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Respect My Authority: The Past, Present, and Future of the Public Authority

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RESPECT MY AUTHORITY: THE PAST, PRESENT, AND FUTURE OF THE PUBLIC AUTHORITY

*Tom Letourneau**

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* University of Maine School of Law, Juris Doctor expected 2024. This comment would not be possible without the generous and honest support of Matt Edwards, Mike Rogers, Timothy Harris, Christian Letourneau, Megan York, Maggie Shields, Kelsey Cromie, Aisha Simon, Phil Saucier, Nathan Madeira, Lee Foden, Natalie Nowatzke, Alicia Rea, my dear family, the OCLJ team, the Maine State Law and Legislative Reference Library, and, perhaps against their better judgment, the Maine Turnpike Authority. As a point of personal privilege, I highly recommend Robert Caro's *The Power Broker* as required reading. Caro's work was the inspiration for this comment.

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ABSTRACT

This comment synthesizes various historical aspects of motor vehicle infrastructure in the United States. The network of issues at play involves centuries of public policy decisions made at the local, state, and federal level, which twentieth century legal innovations hastened and curdled into the car culture we are all a part of today. The public authority is the paradigm of these legal innovations, but it has outlived its usefulness in the face of climate change and burgeoning issues relating to urbanism.

INTRODUCTION

This comment is about the public authority,¹ an innovative, enigmatic, and often misunderstood² legal entity essential to the history of infrastructure in the United States.³ The public authority, while an efficient combination of public power and private capital,⁴ has outlived its usefulness. Originally conceived in order to circumvent state constitutional debt limits,⁵ as the country's relationship to car culture evolves in the face of climate change and shifting economic values, the public authority is no longer a creative public works entity because the problems it was designed to mitigate no longer exist in the same form. The case study in this comment focuses on the Maine Turnpike Authority (MTA), but context matters. Before narrowing in on the MTA, and arguing for its replacement, this comment provides a history of the

1. Broadly, unless referencing a specific authority, this comment will use the term "public authority" to refer to entities that are created by a legislature to undertake and maintain quasi-governmental projects primarily involving public works. *See infra* Section II.B. Precluded from this discussion, however, are building authorities, such as housing authorities, which generally operate under a different scheme. *See* C. Robert Morris, Jr., *Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions*, 68 *YALE L.J.* 234, 251 (1958) (explaining how common law regarding building authorities relies on its own distinct doctrines). *Compare* 1997 La. Acts 40:393 (allowing municipalities and parishes to establish their own housing authorities), *with* KAN. STAT. ANN. § 68-2004 (2023) (granting power to the Kansas Turnpike Authority to focus on maintaining the Kansas Turnpike in particular).

2. For example, the Tennessee Valley Authority, a pillar of the New Deal, was not, in fact, an authority as described in this comment. Robert Gerwig, *Public Authorities in the United States*, 26 *L. & CONTEMP. PROBS.* 591, 593 (Fall 1961) (noting that the Tennessee Valley Authority lacked the requisite financial autonomy to be a true public authority).

3. As an example of the massive public works projects undertaken and maintained by public authorities, one public authority, the Metropolitan Transportation Authority, which used to be the Triborough Bridge and Tunnel Authority, is responsible for the Henry Hudson Bridge, the Whitestone Bridge, Robert F. Kennedy Bridge, Verrazzano-Narrows Bridge, the Bronx-Whitestone Bridge, Marine Parkway-Gil Hodges Memorial Bridge, Cross Bay Veterans Memorial Bridge, Hugh L. Carey Tunnel, and the Queens Midtown Tunnel. *Our Bridges*, NEW YORK STATE, <https://nysba.ny.gov/our-bridges-commercial-vehicles> (last visited Oct. 2, 2023). For reference, just one of those bridges, the Verrazzano-Narrows Bridge, "was the world's longest suspension span" after the authority finished it in 1964. *Verrazzano-Narrows Bridge*, METROPOLITAN TRANSP. AUTH., <https://new.mta.info/bridges-and-tunnels/about/verrazzano-narrows-bridge> (last visited Oct. 2, 2023).

4. *See generally* Jerome J. Shestack, *The Public Authority*, 105 *U. PA. L. REV.* 553 (1957).

5. *See infra* Section II.B.1.

seemingly innate interstates that affect daily life in the United States, lays out the political landscape surrounding urban planning, and defines and discusses the history of turnpikes⁶ and public authorities.

I. BACKGROUND

A. *Car Culture's Origins*

The story of the American city has been told ad nauseum⁷ both in fiction⁸ and in non-fiction,⁹ and in every conceivable form of media, including movies,¹⁰ books,¹¹ and paintings¹² and from nearly every conceivable perspective, including that of the city itself.¹³ These stories and histories often grapple with questions about the American dream¹⁴ and the individual's place within the broader American landscape.¹⁵ The

6. For the purposes of this comment, a turnpike refers to a highway or interstate that charges a toll, a highway is any road, whether maintained by state or federal funds and interstate or intrastate, that has few intersections and a relatively fast speed limit, and an interstate refers specifically to the Eisenhower interstate system universally demarcated by numbered blue and red signs. See DAN McNICHOL, *THE ROADS THAT BUILT AMERICA: THE INCREDIBLE STORY OF THE U.S. INTERSTATE SYSTEM* (2006).

7. See, e.g., *Reading American Cities*, THE GUARDIAN, <https://www.theguardian.com/books/series/reading-american-cities> (last visited Oct. 2, 2023).

8. See HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM*, ch. 8 (Vintage Books 2d ed. 1988) (describing San Francisco in 1968).

9. See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (Vintage Books 1st ed. 2010) (showing how the migration of Black Americans, over the course of the twentieth century, from the South to the North, shaped cities in both regions).

10. *CHINATOWN* (Paramount Pictures 1974) (depicting a drama involving Los Angeles's infrastructure in the 1930s).

11. THE GUARDIAN, *supra* note 7.

12. *Nighthawks*, THE ART INST. OF CHI., <https://www.artic.edu/artworks/111628/nighthawks> (last visited Oct. 2, 2023) (describing Edward Hopper's 1942 painting *Nighthawks*).

13. See, e.g., *MAN WITH A MOVIE CAMERA* (All-Ukrainian Photo Cinema Administration 1929) (depicting a pastiche of urban life in several nameless eastern European cities); JANE JACOBS, *THE DEATH AND LIFE OF THE AMERICAN CITY* (1961) (criticizing urban planning).

14. See, e.g., F. SCOTT FITZGERALD, *THE GREAT GATSBY* (James L.W. West III, 1925) (symbolizing the taunting nature of the American dream with a flashing green light).

15. See, e.g., *SUNRISE: A SONG OF TWO HUMANS* (Fox Film Corporation 1927) (depicting a conflict between rural and urban life); THE ART INST. OF CHI., *supra* note 12.

notions of rugged individualism¹⁶ and manifest destiny¹⁷ that pervaded culture in the United States during the nineteenth and early-twentieth centuries were often stories of migration as settlers subdued an unruly frontier.¹⁸ This historically inaccurate and white-supremacist¹⁹ narrative found its *beau idéal* in the twentieth century with the invention and popularization of the automobile, which soon had entire cities kowtowing to it.²⁰ The country has infused trillions of dollars into an infrastructure that accommodates cars and not people.²¹ Of course, people want cars, and the freedom and status they represent,²² but the

16. The term “rugged individualism” evokes America’s frontier history and its classical liberal ideals, and it was a term coined by then-candidate Herbert Hoover during the 1928 presidential election. See Herbert Hoover, *Presidential Candidate, Republican Party, Principles and Ideals of the United States Government*; John E. Moser, *Introduction*, TEACHING AMERICAN HISTORY, <https://teachingamericanhistory.org/document/rugged-individualism/> (last visited Oct. 2, 2023).

17. “Manifest Destiny, a phrase coined in 1845, is the idea that the United States is destined—by God, its advocates believed—to expand its dominion and spread democracy and capitalism across the entire North American continent. The philosophy drove 19th-century U.S. territorial expansion and was used to justify the forced removal of Native Americans and other groups from their homes.” *Manifest Destiny*, HISTORY, <https://www.history.com/topics/19th-century/manifest-destiny> (last visited Oct. 2, 2023).

18. See, e.g., STAGECOACH (United Artists 1939) (dramatizing the perceived savagery of indigenous peoples and glorifying white colonizers).

19. *Compare*, PEKKA HÄMÄLÄINEN, *INDIGENOUS CONTINENT: THE EPIC CONTEST FOR NORTH AMERICA* (2022) (depicting the colonization of North America from an indigenous perspective).

20. JACOBS, *supra* note 13, at 3 (criticizing urban planning). In Oklahoma City, for example, “[m]any of the city’s neighborhoods lack sidewalks, intentionally, as a symbol of status, because walking was considered to be outmoded, primitive, impoverished, a little sad, an activity that might even distract cars, or offend them.” SAM ANDERSON, *BOOM TOWN: THE FANTASTICAL SAGA OF OKLAHOMA CITY, ITS CHAOTIC FOUNDING, ITS APOCALYPTIC WEATHER, ITS PURLOINED BASKETBALL TEAM, AND THE DREAM OF BECOMING A WORLD-CLASS METROPOLIS 4* (2018).

21. Spending on transportation infrastructure accommodating cars is a bipartisan endeavor, and, just as an example of such bipartisan spending on car-related infrastructure, President Joe Biden’s Infrastructure and Investment and Jobs Act dedicated \$110 billion for “roads, bridges, and major projects,” which, for an idea of the priorities of the legislation, overshadows the \$39 billion dedicated to public transit. Press Release, The White House, *UPDATED FACT SHEET: Bipartisan Infrastructure Investment and Jobs Act* (Aug. 20, 2021) (on file with author). Further, the bill includes \$7.5 billion for a “national network of EV chargers,” bringing car culture into the twenty-first century. *Id.*

22. As an example of this mindset, in 2022, in spite of severe supply-chain issues, the best-selling vehicle in the United States were trucks belonging to the Ford F-Series. Joey Capparella, *The Bestselling Cars, Trucks, and SUVs of 2022*, CAR AND DRIVER (Jan 5, 2023), <https://www.caranddriver.com/news/g39628015/best-selling-cars-2022/>. The next

problems that arise when people reconfigure cities to center around cars have been clear for decades.²³ The problems of smog,²⁴ traffic,²⁵ car-related deaths,²⁶ and road rage²⁷ all seem intractable, baked into everyday life because, simply put, they are. However, they were baked in by *people*, and, not to torture a metaphor, even though something cannot be *unbaked*, the problems of car culture can be ameliorated. Before we begin, as a society, addressing these problems, understanding the governmental and legal choices we made to get here is essential.

As the middle class adapted cars to their everyday life, cars transitioned from status symbols and recreational novelties to essential means of transportation.²⁸ “Toll Roads and Free Roads,” a report from 1939, thirty-one years after the mass production of the Model T began and just as the Great Depression began to ease, written by the federal government’s Bureau of Public Roads (BPR) for President Franklin Delano Roosevelt, “manifested technological determinism in its attribution of city-shaping powers to the automobile.”²⁹ Armed with this foundational report and an influx of New Deal funding, plus a post-war economic boom following a war-time lull on the home front, “specific social actors were attempting to restructure the American city to increase

two best-selling vehicles were also trucks, and the fourth best-selling vehicle of 2022 was an SUV. *Id.* This comment includes all personal vehicles when it references “cars.”

23. See generally JACOBS, *supra* note 13 (advocating stridently to place people at the center of urban planning).

24. See, e.g., *Smog, Soot, and Other Air Pollution from Transportation*, EPA, <https://www.epa.gov/transportation-air-pollution-and-climate-change/smog-soot-and-other-air-pollution-transportation> (last visited Mar. 27, 2023) (defining smog and presenting data on air quality problems presented by transportation).

25. In 2022, as the pandemic eased, “[t]he typical U.S. driver lost 51 hours to congestion . . . , about an hour each week.” David Schaper, *Traffic Congestion Got Much Worse in 2022 but is Still Below Pre-Pandemic Levels*, NATIONAL PUBLIC RADIO (Jan. 10, 2023, 5:20 PM), <https://www.npr.org/2023/01/10/1148205765/traffic-congestion-got-much-worse-in-2022-but-is-still-below-pre-pandemic-levels>.

26. In 2021, 42,939 people died in motor vehicle crashes alone, a rate of 12.9 deaths per 100,000 people. *Fatality Facts 2021 State by state*, INSURANCE INSTITUTE FOR HIGHWAY SAFETY (May 2023), <https://www.iihs.org/topics/fatality-statistics/detail/state-by-state>.

27. See, e.g., Dashcam Lessons, *Road Rage USA & Canada: Bad Drivers, Hit and Run, Brake Check, Instant Karma, Car Crash: New 2023*, YOUTUBE (Mar. 22, 2023), <https://www.youtube.com/watch?v=0NFFJZrzvc> (exemplifying the choices people make when experiencing road rage and typifying the normalcy of road).

28. See ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 143-44 (1974).

29. JOSEPH F. C. DIMENTO & CLIFF ELLIS, *CHANGING LANES: VISIONS AND HISTORIES OF URBAN FREEWAYS* 57 (2013).

automobile use and limit alternative forms of transportation.”³⁰ As an example, Robert Moses, the most influential urban planner in the history of the United States³¹ (and who himself never learned to drive),³² insisted that the overpasses for the freeways he built in New York City stand eleven feet above the street because he knew that the clearance for busses was thirteen feet.³³ Such antipathy toward public transportation and community-centric planning was the innovative vanguard of engineering and urban planning in the twentieth century, and the finest thinkers of the era were on board.³⁴

These brilliant engineers and experts often worked at the state level.³⁵ Without a federal program to organize a vision of a national interstate and without the capital of the federal government, states built highways on their own and with varying approaches.³⁶ As influential as the survey “Toll Roads and Free Roads” was, federal political

30. *Id.*

31. See CARO, *supra* note 28, at 143–44.

32. *Id.* at 836.

33. *Id.* at 546 (“Moses’ ingeniously restrictive laws and ingeniously low-clearance parkway bridges had insured that buses would never be able to ruin the beauty of his Long Island Parkways or carry poor people along them to his state parks.”).

34. The ur-example is designer Norman Bel Geddes, whose “visionary design” of a city in the year 1960 at the 1939 New York World’s Fair, called “Futurama,” synthesized the era’s movement toward a cohesive vision of urban interstate planning and “helped steer both expert and public opinion toward the freeway ‘solution’ to the country’s urban transportation problems.” DIMENTO & ELLIS, *supra* note 29, at 46.

35. For example, President Franklin Roosevelt “appointed a committee of experts . . . to study the need for a national system of interregional highways,” and that committee included state level experts such as Charles H. Purcell, the state highway engineer for California, Harland Bartholomew, a consultant from St. Louis, and G. Donald Kennedy, Michigan’s highway commissioner. *Id.* at 60.

36. “In the 1920s, New York City conceived a system of controlled-access urban parkways featuring separation of cross traffic, the divided highway, and limitation of access to specific locations. In just a decade, the Los Angeles area became the first major proponent of the new system. In 1934, the cities of Pasadena and South Pasadena approved the Los Angeles County Regional Planning Commission’s plans for Arroyo Seco (now the Pasadena Freeway). In 1939, The City of Los Angeles Transportation Engineering Board proposed more than 600 miles of freeways for the region. Later, the California Freeway and Expressway System, which had been created by the state legislature, authorized a grid-like network overlaying the entire Los Angeles basin. The goal was that no Angelino should ever be more than a few miles away from a freeway ramp. Detroit, Chicago, Boston, Washington, D.C., Kansas City, and other American cities also proposed major freeways in the pre-World War II period.” *Id.* at 1.

momentum was piecemeal.³⁷ The federal government’s interest in building highways, grounded in large part by public defense and the general welfare (i.e., safety), took decades to reach an apotheosis.³⁸ Six years after “Toll Roads and Free Roads,” and based on its findings, “[s]ection 7 of the Federal-Aid Highway Act of 1944 authorized designation of a 65,000-kilometer (40,000-mile) ‘National System of Interstate Highways,’”³⁹ and “[w]ithin that original mileage limitation, the routes were designated in 1947 and 1955.”⁴⁰ Still, many people, such as Daniel Moynihan, a professor who worked for the governor of New York at the time, “lamented the absence of planning to conform highway plans to metropolitan land-use plans in the context of general economic and social objectives” and little was actually accomplished.⁴¹

Within this political landscape, public authorities flourished.

B. *Solidifying Car-Centrism in Public Policy*

The Interstate Highway Act of 1956 was the apex political achievement of car culture.⁴² A signature policy achievement of President Dwight D. Eisenhower,⁴³ this law made unifying the state-oriented patchwork approach to highway building “a national necessity.”⁴⁴ Indeed,

[o]ne mark of the overwhelming success of the Eisenhower Interstate System is that the American people take it for granted,

37. See generally DiMENTO & ELLIS, *supra* note 29; Roel Hammerschlag, *Legislating the Highway Act of 1956: Lessons for Climate Change Regulation*, 31 ENVIRONS 59 (2007).

38. Hammerschlag, *supra* note 37 at 63.

39. Richard F. Weingroff, *Federal-Aid Highway Act of 1956: Creating the Interstate System*, 60 PUBLIC ROADS 1 (Summer 1996).

40. Richard F. Weingroff, *The Greatest Decade, 1956-1966: Celebrating the 50th Anniversary of the Eisenhower Interstate System*, FED. HIGHWAY ADMIN. (Jun. 30, 2023), <https://www.fhwa.dot.gov/infrastructure/50interstate.cfm>.

41. *Id.*

42. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374, 462.

43. See, e.g., Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 WHITTIER L. REV. 119, 193 (2008) (listing the 1956 Interstate Act one of the titular moments). Though Eisenhower also signed the Civil Rights Act of 1957 into law, without wading into his relationship to its passage and enforcement, this comment will merely note that the Eisenhower Interstate System bears his name. See Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

44. Richard F. Weingroff, “*Clearly Vicious as a Matter of Policy*”: *The Fight Against Federal Aid*, FED. HIGHWAY ADMIN. (June 27, 2017), <https://www.fhwa.dot.gov/infrastructure/hwyhist05a.cfm>.

as if has always been there, like the Mississippi River or the Rocky Mountains. The Interstates are so much a part of the daily life of Americans that most people do not realize that the system they use to get to work, to school, to the mall, and to their vacation destination could be considered one of the “wonders of the world.”⁴⁵

Such a hagiographic, perhaps even hyperbolic, assessment of the law overlooks its complicated legacy, but the fact that it came to pass was still no mean feat.

Eisenhower was generally a passive participant in the legislative process, preferring to devote his attention to international rather than domestic affairs,⁴⁶ but a confluence of factors, most outside of his control, lead to the passage of this act.⁴⁷ Eisenhower had a general desire to better the vehicular infrastructure of the United States in part because “[a]s a young lieutenant colonel in 1919, [he] volunteered to act as an observer on the U.S. Army’s first motorized transcontinental convoy. But the 62-day Washington-to-San Francisco trek left him appalled.”⁴⁸ Then “two decades later, as the Supreme Allied Commander in World War II, he noted how easily his armies disrupted German supply-lines by bombing railroads. But he also noticed how, despite Allied pummeling, the country’s Autobahn had remained passable.”⁴⁹ In spite of these observations, he had limited interactions with the various stakeholders that might be involved in such legislation, and he outwardly conveyed little grasp of the complicated system already in place.⁵⁰ Various political actors and experts viewed a national interstate system in multifarious terms ranging from mere “[t]raffic conduits” to “[l]arge-scale objects of architecture, landscape architecture, and urban design” to “[t]ools of social policy” and “national defense.”⁵¹ Because he was able to leverage

45. Richard F. Weingroff, *The Year of the Interstate*, 69 PUBLIC ROADS 4 (Jan./Feb. 2006).

46. See FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* 47–49 (1982).

47. Hammerschlag, *supra* note 37, at 70–71.

48. Tom Chaffin, *The Interstates Turn 50*, TIME (June 26, 2006), <https://content.time.com/time/nation/article/0,8599,1207986,00.html>.

49. *Id.*

50. For example, Eisenhower’s “position in the local control vs. federal control standoff was never stated during his election campaign or during the early months of his presidency.” Hammerschlag, *supra* note 37, at 70.

51. DIMENTO & ELLIS, *supra* note 29, at 9 (emphasis removed).

state governors' interest in the power of public works, in the end Eisenhower did unite these disparate visions.⁵²

The interstate system as it existed in 1956 utilized federal funds to support three components of the patchwork system: "primary, secondary, and urban extensions of the primary system."⁵³ This system was referred to as the "ABC system."⁵⁴ "The ABC system was firmly encoded in the federal-aid highway acts by 1944," augmenting "[t]he 50/50 federal-state cost sharing that . . . was established in the first Federal-Aid Highway Act, passed in 1916."⁵⁵ This cost-sharing system was generally supported by the states because

[t]he 1956 Act was unique from its predecessors in two essential respects. The first was the creation of the Highway Trust, a combination of federal funds and gasoline taxes to finance interstate construction, the idea being that through the Highway Trust the federal government can fund interstate highway construction projects without incurring a deficit. The second was an increase in the ratio of federal to state financial contribution to 90 percent federal and 10 percent state. Touted as essential to national defense, the 1956 Act called for a unified system of forty-one thousand miles of interstate to be built over thirteen years.⁵⁶

These forty-one thousand miles originated in prior studies and focused on intercity travel, that is driving from city to city.⁵⁷

The biggest issues regarding this new allotment of highway funding came when cities, planners, and politicians began to turn their attention to *intracity* highway construction, that is, highway building design to get through and around urban centers.⁵⁸ "Prior to the 1956 Act's enactment, the Bureau of Public Roads had yet to designate the last 2,175 miles of Interstate highways; the Bureau selected their placement in cities."⁵⁹ This placement changed the landscape of cities drastically and raised important "questions as to whether the Act was intended to devote so

52. Hammerschlag, *supra* note 37, at 61–97.

53. *Id.* at 66.

54. *Id.*

55. *Id.*

56. Jessica Kraft-Klehm, *21st Century Futurama: Contemplating Removal of Urban Freeways in the World of Tomorrow*, 49 WASH. U. J.L. & POL'Y 205, 209–10 (2015).

57. *Id.* at 210–212.

58. See generally Gary T. Schwartz, *Urban Freeways and the Interstate System*, 8 TRANSP. L.J. 167 (1976) (indicting the state of urban freeways after the 1956 Act).

59. Kraft-Klehm, *supra* note 56, at 210.

much of its interstate funds to serve intracity transportation needs.”⁶⁰ In fact, “Eisenhower himself was allegedly disturbed by the amount of highway construction targeted at city centers after seeing firsthand the construction efforts and resulting congestion while stuck in traffic on the way to Camp David in the spring of 1959.”⁶¹ Ultimately, “Eisenhower directed General John Stewart Bragdon to study the Interstate Program’s current policies regarding . . . ‘intra-metropolitan area routing’ and ‘urban planning,’” but, after a defense of plans from the head of the BPR, “no planned urban routes were abandoned.”⁶²

As early as the beginning of the “1960s, it was clear that the urban freeway form concepts of the 1940s and 1950s were producing unexpected impacts on central cities.”⁶³ Given how various the approaches were, both academic and practical, it should not have been a surprise that “[f]reeway planning—far from being a technical exercise—turned out to be politically explosive, value-laden, and fraught with aesthetic dimensions.”⁶⁴ On a smaller scale, individuals and local coalitions had opposed particular projects to no avail, but now the general consensus was complicated by money and the sheer size and destruction of intracity highway construction.⁶⁵ Even in the face of widespread destruction of neighborhoods, “in the 1960s and continuing heavily into the 1970s, urban activists strongly opposed freeway construction” and “the ability of the freeway opposition to counteract construction of highways though city centers was weak.”⁶⁶ There was simply not enough political capital because the ensuing highway projects were essentially inevitable: public figures were afraid to relinquish or lose funding⁶⁷ and the indirectly affected public, those whose homes were not destroyed, liked the idea of visible progress in their city⁶⁸ and the potential, even if unmerited, of traffic mitigation.⁶⁹

The laissez-faire style of President Eisenhower’s approach to the interstate system he created led to the empowerment of local and state

60. *Id.* at 210–11.

61. *Id.* at 211.

62. *Id.* at 211–12; *see also* Schwartz, *supra* note 59 (detailing the role of General Bragdon in the development of the urban freeway system).

63. DIMENTO & ELLIS, *supra* note 29, at 115.

64. *Id.*

65. *See* CARO, *supra* note 28, at 850–893 (revealing the struggle of one neighborhood against a powerful, well-funded, politically-motivated city planner).

66. Kraft-Klehm, *supra* note 56, at 212.

67. *See* CARO, *supra* note 28, at 630–34.

68. *See id.* at 911–16.

69. *See id.*

actors who, in the face of complicated problems and a dizzying array of stakeholders, often acted in self-interested and biased ways.

C. *Community Effects of Creating and Removing Interstates*

While this comment is not about urban planning and the inherent racism of infrastructure building in the United States, understanding the force of interstates on denser populations offers important parallels to the use of public authorities since public authorities, by their nature, funnel money into projects with a single-minded focus.⁷⁰ The construction of an interstate highway in Santa Monica fundamentally changed the nature of the city.⁷¹ Any city could be profiled here,⁷² but recently, more and more cities are choosing to ameliorate the effects of interstates and their removal has become a viable solution.⁷³

1. Santa Monica

Depending on whether you take I-10 West from Jacksonville, Florida or I-10 East from the Pacific Ocean, Santa Monica is a small city at the end or the beginning of the country. Close to one of the most influential cities in the world, Los Angeles, Santa Monica was influential enough in its own right to have its own personality and avoid the moniker “suburb” for a time (in fact, “enclave” would have been appropriate).⁷⁴ Like many other cities that experienced post-war prosperity beginning in the 1950s, the city embraced “civic projects that had been impossible earlier,” including new libraries, new reservoirs, a new water treatment plant, a

70. *See infra* Section II.B.

71. *See generally* PAULA A. SCOTT, *SANTA MONICA: A HISTORY ON THE EDGE* (2004).

72. *Compare* ANDERSON, *supra* note 20 (detailing the extent and effects of car culture in Oklahoma City, Oklahoma), *with* MIA BIRK WITH JOE KURMASKIE, *JOYRIDE: PEDALING TOWARD A HEALTHIER PLANET* (CADENCE PRESS EDS., 2012) (chronicling the development of biking in Portland, Oregon) *and* Myung-Jin Jun, *Are Portland's Smart Growth Policies Related to Reduced Automobile Dependence?*, 28 J. PLAN. EDUC. & RES. 100 (2008) (connecting diversified land use and distance from the interstate in Portland, Oregon with decreased single occupancy car trips).

73. *See infra* Section I.C.2.

74. *See* SCOTT, *supra* note 71, at 61–66, 95–104 (detailing the growth of Santa Monica as distinct from Los Angeles); *see also* Alisa Chang, Jonaki Mehta & Christopher Intagliata, *Beneath the Santa Monica Freeway Lies the Erasure of Sugar Hill*, NATIONAL PUBLIC RADIO (last visited Sept. 2, 2023, 11:55AM), <https://www.npr.org/2021/05/04/993605428/beneath-the-santa-monica-freeway-lies-the-erasure-of-sugar-hill> (stating that the Sugar Hill neighborhood of Santa Monica was home to prominent Black celebrities, doctors, entrepreneur, and oil barons).

new city hall, a new auditorium, and a new county building.⁷⁵ This infrastructure brought the Academy Awards ceremony, but also “necessarily required the destruction of a neighborhood that housed lower income residents.”⁷⁶ This ethos came part and parcel with the “urban renewal” trend that razed neighborhoods throughout the country,⁷⁷ and was essential to I-10, “[t]he completion” of which “was part of a plan by regional transportation officials to put all Southern Californians within four miles of a freeway.”⁷⁸

Santa Monica wanted to be the interstate’s endpoint because city and civic leaders thought nearby exits would boost sales, proximity to Los Angeles would increase day-trippers and make it easier for Santa Monicans themselves to get to the bigger city, and, simply, for the publicity brought on by the signage.⁷⁹ However, “the 16.2 mile stretch from the Santa Ana Freeway to the coast” required the destruction of “thousands of homes and commercial structures.”⁸⁰ Most of these structures were in communities of color since property in those communities was cheaper for the city to purchase.⁸¹ Black, Hispanic, and Japanese American populations, each with a rich history and deep roots in the area, were sent packing by the rising unaffordability of the restructured city.⁸² Like many other interstate and urban renewal projects,⁸³

75. SCOTT, *supra* note 71, at 129.

76. *Id.*

77. See generally ANDERSON, *supra* note 20 (detailing specifically how urban renewal affected Oklahoma City); Alia Soomro, *Dismantling Mid-Century Urban Renewal: A Community-Based Approach for the Future of New York City*, 84 BROOK. L. REV. 955, 955–75 (2019) (synthesizing a history of urban renewal in the United States and in New York City and addressing current conditions); David J. Barron, *Keith and the Good City*, 45 U.C. DAVIS L. REV. 1945 (2012) (squaring urban renewal with gentrification vis-à-vis urban planning).

78. SCOTT, *supra* note 71, at 133.

79. *Id.* at 134.

80. *Id.*

81. Chang, Mehta & Intagliata, *supra* note 74 (describing how planners in Santa Monica justified building the interstate through the Sugar Hill neighborhood of Santa Monica would be the most economically efficient).

82. SCOTT, *supra* note 71, at 135–36. See generally Liam Dillon & Ben Poston, *The racist history of America’s interstate highway boom*, L.A. TIMES (LAST VISITED SEPT. 2, 2023, 12:24PM), <https://www.latimes.com/homeless-housing/story/2021-11-11/the-racist-history-of-americas-interstate-highway-boom>.

83. See CARO, *supra* note 28, at 850–78 (detailing the destruction of the East Tremont neighborhood of the Bronx from the perspective of residents fighting the construction of the Cross Bronx Expressway); Adam Paul Susaneck, et al., *Mr. Biden, Tear Down This Highway*, N.Y. TIMES (Sept. 8, 2022), <https://www.nytimes.com/interactive/2022/09/08/>

protestations, though vigorous, fell on deaf ears.⁸⁴ In the end, the economic results of the Interstate were decidedly mixed. Instead of shoppers and new manufacturing, Santa Monica got “a rash of new office building[s]” and “soaring land prices, increased demolition of old homes, more apartment buildings . . . , and higher rents.”⁸⁵ This suburbanization outsourced business to shopping centers outside the local business districts and reconfigured the city for generations.⁸⁶

Santa Monica shows that the single-minded focus on installing interstates has unexpected and adverse consequences, but other cities are attempting to reconfigure their relationship to interstates.

2. Removing Interstates

Interstate removal has come into vogue slowly but steadily over the course of the past thirty years.⁸⁷ One of the first interstate removals occurred due to happenstance:⁸⁸ after a 1989 earthquake, “San Francisco chose to remove rather than reconstruct two of its damaged highways” and replaced it with boulevards, which “open[ed] the waterfront and unit[ed] the city’s neighborhoods.”⁸⁹ The boulevards that replaced the highways “include cars, but do not make them a priority.”⁹⁰ This “Highways to Boulevards” approach helps create city streets with walkable space for people to shop, work, live and recreate, reclaiming the ideals of mixed-used planning and promoting other notions such as

opinion/urban-highways-segregation.html (visualizing the route of the highway and highlighting the areas affected).

84. SCOTT, *supra* note 71, at 135; *see also* CARO, *supra* note 28, at 878 (“[w]hether [Robert] Moses refused to change the route [of the Cross Bronx Expressway] for a personal or political reason, the point is that his reason was the only one that counted” and not the displacement of the 1,530 families in its path).

85. SCOTT, *supra* note 71, at 136.

86. *Id.*

87. *See, e.g.*, Adam Paul Susaneck, et al., *supra* note 83; Nadja Popovich, Josh William & Denise Lu, *Can Removing Highways Fix America’s Cities?*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/interactive/2021/05/27/climate/us-cities-highway-removal.html>.

88. Transportation for America, *A policy proposal to undo the damage of “urban renewal,”* T4AMERICA BLOG (Dec. 7, 2020), <https://t4america.org/2020/12/07/four-recommendations-to-undo-the-damage-of-urban-renewal/>.

89. CONG. FOR THE NEW URBANISM, *Highways to Boulevards: A Fact Sheet* (2020), https://www.cnu.org/sites/default/files/CNU%20Highways%20to%20Boulevards%20Fact%20Sheet%202020_0.pdf.

90. *Id.*

“gentle density.”⁹¹ As the number and geographic diversity of cities removing parts of their interstates grows, so do the possibilities.⁹²

Another goal is reconnecting parts of a city cleft by the interstate system, and, unlike previous attempts that began from the ground up, some key political figures support this approach. In 2013, Rochester, New York used an \$18 million grant from the Obama administration to fill-in “the moat,” which was the local term for “an eastern segment of [Rochester’s] sunken Inner Loop freeway.”⁹³ The city filled in six lanes and accompanying access roads, replaced them with boulevards and opened the new real estate to development.⁹⁴ This process has taken years, and is still underway, but, like the San Francisco deconstruction that presaged such projects, apocalyptic predictions of traffic disaster have not become reality.⁹⁵ Furthermore, interstates do not need to be eradicated wholesale to improve cities: eliminating spurs and underused segments alone can benefit a city.⁹⁶ Such changes contribute meaningfully to improve environmental quality and quality of life.⁹⁷

Yet in spite of the optimism and general support from the upper echelons of government, the tide has not totally turned.⁹⁸ On the one hand, the United States Senate has floated the idea of dedicating as much

91. See, e.g., Adie Tomer et al., *We can't beat the climate crisis without rethinking land use*, BROOKINGS (May 12, 2021), <https://www.brookings.edu/research/we-cant-beat-the-climate-crisis-without-rethinking-land-use/> (showing the results of neighborhoods that have reduced driving and energy and how such neighborhoods require new ways of planning).

92. CONG. FOR THE NEW URBANISM, *supra* note 89. Boston, San Francisco, Milwaukee, Providence, Dallas, New Orleans, Chattanooga, Syracuse, and Detroit have all put their spin on highway removal. *Id.*; see also Popovich, Williams, & Lu, *supra* note 87 (profiling Rochester, New York’s approach to highway removal). *But see* Nathaniel Minor, *Colorado Is Sure It Can Expand Highways While Also Meeting Climate Goals. History Suggests That’ll Be a Tough Climb*, CPR NEWS (May 19, 2021, 4:00 AM), <https://www.cpr.org/2021/05/19/colorado-is-sure-it-can-expand-highways-while-also-meeting-climate-goals-history-suggests-thatll-be-a-tough-climb/> (revealing Colorado’s commitment to I-70).

93. Popovich, Williams, & Lu, *supra* note 87.

94. *Id.*

95. *Id.*; CONG. FOR THE NEW URBANISM, *supra* note 89.

96. Popovich, Williams, & Lu, *supra* note 87.

97. Tomer et al., *supra* note 91.

98. See, e.g., Joann Muller, *The \$1 billion push to remove highways dividing communities*, AXIOS (Mar. 6, 2023), <https://www.axios.com/2023/03/06/highway-removal> (noting President Biden’s plan to invest \$1 billion in highway is relatively paltry compared to the multiple billions of dollars planned for highway maintenance and expansion).

as \$10 billion to interstate replacement.⁹⁹ On the other hand, both that amount and President Biden’s allotment of \$1 billion in his Infrastructure Investment and Jobs Act pale in comparison to the \$273 billion dedicated to “improving” existing highways.¹⁰⁰ This is not to mention investments in electric vehicles, the infrastructure for which heralds in a new era of car culture and car-centric planning.¹⁰¹ This single-minded devotion to single-occupancy vehicles is not new.

II. THE PAST: TURNPIKES, AUTHORITIES, AND TURNPIKE AUTHORITIES

Before the Eisenhower system, turnpikes and authorities were two ways localities could create and maintain funding for large-scale public highways.¹⁰² The two entities represent different iterations of uniquely Anglo-American ideals, namely the power, resources, and general veneer of republican legitimacy and the efficiency, limited liability, and capital management of private enterprise.¹⁰³ Turnpikes came into favor in the United States shortly after the American Revolution,¹⁰⁴ and public authorities came about in the United States in the early part of the twentieth century.¹⁰⁵ Both have roots in Elizabethan England,¹⁰⁶ and both have legacies of unprofitability and public failings.¹⁰⁷

A. Turnpikes

Turnpikes innovated by transforming a private road into a public road by means of tolling.¹⁰⁸ Today, the latter concept, of making a private road public, is largely forgotten; however, tolls remain, and their

99. Kea Wilson, *Senate Considering \$10B for Highway Removal*, STREETS BLOG USA (Jan. 11, 2021, 12:01 AM), <https://usa.streetsblog.org/2021/01/11/senate-considering-10b-highway-removal-bill/>.

100. Press Release, The White House, *supra* note 21.

101. *Id.*

102. *See* Shestack, *supra* note 4.

103. *Id.*

104. *See* Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797–1845*, 26 L. & SOC. REV. 469, 472 (1992) (explaining why better highways were a primary infrastructure focus in the late eighteenth century).

105. *See generally* Shestack, *supra* note 4, at 556 (finding that authorities appeared in the late nineteenth century and proliferated a few decades thereafter).

106. *See* CARO, *supra* note 28, at 615; Klein & Majewski, *supra* note 104, at 479.

107. *See generally* CARO, *supra* note 28; Klein & Majewski, *supra* note 104.

108. Klein & Majewski, *supra* note 104, at 479–482. The takings claims were obviously numerous. *Id.*

implementation continues to be almost exactly the same as the first turnpikes in the United States, albeit with the twenty-first century flourish of electronic tolling.¹⁰⁹ Definitionally, turnpikes are simple: they derive their name from the “horizontal bars (or ‘pikes’) set into revolving pillars that would be turned aside to let a carriage pass only after the toll was paid.”¹¹⁰ The basic concept of a toll road “cannot be explained by a technological breakthrough or, as in the case of the canal, by the opening of the state’s purse,” but, rather, by “its *organizational* advantages.”¹¹¹ Paramount among these organizational advantages were an individual community’s ability to incorporate a business-like enterprise and collect tolls in order to maintain the road.¹¹² The organizational advantages came “not [from] some inspired vision but mere legislative *authorization*—authorization to lay out roadway and to demand tolls.”¹¹³ Such tolls, of course, are the true source of its power, but that power was limited substantially by the flaws of a turnpike’s organization.

On the one hand, “the organizational advantages of turnpike companies relative to public road care did indeed translate into better roads,”¹¹⁴ but on the other hand, “many . . . [in this post-colonial landscape], distrusted corporations because they were granted special powers and smacked of privilege.”¹¹⁵ This distrust did not stanch the growing prevalence of turnpike corporations; for example, “[i]n New York, between 1800 and 1830” made up “one third of all business incorporations.”¹¹⁶ In Massachusetts (and, at the time, Maine), turnpikes made up about 12% of corporations.¹¹⁷ As a form of incorporation,

109. See Abraham Bell, *Private Takings*, 76 U. CHI. L. REV 517 (2009) (discussing the history and utility of private takings).

110. CARO, *supra* note 28, at 615.

111. Klein & Majewski, *supra* note 104, at 481.

112. *Id.* at 481. Even though they were “heavily regulated, from a strictly legal viewpoint these creatures look like ‘business corporations’—that is, enterprises set up to earn and pay dividends. The basic legal form—a stock-financed franchise corporation with eminent domain powers, governed by construction standards and fixed toll rates—would remain for over a century.” *Id.* at 485.

113. *Id.* at 481.

114. *Id.* at 501. Turnpikes “were often granted existing (though crude) roadbeds” and “there were quality standards for the initial condition of a new turnpike, but *upkeep* standards and procedures were either nonexistent or extremely elliptical. The 1801 charters contain elliptical remarks to the effect that the company is to “maintain and keep the [road] in good order,” but procedures are not specified. *Id.* at 492.

115. Klein & Majewski, *supra* note 104, at 490.

116. *Id.* at 470.

117. *Id.*

turnpikes were highly ingrained in the community,¹¹⁸ which believed that turnpike construction would link disparate rural communities, encourage trade, and “generate higher land values.”¹¹⁹ These perceived benefits elided the reality of infrastructure construction, a hugely time-consuming and costly endeavor.¹²⁰ Still, communities felt a sense of pride in the incorporation and maintenance of their roads.¹²¹ This community boosterism, the drive that communities felt to persist in the endeavor of a turnpike, lingered.¹²² Though the financial prospects of turnpikes were dim, community boosterism countered those prospects effectively.¹²³ For example, “[o]f about 440 projects initiated in New York through 1845, between 60% and 65% failed to construct enough roadway to justify the opening of a single tollgate,” and still people continued to invest.¹²⁴ Other problems arose as well.

Flaws in New York’s system included “[c]ompany officers rather than public authorities¹²⁵ [laying] out the road;” vague upkeep standards with no enforcement; and “no provision requiring that those petitioning the legislature for a charter give public notice of their intention;” however, the turnpike’s signature flaw was its sheer unprofitability as an enterprise.¹²⁶ Unlike Britain, which “first authorized a toll road in 1663” and experienced “‘turnpike mania’ . . . from about 1750 to 1772” and whose “turnpikes were organized as trusts—not-for-profit organizations financed by bonds[,] . . . Americans [at the time] never tried the trust method of turnpiking.”¹²⁷ Instead, “[v]arious tactics were used to animate public spirit for turnpikes, including town meetings, correspondence, person-to-person solicitation, and newspaper articles,” and, ultimately, “buying stock was much like making a charitable contribution to a community improvement.”¹²⁸ So, two key questions arise: why exactly were turnpikes so unprofitable and why did communities continue to build them?

118. *Id.*

119. *Id.* at 500.

120. *Id.* at 501–505.

121. Klein & Majewski, *supra* note 104, at 501.

122. *Id.*

123. *Id.*

124. *Id.*

125. Here referring to public figures in the community and not the “public authority” to which the rest of this comment refers.

126. *Id.* at 485.

127. Klein & Majewski, *supra* note 104, at 479.

128. *Id.* at 500.

Regarding the former question, “[p]eople believed that turnpike stock would pay. This hope may have been hometown foolishness or, for certain turnpikes, failure to foresee the devastating competition that would arise from canals and railroads” and, as a result, “[p]eople put money into turnpikes mainly to effect a local improvement.”¹²⁹ Regarding the latter question, the answers are wide-ranging, but paramount among them are the aforementioned effects of community boosterism; “[s]hunpiking¹³⁰ was rampant and unavoidable; even under the most favorable laws for combatting shunpiking, toll evasion would be widespread;” and the fact that “[s]tate regulations hamstrung the turnpikes,” which “labored under the peremptory upkeep law, rigid toll rates, inadequate countermeasures to toll evasion, considerable concessions to local users, and a ‘settled hostility’ at the many edges of turnpike operation.”¹³¹ Of course, no one of these four factors “in particular was the ‘real’ cause of unprofitability.”¹³² However, each is essential to understanding the ethos of turnpikes. These monopolistic enterprises leveraged community resources in the name of infrastructure and progress.¹³³ While the public viewed them with skepticism, and frequently failed to pay their definitional tolls, they remained popular and, while they did not turn a profit, they did contribute meaningfully to road upkeep and quality.¹³⁴

Turnpikes, as initially begun in the United States, presented a prime opportunity to blend public and private enterprise, an arrangement an entrepreneurial person could leverage for power. Indeed, turnpikes had all the trappings for contemporary authorities baked into them already, offering the perfect community-based disguise for consolidating money and power in the name of progress. Some of the signatures of authorities that turnpikes already had included a total inability to enforce expectations. For example, “[i]f toll revenues ever repaid ‘all monies . . . expended in purchasing, making, repairing and taking care of [the] road together with an interest of fourteen [sometimes 12 or 10] per centum per

129. *Id.* at 506.

130. Shunpike is a term for using the toll road and not paying a toll. *Id.* at 484.

131. *Id.* at 505.

132. *Id.*

133. Klein & Majewski, *supra* note 104, at 491–94. Technically speaking, most turnpikes did not compete with one another both because of geographic constraints and governmental and organizational constraints. *Id.* This lack of competition certainly did not make turnpikes more efficient, but, like most public utilities, one could make the argument that highways and their maintenance are “natural monopolies.” *Id.*

134. *Id.* at 503.

annum,’ then the road was to become state property.”¹³⁵ As with authorities, which rarely fulfill their obligation to pay off their bonds,¹³⁶ “[n]o turnpike ever met its end this way.”¹³⁷ Additionally, the specter of accountability only went so far. Even though “the [turnpike’s] charter would be forfeited if construction did not commence within two years of the charter date or if the road was not completed within seven years of the charter date[, m]any turnpikes failed to meet these deadlines,” but were readily granted extensions.¹³⁸

In the twentieth century, one man leveraged the opportunities presented by turnpikes to affect another legal innovation, the authority. In so doing, he was able to exploit the turnpike’s monopolism, coupled with its distinct unprofitability and popularity to insulate himself with the power of the state to implement his vision for the future to the tune of billions of dollars.

B. Public Authorities

Best defined as “a corporate body authorized by legislative action to function outside of the regular structure of state or local government in order to finance, construct and usually to operate revenue-producing enterprises,” public authorities have myriad goals.¹³⁹ Often, these “revenue-producing enterprises”¹⁴⁰ are toll roads,¹⁴¹ but the various flavors include port authorities,¹⁴² transit authorities,¹⁴³ housing authorities,¹⁴⁴ water authorities,¹⁴⁵ economic development authorities,¹⁴⁶

135. *Id.* at 485.

136. *See, e.g., infra* Section III.B.

137. Klein & Majewski, *supra* note 104, at 485.

138. *Id.*

139. Shestack, *supra* note 4, at 553.

140. *Id.*

141. *See, e.g.,* N.J. ADMIN. CODE § 19:9-1.1, et seq. (2023) (regulating the New Jersey Turnpike Authority); OKLA. STAT. TIT. 69, §§ 1701–5 (2023) (enabling the Oklahoma Turnpike Authority); W. VA. CODE §17-16A-1–30 (2023) (enabling the West Virginia Parkways Authority).

142. *See, e.g.,* CONN. GEN. STAT. § 15-31a-j (2021) (relating to and establishing the Connecticut Port Authority).

143. *See, e.g.,* UTAH CODE ANN. § 17B-2a-8 (LexisNexis 2023) (allowing local governments to create the Utah Transit Authority).

144. *See, e.g.,* SNOHOMISH CNTY., WASH., CODE ch. 2.64 (2023) (pertaining to the Snohomish County Housing Authority).

145. *See, e.g.,* 1961 Ga. Laws 2588 (creating the Henry County Water Authority).

146. *See, e.g.,* P. & S.L. 1997, ch. 79 (creating the Kennebec Regional Development Authority).

and land bank authorities.¹⁴⁷ None of these enterprises would exist across the country as they do now if not for the ingenuity of one person in particular.

No single person did more to shape urban planning in the history of the United States than Robert Moses, and it was he who created public authorities as we know them today.¹⁴⁸ Much like the turnpike,

[t]he public authority was not a new device. The first of these entities that resembled private corporations but were given powers hitherto reserved for governments—powers to construct public improvements and, in order to pay off the bonds they sold to finance construction, to charge the public for the use of the improvements—had been created in England during the reign of Queen Elizabeth.¹⁴⁹

Moses took the above-mentioned aspects of turnpikes to make a fiefdom in New York because

147. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 5154 (Westlaw through 2022 1st Reg. Sess.).

148. See generally CARO, *supra* note 28. Robert Moses is widely considered to be the father of car-culture worldwide, and, while this comment cites Robert Caro's biography of Moses's life, *The Power Broker*, a brief contextualizing of the man is necessary here. *Id.* at 901–904. While he held no elective office, he accumulated and consolidated power by spearheading massive public works projects both in New York and in New York City. *Id.* at 630–31. He began his career in the state legislature as an aid to Governor Al Smith, drafting bills and whipping support. *Id.* at 172–77. He became the head of the parks department in New York City and used millions of dollars in federal funds from his political nemesis Franklin Delano Roosevelt to construct massive public works projects, often to the detriment of the city's residents. *Id.* at 313–19. These projects included the Triborough Bridge, the Long Island Expressway, Fire Island, the Whitestone Bridge, and countless others. See, e.g., *id.* at 516. His disdain for the public and his racism shaped these projects and can be seen explicitly in his decision to build a vast majority of his parks in white neighborhoods and to invent, à la Dr. Suess's *The Lorax*, a special machine to tear down trees in the undeveloped area of upper Manhattan twice as fast as typical. CARO, *supra* note 28, at 499–575. He used strategies that included whipsawing (going back and forth between stakeholders in order to create confusion and reliance upon himself), commencing projects that did not have full funding in order to gain more funding later, and threatening to quit in the middle of projects. See, e.g., *id.* at 3–4. His career spanned nearly sixty years. See, e.g., *id.* at 961–1162.

149. CARO, *supra* note 28, at 615. Additionally, “public authorities appeared in this country as early as the 1890s,” but “the first major impetus to the authority movement took place with the establishment of the Port of New York Authority in 1921.” Shestack, *supra* note 4, at 556. Robert Moses built on these existing legal concepts beginning in the late 1920s. CARO, *supra* note 28, at 625.

[a] public authority, he had learned, possessed not only the powers of a large private corporation¹⁵⁰ but some of the powers of a sovereign state: the power of eminent domain that permitted the seizure of private property, for example, and the power to establish and enforce rules and regulations for the use of its facilities that was in reality nothing less than the power to govern its domain by its own laws.¹⁵¹

Furthermore, like turnpikes, public authorities are ultimately a matter of legislative grace, and Moses used his bill-drafting prowess to ensure that “[t]he safeguards included in all previous New York State legislation on authorities” were “limit[ed],” thus creating one of the contemporary public authorities’ key features.¹⁵² Indeed, “[t]he most prominent feature of the authority lies in the use of revenue bond financing.”¹⁵³ Revenue bonds are defined as “obligations whose interest and principal are to be paid solely from the revenues earned by the facilities constructed from the proceeds of the bond sales,” these funds are “distinguished from the tax-supported general obligation of regular governmental units.”¹⁵⁴ Furthermore, “[t]hey do not require a pledge of the credit of the state or municipality, and are not regarded as general obligations of the state.”¹⁵⁵ Moses made sure that his iteration of the public authority dispensed with “provisions setting a time limit on their bonds, a date by which each authority must redeem all its bonds, surrender control of all its facilities and go out of existence.”¹⁵⁶ When he “draft[ed] amendments to the Triborough Bridge Authority Act, [he] knew that the Legislature would

150. “In form, practically all authorities at all levels of government are organized as public corporations, with multistate authorities being created by interstate compact or an act of Congress, and those on the state level by special acts of the legislature. In many jurisdictions, enabling legislation patterned after general incorporation acts empowers county and municipal governments to create authorities by filing certificates in the nature of articles of incorporation. In keeping with the corporate form, all authorities are governed by a board of directors, never by one man. Some boards are elected, but usually the directors are appointed by the unit of government sponsoring the authority or, as officers of that government, are directors *ex officio*.” Morris, *supra* note 1, 236–39.

151. CARO, *supra* note 28, at 623.

152. *Id.* at 625.

153. Shestack, *supra* note 4, at 555.

154. *Id.*

155. *Id.* While not a general obligation of the state, these bonds are often *backed* by tax revenue. See, e.g., Office of the State Treasurer, *Maine’s Debt Snapshot*, THE STATE OF MAINE (June 30, 2023), <https://www.maine.gov/treasurer/debts-bonds/maines-debt-snapshot> (showing \$559.37 million in General Obligation Bonds “secured by the State’s full faith, credit, and taxing power.”).

156. CARO, *supra* note 28, at 625.

never agree to the elimination of these safeguards. So he didn't eliminate them. He just made them meaningless" by ensuring that as long as the public authority owed money it would continue to exist.¹⁵⁷ Public authorities today, therefore, have incentive to proactively accrue debt in order to maintain their existence.

1. State Constitutional Debt Limits

Two other prominent, definitional legal features of the public authority merit attention here as well. First, another "of the primary advantages claimed for the authority is that it permits the financing of improvements outside state constitutional debt limitations."¹⁵⁸ At the time of their increasing popularity, "[t]he constitutions of all but eight states limit[ed] the exercise of legislative discretion with respect to state debt," and "in nearly every jurisdiction the state constitution limit[ed] the debts of counties and municipalities to a percentage of the value of taxable property within their bounds."¹⁵⁹ "[T]hese restrictions have their origins in the financial debacles of the previous century. Following the panic of 1837, the states which had been embarrassed by heavy indebtedness adopted constitutional debt limits."¹⁶⁰ However, by the end of the nineteenth century courts had begun creating exceptions, most relevant of which is the "special fund doctrine," which originated when "the Supreme Court of Washington was persuaded that a bond, the principal and interest of which were payable wholly out of the revenues of the facility financed from the proceeds of the bond, did not constitute debt within the meaning of the constitutional restriction."¹⁶¹ The acceptance of this doctrine by various states was haphazard at best as

early attempts by municipalities to except revenue-type financing from debt limitations were struck down with the admonition that one cannot achieve by indirection what cannot be done directly. In other states, the courts announced a "limited" or "restricted special fund" doctrine in holding that revenue bonds did not escape constitutional limitations unless the bonds were to be paid solely from the revenues of the project

157. *Id.*

158. Shestack, *supra* note 4, at 557.

159. Morris, *supra* note 1, at 240–41.

160. *Id.* at 241.

161. Shestack, *supra* note 4, at 558.

financed, and not from the revenues of the entire system to which the improvement was to be an addition.¹⁶²

As such, the public authority became a prime way to avoid this legal morass. This justification of the public authority, while useful for contextualizing its creation and relied upon by those who wish to continue with public authorities, is no longer relevant.¹⁶³

2. Sovereign Immunity

Second, public authorities enjoy sovereign immunity.¹⁶⁴ Generally, as a “result of th[eir] hybrid [public and private] quality” there “has been considerable confusion in the application of sovereign immunity to” public authorities.¹⁶⁵ Complicating matters further is the fact that “[t]he customary legislative mandate that an authority may ‘sue and be sued’ has not settled the question, for when such a clause has been passed with respect to state executive departments it has been interpreted as not abrogating the immunity completely.”¹⁶⁶ In spite of the fact that public authorities have a board and generally consider themselves “a juristic person” they usually are not “responsible for all . . . [the] tortious and contractual wrongs” inherent with that role.¹⁶⁷ Instead,

many courts have assumed that in the absence of a “sue and be sued” clause these authorities would be entitled to the complete shelter of a state’s sovereign immunity and, as in the case of executive departments, have refused to read these clauses as a

162. *Id.*

163. *Id.* at 561–62 (“Thus, except in the case of the relatively few states which refuse to recognize the special fund doctrine or restrict it so as to limit practical use, it would appear that constitutional limitations on state and local borrowing are not the obstacle they once were, or are still thought to be. Municipalities have or may be given resort to revenue bond financing without the necessity of using the authority device. Accordingly, relief from constitutional debt limitations does not, in most states, provide an adequate ground for authority financing. If the authority is to be justified, it must be on another basis.”).

164. See generally *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 HARV. L. REV. 714 (1961). Robert Moses reinforced this precedent by making sure, since “[a] public authority . . . possessed not only power of a large private corporation but some of the power of a sovereign state,” that those powers were invested in him as the sole member of his authorities’ boards. CARO, *supra* note 28, at 623, 629.

165. *The Applicability of Sovereign Immunity to Independent Public Authorities*, *supra* note 164, at 714.

166. *Id.*

167. See *id.* at 725.

complete waiver. Only about half the courts considering the question have thought them to allow damages in torts. In some states an additional problem is posed by a constitutional prohibition of suits against the state. In such states the courts have held that consent to suit is unconstitutional when applied to executive departments, but have differed on its applicability to authorities.¹⁶⁸

Courts have further expanded the applicability of sovereign immunity to public authorities over the years to the point where public authorities essentially cannot be held responsible for tortious or contractual wrongs.¹⁶⁹ This protection makes public authorities even more appealing as the synthesis of public and private concerns.

Debt evasion and sovereign immunity rank high among the reasons public authorities have outlived their usefulness as creative legal entities. Looking at the Maine Turnpike Authority readily reveals both the successes and flaws of public authorities and the general power of the judiciary in support of them.

III. THE PRESENT: THE MAINE TURNPIKE AUTHORITY

The Maine Turnpike Authority presents its own official history neatly in a glossy, hard-bound volume available for free upon request. Made to commemorate the turnpike's seventy-fifth anniversary in 2022, the MTA credits itself with saving the Maine economy at several points in the twentieth century.¹⁷⁰ While this official history documents a few of the MTA's setbacks, primarily a voter initiative in 1991 prohibiting lane expansion in the far southern portion of the highway,¹⁷¹ it mostly serves as an exultation of the road and the people who built it, all of which reveals the truly unique system Maine created.¹⁷²

168. *Id.* at 718–19 (citations omitted).

169. *See infra* Section III.C.

170. MAINE TURNPIKE AUTHORITY, MAINE TURNPIKE 75TH ANNIVERSARY 1947-2022, at 16–17 (2022). In an entire section entitled “How the Pike Saved Maine’s Economy,” the MTA presents itself as the state’s savior when in the 1850s textile mills began to falter, then shipbuilding, then shoemaking, then canning, then the lumber industry, then the farming industry, and then the paper industry. *Id.* at 16–17. The point the MTA builds up to is that Maine’s economy relies heavily on tourism now. *Id.* However, the depiction of the MTA replacing each of these industries and supplanting the economy of an entire state is incongruous at best.

171. *Id.* at 12.

172. *Id.* at 171.

A. Legislatively

Much like the passage of the 1956 Interstate Highway Act, the passage of “An Act Creating the Maine Turnpike Authority,” despite all the complicated issues surrounding it, was fairly straight-forward, perhaps in part because of the absolution of state responsibility in the design of the authority.¹⁷³ In an address to the Association of Highway Officials of North Atlantic States in Boston on March 2, 1949, Executive Director of the MTA, W.B. Getchell, Jr., affirmed the legislative reasoning behind the passage of the enabling act.¹⁷⁴ The legislature felt that “hourly densities exceeding 1,000 . . . and 24-hour counts often exceed[ing] 15,000” on Route 1 presented a “critical situation.”¹⁷⁵ He explained in his speech the relative innovations of the MTA stating that

[t]he Legislature provided that the undertaking must be strictly self-liquidating, financed through the sale of revenue bonds to be paid solely from tolls. The credit of the State was withheld as a pledge for interest or retirement, since any substantial additional issue of general obligation highway bonds would over-run the limit of \$36 million dollars provided in the State Constitution.¹⁷⁶

The MTA’s structure at this time was typical of public authorities.¹⁷⁷ However, in Maine’s case, the MTA’s inception was relatively groundbreaking.¹⁷⁸

B. A Practical and Political Overview

Some sources cite Maine as having the first public authorities to exist in their nascent form in this country, and, certainly, Maine is a unique

173. *Id.* at 7–8 (noting that the idea for the turnpike and passage of its enabling act occurred in the same year and primarily involved only a handful of people, including the Speaker of the Maine State House of Representatives George D. Varney, Governors Horace Hildreth and Sumner Sewall, and private attorney George Lord).

174. W.B. Getchell, Executive Director, Me. Tpk. Auth., Address Before Association of Highway Officials of North Atlantic States at 2 (Mar. 2, 1949).

175. *Id.*

176. *Id.* at 2–3.

177. *See supra* Section II.B.

178. HENRY PETROSKI, *THE ROAD TAKEN: THE HISTORY AND FUTURE OF AMERICA’S INFRASTRUCTURE*, 39 (2016) (noting that while the Pennsylvania Turnpike was the country’s first paved toll road, Maine opened its paved toll road shortly thereafter and was the first state to use asphalt instead of concrete).

state of firsts and mosts.¹⁷⁹ This heritage comes from having the first sunrise in the nation,¹⁸⁰ being the state with the most forest cover,¹⁸¹ and being the second most rural,¹⁸² the oldest,¹⁸³ and until recently, the whitest state in the nation,¹⁸⁴ among other things. In fact, the latter characteristics are crucial in distinguishing the MTA's issues from the above overview of urban issues regarding interstates: Maine's turnpike does not bisect any major metropolitan area, but it does cleave the state's coastal and interior regions, which are often at political odds.¹⁸⁵ Perhaps because of Maine's unique political and geographic heritage, it, like the other states of Northern New England, relies more heavily than other single-occupancy vehicles for commuting.¹⁸⁶ This reliance makes I-95 in Maine, i.e., the Maine Turnpike, an essential traffic conducting artery.

Even in the 1940s, Maine relied on tourism, and the burgeoning use of the automobile congested the state's primary artery, U.S. Route 1, which was so clogged with traffic that it "require[d] a good half day to drive from Kittery to Portland," about fifty miles.¹⁸⁷ This acute problem inspired a collection of government officials, particularly State

179. See *Kennebec Water Dist. v. City of Waterville*, 96 Me. 234, 52 A. 774 (1902). Of note is the fact that "[t]he Kennebec Water District, incorporated in 1899, is the first reported public authority which received judicial approval." Morris, *supra* note 1, at n.1. This approval came after "[a]n act creating the Waterville New City Hall Commission, the earliest attempted public authority reported, was held unconstitutional in *Reynolds v. City of Waterville*, 92 Me. 292, 42 A. 553 (1898)." *Id.*

180. Judson D. Hale, *Where in the United States Does the Sun Shine First?*, NEW ENGLAND (Jul. 8, 2022), <https://newengland.com/today/living/new-england-environment/where-in-the-united-states-does-the-sun-shine-first/>.

181. *Most Forested States*, WISEVOTER, <https://wisevoter.com/state-rankings/most-forested-states/>.

182. *Most Rural States 2023*, WORLD POPULATION REV. (2023), <https://worldpopulationreview.com/state-rankings/most-rural-states>.

183. Lillian Kilduff, *Which U.S. States Have the Oldest Populations?*, POPULATION REFERENCE BUREAU (Dec. 22, 2021), <https://www.prb.org/resources/which-us-states-are-the-oldest/>.

184. *Whitest States 2023*, WORLD POPULATION REV. (2023), <https://worldpopulationreview.com/state-rankings/whitest-states>.

185. See Micah Cohen, *In Maine, Independent Streak Complicates Political Landscape*, FIVETHIRTYEIGHT (Oct. 15, 2012, 1:37 PM), <https://fivethirtyeight.com/features/in-maine-independent-streak-complicates-political-landscape/> ("The main political divide in Maine is between the south coast and the vast interior north of Augusta, roughly mirroring the geography of the state's two Congressional districts.").

186. Richard Watts & Geoff Battista, *Reducing Single-Occupancy Vehicle Use in Northern New England; Unlimited Access, Employee Incentives and Ridesharing*, UVM TRANSPORTATION RESEARCH CENTER (June 30, 2014), https://www.uvm.edu/~transctr/research/trc_reports/UVM-TRC-13-010.pdf.

187. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 7.

Representative Joe Sayward and State House Speaker George Varney, to draft “An Act Creating the Maine Turnpike Authority,” which passed in 1941 and was immediately put on hold as the United States entered World War II.¹⁸⁸ When the war ended in 1945, however, it took merely two years to complete forty-seven miles of “carved, graded, and paved” road paid for “entirely with user tolls.”¹⁸⁹ It was “the world’s first asphalt highway”¹⁹⁰ and had unique safety features such as a grass median between north- and south-bound lanes, augmenting its reputation as a “Mile-A-Minute” highway.¹⁹¹ In 1957, “[a]verage daily Turnpike traffic volume reach[ed] 2,500 vehicles,” or about 912,000 vehicles annually.¹⁹² In 1971, “[a]nnual Turnpike travel top[ped] ten million vehicles,” an amount which, by 1983, doubled.¹⁹³ That figure doubled again to forty million vehicles in 1994.¹⁹⁴ In 2013, that figure grew to sixty-two million.¹⁹⁵ Since the initial portion of Maine’s turnpike, connecting only Kittery to Portland, proved popular and financially efficient, by the time Eisenhower signed the Interstate Highway Act into law eight years later, the politics and planning proved powerfully in favor of expansion from Portland to Augusta and eventually to the Canadian border in Houlton.¹⁹⁶

The MTA initially planned “to retire the Turnpike’s investment bonds in 1982, eliminate the tolls, and have the Maine Department of Transportation [MaineDOT or MDOT] take charge of the highway.”¹⁹⁷ However, in another self-purported instance of saving Maine’s economy, the MTA’s plans changed when

[t]he 1973 Arab oil embargo and the Iranian hostage crisis of 1979 drove gas prices from 35¢ a gallon to \$1.40, the popularity of smaller, high mileage cars soared. Gas sales and gas tax revenues plummeted leaving MaineDOT millions of dollars short of covering its own annual expenses.¹⁹⁸

188. *Id.* at 8.

189. *Id.* at 8-9.

190. *Id.* at 9.

191. *Mile-A-Minute Highway*, ME. TURNPIKE AUTH. (2023), <https://www.maine.turnpike.com/About-MTA/History/Mile-A-Minute-Highway>.

192. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 8.

193. *Id.* at 9, 11.

194. *Id.* at 12.

195. *Id.* at 14.

196. *See id.* at 8.

197. *Id.* at 12.

198. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 12.

Thus, as a solution, “Maine’s legislature . . . voted to allow the Turnpike to remain independent, offer volume discounts, and turn over 25 percent of its revenue to cover the MaineDOT shortfall.”¹⁹⁹ The MDOT would get one hundred percent of this revenue if it were to take over control of the MTA, and thus, it would be able to spread those funds throughout the state rather than continuously funneling them into self-perpetuating projects.

Nonetheless, since this unique revenue sharing agreement in the 1980s, things have proceeded apace for the MTA. With little to no headwind, the MTA has gotten everything it has wanted and then some.²⁰⁰ Even if it has taken extra time, what is time to an entity without an expiration date and no public accountability? As an example, “[i]n 1990 construction started up on . . . [lane] expansion;”²⁰¹ however “[i]n 1991, Maine voters halted that effort through a statewide, citizen referendum.”²⁰² By 1997, voters had evolved on the issue and “overwhelmingly approved a ballot initiative to allow a widening of the Turnpike.”²⁰³ So, “[f]rom York to South Portland, 30 miles of two-lane highway were expanded to three lanes with every single bridge in between widened accordingly.”²⁰⁴ Of course, in the never-ending pursuit of progress, now the MTA is wrapping up its “Portland Area Widening project,” which means “[f]rom Mile 44 to Mile 49, construction is

199. *Id.* The MTA notes that “[i]n 1992 . . . the legislature upped the Turnpike Authority’s annual MaineDOT payment to \$5 million. In 1994, \$16 million. In 1996, \$35 million with payments spread over ten years. Since then, the Turnpike has provided more than a quarter billion dollars to Maine DOT.” *Id.* at 13.

200. *See, e.g.*, Jessica Piper, *Maine could build a rare \$220M toll road to a booming Portland suburb*, BANGOR DAILY NEWS (Dec. 14, 2021), <https://www.bangordailynews.com/2021/12/14/politics/does-maine-need-a-new-220m-toll-road-to-a-booming-portland-suburb/> (noting that this proposal comes as the MTA is widening lanes in the Portland area); Edward D. Murphy, *New high-speed toll plaza in York finally ready to open*, PORTLAND PRESS HERALD (Sept. 14, 2021), <https://www.pressherald.com/2021/09/14/new-high-speed-toll-plaza-in-york-finally-ready-to-open/> (noting that the project cost about \$52.2 million). *Cf.* Phelps Turner, *Road Work Ahead? Proposed Expansions of the Maine Turnpike Should Proceed with Caution*, CONSERVATION L. FOUND.: BLOG (Nov. 1, 2017), <https://www.clf.org/blog/road-work-ahead-proposed-expansions-maine-turnpike-proceed-caution/> (urging an assessment of alternatives to the project).

201. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 12.

202. *Id.*

203. *Id.* at 14.

204. *Id.*

underway, again from two lanes to three and a substantial redesign of Exit 45.”²⁰⁵ A new exit is further underway in Saco.²⁰⁶

Also in 1997, “the Turnpike unveiled ‘Transpass,’ an automatic, electronic toll collection system to enable true, non-stop travel.”²⁰⁷ This technology eventually expanded in the form of “‘Open Road Tolling’ gantries” wherein “E-ZPass drivers [can] now cruise through specially designated lanes at highway speed with their toll payments processed in nanoseconds.”²⁰⁸ As of 2021, the “gateway toll plaza in York” features six lanes.²⁰⁹ The MTA states that “traffic flow ha[s] never been better,”²¹⁰ but the expansion in York, along with other aspects of the MTA’s approach has been contentious.²¹¹ In spite of the fact that, ominously, “there’s no end to the changes driving the Turnpike’s evolution,”²¹² the MTA is currently slated to pay off its bonds by 2042.²¹³

Essentially, the Maine Turnpike Authority has distilled the visions of Robert Moses and President Eisenhower. Those visions have been ordained by the legislature, and, in turn, the actions undertaken have been approved by the judiciary, creating an organization entirely lacking impunity and accountability. Thus, while people often think that public authorities are owned by the public or held accountable to the public, they are shielded from scrutiny at almost every level.²¹⁴

205. *Id.*; see also Peter McGuire, *Turnpike authority approves \$140 million widening plan*, PORTLAND PRESS HERALD (Sept. 7, 2018), <https://www.pressherald.com/2018/09/07/turnpike-authority-approves-140-million-widening-plan/>.

206. Brad Rogers, *New turnpike exit in Saco expected to be done in 2025, cost \$42 million*, WGME (Mar. 22, 2023, 5:25PM), <https://wgme.com/news/local/new-turnpike-exit-saco-expected-done-2025-cost-42-million-dollars-maine-authority-35>.

207. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 14. Transpass is now known as E-ZPass. *Id.*

208. *Id.*

209. *Id.* at 14–15.

210. *Id.* at 15

211. See, e.g., Gillian Graham, *Proposal to Relocate York Toll Plaza Head for Public Hearing*, PORTLAND PRESS HERALD, May 22, 2017, 2017 WLNR 15882041 (noting residents’ and political leaders’ fervent resistance).

212. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 15.

213. *About MTA, FAQ: General*, MAINE TURNPIKE AUTHORITY (2023), <https://www.maineturnpike.com/About-MTA/FAQ.aspx>. (“All outstanding Maine Turnpike Authority bonds are scheduled to be paid off by 2042. Future capital planning projects approved by the Maine Turnpike Authority and decisions by future state legislatures and governors could push any conversion from a toll supported facility to a tax-supported highway further into the future.”).

214. See, e.g., OUR POWER, <https://ourpowermaine.org/> (last visited Oct. 23, 2023). Notably, this 2023 Maine ballot initiative to create a “consumer owned utility” does not mention the phrase “public authority,” but has all the hallmarks of a public authority.

C. Case Studies

These cases reveal the privileges and limits of the Maine Turnpike Authority and lay out the scope of the Maine Turnpike Authority's power by showing how the interplay of public power and private liability has played out in the judiciary.

1. *Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority* (1950)

In this case, the Maine Supreme Judicial Court, sitting as the Law Court, held that the MTA's pollution of the water in Branch Brook was a reasonable use of its own land, and, in doing so, both chose not to wade into an analysis of water rights and shaped water rights drastically.²¹⁵ The court reasoned that, even though construction of the turnpike polluted the water used by the water district downstream, its construction of a bridge was a non-riparian use, and, additionally, that, even though the Water District was a riparian proprietor and a public authority, it could not "by virtue of the ownership of riparian lands abstract water from a brook on which they are located for public distribution."²¹⁶ Both the holding and the court's reasoning seem somewhat counter-intuitive given that the legislature sanctioned both entities to conduct their specific enterprises and that the District's ordained purpose was to provide drinking water to municipalities. The court's analysis relied "upon the doctrine that reasonable use by *both the upper and lower riparian proprietors* is the underlying principle which determines their correlative rights."²¹⁷ As such, the court found that

in determining whether or not the use made by the Authority of its land and the stream was a reasonable one *as against the District* as a lower riparian proprietor, we must determine whether or not the use by the District of the stream, as its source of public water supply, and which is the only use that it claims

Learn More: Read the Initiative! PINE TREE POWER, <https://pinetreepower.org/read-the-initiative/> (last visited Oct. 23, 2023). Such campaigns, especially those emphasizing how much power they are allegedly putting in the hands of "the people" should be scrutinized thoroughly given, as seen throughout this paper, the total impunity of other public authorities.

215. *Kennebunk v. Me. Tpk. Auth.*, 71 A.2d 520, 530–32 (Me. 1950).

216. *Id.* at 530.

217. *Id.* at 526.

was injuriously affected by the acts of the Authority, was itself a reasonable use thereof.²¹⁸

The key to understanding this legal jiu-jitsu is that “[u]nless the acts of the Authority in the use of its land injuriously affected some reasonable use by the District of the waters of Branch Brook, the Authority was not making an unreasonable use of its land with respect to the District.”²¹⁹ In the end, the MTA was legally building its interstate and the Water District’s legislative charter did “not . . . grant to the [District] . . . water rights, but authorizes it to use as its source of supply, *if proprietary rights are properly acquired*, any waters named therein.”²²⁰ Simply put, the District, under Maine common law precedent, did not attempt to make a legal taking as necessary to acquire proprietary rights, and “to hold otherwise would allow a municipal corporation to take private property without payment of just compensation.”²²¹

This case is fundamental to understanding water rights in Maine, because Maine is one of only three states in the country that relies on common law water rights rather than a regulatory scheme.²²² This scheme is historically rooted in riparianism, which prized the flow of water rather than the quality of the water.²²³ As Maine became less agricultural and more industrial, it shifted to a “reasonable use” approach first established in *Lockwood Co. v. Lawrence*.²²⁴ This approach was used in *Kennebunk* and is still good law today.²²⁵ Indeed, *Kennebunk* relies on and reinforces *Lockwood’s* holding that “[t]he rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with a just regard to the like reasonable use by all others who may be affected by his acts.”²²⁶ By elaborating on takings in Maine (i.e., finding that the District did not acquire proprietary rights), the state in *Kennebunk* “was appropriating water to its own use,

218. *Id.* at 527.

219. *Id.*

220. *Id.* at 528 (emphasis added).

221. *Kennebunk*, 71 A.2d at 530.

222. Peggy Bensinger, Assistant Att’y Gen., Off. of the Me. Att’y Gen., Notes for Talk on Groundwater Law at Water Resources Planning Committee 1–2 (May 1, 2020); see generally Bradford R. Bowman, *Instream Flow Regulation: Plugging the Holes in Maine’s Water Law*, 54 ME. L. REV. 287, 288 (2002) (explaining why this case is fundamental and how Maine’s legal scheme is unique).

223. Bowman, *supra* note 222, at 295–300 (discussing the history of riparianism in Maine).

224. *Id.* at 297.

225. *Kennebunk*, 71 A.2d at 525–28 (discussing *Lockwood*).

226. *Id.* at 525–26.

significantly curtailing water rights in the process.”²²⁷ However, commentators and officials have used *Kennebunk* and *Lockwood* to argue for the state’s adoption of a regulatory scheme²²⁸ because:

[b]y proposing to regulate stream flow on Maine rivers, the State is not appropriating water for its own use, but acting to prevent an adverse impact of a particular class of land uses, something which results in diffuse public benefits. There is no “taking” in such a case, because landowners never possessed a right to withdraw water to the detriment of the waterbody.²²⁹

Lost in the foundational water law and the complex reasoning of this case are the facts. Ultimately, the court allowed the MTA to pollute Branch Brook. This case came at the beginning of turnpike construction and established an ethos that the MTA had little impunity. The following case also shifts the focus of analysis away from the MTA and finds in favor of the growing public works project.

2. First National Bank of Boston v. Maine Turnpike Authority
(1957)

In this case, the Maine Supreme Judicial Court held that an amendment to the MTA’s enabling statute which would compensate public utilities for the relocation and replacement of facilities and equipment was unconstitutional.²³⁰ Citing extensive caselaw from Maine and throughout the country,²³¹ the court dismisses “[c]harters, franchises, statutory grants and permits affording the use of public ways to utility locations” as “subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power.”²³² The “relocation of utility facilities in public streets or ways are at utility expense” and “a common law liability unless abrogated by the clear import of the language used in a particular instance.”²³³

227. Bowman, *supra* note 222, at 327.

228. See STATE OF MAINE OFF. OF POL’Y AND LEGAL ANALYSIS, COMMISSION TO STUDY THE ROLE OF WATER AS A RESOURCE IN THE STATE OF MAINE, 130th Leg., 2d Sess., at 7–8 (2022). See generally Bensinger, *supra* note 222; Bowman, *supra* note 222.

229. Bowman, *supra* note 222, at 327.

230. First Nat. Bank of Boston v. Me. Tpk. Auth., 136 A.2d 699 (Me. 1957).

231. See, e.g., *id.* at 707 (citing precedent from Ohio, Massachusetts, and Florida as well as federal jurisdictions).

232. *Id.* at 711.

233. *Id.*

Such a finding belies both the extensive policy argument the court undertakes and the express curtailment of power the legislature undertook in its amendment to the enabling act. First, the court makes plain that public ways are more essential to public safety than utilities. In sweeping terms, the court elevates the work of the MTA by stating:

[p]ublic safety is a prime requisite and transcendentally so in a turnpike. The latter must be of limited access with a minimum of curves and approaches. There can be no intersections. Sufficient overpasses and underpasses must be available. Divided lanes are necessary. Road digging and alteration must be precluded irreducibly. The stream of commerce must flow with all reasonable speed. Millions of automobiles are being made, distributed and placed upon public ways. Old town and shire roads are no longer safe or adequate. Turnpikes or expressways are vital for fast, direct movement of the armed forces and their impedimenta.²³⁴

While this dictum is not the foundation upon which the court decides this case, it reveals the overarching ethos of the judiciary in cases involving the MTA. It demonstrates that the court is very willing to defer to the MTA in the grand terms set out by Eisenhower: a contemporary interstate system is vital to the national interest.²³⁵

Second, the actual legal analysis the court undertakes disregards the legislature's attempt to compensate utilities for the removal or replacement of their equipment. While the court makes very plain that the legislature had every intention of paying for the utilities, it finds that in doing so it merely "pretended to prescribe such a payment."²³⁶ The amendment apparently unconstitutionally impaired the MTA's right to contract because "[s]uch a payment could be made only by diversion from moneys which pursuant to the enabling act and the indenture thereunder had been in 1953 pledged with the plaintiff trustees for the turnpike bondholders."²³⁷ Since the court is "not unaware that all acts of the legislature are presumed to be constitutional and will not be adjudged to be otherwise unless the conclusion is free from all doubt,"²³⁸ it takes extensive pains to cite appropriate precedent.²³⁹

234. *Id.* at 715.

235. *See, e.g.,* Weingroff, *supra* note 40.

236. First Nat. Bank of Boston, 136 A.2d at 720.

237. *Id.*

238. *Id.* at 721.

239. *See, e.g., id.* (citing to twenty-seven cases).

This analysis prefers the legislature's initial creation of the MTA, as opposed to any subsequent changes, by reinforcing the "considerable pains [the legislature took] to immunize the State of Maine from liability for the turnpike and [making] it unmistakably clear that the State's credit was in no way pledged therefor."²⁴⁰ When the legislature shielded its credit this way, the State passed provisions assuring security and marketability for bondholders, including exempting taxation and attachment.²⁴¹ These provisions formed the basis of the contracts in dispute.²⁴² Ultimately, this case solidified the growing power of the MTA and couched its growth in broad terms symbolically above even the legislature.

3. *Nelson v. Maine Turnpike Authority* (1961) and *Foss v. Maine Turnpike Authority* (1973)

As mentioned above, public authorities benefit from sovereign immunity.²⁴³ Sovereign immunity for the MTA is indeed incredibly broad but subject to very narrow exceptions.²⁴⁴ In *Nelson v. Maine Turnpike Authority*,²⁴⁵ the Maine Supreme Judicial Court bluntly states the question at hand: "Should sovereign immunity in tort, time tested in our State, be discarded or destroyed?"²⁴⁶ The answer, in the end, is no.²⁴⁷ First, relying on *First National Bank of Boston*, the court reasoned that the state could have had the MTA operate under the auspices of the State Highway Commission but instead chose deliberately to make it its own entity.²⁴⁸ That being so, and in spite of its freedom to contract and other corporate functions, the MTA remains an agent of the state who has a "real party interest in its activities."²⁴⁹ Second, relying on *Kennebunk*, the court found that the "sue and be sued" clause²⁵⁰ of its statute does not

240. *Id.* at 718.

241. *Id.*

242. *See generally* *First Nat. Bank of Boston*, 136 A.2d at 720.

243. *Supra* Section II.B.2.

244. *See* *Foss v. Me. Tpk. Auth.*, 309 A.2d 339 (Me. 1973).

245. The facts in this case are scantily stated, but appear to involve personal injuries, and thereupon a tort claim for negligence, stemming from an accident on the turnpike. *Nelson v. Me. Tpk. Auth.*, 170 A.2d 687, 687–88 (Me. 1961).

246. *Nelson*, 170 A.2d at 693.

247. *Id.*

248. *Id.* at 689–90.

249. *Id.* at 690.

250. *See* ME. REV. STAT. tit. 23, § 1965(1)(A) (2023) ("The Maine Turnpike Authority . . . may[] [s]ue and be sued").

operate as a waiver of sovereign immunity.²⁵¹ *Kennebunk* offers an example of what kind of suit a party can bring against the MTA, i.e., seeking damages from water pollution or an unconstitutional takings claim.²⁵² Of note is the fact that the defendant emphatically lost in *Kennebunk*, which begs the question: are these situations distinctions without differences? Third, the court found that, while some jurisdictions at the time had compellingly overturned the doctrine of sovereign immunity,²⁵³ at the very least it is a job for Maine's legislature.²⁵⁴ In the end, the court upheld the MTA's sovereign immunity from tort claims broadly and precluded Nelson from bringing her case altogether.²⁵⁵

In *Foss v. Maine Turnpike Authority*,²⁵⁶ the court narrowed *Nelson*, albeit ever so slightly, by reversing the dismissal of "counts[] labeled 'count in nuisance,' 'count in negligence,' 'count in trespass,' and 'count for an injunction.'"²⁵⁷ The court explicitly declined to overturn *Nelson*, but instead found certain exceptions to sovereign immunity, specifically when the question "aris[es] out of situations in which a municipality or governmental agency has either physically invaded private property or has performed acts not authorized by law which have impaired the use and enjoyment of that property."²⁵⁸ A defense to this exception involves specific acts of the legislature, which "has the power to authorize what otherwise would be traditionally categorizable as 'nuisances' and 'trespasses,'" thus, "if the [governmental entity or agency] thereafter carries out the acts in the manner contemplated by the legislative authorization," a lawsuit would be precluded.²⁵⁹ In addition, "the acts [must] actually be carried out in a limited, reasonable manner" anticipated by such legislation.²⁶⁰ The court also offers takings as an

251. *Nelson*, 170 A.2d at 690.

252. *Id.*

253. *See, e.g.,* *Muskopf v. Corning Hospital Dist.*, 359 P.2d 457, 458 (Cal. 1961) (holding that "the rule of governmental immunity from tort liability . . . must be discarded as mistaken and unjust"); *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 96 (Ill. 1959) (finding the doctrine of sovereign immunity for a school district to be "unsound and unjust").

254. *Nelson*, 170 A.2d at 693.

255. *Id.*

256. In *Foss*, the plaintiff alleged that the MTA's overuse and subsequent runoff of road salt adversely affected his abutting property and brought tortious claims against the MTA that the Superior Court noted were "nearly analogous in some respects" to the claims in *Nelson*. *Foss*, 309 A.2d at 341.

257. *Foss*, 309 A.2d at 341.

258. *Id.* at 342.

259. *Id.* at 342–343.

260. *Id.* at 343.

alternative basis upon which to bring this case.²⁶¹ Using those two arguments, legislative authorization and takings, the court distinguishes from *Nelson* because “[i]n *Nelson*, . . . [t]hose circumstances did not involve negligence which had resulted in a physical invasion of property or an impairment of property rights, but merely ‘negligence’ alone.”²⁶² These narrow exceptions to sovereign immunity show that the court is at least willing to consider some exceptions, but this precedent reinforces the values of car culture by privileging property rights over life rights.

4. Maine Turnpike Authority v. Joseph E. Brennan (1975)²⁶³

The straight-forward question on appeal here is whether “the [MTA is] empowered by its Enabling Act to apply toll revenues either to build additional lanes or to expand turnpike bridges and overpasses to accommodate these lanes.”²⁶⁴ The court held that lane expansion does not fall under “such incidental implied powers as are necessary to carry out its express powers and to vindicate its public purpose”²⁶⁵ The MTA had undertaken an increase in the number of lanes in the southernmost part of the interstate, but, after a memo from the state attorney general, desisted.²⁶⁶ In refuting the MTA’s argument for broad construction of its statutory language, the court drew parallels between this case and *First National Bank of Boston*.²⁶⁷ In *First National Bank of Boston*, the court focused on “the effect of a subsequent legislative enactment on the pre-existing contract between the Authority, its bondholders, and their trustees,” an action that was subordinate to the Enabling Act.²⁶⁸ Here, the MTA must also “find warrant in the language of the Enabling Act.”²⁶⁹ The court reasoned that lane-building was not “an aspect of maintaining, repairing, and operating the Turnpike” insofar as the use of toll revenues was concerned because the Act cannot be construed as ordaining work of

261. *Id.* at 344.

262. *Id.* at 345.

263. Brennan was the state attorney general at the time. *Gov. Joseph Edward Brennan*, NATIONAL GOVERNORS ASSOCIATION, <https://www.nga.org/governor/joseph-edward-brennan/> (last visited Oct. 5, 2023).

264. *Maine Tpk. Auth. v. Brennan*, 342 A.2d 719, 722–23 (Me. 1975).

265. *Id.* at 723.

266. *Id.* at 722.

267. *Id.* at 723.

268. *Id.* at 724.

269. *Id.* at 725.

“such a magnitude and duration” and that capital expenditures should be financed by bonds and not the diversion of toll monies.²⁷⁰

This case is significant because the court goes out of its way to rebuke the MTA and address the weaknesses of even its secondary and tertiary arguments.²⁷¹ The court bluntly notes “the legislature . . . intended the Turnpike to be built to a conclusion” and that it is a “finite undertaking.”²⁷² Regarding its construction of additional lanes, the court notes that “the legislature did not intend for the Authority to build the Turnpike once and then, some years after construction, on asserted grounds of need, to go back and double the roadway, in effect building the Turnpike again.”²⁷³ The court excoriates the MTA for using the term “reconstruct” to justify the additional lanes.²⁷⁴ Though toll monies may indeed be used to reconstruct the turnpike, here, the MTA is neither reconstructing the existing turnpike nor would it be using tolls since “[t]he fact that there are unexpended toll revenues does not mean that the restrictions on the uses of toll revenues may be avoided in favor of more generalized powers of expenditure.”²⁷⁵ The court goes on to soften its reasoning, still in patronizing tones, by remarking “the Authority cries wolf when it fears that its power to reconstruct will be confined to an atom for atom replacement of existing assets.”²⁷⁶ The court allows that guardrails and medians are maintenance and that augmentation can constitute reconstruction, but does not embrace the sweeping public safety and national defense terms used in *First National Bank of Boston*.²⁷⁷

As noted above, adding lanes to the turnpike was a politically arduous process for the MTA.²⁷⁸ However, the MTA gets what it wants, and it completed its vision thirty years later.²⁷⁹ The MTA is adding more lanes, in a separate project, as of 2023.²⁸⁰

270. Brennan, 342 A.2d at 725.

271. *See id.* at 726–29.

272. *Id.* at 727.

273. *Id.*

274. *See id.* at 727–729.

275. *Id.* at 728.

276. Brennan, 342 A.2d at 729.

277. *Compare id.* at 727, with *First Nat. Bank of Boston*, 136 A.2d at 712–13.

278. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 12 (noting that Mainers disapproved of a ballot measure in 1991 that would have allowed the MTA to expand lanes on the turnpike).

279. *Id.* at 12–13 (noting that the MTA completed its widening project for the southern-most portion of the turnpike in 2004).

280. *Id.* at 15.

IV. THE FUTURE: DISMANTLING, REPLACING, AND RE-ENVISIONING PUBLIC AUTHORITIES

Resistance, or at least hesitancy, regarding public authorities is not new.²⁸¹ Nonetheless, public authorities have proven themselves to be incredibly effective²⁸² and even popular in spite of protestations of their end results.²⁸³ However, as the twentieth century finally begins to wane,²⁸⁴ public authorities, which have a rich history that reached its peak in the twentieth century, have outlived their usefulness.

A. *Why Replace Authorities*

1. Private Entities Are Not More Efficient Than Public Ones

Politicians base entire campaigns on the evils of public governance and espouse the alleged virtues of private industry.²⁸⁵ Many a politician has clung to their private sector experience as a shibboleth in the face of accusations of actually being a politician.²⁸⁶ Indeed, the quasi-corporate structure of a public authority likely contributes to its general

281. See, e.g., Gerwig, *supra* note 2, at 612–16 (appraising the merits of public authorities); Charles L. Dearing, *Turnpike Authorities in the United States*, 26 L. & CONTEMP. PROBS. 741, 750–53 (Fall 1961) (addressing basic problems with tolling and turnpike authorities); see generally N.Y. State Bar Ass’n, *Public Authority Reform*, 11 GOV’T L. & POL’Y J. 2 (Fall 2009) (critiquing broadly public authorities in New York State).

282. *Our Bridges*, *supra* note 3.

283. See, e.g., Juan Cameron, *Whose Authority?*, THE ATLANTIC (Aug. 1959), <https://www.theatlantic.com/magazine/archive/1959/08/whose-authority/640428/> (noting that even though turnpikes might be popular, many leave the public in the dark regarding their operations).

284. While, as of the writing of this paper, we are twenty-four years removed from the twentieth century, the current President, Joe Biden, was born closer to Abraham Lincoln’s second inauguration than his own inauguration. Former President Jimmy Carter and former Secretary of State Henry Kissinger are still living—memorials to a never-ending era of governance. However, no human can escape the eternal march of time, and, slowly, we will have leaders with twenty-first-century approaches to governance, whatever that may come to mean.

285. See, e.g., David Wright, *Ohio GOP Businessman Moreno Files for Senate Bid*, CNN (April 11, 2023, 10:24 AM), <https://www.cnn.com/2023/04/11/politics/bernie-moreno-ohio-senate-race/index.html>.

286. See, e.g., *id.* (noting that it is Moreno’s second time running for Senate in as many years).

popularity.²⁸⁷ Nonetheless, “public authorities borrow more money than all of the cities and states combined, and in some states, such as New York, they issue over 90% of the public debt.”²⁸⁸ As private banks seek their seemingly annual government bailouts²⁸⁹ and recession, or the threat thereof, looms large decennially,²⁹⁰ the private sector often acts with impunity in spite of “mismanagement and malfeasance . . . attributable to subprime loans, poor oversight, deregulation, greed, Ponzi schemes or a host of other ailments.”²⁹¹ In spite of the veneer of efficacy and efficiency in the free market, private industry relies on the public sector to the tune of trillions of dollars.²⁹² A question arises: “[O]n what grounds do public authorities rely to show that they are achieving . . . justifiable independence?”²⁹³

Indeed, as seen above, public authorities reap the benefits of sovereign immunity and extreme judicial deference as state actors but are not privy to accountability inherent in democratic governance.²⁹⁴ Because public authorities rely so heavily on public resources, privileges, and immunities, accrue massive amounts of debt, and often create quotidian utilities of public necessity, their power should transfer to the government for adequate oversight and management.

287. *Compare Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> (finding that only 22% of people in the United States trust the federal government), with Andrew Ross Sorkin et al., *Larry Fink Defends Stakeholder Capitalism*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/business/dealbook/fink-blackrock-woke.html> (reporting that about half of people in the United States trust CEOs on the whole).

288. Jonathan D. Rosenbloom, *Is the Private Sector Really a Model of Efficiency and Independence?: Re-Evaluating the Use of Public Authorities During Recessionary Times*, 11 GOV'T L. & POL'Y J. 6, 6 (Fall 2009).

289. See, e.g., Roger Lowenstein, *The Silicon Valley Bank Rescue Just Changed Capitalism*, N.Y. TIMES (Mar. 15, 2023), <https://www.nytimes.com/2023/03/15/opinion/silicon-valley-bank-rescue-glass-steagall-act.html>.

290. See, e.g., Santul Nerkar & Amelia Thomson-DeVeaux, *Are We Headed for a Recession or Not?*, FIVETHIRTYEIGHT (Feb. 28, 2023, 6:00 AM), <https://fivethirtyeight.com/features/are-we-headed-for-a-recession-or-not/>.

291. Rosenbloom, *supra* note 288, at 8.

292. *Id.* (revealing private reliance on government during the 2008 financial crisis).

293. *Id.*

294. See, e.g., Judson Vickers, *Interpreting the Public Authorities Accountability Act of 2005*, 11 GOV'T L. & POL'Y J. 41 (Fall 2009) (addressing the fact that public authorities are exempt from the Sarbanes-Oxley Act that was passed in the wake of the Enron scandal).

2. The Single-Minded Focus of Public Authorities Obscures Their Dangers

Public authorities have one *raison d'être*: to create and maintain the works laid out under their enabling acts.²⁹⁵ In order to achieve these ends, they accrue debt and can exist until such debt is paid.²⁹⁶ In the case of the MTA, it seems to find endless reasons to expand and improve that meet the criteria laid out in *Brennan*.²⁹⁷ As carbon emissions reach critical levels,²⁹⁸ redoing, expanding, and generally improving a massive road does nothing to reduce carbon emissions, improve air quality, or even improve traffic.²⁹⁹ Further, single-occupancy vehicle use in the United States has increased generally and is above the U.S. average in northern New England.³⁰⁰ Continuously funneling money into the interstate does little to persuade the public to try public transportation alternatives; instead, that money might be better spent on incentives and public transportation infrastructure.³⁰¹

3. Expanding Lanes Is an Ineffective Traffic Mitigator

Robert Moses himself, decades ago, knew the ineffectiveness expanding lanes on an interstate.³⁰² The science was out by the 1960s as engineers realized that “the hoped-for benefits from highway expansion tend to be short-lived and do not provide lasting relief to traffic congestion” because “over time and without any other offsetting deterrent, rush-hour traffic speeds tend to revert to their pre-expansion

295. See *supra* Section II.B.

296. See *id.* Authorities have this structure in most instances, though occasionally some exist beyond the payoff of their debt. See P. & S.L. 1997, *supra* note 146 (enabling the Kennebec Regional Development Authority to exist beyond its debt payoff and dissolve only by a vote of municipalities).

297. See Piper, *supra* note 200.

298. Brad Plummer, *Carbon Dioxide Emissions Increased in 2022 as Crises Roiled Energy Markets*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/climate/carbon-dioxide-emissions-global-warming.html> (chronicling the dire need to meet emission reduction goals).

299. *Why Building More Roads Has Environmental Effect and Won't Ease Gridlock in the Long Run*, CBC NEWS (Dec. 9, 2021, 2:18 PM), <https://www.cbc.ca/news/science/what-on-earth-highways-environment-1.6279735>.

300. Watts & Battista, *supra* note 186.

301. *Id.*

302. CARO, *supra* note 28, at 515–16.

levels.”³⁰³ This “Fundamental Law of Road Congestion” states “that the elasticity of vehicle miles traveled with respect to lane mileage is equal to one, implying that driving increases in exact proportion to highway capacity additions.”³⁰⁴ Lane expansion, and the very public construction that naturally goes along with it, in addition to the implementation of these lanes, shows action and, on its face, seems like an intuitive solution to congestion. However, put simply,

wider highways increase traffic speeds and reduce the time cost of driving, thereby inducing additional vehicle travel. In the short run, when residential and employment locations are fixed, faster peak period highway speeds attract drivers from alternate routes, modes, and times of day. Then, in the long-run, faster speeds encourage additional social and economic behavior in areas made more accessible by the new highway capacity, which further increases traffic volumes.³⁰⁵

Thus, public authorities often blindly overlook the science and best practices of their particular utility and instead focus on outcomes frequently counter to their purpose but imbued with the veneer of accomplishment.

B. Replace the Maine Turnpike Authority with the Maine Department of Transportation (MDOT)

Regarding the case study presented here, replacing the MTA would be easy on its face. The MTA website even states, almost tauntingly, that

[i]f the state legislature prefers to turn the Turnpike over to MaineDOT and have tolls removed, the Turnpike would then be supported by taxes. That first would require the state to pay \$380 million in outstanding Turnpike bonds. First, by asking voters to approve a bond issue borrowing the money to pay off existing Turnpike debt rather than simply assuming it. Subsequently, the state would likely need more federal and state tax revenue to

303. Kent Hymel, *If You Build It, They Will Drive: Measuring Induced Demand for Vehicle Travel in Urban Areas*, 76 *TRANSP. POL’Y* 57, 57 (2018); see also Martin J. H. Mogridge, *The Self-Defeating Nature of Urban Road Capacity Policy*, 4 *TRANSP. POL’Y* 5 (1997) (explaining the science and math in depth). Essentially, the feeling that when one is procrastinating and the work ends up taking the exact amount of time you devote to it is a real scientific concept and applies to lane expansion, meaning that the amount of lanes you have are the exact amount of lanes that will be congested. *Id.* at 5.

304. Hymel, *supra* note 303, at 57.

305. *Id.*

continue capital improvements and maintenance to prevent the highway from falling into disrepair.³⁰⁶

This dare ignores the fact that many public authorities, if not the MTA, have their bonds backed by taxes anyway.³⁰⁷ Couching the MTA's subsumption by MDOT elides the fact that it would not have to get rid of the tolls and, in fact, could continue to raise revenue much like the MTA does now.³⁰⁸ Next, the \$380 million in outstanding bonds would only have to be paid off immediately if the state were to dissolve the MTA immediately. This solution would not be sensible; instead, the state could hasten the payment of the MTA's bonds over time. Right now, the MTA is set to pay off its debts and dissolve in 2042, after nearly a century of existence.³⁰⁹ Paying off the MTA's debts and taking it over in ten years would allow the MTA to finish all outstanding projects and assure bondholders and the public with a smooth transition.³¹⁰

The benefits of having MDOT take over the turnpike are myriad. The MTA rarely relies on consideration of the public;³¹¹ the MDOT has more public oversight.³¹² The MTA has a single-minded focus, to build and maintain the turnpike, which was often at odds with local and state planning;³¹³ the MDOT is inherently more collaborative.³¹⁴ The MTA has

306. MAINE TURNPIKE AUTHORITY, *supra* note 170.

307. *See supra* Section II.B.

308. *See* Corry Kendall, *State Tolling Practices: The Future of Highway Finance or an Unconstitutional State Practice?*, 38 *TRANSP. L.J.* 33, 62 (2011) (arguing that most state tolling practices are constitutional unless, for example, tolls burden out of state drivers in a way that violates the dormant commerce clause and that the Supreme Court should grant cert and clarify a circuit split regarding the analytical approach).

309. MAINE TURNPIKE AUTHORITY, *supra* note 170.

310. When he was governor, Paul LePage floated the idea of dismantling the MTA. Scott Thistle, *LePage Envisions Eliminating Most Highway Tolls with Merger of Transportation Agencies*, *PORTLAND PRESS HERALD* (Mar. 23, 2017), <https://www.pressherald.com/2017/03/22/lepage-foresees-merging-turnpike-authority-and-department-of-transportation/>. Notably, this comment's proposals are more nuanced and would pass constitutional muster, since tolling only out-of-state drivers would not. Kendall, *supra* note 308 at 58. Further, this idea seems to be merely a combative whim for the governor rather than grounded in any human-centric policy. Thistle, *supra* note 311. As such, his approach would likely not ensure a smooth transition for bondholders.

311. *See, e.g.*, Peter McGuire, *Why Build Tollbooths if the Maine Turnpike Plans a Future Without Cash?*, *PORTLAND PRESS HERALD* (July 29, 2022), <https://www.pressherald.com/2022/07/29/why-build-new-tollbooths-if-the-maine-turnpike-plans-a-future-without-cash/> (reporting critically that the MTA spent nearly a million dollars on two new tollbooths while simultaneously promoting an all-electronic future).

312. For example, MDOT is subject to Maine's Administrative Procedure Act.

313. *See, e.g.*, Graham, *supra* note 211.

a single-minded focus on creating and maintaining the interstate;³¹⁵ the MDOT has myriad purposes and can provide a more holistic approach to road construction³¹⁶ that can include public transportation³¹⁷ (such as a train in the grass median of the interstate).³¹⁸ The MTA is inherently driven to accrue debt;³¹⁹ the MDOT fully uses public funds and must be fiscally responsible.³²⁰ The MTA shares its toll revenue with MDOT;³²¹ MDOT could have all the toll revenue and spread it equitably throughout all state roadways. MTA in its current form, only maintains I-95 from Kittery to Augusta; the MDOT maintains I-95 north of Augusta and seems to handle this responsibility well enough that few Mainers even realize when the authority of the MTA ends and the authority of MDOT begins.³²²

C. *The Potential for Public Authorities of Another Kind*

In considering the future of public authorities, recognizing their effectiveness could inspire creative solutions to new problems. The Maine State Legislature recently created³²³ the Maine Redevelopment and Land Bank Authority for “[t]he purpose of . . . assist[ing] municipalities and other entities in this State in the redevelopment of

314. For example, their website promotes public involvement and includes links to their current Work Plans. MAINEDOT, <https://www.maine.gov/mdot/> (last visited Sept. 30, 2023).

315. *Supra* at Section II.B.

316. *See, e.g.,* Devan Eaton & Ben Walz, *How MaineDot Replaced an Interstate Bridge In 60 Hours*, CIVIL & STRUCTURAL ENGINEER (Nov. 1, 2022), <https://csengineermag.com/how-mainedot-replaced-an-interstate-bridge-in-60-hours/>. Notably, the MTA does not have jurisdiction of I-295.

317. *MaineDOT Public Transit*, MAINEDOT, <https://www.maine.gov/mdot/transit/> (last visited Sept. 30, 2023).

318. This idea comes from the author’s imagination.

319. *Supra* Section II.B.

320. *See, e.g.,* FED. HIGHWAY ADMIN., STEWARDSHIP AND OVERSIGHT AGREEMENT ON PROJECT ASSUMPTION AND PROGRAM OVERSIGHT BY AND BETWEEN FEDERAL HIGHWAY ADMINISTRATION, MAINE DIVISION AND THE STATE OF MAINE DEPARTMENT OF TRANSPORTATION (2015), <https://www.fhwa.dot.gov/federalaid/stewardship/agreements/me.pdf>.

321. MAINE TURNPIKE AUTHORITY, *supra* note 170, at 12.

322. This statement is purely anecdotal based on the author’s own personal realization and supported by conversations he has had discussing this comment.

323. *Summary of LD 1694*, STATE OF MAINE LEGISLATURE, <https://www.mainelegislature.org/LawMakerWeb/summary.asp?ID=280080793> (last visited Sept. 30, 2023) (noting that the bill became law on April 26, 2022 without the signature of the governor).

properties identified as eligible under section 5157, subsection 1 in order to return those properties to productive use.”³²⁴ Eligible properties under section 5157 include “[p]roperty that the redevelopment authority has determined is abandoned, . . . blighted . . . [and/or] functionally obsolete due to a substantial loss in value resulting from factors such as overcapacity, changes in technology, deficiencies or superadequacies.”³²⁵ This land bank authority is designed to reinvigorate communities across the state.³²⁶ While its effectiveness remains to be seen, the potential for success offers an exciting path forward for public authorities to be more rooted in a broader, comprehensive approach to supporting the public it was designed to serve. Nonetheless, many various safeguards should be considered, including ones that limit its perpetuity.

CONCLUSION

The history of the public authority is one rooted in the spirit of United States’ governance. It has elements of laissez-faire private industry and civic-minded communitarianism. Public authorities were a creative solution to implement public works during the twentieth century because they subverted debt limits, wielded their immense power flexibly, and produced visible results. However, public authorities’ power is rarely tempered by the judiciary, and they have become an outmoded approach to many intractable problems facing our nation, paramount of which is the destructive nature of car culture. For example, the MTA accrues debt by expanding lanes, an ineffective traffic mitigator. Public authorities, particularly turnpike authorities, should be taken over by the appropriate government agencies in order to be held accountable and ground their decision-making in science. The future of public authorities might include solutions to climate change, but a new Robert Moses should be unwelcome.

324. ME. REV. STAT. tit. 30-A, § 5153 (2022).

325. *Id.* § 5157.

326. *See id.* § 5153 (stating the purpose of the Maine Redevelopment Land Bank Authority).