, including the feasibility of a toll system on such

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45 Id. at 100–01.
46 Id. at 78–85.
47 See KLEIN & FIELDING, supra note 24, at tbl. III.
48 See id.
49 Id. at 5–6.
50 The promise of facilitating movement and trade found appeal in “merchants, farmers, landowners and ordinary residents.” Daniel Klein & John Majewski, America’s Toll Road Heritage: The Achievements of Private Initiative in the Nineteenth Century, in STREET SMART: COMPETITION, ENTREPRENEURSHIP, AND THE FUTURE OF ROADS 281 (Gabriel Roth ed., 2006).
52 See KLEIN & FIELDING, supra note 24, at 10–11 (explaining that townspeople were motivated to build turnpikes primarily by the local benefits that would result).
53 KLEIN & FIELDING, supra note 24, at 12.
54 KLEIN & FIELDING, supra note 24, at 14–17.
roads. The study resulted in the 1939 report “Toll Roads and Free Roads,” which was influential in advocating that Congress adopt the HTF model instead of toll financing. Thus, the origin of the trust-fund-based interstate system in the United States is traced partly to this 1939 report. The landmark Federal-Aid Highway Act and the companion Highway Revenue Act (jointly as the Highway Act of 1956) were influenced by this 1939 report. These two acts were often credited as the catalyst for the interstate system because they provided a 90% federal share that finally motivated states to vigorously participate in the interstate system. These two acts were also significant in changing the longstanding general revenue model to a highway-user-finance model. Before 1956, all federal excise taxes on motor fuels, motor vehicles, and associated products went into the general fund and all appropriations for federal aid to the state for highway improvements were made from the Treasury general fund. The 1956 acts completely changed the model to be wholly highway-user-financed and pay-as-you-build. To implement the change in the financing model, Congress increased some of the existing highway-related excise taxes and levied new ones.

**Examination of Arguments Made in Toll Roads and Free Roads**

The scope of the 1939 investigation by the Bureau of Public Roads was restricted to six total intercontinental highways: three east-to-west and three north-to-south. The report estimated that for the period 1945–1960, there would be 4,544 million vehicle-miles of toll-paying traffic per year, of which 3,635 million would be accumulated by passenger automobiles and 909 million by motor trucks and buses. This implied an equivalent average traffic volume on each mile of the six superhighways of 699 passenger automobiles and 175 motor trucks and buses per day. The report stated that the most optimistic average daily toll-paying traffic for the period varied from a maximum of 5998 passenger automobiles and 1500 motor trucks and buses for the section from Jersey City, New Jersey, to New Haven, Connecticut, to a minimum of 96 passenger automobiles and 24 motor trucks and buses for the section from Spokane, Washington, to Fargo, North Dakota. The report assumed average toll rates of 3.5 cents per vehicle-mile for motor trucks and buses, and one cent per vehicle-mile for passenger cars. On such assumptions, the total maximum toll was estimated to be $1,154,236,000 for the period 1945–1960, or $72,140,000 per year, while the average total annual cost was estimated to

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58 S. REP. NO. 89-1410 at 2.
59 Moon, supra note 57, at 426.
60 S. REP. NO. 89-1410 at 4.
61 Id.
63 Id. at 2.
64 Id.
65 Id.
66 Id.
be $184,054,000. The resulting solvency or operating ratio was 39.2% for the period 1945–1960 and the ratio was 45.7% for 1960. The Bureau also dismissed a hybrid tax and toll system. The Bureau stated that it may be argued that because state gasoline taxes have been justified as charges for road use, such tax earning should contribute to the support of the system of toll roads in proportion to the gasoline consumed on them. But it concluded that the tax contribution to a toll system would make no important change in the conclusions reached because the average annual deficit for the entire system would be reduced by only about 14%. The Bureau considered the former property tax financing model as passé, because the motor vehicle had now become an abundant revenue producer. It then concluded that because a liberal estimate of revenue for the period 1945–1960 was less than 40% of a conservative estimate of debt service, maintenance, and operating costs, a toll system on the roads was not feasible.

The Bureau based its revenue estimate of a toll scenario on several travel demand estimates made at the time. First, it assumed that the transcontinental travel would be light. The report stated that the sum of the numbers of cars bound to or from points in states bordering on or near the Atlantic Coast was 300. This figure represented the total volume of average daily passenger-car traffic moving over all main-traveled highways between the east and west coasts. Second, the Bureau used planning survey data from eleven representative states and estimated that trip lengths were less than five miles that ranged between 25.7% and 43.8% of all trips in the eleven states. The Bureau also estimated that the median was between 6.3 miles and 8.9 miles, and the mean was between 11.7 miles and 18.7 miles. It then concluded that those conditions automatically excluded as potential toll payers a large number of vehicles moving in approximately the same direction as the toll facility but for shorter distances than those between the toll-highway access points.

The Bureau found that the majority of automobile owners had low incomes and that half of all family cars were owned by families that had an annual income of $1500 or less; the median income in 1939 was below $1,217. It assumed that for the car owner with an income of less than $1,500 a year, a toll of one cent per mile was not feasible because

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67 Id.
68 Id. at 86.
69 Id. at 109-10.
70 Id.
71 Id. at 150.
72 Id. at 110.
73 Id. at 7.
74 Id. at 12.
75 Id.
76 Id. at 11.
77 Id.
78 Id. at 13.
79 Id.
80 See J. C. Capt, Educational Attainment by Wage or Salary Income: 1940, BUREAU OF THE CENSUS (1946), available at http://www.census.gov/hhes/socdemo/education/data/cps/1946/p46-5/tab-04-05.pdf. The author has intentionally used “below $1,217” because the exact median was not easily obtained, but it is certainly below $1,217, which is the mean for Caucasian households.
it was a 100% increase in the cost of operation.\textsuperscript{81} It contrasted tolling with the cost of the gasoline consumed on a trip, which amounted to little more than a cent a mile.\textsuperscript{82} The consideration of the ability to pay tolls led to the Bureau’s conclusion that no more than one-third of the travelers that might use a free road would be viable toll users.\textsuperscript{83}

The Bureau believed that a toll highway user would regard inadequate width—i.e., too few lanes—differently than a non-toll user, because the user could choose between the free and the toll route.\textsuperscript{84} The Bureau based the required number of lanes on a maximum hourly traffic capacity of 520 vehicles and 2000 vehicles per day.\textsuperscript{85} In order to manage congestion, the Bureau stated that it was important that speed did not decrease significantly with increasing volume on a four-lane road.\textsuperscript{86} Using a linear volume-speed relationship, it found that there was no point at which congestion suddenly occurs.\textsuperscript{87} The report envisioned advances in technology like overdrive transmission that would make toll rates economical, because the costs of high-speed driving on toll roads would be comparable to the costs of driving on existing highways.\textsuperscript{88}

**Problems with the Bureau of Public Roads’s Analysis**

The purpose of discussing the 1939 report is not to dispute the Bureau’s findings but rather to illustrate the pragmatic approach taken by the Bureau in ruling out tolling. The Bureau’s opposition to the toll-road-financing model was based on very different principles than modern opposition to the model. The 1939 report’s conclusions were problematic. First, the travel demand forecast in the report did not envision the rapid changes in the transportation landscape after 1960. The challenges of travel demand forecasting are well known in the transportation planning community due to the difficulty in predicting the economy and the inherent relationship between the economy and transportation. For the period between 1960 and 1990, the number of solo automobile trips increased disproportionately to population.\textsuperscript{89} The total workers increased by 78\% while commuting increased by 135.5\%.\textsuperscript{90} The number of trips expanded both temporally and spatially, covering more hours of the day and more distance due to suburbanization.\textsuperscript{91} During that period, vehicle ownership tripled to 152.4 million.\textsuperscript{92} The Bureau’s claim that the majority of automobile owners have low incomes was no longer applicable as

\textsuperscript{81} H.R. DOC. No. 76-272, at 15.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 33–34.
\textsuperscript{84} Id. at 35.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 3.
\textsuperscript{87} Id. at 38.
\textsuperscript{88} Id. at 39.
\textsuperscript{90} Id. at ES-2.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at ES-1.
household income adjusted for inflation steadily increased from 1967 to 2008. A second problem of the 1939 report was that motor vehicle use was studied individually by each state; the U.S. Bureau of the Census conducted the first national automobile use study in 1961, which was a precursor to the Nationwide Personal Transportation Study (“NTPS”).

Improvements in traffic flow theory or vehicular technology presented other problems with the report. The Bureau’s assumption of a linear volume-speed relationship and rejection of the sudden onset of congestion have all been disproved; the simple-to-use Bureau of Public Roads link performance function was developed much later. The hourly capacity of 520 vehicles differed from modern capacities of 2200 to 2700 vehicles per hour per lane. The modern day challenges faced by the transportation system were not and could not have been envisaged in 1939.

**Focus on National System of Interstate and Defense Highways**

The legislative history of the Highway Act of 1956 reflected the urgent desire of Congress to quickly achieve an integrated system. In the Senate report, the Public Works Committee explained that the goal was to initiate an accelerated long-range highway program in the immediate future; the program for the National System of Interstate Highways was to cover a period of thirteen years. The Finance Committee stated that the Senate Public Works Committee neither made authorizations nor expressed an intent with respect to the years beyond 1961 in the case of the regular road program. The Act focused on the immediate establishment of approximately 42,500 miles of the Interstate System rather than on the future maintenance of the system. The 1956 Highway Act was not intended to be the long-term plan for highway financing.

The Public Works Committee emphasized that the program would not allow the federal government to construct highways but rather would be a federal-aid program in cooperation with the state highway departments that permitted maximum flexibility in meeting the needs of the states. The report mentioned specifically:

> [T]he committee recognizes the apprehension of people in some quarters that the Interstate System could parallel or compete with present toll roads. No provision

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99 Id. at 14 (“Table 2 reflects no new authorizations for primary, secondary, and urban roads beyond the fiscal year 1961 since H.R. 10660 as amended by the Senate committee on Public Works neither makes authorizations nor expresses an intent with respect to the years beyond 1961 in the case of the regular road program.”).
100 Id. at 4.
on this is suggested in the bill because the committee believes that complete control of the location and construction of the Interstate System by the States, subject to the approval of the Bureau of Public Roads, gives each State complete protection in this matter, and that is the intent of the committee.101

Thus, the intent of the 1956 Act was not to dictate to states a particular transportation revenue model or to restrict states’ flexibility in meeting local transportation needs. The intent was to promote the national HTF model for accelerating the creation of the Interstate System.

In explaining congressional intent, the language of the 1956 Act stated that because of its primary importance to national defense, the name of the system was changed to the “National System of Interstate and Defense Highways.”102 The Act also mentioned the needs of local and interstate commerce as well as the national and the civil defense.103 Notably, the word “defense,” rather than “commerce,” was part of the interstate system name as the memories of the recent world wars were still fresh. An urgent system of roadways for national defense should be developed with a centralized tax-based national highway trust fund system. However, it is more problematic to argue that the intent was also to limit states’ financial flexibility for the long-term expansion and maintenance of related state highways, which serve rather than provide for the national defense. Mark H. Rose summarized the overall emphasis of the Highway Act of 1956 as on federal financing (roughly 90%), rapid completion of the Interstate system, and continuing modernization of the rural road networks.104

**Various Competing Interests Behind the 1956 Highway Act**

The legislative debates over the details of the Highway Act of 1956 were contentious. Members of Congress lobbied for their version of good highway programming and debated the virtues of national control of road construction, the merits of toll and free highways, and the proper rate of gasoline taxation. So troublesome were these debates that many believed Congress would hold up the legislation.105 A number of proponents in the Eisenhower administration favored the toll financing model. As the most diligent proponent of toll financing, Special Assistant to the President for Public Works Planning General Bragdon claimed that toll collections could finance at least 23,000 expressway miles provided earnings were transferred from one state to another.106 Treasury Secretary Humphrey was an independent actor on the highway scene who concentrated on ensuring self-sufficiency for any road project.107 He also preferred toll financing, but would have

101 Id.
103 Id. at §116(a).
105 Id. at 85.
106 Id. (citing Letter from John S. Bragdon, Special Assistant to the President for Public Works Planning, to Andrew J. Goodpaster, White House Staff Secretary (July 28, 1955) (on file with the Eisenhower Library)).
107 Id. at 87.
accepted an earmarked user tax if equal to expenses. He believed that construction time would drag on for sixteen to eighteen years, because a ten-year tax would not be sufficient to complete the envisioned program. Truckers were opposed to one of the competing highway bills, the Fallon bill, because it imposed differential tax rates, especially on tires. They preferred that toll roads move more easily but opposed schemes encouraging further toll collections or extensions of toll networks.

**Limitations on Federal-Aid Funds and Economic Climate**

The Highway Act of 1956 approved any toll road, bridge, or tunnel that met the standards adopted for the improvement of projects located on the Interstate System, whenever such a facility was already located on an Interstate System route. However, no federal-aid highway funds were to be expended for the construction, reconstruction, or improvement of any such toll road except to the extent permitted by law. Thus, this Act was the beginning of the long-term exclusion of new toll facilities on the Interstate System. The turnpikes in existence at the time—for example, the Kansas, Massachusetts, New Jersey, and Pennsylvania turnpikes—were included on the interstate system as toll roads. For approaches having no other use than on the integrated Interstate System, the Act further provided that the section of toll road would become free to the public upon the collection of tolls sufficient to liquidate the cost of the toll road or any bonds outstanding at the time. The toll road section was not required to become free on approaches having other uses. Ironically, an act meant to promote a uniform national highway system actually ended up bifurcating states into toll and non-toll states.

The Finance Committee report reflected the financial and political climate in 1956 and expressed that receipts of the trust fund were expected to exceed the expenditures by nearly $7.7 billion. The Finance Committee’s statement reflected the optimistic revenue outlook for the trust fund as formulated using the free roads model. The rosy transportation-funding outlook at the time was clearly very different from the current challenging funding climate.

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108 *Id.*
109 *Id.* (citing Notes on Possible Federal Highway Legislation, John S. Bragdon, Special Assistant to the President for Public Works Planning (Nov. 30, 1955) (on file with the Eisenhower Library)).
110 *Id.* at 86 (citing Letter from I. Jack Martin, Administrative Assistant to the President, to L. Sherman Adams, White House Chief of Staff (Oct. 18, 1955), and Letter from I. Jack Martin, Administrative Assistant to the President, to Howard Pyle, Administrative Assistant to the President (Oct. 19, 1955) (on file with the Eisenhower Library)).
111 *Id.* (citing Letter from I. Jack Martin, Administrative Assistant to the President, to L. Sherman Adams, White House Chief of Staff (Oct. 18, 1955) and Letter from I. Jack Martin, Administrative Assistant to the President, to Howard Pyle, Administrative Assistant to the President (Oct. 19, 1955) (on file with the Eisenhower Library)).
113 *Id.*
114 *Id.* §113(c)(1).
115 *Id.* §113(b).
Federal Legislation in Support of States

The federal restrictions placed on toll roads in 1956 have slowly eroded over the years. The most recent transportation reauthorization, Safe Accountable Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), incorporated several provisions authorizing states to use federal funding for toll facilities. First, SAFETEA-LU authorized states to create high-occupancy/toll (“HOT”) lanes. Such lanes are a variation on the traditional high occupancy vehicle lanes (“HOV”). HOV lanes are typically reserved for vehicles that have two or more occupants per vehicle, motorcycles, or public transportation vehicles. HOT lanes allow vehicles that do not meet the HOV requirement to use the lanes by paying a toll. They are authorized on both interstate and non-interstate facilities, and they could be an option for expanding certain interstates, especially in the urban areas where congestion is acute.

Second, federal participation was allowed in the following five types of toll activities: (1) initial construction of toll highways, bridges, and tunnels including the approaches, except on the Interstate System; (2) reconstruction, resurfacing, restoration, and rehabilitation of any existing toll facility; (3) reconstruction or replacement of free bridges or tunnels and conversion to toll facilities; (4) reconstruction of a free federal-aid highway—except on the Interstate System—and conversion to a toll facility; and (5) preliminary studies to determine the feasibility of the above toll construction activities. In addition, SAFETEA-LU authorized a value-pricing program, new express lane demonstration programs, and toll pilot programs on interstate highways.

Missouri Approach: Pohl v. State Highway Commission

In the 1969 case Pohl v. State Highway Commission, the Missouri Supreme Court placed a stumbling block that has prevented toll road development in the state ever since. The decision was a good example of how the Highway Act of 1956 has affected states. In Pohl, a taxpayer who was a contractor sued for an injunction. The taxpayer sought to restrain the Highway Commission and Missouri Turnpike Authority from issuing revenue bonds to build toll roads and from entering into a leasing agreement on the grounds that the Toll Road Authority Act (“TRAA”) was unconstitutional. The TRAA created a

118 Id. § 166.
119 Id. § 166(a)(2), (b)(2)–(3).
120 Id. § 166(b)(4).
121 Id. § 129.
122 Id. § 129(a)(1)(A).
123 Id. § 129(a)(1)(B).
124 Id. § 129(a)(1)(C).
125 Id. § 129(a)(1)(D).
126 Id. § 129(a)(1)(E).
127 Id. § 1604.
128 See Pohl v. State Highway Comm’n, 431 S.W.2d 99, 106 (Mo. 1968) (en banc).
129 Id. at 100.
Missouri Turnpike Authority and empowered it to do several things. First, the Authority was empowered to construct, maintain, repair, reconstruct, and operate turnpike projects. Second, it was empowered to pay construction and operation costs through turnpike revenue bonds payable solely from tolls, revenues, or other pledged funds. Third, it was empowered to lease the toll road to the Highway Commission for a consideration not less than the amount required to pay all obligations of the project.

The *Pohl* court used the following line of reasoning in holding that the TRAA resulted in an unconstitutional diversion of allocated revenue from free highways to toll roads. First, the toll road under TRAA was not a state highway or part of the state highway system within the meaning of Article IV, Sections 29, 30(a) and 30(b) of the 1945 Missouri Constitution. Second, tolls were not sufficient to comply with the legislatively authorized agreement to pay not less than the amount required to pay all obligations of the Authority respecting the project, and thus the Commission had to resort to other funds available to it.

**Toll Roads Are Not on the State Highway System**

The court raised three points to support the assertion that toll roads are not part of the state highway system. First, the TRAA Act expressly provided that a toll road project does not become a part of the state highway system until it is paid for, and then only if the Highway Commission, in its discretion, elects to include it as part of the state highway system. Second, the rental charges from public utilities authorized under TRAA are not legally allowable for state highways. Third, the Highway Commission has exclusive authority over the location, construction, and maintenance of all state highways. In contrast, the Toll Road Authority only has the power to locate, construct, and maintain toll roads.

The Missouri Supreme Court has not held consistently on the question of who can designate a state highway. The *Pohl* court drew attention to the October 27, 1967, agreement between the Commission and the Toll Road Authority that required the Commission to incorporate a proposed turnpike into the state system of highways prior to the issuance of revenue bonds. The court pointed out an inconsistency in the TRAA—the TRAA provided that only after the bonds had been paid in full could the Highway

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131 *Id.* § 225.060(4).
132 *Id.* § 225.060(5).
133 *Id.* § 225.060(10).
134 *Pohl v. State Highway Comm’n*, 431 S.W.2d 99, 103 (Mo. 1968) (en banc).
135 *Id.* at 101.
136 *Id.* at 102.
137 *Id.* at 100–01.
138 *Id.* at 101.
139 *Id.* at 101–02.
140 *Id.* at 101.
Commission operate and maintain a toll road as a part of the state highway system. The following case law discussion is not meant to trivialize the problem of statutory construction raised by the *Pohl* court but to illustrate that the court addressed the question differently at different times.

Several previous cases seemed to imply that the Highway Commission had the authority, if not the exclusive authority, to designate the state highway system. In *Palmer v. State Highway Commission*, the court held that the Highway Commission’s records must show the adoption of a road or project as a part of the state highway system. In *State ex rel. State Highway Commission v. Thompson*, the court held that the Centennial Road Law gave the Highway Commission the authority to designate the higher type roads of approximately 1500 miles connecting the principal population centers of the state, and with it the implied authority to include bridges over navigable streams. In *State ex rel. Reynolds County v. State Highway Commission*, the county sought a refund from the Highway Commission for money expended claiming that the roads and bridges were on the state highway system. The court examined Commission minutes, letters, and resolutions and found nothing showing that the Commission had taken these projects into the state highway system. In *State ex rel. Liberty Township v. State Highway Commission*, the court stated that the General Assembly, in framing the Centennial Road Law in 1921, described the routes composing the state highway system but wisely refrained from locating, designating, or making any road between any of the places or points named. The court stated that the locating is to be left to the sound discretion of the Highway Commission. In *State ex rel. City of Hannibal v. Smith*, the court stated that the Highway Commission may incorporate a proposed toll bridge as a part of the highway system either before or after the bridge has become toll-free. All these cases seem to suggest that the Highway Commission could in fact designate routes on the state highway system.

On the other hand, other cases seem to be inconsistent with the notion that the Highway Commission could designate state routes. The court in *State ex rel. Russell v. State Highway Commission* stated that a statutory provision authorized the Highway Commission to designate the routes and types of approximately 1500 miles of primary roads and to make such changes in the routes as it may deem necessary in the interest of economy and directness. The court further stated that all federal-aid roads in the state possibly may be considered a part of a state highway system and that the General Assembly...  

141 Id. at 101 n.2.  
142 Palmer v. State Highway Comm’n, 69 S.W.2d 653, 655–56 (Mo. 1934).  
143 *State ex rel. State Highway Comm’n v. Thompson*, 53 S.W.2d 273, 326 (Mo. 1932) (en banc).  
144 *State ex rel. Reynolds Cnty. v. State Highway Comm’n*, 42 S.W.2d 193, 193 (Mo. 1931) (en banc).  
145 Id. at 195.  
146 *State ex rel. Liberty Twp. v. State Highway Comm’n*, 287 S.W. 39, 43 (Mo. 1926) (en banc).  
147 Id.  
148 *State ex rel. City of Hannibal v. Smith*, 74 S.W.2d 367, 373 (Mo. 1934) (en banc).  
149 The court stated: “But suppose the tolls are not sufficient? Then to comply with the legislatively authorized agreement to pay not less than the amount required to pay all obligations of the authority respecting the project, the commission would have to resort to other funds available to it. . . . The only other funds available to the state highway commission are the funds it receives under s 30(b), Art. IV, 1945 Constitution.” *Pohl v. State Highway Comm’n*, 431 S.W.2d 99, 102 (Mo. 1968) (en banc).
Assembly carefully designated the state highway system in statutes.\textsuperscript{150} In \textit{State ex rel. St. Louis County v. State Highway Comm’n}, the court stated that the power given to the Commission under the Centennial Road Law to construct the roads cannot be held to include the power to select or designate their routes but instead the legislature itself prescribed the routes of all the roads constituting the state highway system.\textsuperscript{151} While \textit{Palmer, Thompson, Reynolds County, Liberty Township, and Hannibal} all seem to imply that the Highway Commission could designate the state highway system, \textit{Russell} and \textit{St. Louis County} seem to imply that the General Assembly designates the state highway system. There are ways to reconcile this inconsistency. One is to construe the designation of state highways as authorized by the General Assembly and delegated mostly to the Highway Commission. Another is to portray the power of designation as context-dependent. The case law included contexts such as road abandonment, toll bridge financing, special road districts, and intra-county roads. However, the cases do not make this clear, and readers are left to wonder about the reasoning behind the seemingly contradictory court decisions.

**Insufficiency of Toll Road Bonds**

The \textit{Pohl} court assumed that the only way to comply with TRAA would in fact be unconstitutional. The court focused on the toll road lease agreement language that said that the legislature has authorized the Highway Commission to agree to pay to the Toll Road Authority a rental for the project of a sum not less than the amount required to pay all obligations of the Authority respecting the project.\textsuperscript{148} First, the court assumed that tolls alone would be insufficient, but that assumption was not based on any reported economic analysis made by the Commission or other parties. In other cases, the court was less eager to estimate future economic scenarios. For example, in \textit{State ex rel. City of Hannibal v. Smith}, the court considered whether the operation, maintenance, and repair of a toll bridge would exceed the toll revenue, requiring other sources of funding.\textsuperscript{152} The \textit{Hannibal} court said the contingent liability in the case was different from a debt and a debt solvendum in future—uncertain whether anything will ever be demandable by virtue of the contract—cannot be called a debt.\textsuperscript{153} Even assuming, \textit{arguendo}, that tolls would be insufficient, the \textit{Pohl} court disregarded other funds available to the Commission that the court later admitted existed. In the more recent case of \textit{In re Fabius River Drainage Dist.}, the court stated that the Highway Commission receives other funds less restricted than state revenue derived from highway users and that the Commission has access to general revenue funds.\textsuperscript{154} Perhaps the court will no longer view the toll revenue insufficiency as a deal breaker.

\textsuperscript{150} \textit{State ex rel. Russell v. State Highway Comm’n}, 42 S.W.2d 196, 201 (Mo. 1931) (en banc).
\textsuperscript{151} \textit{State ex rel. St. Louis Cnty. v. State Highway Comm’n}, 286 S.W. 1, 2 (Mo. 1926) (en banc).
\textsuperscript{152} \textit{Hannibal}, 74 S.W.2d at 370.
\textsuperscript{153} The court said, “If, therefore, there is any liability at all in the maintenance of the bridge, it is purely contingent upon the happening of future events. It may be that there will always be sufficient revenue to maintain the bridge; time can only tell.” \textit{Id.} at 372.
\textsuperscript{154} \textit{In re Fabius River Drainage Dist.}, 35 S.W.3d 473, 481 (Mo. Ct. App. 2000).
Second, the *Pohl* court stated that the constitution restricted the use of all “state revenue derived from highway users” for certain enumerated purposes and no other, and that the expressly set out purposes, none of which include toll roads, relate to state highways, bridges and tunnels, and the state system of highways.\(^{155}\) The court discounted an argument that the last enumerated purpose of section 30(b) of the Missouri Constitution—i.e., other purposes and contingencies deemed by the Commission to be related to the construction and maintenance of highways and bridges—as applying to toll roads.\(^{156}\) The court also distinguished two cases that involved the Highway Commission contributing to toll or private bridges; however, the court’s elaborate explanations were unclear.\(^{157}\) One case, *State ex rel. Kansas City v. State Highway Commission*, involved a complicated transaction whereby Kansas City and Clay County paid a bridge company to make a toll bridge free but the company retained the right to the lower railroad deck and upper deck right-of-way for a double-track electric railroad.\(^{158}\) This bridge was then conveyed to the Commission so that it could maintain both the upper deck used by vehicular and pedestrian traffic and the lower railroad deck except for rails and such.\(^{159}\) The *Pohl* court distinguished between an incidental function—maintenance of the lower deck—and the integral function—maintenance of the bridge itself—of the Commission, suggesting that incidental functions do not fall under the “other purposes and contingencies” authorized under section 30(b).\(^{160}\) From an engineering standpoint, it is difficult to see how the deck of the bridge could be construed as incidental to the superstructure of the bridge. The different types and volumes of loadings on the deck, like trains, trucks, passenger vehicles, or pedestrians, determine the design of the deck, which in turn dictate the superstructure. Therefore, how could the deck be integral from a maintenance and engineering standpoint but incidental from a legal standpoint?

Another way of portraying the court’s decision is to view the physical bridge deck as not being a part of the state highway system while the attached superstructure and substructure are part of the system. This physical segmentation of an integrated physical structure is unusual.

The other case, *State ex rel. City of Hannibal v. Smith*, involved the constitutionality of the city of Hannibal’s construction of a toll bridge under a Missouri bridge act with contributions from the federal government and the state Highway Commission.\(^{161}\) The *Pohl* court pointed out that the question of whether the Highway Commission’s contribution was an improper diversion of the state revenue from highway users was not addressed directly.\(^{162}\) The *Pohl* court also recounted the various stages of the Missouri Constitution with respect to highway revenue taxes, emphasizing that the 1945 Constitution as amended in 1962 was more restrictive on uses for the revenue from the highway user taxes than the constitution at the time of the *Hannibal* decision.\(^{163}\) The

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\(^{155}\) *Pohl v. State Highway Comm’n*, 431 S.W.2d 99, 102 (Mo. 1968) (en banc).

\(^{156}\) *Id.* at 105.

\(^{157}\) *Id.* at 104.

\(^{158}\) *State ex rel. Kansas City v. State Highway Comm’n*, 163 S.W.2d 948, 951 (Mo. 1942) (en banc).

\(^{159}\) *Id.*

\(^{160}\) *Pohl*, 431 S.W.2d at 105.

\(^{161}\) *State ex rel. City of Hannibal v. Smith*, 74 S.W.2d 367, 368–69 (Mo. 1934) (en banc).

\(^{162}\) *Pohl*, 431 S.W.2d at 104.

\(^{163}\) *Id.* at 105.
Pohl court neglected the fact that the Hannibal court mentioned that the Missouri Bridge Act of 1933\(^{164}\) granted the Highway Commission the authority to incorporate any such toll bridge into the state highway system and to maintain the bridge as a part of the state highway system.\(^{165}\) The Hannibal court explained that the state Highway Commission could both contribute to a toll bridge project using revenues from highway user taxes and designate such a bridge to be part of the state highway system as part of the bridge act. In fact, the Hannibal court further explained that the act authorizing the building of a bridge was analogous to statutes that authorized the Highway Commission to build streets in municipalities that form a part of the state highway system.\(^{166}\)

Third, the court stated that it had no way of telling how much toll roads might drain the state road fund, funded by state revenue derived from highway users. The court speculated that it might be enough of a diversion that the Highway Commission would be seriously handicapped in carrying on the necessary construction and maintenance of the free public state highway system.\(^{167}\) While the court was clearly concerned about the diversion of funds away from non-toll roads on the state highway system, it did not contemplate that toll revenue could enlarge the total pie and could be used to supplement deficiencies from fuel taxes and fees.

The Pohl court also explicitly stated that federal funds were not available to pay rentals on toll roads.\(^{168}\) As previously discussed in the review of the history of the Highway Act of 1956, there were restrictions against toll roads in the 1956 Highway Act. However, the federal trend of making more federal funding available for financing projects involving tolls would mean that there is another funding source to complement toll bonds. Would changes in federal legislation, such as SAFETEA-LU, help to distinguish Pohl? If federal funds are now available for paying for toll roads, then some of the court’s fears of highway revenue diversion could be assuaged. The federal government, arguably the most instrumental entity in instigating the concept that public roads are free roads, has recently started to reverse that trend.

**Public Road Equals Free Road**

In addition to the main holding, the Pohl court issued dicta about free public highways. The court volunteered that all public highways are free highways and not toll highways, stating “We need reach … that the act [TRAA] violates s 30(b), Art. IV of the 1945 Constitution by permitting an unconstitutional diversion of allocated revenue from free highways to toll roads.”\(^{169}\) It construed the potential diversion as a drain on the necessary construction and maintenance of the free public state highway system.\(^{170}\) The court said that prior legislatures have regarded the highway user taxes as being exclusively for use

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\(^{164}\) Missouri Bridge Act, 57th Gen. Assembly, Ext. Sess. 363, 364 (Mo. 1933).

\(^{165}\) *Hannibal*, 74 S.W.2d at 373.

\(^{166}\) *Id.* at 373–74.

\(^{167}\) *Pohl*, 431 S.W.2d at 103.

\(^{168}\) *Id.* at 102 n.3 (citing 23 U.S.C. 301).

\(^{169}\) *Id.* at 101 (emphasis added).

\(^{170}\) *Id.* at 103.
on the free public highways,\(^\text{171}\) and historically painted the state highway system in Missouri as a system of free highways.\(^\text{172}\) In supporting the court’s interpretation of the history of the legislature and Missouri, the court discussed the historical definition of public highways as “every way or place of whatever nature, generally open to the use of the public as a matter of right, for the purposes of vehicular travel.”\(^\text{173}\) It explained that the definition of public highways quoted in the preceding paragraph, which first appeared in the 1943 amendment, was changed from “completing the construction of the highway program” to that of providing for the “construction and maintenance of public highways of the state.”\(^\text{174}\) The court also discussed the authorization of the increase in fuel tax from one cent to five cents and explained: “It thus took a constitutional amendment to authorize a sharing of the gasoline tax with cities and counties. Yet the toll road act purports to authorize, by statute, a sharing with the toll road project. This it cannot constitutionally do.”\(^\text{175}\) However, nowhere in the Missouri history that the Pohl court recited did the word “free” ever appear expressly next to the term public highways.

The court seems to have purposely disregarded much of Missouri’s highway history—especially the early history. This early history was discussed in the case of Allison v. Hannibal, which involved the expiration of a turnpike charter.\(^\text{176}\) The Allison court said that plank-road companies were created for a public purpose, to wit, the building and maintaining of a highway or turnpike road.\(^\text{177}\) The court described the characteristics of turnpikes in detail:

Turnpike road is nomen generalissimum. It includes as well gravel and plank-road companies, which have the right to collect tolls from persons passing over their road, and enforce the collection by erecting turnpikes or gates, or both, to obstruct the passage till the tolls are paid. . . . Now, a turnpike is a highway differing neither in the responsibility for its proper maintenance, nor in any other particular, from an ordinary highway, save in the mode of constructing and maintaining it. An ordinary public road is maintained and repaired by taxes. A turnpike is supported and maintained by the tolls exacted. A turnpike is regarded in law as a public easement, and not as private property. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other highway. These principles are well established.\(^\text{178}\)

Thus, it is difficult to reconcile the Pohl position with the Allison position that a traveler on a turnpike has the same right to its use as a traveler on a non-toll road. The Allison court further emphasized the public nature of turnpikes by mentioning several other characteristics of turnpikes and turnpike corporations. First, turnpike corporations had

\(^{171}\) Id. at 105.
\(^{172}\) Id. at 106.
\(^{173}\) Id. at 105.
\(^{174}\) Id. at 105–06.
\(^{175}\) Id. at 106.
\(^{176}\) State ex rel. Allison v. Hannibal & R.C. Gravel-Road Co., 39 S.W. 910 (Mo. 1897).
\(^{177}\) Id. at 912.
\(^{178}\) Id.
condemnation power. Second, turnpikes imposed no additional burdens upon adjoining landowners on the principle that the character of the easement was not changed so the road remained a public highway. Third, a turnpike corporation was authorized to locate its road on any public road provided it first secured the consent of the county court of the county in which the public road was located. Fourth, upon the termination of the franchise, the road remained a public highway, wholly freed from the burden of tolls. The Allison court could not have been more explicit in stating that a turnpike is a public highway.

**Treating As-applied Challenge as Facial**

In addition to the dicta, the Pohl court also appeared to have entertained, *sua sponte*, an as-applied challenge as a facial challenge. The court stated that to make a provision unconstitutional, it was not necessary to show that a diversion definitely would result but rather that the TRAA would authorize, permit, and encourage such a diversion. The court appeared very willing to help the litigant taxpayers. In Weinschenk *v.* State, the court stated that constitutional challenges to laws are ripe when the facts necessary to adjudicate the underlying claims were fully developed and the laws at issue were affecting the plaintiffs in a manner that gave rise to an immediate, concrete dispute. In *Community Federal Savings & Loan Association v. Director of Revenue*, the court held that a claim to a constitutional prohibition against the state’s reduction of its proportion of the costs of free public schools was not ripe where there was no determination as to how refunds would be paid to the savings and loan associations. In *Union Electric Company v. Kirkpatrick*, the court indicated that courts have the discretion to consider, at least in mandamus actions, allegations that an initiative is facially unconstitutional. But the court held that the respondents’ allegations did not rise to the level of facial unconstitutionality, stating that the court will not sacrifice the democratic process to the interest of judicial economy. The court implied that a facial constitutional challenge means that it is not conceivable for a statute ever to be applied constitutionally.

The Pohl court described the suit as an injunction suit by taxpayers who pay highway user taxes to restrain the state Highway Commission and the Missouri Turnpike Authority from issuing revenue bonds to build a toll road or from carrying out the provisions of an agreement into which defendants have entered. The agreement between the Commission and the Turnpike Authority stated that when the Authority has undertaken the construction of a toll road in a location approved by the Commission and

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179 *Id.*
180 *Id.*
181 *Id.* at 911.
182 *Id.* at 913.
183 *Id.*
184 Pohl v. State Highway Comm’n, 431 S.W.2d 99, 106 (Mo. 1968) (en banc).
185 Weinschenk v. State, 203 S.W.3d 201, 204, 221 (Mo. 2006) (en banc).
186 Cmty. Fed. Sav. & Loan Ass’n v. Dir. of Revenue, 752 S.W.2d 794, 800 (Mo.1988) (en banc).
188 *Id.* at 405–06.
189 Pohl v. State Highway Comm’n, 431 S.W.2d 99, 100 (Mo. 1968) (en banc).
determined to be an essential and integral part of the state highway system, the Commission will then enter into a lease with the Authority. However, there had been no actual diversion of highway revenues to any toll roads because no physical toll road had yet been proposed. It could be argued that the as-applied challenge was not yet ripe.

**California Approach: Professional Engineers in California Government v. Department of Transportation**

The state of California took a different, more pragmatic direction. In 1989, the California legislature passed Assembly Bill 680 authorizing the California Department of Transportation (“Caltrans”) to enter into agreements with private entities for the construction by, and lease to, private entities of four transportation demonstration projects. The bill authorized a private entity to charge tolls for the use of privately constructed facilities. The projects would be state-owned at all times; they would be part of the state highway system during the term of the lease and revert to the state at the expiration of the lease. One financial justification for the legislation, as explained in the findings section, was that public sources of revenues have not kept pace with California’s growing transportation needs, and alternative funding sources should be developed to augment or supplement available public sources of revenue. A practical justification was to take advantage of private sector efficiencies in designing and building transportation projects. Other justifications included the need for the rapid formation of capital necessary for funding transportation projects and the need to quickly bring reductions in congestion in existing transportation corridors. Four entities were subsequently selected for the demonstration projects.

The labor union of state engineers, Professional Engineers in California Government (“PECG”), and taxpayers sued to enjoin the projects and to declare the agreements unconstitutional. The project agreements set forth a non-competition zone along facility corridors where Caltrans agreed not to issue any competing franchise or to open or operate any competitive transportation facility within the special zone for the term of the lease or agreement. Presumably, the reason for the non-compete clause was to avoid diverting traffic from the toll facility, which would affect its viability. PECG

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190 Id. at 101.
192 Id.
193 Id.
194 Id.
195 Id.
196 Id. at 590–91.
197 Toll roads were also being built in California under county and municipal authority like the Transportation Corridor Agencies, but this paper only addresses the state level.
199 Id. at 590–91.
200 The non-compete clause eventually ignited a political firestorm in the SR 91 project. The particular non-compete clause forbade public agencies from increasing highway capacity within a 1.5-mile wide corridor on either side of the toll lanes for the life of the franchise agreement. Eventually, the Orange County Transportation Authority purchased the toll lanes from the private franchise and a settlement was achieved involving the political process. It is important to note that a strict non-compete clause like the one
claimed that such an agreement was unconstitutional because it amounted to a state abdicating its police powers. The court held that there was no express abdication of police powers, and the court would not read into the contracts an abrogation of the potential future exercise of the sovereign police power. The court said that the validity of exclusive franchises for the provision of public services and benefits was well settled.

The second contention raised by PECG was that contracting out to private parties was against California’s civil service laws. Courts have held that Article VII of the California Constitution implied certain limits as essential to protect the civil service mandate against dissolution and destruction. This contention is somewhat similar to the highway revenue diversion issue in Pohl, except here, the alleged diversion is in service contracts. The civil service limits are violated if the nature of contracted services is such that a civil servant could have performed them. The limits have an exception of a “new state function” where the contracted services embrace a new state activity and do not displace an existing state civil service function. The court held that indeed the toll road agreements were novel because of the privatization of project financing and management. The court repeated the legislature’s reasoning that this new experimental program solved state transportation needs that available public revenue could not meet while fulfilling the civil service mandate of promoting efficiency and economy in the state government.

The third PECG argument was that the granting of airspace leases was beyond the scope of the toll road authorization bill because it amounted to leases for commercial development along the completed toll roads. The airspace lease gave developers the right to construct commercial improvements or to sublease the right to others. But instead of frowning upon this financial inducement, the court lauded the agreement for making the projects more financially viable and more attractive to private developers. It made an economic argument that airspace lease provisions were reasonable in light of the risks assumed by the developers and any value that the leases may eventually produce results from the developers’ own investment. The court again repeated the practical benefit to the state and said that the result is the funding and building of transportation

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200 See Prof'l Eng'rs in Cal. Gov't, 13 Cal.App.4th at 590.
201 Id. at 591.
202 Id. at 592.
203 Id.
204 Id.
205 Id. at 593.
206 Id.
207 Id.
208 Id. at 593–94.
209 Id. at 595.
210 Id.
211 Id.
212 Id. at 598.
facilities otherwise beyond the state’s financial means.\textsuperscript{213} It emphasized that projects will be state highways at all times; the toll roads are to be state-owned and are part of the state highway system.\textsuperscript{214}

In summary, the \textit{PECG} court seemed greatly concerned with the well-being of the state’s transportation facilities and gave great deference to Caltrans in operating under the toll authorization statute. It construed the toll road authorization as giving Caltrans broad discretion to carry out the statute’s purposes.\textsuperscript{215} The court agreed with the lower court’s emphasis that the Legislature intended to encourage private construction of toll roads and not to cramp this goal with a strained reading of the enabling legislation.\textsuperscript{216}

\textbf{Pohl Contrasted with PECG}

\textit{Pohl} and \textit{PECG} illustrate two different approaches, one categorical and one pragmatic. The fundamental differences between the state constitutions and statutes are the most important considerations for explaining differences behind the decisions. The goal of this paper is not to explain such considerations involving the intricate differences in statutory construction by the Missouri and California courts. Instead, the goals of this paper are to compare the attitudes of the courts towards toll roads, to analyze the general approaches taken, and to explore reasons for the differing approaches. To summarize the two cases, \textit{Pohl} involved no actual roadway\textsuperscript{217} while \textit{PECG} involved four projects with routes listed in the toll statute.\textsuperscript{218} Thus, the \textit{Pohl} court construed the case as a facial challenge\textsuperscript{219} while the \textit{PECG} court entertained the case as an as-applied challenge of the toll statute.\textsuperscript{220} The \textit{Pohl} court categorically excluded toll roads from the state highway system\textsuperscript{221} while the \textit{PECG} court emphasized the fact that the privately operated toll roads were public state highways at all times.\textsuperscript{222} In \textit{Pohl}, the court rendered a very narrow reading of the toll statute\textsuperscript{223} while in \textit{PECG}, the court construed the toll enabling statute very liberally.\textsuperscript{224} \textit{Pohl} focused more on the history of Missouri\textsuperscript{225} while \textit{PECG} pointed mostly to future transportation challenges in California.\textsuperscript{226} One main concern of the \textit{Pohl} court was to protect the constitutionally-created highway revenue stream from diversion\textsuperscript{227} while the \textit{PECG} court encouraged creativity in using new funding streams to assist the cash-strapped highway revenue sources and to exploit private sector efficiencies.\textsuperscript{228} Thus, in

\begin{itemize}
\item \textsuperscript{213} \textit{Id.} at 596.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.} at 597.
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Pohl} v. State Highway Comm’n, 431 S.W.2d 99, 101 (1968).
\item \textsuperscript{218} \textit{Prof’l Eng’rs in Cal. Gov’t}, 13 Cal.App.4th at 590.
\item \textsuperscript{219} \textit{Pohl}, 431 S.W.2d at 106.
\item \textsuperscript{220} \textit{See Prof’l Eng’rs in Cal. Gov’t}, 13 Cal.App.4th at 590.
\item \textsuperscript{221} \textit{Pohl}, 431 S.W.2d at 101.
\item \textsuperscript{222} \textit{Prof’l Eng’rs in Cal. Gov’t}, 13 Cal.App.4th at 596.
\item \textsuperscript{223} \textit{See Pohl}, 431 S.W.2d at 99.
\item \textsuperscript{224} \textit{See Prof’l Eng’rs in Cal. Gov’t}, 13 Cal.App.4th at 598.
\item \textsuperscript{225} \textit{Pohl}, 431 S.W.2d at 105–06.
\item \textsuperscript{226} \textit{Prof’l Eng’rs in Cal. Gov’t}, 13 Cal.App.4th at 596.
\item \textsuperscript{227} \textit{Pohl}, 431 S.W.2d at 105.
\item \textsuperscript{228} \textit{Prof’l Eng’rs in Cal. Gov’t}, 13 Cal.App.4th at 596.
\end{itemize}
Pohl, the size of the pie was viewed as limited; in PECG, tolls were viewed as both adding to the size of the pie and making the most of the existing pie. There was also a difference in the level of the court that resulted in a much greater impact for Missouri. Pohl was an en banc decision by the Missouri Supreme Court, but PECG was a decision by the California Court of Appeal.

The years Pohl and PECG were decided is one important difference, Pohl in 1968 and PECG in 1993. The demographics and the level of traffic congestion of the two contexts were very different. Missouri had less than five million residents in 1970, while California had nearly thirty million residents in 1990 and was at the time, the most populous state in the United States. In Orange County, where much of the toll roads action was focused in the 1990s, the population grew by 2.1 million while the freeway system added only four miles between 1950 and 1989. In 1989, Los Angeles— including Orange County—was the most congested metropolitan area not only in California but in the United States as a whole. In contrast, the worst in Missouri was St. Louis, which ranked twenty-fifth nationally. In fact, four California metropolitan areas placed in the top ten of the most congested, including San Francisco-Oakland, San Diego, and San Bernardino-Riverside. It is clear that transportation problems in 1990 in California were orders of magnitude worse than 1970 in Missouri.

Despite taxpayers being the litigants in challenging both state toll statutes, the California case also included the labor union. In fact, the PECG court emphasized PECG issues over taxpayer issues. Many of the issues raised were relevant to both the labor union and taxpayers, but the major issue of civil service laws seemed to be more central to PECG. At the time, there was significant opposition to toll roads from the California public, including from the Southern California Automobile Club and some legislators. The PECG court chose to address the PECG issues over the taxpayer issues nonetheless.

One similarity between the two states was that neither state had interstate toll highways grandfathered in under the 1956 Highway Act. Except for toll bridges, neither state had approved statutes authorizing toll roads on the state highway system until years after the 1956 Act.

Conclusion

This article sought to highlight two different legal approaches toward the toll model of highway financing. The pragmatic approach highly values the end goal of providing the most efficient means of meeting pressing transportation infrastructure demands. The 1393 Report, the 1956 Highway Act, and the PECG court seem to have taken that

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231 Laguna Greenbelt v. U.S. Dep’t of Transp., 42 F.3d 517, 521 (9th Cir. 1994).
232 TRANSPORTATION RESEARCH BOARD, CURBING GRIDLOCK: PEAK-PERIOD FEES TO RELIEVE TRAFFIC CONGESTION—SPECIAL REPORT 242 104 (1994).
233 Id.
234 KLEIN & FIELDING, supra note 24, at 17.
approach. This pragmatic approach would allow the use of toll financing unless state constitutions or statutes explicitly forbid tolling. In contrast, the categorical approach taken by the Pohl court values the classification of the highway system and the financing model into either free or toll. The approaches are not necessarily mutually exclusive. To the extent that the Pohl court unnecessarily categorized public roads and state highways into toll or free, the court eliminated a practical approach that would have addressed the same underlying concerns differently—the funding of a viable transportation system via constitutional, legal methods. The Pohl court could have waited until a ripe case appeared concerning an actual proposed toll road with more developed facts on the financing of a particular toll road. At that time, it would be much easier to ascertain the potential revenue, the traffic forecast, the competition from parallel corridors, the spacing of exits and toll gates, and the possibility of revenue diversion. In contrast to the smaller and localized toll roads of the nineteenth century, modern toll roads are much more customized to a specific set of constraints and facts, and those details are required in order to correctly assess the toll road finances. Even in a facial analysis, it appears that the Pohl decision could have gone the opposite way with the practical approach. In the current economic and federal legislative climate, it is almost certain that the problem of highway revenue diversion would not be considered a deal breaker. The relaxation of federal funding toward toll roads, the innovative ways of establishing private-public partnerships, and the deficient highway tax and fee funding system mean that the tolling model will be viewed more as augmenting instead of diverting existing highway funds.

Each approach has consequences. California’s adoption of a pragmatic approach means that tolling is now an available option under the right circumstances. The toll road authorization statute, having withstood a legal challenge in PECG, enabled further exploration of other related toll legislations.235 A 2002 bill allowed the Orange County Transportation Authority (“OCTA”) to purchase the SR 91 franchise from the California Private Transportation Company to eliminate the non-compete clause.236 In 2008, another bill authorized OCTA to transfer its rights and interest in the Riverside County portion of the SR 91 toll lane, including the ability to impose tolls for fifty years, to its sister agency, Riverside County Transportation Commission (“RCTC”).237 This potentially opens the door for SR 91 to be expanded further inside Riverside County. In fact, the potential excess revenue from SR 91 could assist many other transportation projects, including additions of non-tolled lanes, interchange improvements, and light rail and bus service.238 These possibilities would probably not be open or at least would have been delayed if the PECG court had categorically invalidated the tolling legislation.

Missouri’s categorical approach in Pohl means that there is legal uncertainty in the state regarding the constitutionality of toll roads. It is not surprising that the Missouri legislature has not attempted a similar toll enabling statute in over forty years since the Pohl decision. One way of clarifying the picture in Missouri would be to seek a

236 RBF CONSULTING, supra note 194, at 1.
237 Id.
238 Id. at 2–3.
constitutional amendment that expressly provides for toll roads. For example, Missouri Constitution article IV section 30 could be amended by expressly authorizing toll roads and addressing the related issues of financing and the designation of public and state highways. Passage of a constitutional amendment, however, is much easier said than done. The legislature could instead enact another toll enabling statute in the hopes that the court would differentiate Pohl in any potential litigation. The current transportation and economic climate is certainly different from forty years ago, and one would hope that now a court might take a more pragmatic approach in its jurisprudence. Because highway revenue diversion was at the forefront of the Pohl decision, any enabling statute would have to explicitly eliminate the possibility of revenue diversion. Another approach might be to authorize and implement a demonstration project with federal aid. A good demonstration project could be a much-needed toll bridge or a HOT lane in a highly congested urban area.

The purpose of this article is not to criticize courts that take a categorical approach like the Missouri Supreme Court has. The Pohl court demonstrated its firm conviction that Missouri citizens decided that state highways are not toll roads, highway revenues cannot be diverted to toll roads, and public roads are free roads. After all, the 1945 Missouri Constitution explicitly differentiated the revenue from highway users from other sources of revenue. However, the Pohl court could have been more flexible in interpreting the legislative intent of the Missouri Constitution by considering the early history of Missouri roads, the background behind the Highway Act of 1956 and the resulting influence on Missouri’s perspective, and the constraints the decision would place on future transportation financing. The Pohl court was not intentionally trying to harm Missouri’s transportation future, but that may have been an unintended consequence of its decision.

On the other hand, tolling may not be the only or the best solution for the current transportation-funding crisis. This article does not address other complementary ways of rectifying the financing crisis. These include enhancing the HTF by indexing the HTF sources,\textsuperscript{239} implementing comprehensive pricing/direct vehicle miles traveled (“VMT”) fee system,\textsuperscript{240} bonding, cordon pricing,\textsuperscript{241} and promoting local measures like excise taxes, development exactions, and development districts.

Public support for toll roads seems to have come full circle in the past century. The first part of the century involved many turnpike corporations left over from the turnpike boom of mid-1800s.\textsuperscript{242} The 1939 publication of *Toll Roads and Free Roads* played a part in influencing future federal legislation. The Highway Act of 1956, with its generous federal match and subsequent federal-aid acts, has perhaps caused states and the public to equate public highways with non-tolled or free highways. Some states were exceptions that kept their pre-1956 turnpikes like Florida, Illinois, Indiana, Kansas, Massachusetts, Massachusetts,

\textsuperscript{239} NAT’L SURFACE TRANSP. INFRASTRUCTURE FIN. COMM., supra note 4, at 194.

\textsuperscript{240} Id. at 195.

\textsuperscript{241} Id. at 130.

\textsuperscript{242} Turnpikes and Toll Roads, supra note 51.
New Jersey and Oklahoma. But the general public took a negative stance towards toll roads in the decades following the Act. In the 1980s, a resurgence in toll roads appeared as states coped with the increasing transportation-financing gap. Both Greenfield (new project) and Brownfield (rehabilitation) toll roads have been appearing nationwide. Some examples of Greenfield projects are the Pocahontas Parkway in Virginia, the San Diego South Bay Expressway, and SR 91 in Orange County. Some examples of Brownfield projects are the HOT lane conversions in California, Colorado, Minnesota, and Utah. As of 2009, there were 277 state and local toll roads, bridges, and tunnels in 32 states, totaling nearly 5,000 miles of roadway. Solving the transportation-funding crisis requires the same cooperation that the federal government and the states exhibited for the creation of the national interstate system. Federal encouragement of tolling projects alone would not amount to much unless state courts take a more pragmatic approach towards their interpretation of tolling statutes and case law. Where toll road decisions have diverged, states like California took the more practical approach, and perhaps it will make all the difference.

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244 Id. at 129.
245 Id.
246 Id.