JUDICIAL ENFORCEMENT OF COMPETITION IN REGULATED INDUSTRIES

FORREST N. KRUTTER*

INTRODUCTION

The Sherman Antitrust Act of 1890[1] rests on the premise that free and unfettered competition is in the nation's best interest. The Act to Regulate Commerce of 1887[2] rests on the premise that the forces of the free market must be regulated in the public interest. Since the passage of these landmark statutes there has been a clash between the ideas of free competition, fostered by the antitrust laws, and the regulation of various industries, under the aegis of various state and federal agencies. Since the birth of the Interstate Commerce Commission ("ICC") in 1887, Congress has established numerous federal agencies to regulate other industries.[3] Each of these agencies was designed to regulate single industries (as opposed to the problem-oriented agencies, such as the Environmental Protection Agency, which have been created in recent years).[4] The justification for many of these agencies was that, in

* S.B. in Economics and S.M. in Civil Engineering, 1976; Massachusetts Institute of Technology; J.D., 1978, Harvard University. Attorney, Union Pacific Railroad Company.

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1. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)).

2. Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887). In this paper the Act to Regulate Commerce refers to the statute as it was enacted on February 4, 1887 and the Interstate Commerce Act refers to the successively amended versions of the Act to Regulate Commerce. The Interstate Commerce Act is currently codified at title 49 of the United States Code. Act to Revise, Codify, and Enact without Substantive Change the Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978), *reprinted in* U.S. CODE CONG. & AD. NEWS Nov., 1978.

3. *See, e.g.*, 12 U.S.C. §§ 241-262 (1976) (Board of Governors of the Federal Reserve System); 46 U.S.C. §§ 1101-1126 (1976) (Federal Maritime Commission); 47 U.S.C. §§ 9-744 (1976) (Federal Communications Commission); 49 U.S.C. §§ 1301-1542 (1976) (Civil Aeronautics Board); 42 U.S.C.A. §§ 7171-7177 (West Supp. 1978) (Federal Energy Regulatory Commission); 42 U.S.C. §§ 5841-5849 (1976) (Nuclear Regulatory Commission).

4. *See, e.g.*, Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 Compilation), *reprinted in* 5 U.S.C. app., at 827-32 (1976) *and in* 84 Stat. 2086 (1970) (Environmental Protection Agency).

some way, the free enterprise system did not work to insure optimal conditions in the industry.[5] These problems could be traced to a natural monopoly,[6] excessive competition,[7] lack of adequate information to the public,[8] a scarce resource which should not be allocated by the free market,[9] or a sense of paternalism.[10]

Recently, there has been a growing interest in substituting competition for regulation. Various federal regulatory agencies have acted to reduce the extent of regulation and encourage competition. The deregulation of the airline industry[11] has resulted in greatly discounted fares for many travelers and in a large increase in both business and profits for the airlines. Congress is experimenting with partial natural gas price deregulation[12] as a partial solution to the energy crisis. The ICC has begun to loosen its regulatory grip on the motor carrier and railroad industry.[13] The Fed-

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5. Shwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 436-37 (1954).

6. Moulton, *Monopoly and Competition Issues Facing the Communications Industries*, 13 ANTITRUST BULL. 889 (1968) (telephone industry regulated as a natural monopoly). For a discussion of the various reasons for regulation, see Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 552-60 (1979).

7. STAFF OF THE HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS, H.R. DOC. NO. 805, 63d Cong., 2d Sess. 416 (1914) (end to rate agreements between ocean carriers would result in cutthroat competition).

8. Wheat, *The Disclosure Policy Study of the SEC*, 24 BUS. LAW. 33 (1968) (disclosure is the keystone of federal securities laws).

9. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (primary purpose of federal regulation of radio broadcasting was the allocation of scarce radio frequencies).

10. American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968) (motorcycle helmet law designated solely to protect individual motorist violates Michigan Constitution). *See generally* Note, *Constitutional Law—Police Power—Michigan Statute Requiring Motorcyclists to Wear Protective Helmets Held Unconstitutional*, 67 MICH. L. REV. 360 (1968).

11. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (to be codified in 49 U.S.C. §§ 1301-1542); Federal Aviation Act of 1958 Amendments, Pub. L. No. 95-163, § 17, 91 Stat. 1278 (1977).

12. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978).

13. In its notice of a proposed policy statement in Ex Parte MC-121, Policy Statement on Motor Carrier Regulation, the Interstate Commerce Commission stated:

> Past regulatory practice has emphasized the need to protect existing motor carriers against excessive competition and against the assumption of excessive debt in order to provide an environment in which a young industry would grow and provide needed public services. In light of the maturity of the motor carrier industry, and of changing economic conditions generally, the Commission has concluded that more weight should be given to the benefits of healthy competition and less emphasis should be placed on protection in carrying out its regulatory responsibilities in the motor carrier area.

43 Fed. Reg. 56,978 (1978).

In its order in MC-121 the Commission stated that it would "make a positive

eral Communications Commission ("FCC") has been working for ten years to bring some competition into the telephone industry[14] and is now acting to extensively deregulate the cable television industry.[15] A major ingredient in President Carter's program to combat inflation is the removal of unnecessary regulation. In his address to the nation of October 24, 1978, the President explained that: "We are also cutting away the regulatory thicket that has grown up around us and giving our competitive free enterprise system a chance to grow up in its place."[16] Over the course of the last decade, both inside and outside the federal government, there has been a growing conviction that competition is often more successful than detailed regulation in meeting the goals for which the various regulatory agencies were established.[17] Increasingly, critics of the current regulatory system urge greater competition rather than more or better regulation.

Courts have been forced to deal with the clash of regulatory and competitive goals in two situations: (1) in an antitrust suit challenging an action of a regulated firm, and (2) in reviewing agency action which has an anticompetitive effect. The use of the

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effort to increase the expertise of [the] staff in antitrust and related matters." Ex Parte MC-121, unpublished order served November 30, 1978, at 11. In the area of railroad deregulation of the Commission recently took a major step forward by exempting from regulation the transportation of fresh fruits and vegetables by rail. This order will give the railroads an opportunity to compete with the unregulated truckers, which currently dominate the market, on an equal footing. In addition, it will give all interested parties a chance to evaluate railroad deregulation before economy-wide deregulation is considered. Order of the Interstate Commerce Commission in Ex Parte 346(1), 44 Fed. Reg. 18,229 (1979).

14. The FCC's effort to encourage competition is generally traced to the 1968 *Carterfone* decision. This decision held that a telephone company could not refuse to interconnect with a mobile telephone provided by the customer. Carterfone Device, 13 F.C.C.2d 420, 423-24, *aff'd*, 14 F.C.C.2d 571 (1968). *See generally* Report by the Federal Communications Commission on Domestic Telecommunications Policies (1976); Note, *Competition in the Telephone Equipment Industry: Beyond Telerent*, 86 YALE L.J. 538 (1977).

15. Cable Television Certificate of Compliance Process, 43 Fed. Reg. 49,003 (1978).

16. 14 WEEKLY COMP. PRES. DOC. 1829, 1842 (1978). President Carter noted that:

> Of all our weapons against inflation, competition, prices and wages go up, even when demand is going down. We must therefore work to allow more competition whenever possible so that powerful groups—government, business, labor—must think twice before abusing their economic power. We will redouble our efforts to put competition back into the American free enterprise system.

Id. Accord, Houthakker, *Economic Aspects of Deregulation*, in DEREGULATING AMERICAN INDUSTRY 1 (D. Martin & W. Schwartz eds. 1977).

17. *See, e.g.*, A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 328 (1971); PROMOTING COMPETITION IN REGULATED MARKETS (A. Phillips ed. 1975); Adams, *The Role of Competition in the Regulated Industries*, AM. ECON. REV. 527 (1958); MacAvoy, *The Outlook for Regulation*, 45 ANTITRUST L.J. 186 (1976); Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

antitrust laws as a supplement to regulatory regimes is not a recent development. As early as 1897 the Supreme Court held that the mere existence of a regulatory agency with jurisdiction over the industry did not displace the antitrust laws.[18] As regulatory agencies have become more prevalent, the Supreme Court has been forced to reconcile these two bodies of law. The Court has read into the regulatory statutes a requirement that competition be considered by regulatory agencies. Thus, in *McLean Trucking Co. v. United States*,[19] the Supreme Court explained that, while the ICC is not bound by antitrust standards in considering merger applications, it must "estimate the scope and appraise the effects of the curtailment of competition."[20]

Congress has also consistently recognized the importance of competition in regulatory statutes themselves. In the Panama Canal Act of 1912,[21] Congress prohibited railroads from controlling water carriers unless the ICC found that competition was not reduced. More recently, Congress has instructed regulators to consider the advice of the Attorney General and Federal Trade Commission ("FTC") on the anticompetitive effects of regulatory actions.[22]

This article will examine the balance that has been struck between the ideas of free competition and government regulation. Since regulation was established as an answer to different problems, its nature and extent varied widely in different industries. Likewise, the extent to which regulation displaced competition in different regulated industries varied widely.

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18. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312-27 (1897). In *Trans-Missouri Freight Ass'n*, Congress had not explicitly exempted the activity from the antitrust laws. *Id.* at 312-13. In 1948, Congress provided antitrust immunity for railroad rate bureaus whose organization had been approved by the Interstate Commerce Commission. Carriers' Rate Bureau (Reed-Bullwinkle) Act, ch. 491, 62 Stat. 472 (1948) (codified at 49 U.S.C. § 5(b) (1976)).

19. 321 U.S. 67 (1944). In *McLean*, the Commission had authorized a merger between two motor carriers pursuant to § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 11344 (as recodified in 1978), *see* note 2 *supra*. The Act specifically states that a carrier or other person participating in a Commission-authorized merger is exempt from the antitrust laws to the extent required to carry out the transaction. 49 U.S.C. § 11341 (as recodified in 1978), *see* note 2 *supra*. In approving the merger the Court was required to find that it would not unduly restrain competition. The Court upheld the Commission's order since the Commission had considered the policy of the antitrust laws. 321 U.S. at 69, 87-88.

20. 321 U.S. at 87.

21. 49 U.S.C. § 11321 (as recodified in 1978). *See* note 2 *supra*.

22. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(b), 90 Stat. 35 (1976); 33 U.S.C. § 1506 (1976) (no license to be given for deepwater port without antitrust review); 30 U.S.C.A. § 208-2 (West Supp. 1978) (Attorney General shall report annually on whether antitrust laws are effective in preserving and enhancing competition in the coal industry).

This article will concentrate on the ways in which the antitrust laws and various regulatory statutes have been accommodated. The experience of different agencies will be used to illustrate the interplay of regulation and competition. Fundamental to the ideas presented here is the notion that this interplay has been dynamic, resulting in a gradual change in the way Congress, the courts, and the agencies themselves view competition in those industries which Congress has chosen to regulate.

In the following chapter this article will explore the economic underpinnings for the relationship between competition and regulation. Economic regulation of an industry is the exception in a free enterprise economy. It is a reaction to a market imperfection, perceived or real, that adversely impacts on some portion of the society.

In the second chapter this article will explore the process by which the regulatory function of assuring just and reasonable rates in certain industries passed from common law court to regulatory agency. As the regulatory responsibilities of the courts were transferred to agencies, courts could refuse to accept the arguments of unregulated industries that competition was undesirable. Rather, they could proceed on the theory that competition was the best method for achieving just and reasonable rates. The courts, however, have not foresworn their general policy of encouraging competition even in regulated industries. Rather, as part of the regulatory process in reviewing agency action, they have forced regulators to consider competition as an essential ingredient of the public interest. In industries with substantial monopoly power the result may be that an expert agency can bring greater competition to an industry than any court could under the antitrust laws.

In the third chapter this article will explore the ways in which the Supreme Court has dealt with regulated industries when their practices were attacked as violations of the antitrust laws. The chapter will discuss the ways in which courts have analyzed a regulatory scheme to determine whether an action of a regulated industry must be exempted from the antitrust laws. In some cases Congress has explicitly considered the problem when it enacted the regulatory statute. In other cases courts have tried to resolve a clash between the antitrust laws and the regulatory statute; and Congress, disagreeing with the judicial resolution, has provided a statutory exemption. The chapter concludes with an exploration of the impact of the antitrust laws on certain activities of regulated firms including price agreements between competitors, mergers, refusals to deal, and exclusionary practices.

I. COMPETITION AND REGULATION IN ECONOMIC THEORY

In order to understand the role of competition in regulated areas of the economy, it is important to consider the microeconomic theories which lie behind the analysis. The basic theorem of the believer in competition is that:

> The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle that it alone, and without any assistance, is not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred unpertinent obstructions with which the folly of human laws too often encumbers its operations. . . .[23]

This laissez-faire position is substantially valid if one assumes a perfectly competitive marketplace. To the economist, perfect competition requires that no person can change the price of a good by his own actions. In such an economy, all firms are sufficiently small that they cannot raise prices by withholding products or reduce prices by flooding the market.[24] If all markets in an economy are perfectly competitive, then microeconomic theory concludes that goods in the economy will be allocated in an efficient manner. In such an optimal economy no consumer can be made better off without making another consumer worse off. Likewise, no firm can produce more without forcing another firm to produce less.[25]

Markets in our modern economy rarely approach the perfect competition model. In some markets, monopolists or oligopolists can affect the price of their goods by their production decisions. By limiting production, a monopolist limits the supply of his product, thereby raising the price of his goods and maximizing profits. The results of monopoly are higher prices and fewer goods.

The natural monopoly is the first of two primary situations in which regulation is likely to occur. Natural monopolies result when unit costs of a good drop as production expands.[26] For example, an electric company is generally considered to have a natural monopoly because of the need to set up a distribution system. The construction of a duplicate distribution grid would be wasteful.

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23. A. SMITH, INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 422 (Modern Library ed. by E. Canaan 1937).

24. In order to have perfect competition, there must be a large number of firms none of which is very large in comparison with the market. In the perfectly competitive world, entry is assumed to be costless so that new firms can enter if the firms already in the market are making a substantial profit. W. NICHOLSON, MICROECONOMIC THEORY 260 (1972).

25. *Id.* at 442-47.

26. Posner, *supra* note 17.

The same logic has been applied to telephone and natural gas pipeline companies.[27]

Regulatory agencies are established to prevent such monopolists from obtaining excessive profits.[28] In order to accomplish this preventive goal, the regulator will use a cost-of-service rate-making formula. This formula is designed to provide the monopolist with sufficient revenues to cover costs which are incurred under "honest, economical, and efficient management" plus an adequate return on prudent investment.[29] As can readily be seen, the complexities facing the regulator who has to determine what costs should be recovered,[30] what rate of return is adequate,[31] and what investments are prudent are quite difficult.[32] They are com-

27. Natural monopoly would only exist if unit costs decreased over the entire range of market production. Kenneth Jones lists as natural monopolies generally subject to regulation: water supply, intercity railroads, petroleum pipelines, light and power industries, urban mass transit, and telecommunications. W. K. JONES, CASES & MATERIALS ON REGULATED INDUSTRIES 7-25 (1st ed. 1967). This list is subject to serious question.

Electric companies, telephone companies, and natural gas companies are regulated by both the federal and state governments. 16 U.S.C. §§ 824-828 (1976) (regulation of electric utilities engaged in interstate commerce); 47 U.S.C. §§ 201-223 (1976) (common carriers by wire or radio in interstate or foreign commerce); 15 U.S.C. §§ 717-717w (1976) (transportation and sale of natural gas in interstate commerce); CAL. PUB. UTIL. CODE § 216 (West 1975); COLO. REV. STAT. § 40-1-103 (1974); IOWA CODE §§ 476.1, 479.1 (Supp. 1978-79); KAN. STAT. § 66-104 (Supp. 1978); MO. REV. STAT. § 386.020 (Supp. 1979); MONT. REV. CODES ANN. § 70-103 (1971); NEB. REV. STAT. § 75-109 (1976); NEV. REV. STAT. § 704.020 (1973); OR. REV. STAT. § 757.005 (1977); UTAH CODE ANN. § 54-2-1 (1953); WASH. REV. CODE § 80.01.040 (West 1962); WYO. STAT. § 37-1-101 (1977) (definition of regulated public utilities).

28. Smyth v. Ames, 169 U.S. 466, 544-46 (1898). *See, e.g.*, Transportation Act of 1920, ch. 91, § 422, 41 Stat. 456 (1920) (repealed 1933) (recapture of excess rates earned by railroads).

29. 49 U.S.C. § 15(a)(2) (1976). In FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944), the Court explained:

> The rate-making process under the [Federal Power] Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests . . . . [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Id.

30. West Ohio Gas Co. v. Public Util. Comm'n, 294 U.S. 63, 72 (1935); North Dakota Pub. Serv. Comm'n v. Montana-Dakota Util. Co., 100 N.W.2d 140 (N.D. 1959); Latourneau v. Citizens Util. Co., 125 Vt. 38, 209 A.2d 307 (1965).

31. New England Tel. & Tel. Co. v. Department of Pub. Util., 327 Mass. 81, 97 N.E.2d 509 (1951); State v. New Jersey Bell Tel. Co., 30 N.J. 16, 152 A.2d 35 (1959).

32. Net Investment—Railroad Rate Base & Rate of Return, 345 I.C.C. 1492, 1519-22 (1976).

pounded by the need to allocate joint costs[33] among different classes of consumers, such as businesses and residences.[34] In many cases joint costs must also be allocated among different states as well as between interstate services regulated by the federal government and intrastate services regulated by state governments.[35] Some economists have gone so far as to argue that such regulation of monopolists is so inexact and the results so poor that the economy would be better off if the monopolist were simply allowed to earn his monopoly profit.[36]

In most natural monopoly situations, however, the consensus remains that some regulation is required. In a natural monopoly, the nature of production is such that cost savings result from having one producer as opposed to numerous producers in a competitive market. If competition is not feasible in a market, the antitrust laws will not serve to regulate the industry since these laws are designed to preserve or restore competition.[37] The problem that remains is to determine when a natural monopoly exists.

The second situation in which regulation often appears is in a market prone to "excessive competition." Here regulation is designed to prevent unfair or predatory pricing;[38] to promote some

33. The term joint costs refers to those costs which arise from the production of two or more products which are the result of the same production process. Thus, the cost of producing steam and electricity in an electric power plant is a joint cost. It is impossible to allocate production costs between these two products.

34. Mississippi River Fuel Corp. v. FPC, 163 F.2d 433 (D.C. Cir. 1947); Atlantic Seaboard Corp., 11 F.P.C. 43 (1952).

35. *See* Colorado-Wyoming Gas Co. v. FPC, 324 U.S. 626 (1945); Smyth v. Ames, 169 U.S. 466 (1898). *See also* J.C. Spychalski, *The NARUC: Contributor to Effective Regulation? A Retrospective and Prospective Critique*, in A CRITIQUE OF ADMINISTRATIVE REGULATION OF PUBLIC UTILITIES 89, 106-12 (W. Samuels & H. Trebing eds. 1972).

36. Posner, *supra* note 17, at 549, 618-25. Some studies indicate that the impact of allocative inefficiency on the nation's productivity may be slight. W. BAUMOL, WELFARE ECONOMICS AND THE THEORY OF THE STATE 101 (2d ed. 1965); Leibenstein, *Allocative Efficiency v. "X-Efficiency"*, 56 AM. ECON. REV. 392-97 (1966). *But see* Kamerschen, *An Estimation of the "Welfare Losses" from Monopoly in the American Economy*, 4 W. ECON. J. 221 (1966).

37. In Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958), the Court explained that

> [t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id.

38. Proponents of the Act to Regulate Commerce argued that there was too much competition which resulted in undesirable rate wars and destructive competition. 1 ICC ANN. REP. 5 (1887). *See generally* G. KOLKO, RAILROADS AND REGULA-

societal goal, such as rural development;[39] to stabilize firms in the market;[40] to promote safety;[41] or to prevent deceptive or unfair actions by competitors.[42] It is in these markets that the antitrust laws present a viable alternative to agency regulation. The industries included in this category are quite varied. They include railroads, motor carriers, water carriers, air carriers, ocean carriers, natural gas producers and pipelines, radio and television broadcasters, some aspects of telecommunications and banking. Just as these industries are varied, the reasons for their regulation are varied and the extent to which the antitrust laws can serve as a substitute for current regulation varies. In order to understand the role of the antitrust laws and competition in industries where there is regulation, the next section of this article will explore the development of antitrust law in regulated industries.

TION 1877-1916 (1965). Likewise, in the inland waterway, trucking, and airline industries, proponents of regulation felt that there was excessive competition. *See* C. FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 12, 16, 20-21 (1961); Westwood & Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterward*, 42 NOTRE DAME LAW. 309 (1967); Comment, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport*, 42 J. AIR L. & COM. 187, 192-94 (1976).

39. A number of industries justify regulation based on the need for cross-subsidization between rural and metropolitan consumers. The primary example of this type of cross-subsidization is the U.S. Postal Service. In urging Congress to expand the postal monopoly in 1843, the Postmaster General explained: "These private expresses will only be found to operate upon the great and profitable thoroughfares between great commercial points, whilst the extremes are left to depend upon the operations of the United States mail, crippled and broken down for the want of means." Doc. No. 1, 28th Cong., 1st Sess. 59 (Dec. 2, 1843), *quoted in* Johnston, *The United States Postal Monopoly*, 23 BUS. LAW. 379, 385 (1968).

40. *See, e.g.*, de Felice, Moss, Lechliter & Stout, *Progress in the Regulation of Motor Carriers by the Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 791, 800-01 (1937). According to one witness at a Congressional hearing on ocean shipping regulation:

> There should be some plan by which lines or conferences can make the rates, subject to the approval of some board such as the Commerce Commission, to see that they are proper rates, and also to see that the conference does not combine to freeze out of the game anyone else who is really entitled and responsible who wishes to come in that same trade. With such a commission or board to supervise the making of rates or pools or conferences, I think you would get stability of your steamship business without doing any harm to the shippers.

Investigation of Shipping Combinations under H.R. Res. 587 Before House Comm. on the Merchant Marine & Fisheries, 62d Cong., 1st Sess. 777 (1913).

41. *See* Lloyd-Jones, *Deregulation and Its Potential Effects on Airline Operations*, 41 J. AIR L. & COM. 815, 817-19 (1975). Congress separated safety regulation from economic regulation in the Department of Transportation Act, Pub. L. No. 89-670, §§ 5-6, 80 Stat. 931 (1966).

42. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(f), 90 Stat. 39 (1976).

II. THE PROMOTION OF COMPETITION THROUGH REGULATORY ACTION

One of the chief justifications for governmental regulation is that an industry has a monopoly which can be exploited to the detriment of consumers and the economy. When this monopoly occurs in an industry which is critical for the well-being of large numbers of people, regulation becomes a popular solution to actual or perceived exploitation. Thus, high rates and large profits by monopolists operating "in the very 'gateway of commerce' " result in calls for government control.[43] In *Munn v. Illinois*,[44] the Supreme Court held that the states could regulate those occupations which are "clothed with a public interest."[45] In subsequent decisions, the Court upheld both federal and state regulation of natural monopolies against charges that regulation violated the fifth or fourteenth amendments by depriving these businesses of their property without due process of law.[46]

The common law traditionally provided theoretical protection against certain public businesses, such as innkeepers and common carriers, who exploited the public.[47] But the consumer who felt that the price demanded was unreasonable was generally forced to pay the rate demanded and sue for damages. The courts would then determine whether the rate charged was just and reasonable by considering comparable rates, the cost of providing the service, and the overall profitability of the business.

The common law did not establish a test to determine what

43. Munn v. Illinois, 94 U.S. 113 (1877). *See generally* I. BARNES, PUBLIC UTILITY CONTROL IN MASSACHUSETTS 4-18, 87-99 (1930); S. BUCK, THE GRANGER MOVEMENT 9-15, 124-51 (1913); E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 3-146 (1966).

44. 94 U.S. 113 (1877).

45. *Id.* at 126.

46. Stafford v. Wallace, 258 U.S. 495 (1922) (commission men and dealers under the Packers and Stockyards Act); Pipe Line Cases, 234 U.S. 548 (1914) (regulation of oil pipelines); Spring Valley Water Works v. Schottler, 110 U.S. 347, 354 (1884) (water works regulation by municipality). *See also* Hockett v. State, 105 Ind. 250, 5 N.E. 178 (1886); Chesapeake & Potomac Tel. Co. v. Baltimore & Ohio Tel. Co., 66 Md. 399, 7 A. 809 (1887); Nebraska v. Nebraska Tel. Co., 17 Neb. 126, 22 N.W. 237 (1885); Zanesville v. Gas-Light Co., 47 Ohio St. 1, 23 N.E. 55 (1889); State v. Gas Co., 34 Ohio St. 572 (1878). In Nebbia v. New York, 291 U.S. 502 (1934), the Supreme Court abandoned the distinction between occupations clothed with a public interest and private occupations and held that state governments have the authority to regulate all occupations. *Id.* at 536-37.

47. Common carriers were regulated in England as early as 1691. *See* 3 W. & M., c. 12, § 24 (1691). A common carrier is generally defined as one who holds himself out to the public generally as engaged in the business of transporting persons or property for compensation. Cushing v. White, 101 Wash. 172, —, 172 P. 229, 232 (1918).

was a reasonable price[48] nor could a prospective patron obtain a prior determination as to what was a reasonable rate.[49] Furthermore, there was no uniformity between courts as to what constituted the hypothetical "reasonable rate." While one court might find a rate to be unreasonable, a different court might find the same rate to be reasonable.[50] This left the consumer with little practical remedy from the monopolist who provided an essential public good.[51]

The Act to Regulate Commerce was designed to turn a theoretical remedy available under the common law into real protection from the monopolist.[52] The drive toward railroad regulation began in the granger states of the Midwest. Midwestern farmers, dependent on rail transportation to move their production to market, felt that railroad rates were unreasonably high.[53] At the end of the nineteenth century when railroads provided the only interstate freight transportation of consequence, they would set their rates in a highly competitive manner on routes served by more than one line while exacting much higher rates on all other routes. In the early 1870's various midwestern states established regulatory commissions which were empowered to determine whether railroad rates were just and reasonable and prescribe maximum rates. The state regulatory commissions, and later the ICC, were empowered to prevent such abuses of monopoly power. In the original Act to Regulate Commerce of 1887, the Commission's only power was to declare rates unjust and unreasonable.[54] In 1906 the Commission's

48. Lewis-Simas-Jones Co. v. Southern Pac. Co., 283 U.S. 654 (1931); Tift v. Southern Ry., 123 F. 789 (C.C.S.D. Ga. 1903); Louisville, E. & St. L. Consol. R.R. v. Wilson, 132 Ind. 517, 32 N.E. 311 (1892); Cook & Wheeler v. Chicago, R.I. & Pac. Ry., 81 Iowa 551, 46 N.W. 1080 (1890); Heiserman v. Burlington, C.R. & N. Ry., 63 Iowa 732, 18 N.W. 903 (1884). *See generally* Note, *The Shipper's Right to Recover for Unreasonable Railroad Rates*, 21 IOWA L. REV. 751 (1936).

49. There was a split of authority as to whether injunctive relief was available against unreasonable rates before the ICC was granted authority to postpone rate increases while investigating them to determine their lawfulness.

50. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

51. An injunction from a court of equity was only available where it was clear that the rate was unreasonable. Cincinnati v. Cincinnati, G. & P. Ry., 13 Ohio N.P. (n.s.) 265, 24 Ohio Dec. 155 (Ct. App. 1912), *aff'd per curiam*, 89 Ohio St. 468, 106 N.E. 1049 (1914). The power to prescribe rates for the future was considered to be a legislative act as opposed to a judicial act. ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479 (1897); St. Louis & S.F. Ry. v. Gill, 156 U.S. 649 (1895). However, courts did enjoin the railroads from charging rates which were discriminatory and, therefore, unreasonable. Southern Express Co. v. Memphis R.R., 8 F. 799 (C.C.E.D. Ark. 1881); Coe & Milson v. Louisville & N.R.R., 3 F. 775 (C.C.M.D. Tenn. 1880).

52. *See* S. REP. NO. 46, 49th Cong., 1st Sess. 81-82, 177 (1886); SMITH, DOWLING & HALE, CASES ON PUBLIC UTILITIES 1-5 (2d ed. 1936).

53. S. BUCK, THE GRANGER MOVEMENT 9-15, 134 (1913), *reprinted in* W.K. JONES, *supra* note 27, at 38-41.

54. ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479 (1897).

power was broadened to allow it to prescribe maximum rates.[55] The rationale for granting the Commission this authority was that the railroads were a public utility which exercised monopoly power over many routes.[56]

The monopoly held by the railroads was the result of a lack of sufficient demand to justify the construction of two railroads in most areas. Technology had not yet developed the motor or water carriers to the point where they could be a viable alternative to rail transportation. Hence competition was nonexistent. The antitrust laws do not provide a mechanism whereby a court can set a reasonable price where the forces of competition are absent. Rather, they are designed to allow competition to work to set a reasonable price.[57] Where the state of technology makes that impossible, the antitrust laws are not a suitable alternative.

The fact that the antitrust laws could not "regulate" the railroad industry did not mean that competition was given up as an unattainable goal. Between many cities in nineteenth century America, railroad competition was quite important. Congress encouraged that competition in the markets where it existed, while creating a regulatory mechanism for those markets where railroads had a monopoly. Thus, the ICC, in its first annual report, explained that the Act "was intended in its passage to preserve for the people the benefits of competition as between the several transportation lines of the country."[58] Central to this scheme were the provisions of the Act which restricted pooling[59] by competing carriers. This provision ended the practice of many railroads of pooling their traffic, thereby creating monopolies even in those traffic corridors which could support competition.[60]

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55. Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 589 (1906), now enacted as Act of Oct. 17, 1978, Pub. L. No. 95-473, § 10704, 92 Stat. 1337, 1373-75 (to be codified in 49 U.S.C. § 107040, *reprinted in* U.S. CODE CONG. & AD. NEWS Nov., 1978.

56. S. REP. NO. 499, 94th Cong. 1st Sess. 10-12 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 24-26. Congress, in the Railroad Revitalization and Regulatory Reform Act, restricted the Commission's power to find rates unreasonably high to those situations where the railroad had market dominance. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(b), 90 Stat. 35 (1976), now enacted as Act of Oct. 17, 1978, Pub. L. No. 95-473, § 10709, 92 Stat. 1337, 1382-83 (to be codified in 49 U.S.C. § 10709), *reprinted in* U.S. CODE CONG. & AD. NEWS Nov., 1978. It is generally agreed that the ICC has interpreted the market dominance provisions to make them virtually meaningless.

57. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

58. 1 ICC ANN. REP. 40 (1887).

59. Pooling occurs when competitors agree to share the traffic or profits on a route. In a pooling arrangement, the railroads have no incentive to lower rates to divert business from their competitors.

60. The ICC explained that

The requirement that rates be just and reasonable was a codification of the common law requirements. The result was a transfer from court to Commission of the difficult task of determining whether a rate was reasonable. While even the Commission considered the task of determining whether a rate was reasonable to be difficult, the courts have recognized in subsequent antitrust cases that they are totally unable to determine reasonableness.[61]

The courts, therefore, turned over to the regulatory bodies the task of determining reasonable rates. The courts retained only the function of review to insure that the findings of these bodies did not result in a confiscation which violated the fifth amendment.[62] In addition, the courts were given the responsibility by Congress of reviewing most final agency orders.[63]

In *McLean Trucking Co. v. United States*,[64] the Supreme Court directed regulatory agencies to consider the goal of fostering competition in considering the public interest under a regulatory statute. The courts have been quite willing to find the preservation of

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> [t]he pooling system was looked upon with distrust by the public, mainly because it seemed to be a scheme whereby competition between the roads could be obviated, and rates for railroad service put up or kept up to unreasonable figures. But if railroad managers supposed that by this scheme they were to stop competition among themselves, the result has not answered their expectations. The competition has still gone on; each road striving to obtain as large a share of the business as possible and no agreement among them could altogether prevent a yielding to the pressure of shippers for lower rates.

Id. at 34. Pooling had been traditionally frowned upon by the common law. Texas & Pac. Ry. v. Southern Pac. Ry., 41 La. Ann. 970, 6 So. 888 (1889); Morrill v. Boston & M.R.R., 55 N.H. 531 (1875). One commentator has argued that the original purpose of the Act to Regulate Commerce, as proposed by the railroads and supported by the Senate, was to make pooling agreements enforceable. The Senate passed a version of the bill that explicitly permitted pooling, but the House rejected that provision. Hilton, *The Consistency of the Interstate Commerce Act*, 9 J.L. & ECON. 87 (1966).

61. United States v. Trenton Potteries Co., 273 U.S. 392 (1927). *See* 1 ICC ANN. REP. 36-41 (1887).

62. In Smyth v. Ames, 169 U.S. 466 (1898), the Supreme Court held that the federal courts must insure that state regulators do not prescribe rates which are "unjust and unreasonable to the company and its stockholders," *id.* at 545, in violation of the fourteenth amendment. The Court, in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), went so far as to require de novo judicial review of whether prescribed rates met the constitutional requirement that they be just and reasonable to the company and its stockholders. The Court abandoned this type of in depth review of reasonableness for a far more liberal standard of review in FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). However, the Court still determined whether a rate prescription is confiscatory by whether its results were just and reasonable to investors. Nevertheless, the scope of review has been limited to whether the regulator's finding that a rate was just and reasonable was based on substantial evidence. Hudson & M.R.R. v. United States, 313 U.S. 98 (1941).

63. 5 U.S.C. §§ 701-706 (1976); 28 U.S.C. §§ 2341-2353 (1976).

64. 327 U.S. 67 (1944).

competition to be a goal of Congress in enacting regulatory statutes. In *Sabin v. Butz*[65] and *Central Power & Light Co. v. Federal Energy Regulatory Commission*,[66] the Courts of Appeal for the Tenth Circuit and the District of Columbia Circuit held that the Forest Service and the Federal Energy Regulatory Commission, respectively within their separate regulatory responsibilities, must take competitive factors into account. In *Sabin*, the court refused to reverse a grant of summary judgment because there was a material question of fact as to whether the Forest Service arbitrarily refused to consider the monopolistic and anticompetitive effects of its decision. In this case, an independent ski instructor challenged the Forest Service's denial of a special use permit which would have allowed the instructor to teach downhill skiing within a national forest. The permit was denied because of a Forest Service policy against authorizing more than one individual to operate a concession in one area. The court of appeals was concerned with the question of whether the agency's action was arbitrary because of the failure to consider the broader considerations of anticompetitive factors.[67] Similarly, in *Central Power & Light Co.*, the court remanded a case to the Federal Energy Regulatory Commission because the record did not indicate that the Commission had considered the anticompetitive effects of its decision.[68]

In earlier cases the courts exhibited a greater willingness to allow regulation to substitute for competition. Thus, in *Mackay Radio & Telegraph Co. v. FCC*,[69] the Court of Appeals for the District of Columbia Circuit ruled that the federal antitrust laws do not require agencies to grant licenses to companies merely to encourage competition.[70] In *Mackay Radio*, the Court noted that Congress had decided not to apply the concerns of the antitrust laws to the radio broadcast industry but to apply a contrary policy. The very nature of free competition assumes that all are free to enter the industry and compete. The Federal Communications

65. 515 F.2d 1061 (10th Cir. 1975).
66. 575 F.2d 937 (D.C. Cir. 1978).
67. 515 F.2d at 1068.
68. 575 F.2d at 939.
69. 97 F.2d 641 (D.C. Cir. 1938). In an even stronger decision, the Supreme Court remanded an FCC order granting permission to a radiotelegraph company to expand operations over the objections of a competing company. The Court noted that "substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support," but "authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us [to be] one of the primary duties imposed on its by Congress." FCC v. RCA Communications, 346 U.S. 86, 93, 95 (1953).
70. 97 F.2d at 643-44.

Act, however, forbids competition by all who cannot prove that their entry will serve the "public interest, convenience and necessity."[71] Obviously, the policy of antitrust law is not the sole measure of the FCC's duty. On the contrary, competition is merely one consideration which the FCC must consider. Thus, the courts refused to accord competition a preeminent place in the operation of regulatory statutes. In some cases the Court even noted that the regulatory agency should consider competition as an undesirable situation in certain circumstances. Thus, in *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway*,[72] the Court recognized that "competition between carriers may result in harm to the public as well as benefit."[73]

In recent cases, the Court has been very willing to uphold agency actions designed to parallel the structures of the antitrust laws. Thus, in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*,[74] the Court upheld a Commission decision disapproving two of the rules of an ocean carrier conference. The first rule forbade travel agents who booked passage on conference ships from also booking passage on competing, non-conference lines.[75] The second provision required unanimous agreement by the conference's members in order to increase the size of the commission a carrier could pay a travel agent. The Commission disapproved both rules on antitrust grounds, and formulated a principle that conference rules which interfered with the policies of the antitrust laws would only be approved if the conference could "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."[76] The Court affirmed the Commission's actions stating that it could "see no objection to the Commission's casting its primary analysis in terms of the requirements of

71. 47 U.S.C. § 309 (1976). The ICC for years excluded competition from the motor carrier industry on the grounds that "existing carriers are entitled to all the traffic that they can handle adequately, efficiently, and economically within the limits of their authorities before a new competing service is authorized." Mobile Home Express, Ltd., Extension—12 States, 112 M.C.C. 765, 771 (1971). The ICC is now reconsidering this philosophy. *See* Leland, *The Emergence of Competition as a Factor in Motor Common Carrier Licensing*, 46 I.C.C. PRACT. J. 56 (1978).

72. 270 U.S. 266 (1926).

73. *Id.* at 277.

74. 390 U.S. 238 (1968).

75. *See generally* Llorca, *Anti-Trust Exemption of Shipping Conferences*, 6 J. MAR. L. & COM. 287 (1975).

76. 390 U.S. at 243. *See also* American Soc. of Travel Agents, Inc. v. Aktiebolaget Svenska Amerika Linien, 7 Dec. Fed. Mar. Comm'n 737 (1964).

its antitrust test."[77]

As has been seen thus far, courts have reconciled the antitrust statutes and regulatory policies by emphasizing the importance of carrying out the principles of the antitrust laws where they are not clearly repugnant to the aims of other statutes. Even where the peculiar nature of an industry requires, in Congress' judgment, less than the full measure of competition, an agency's failure to consider the national goal of a competitive economy as part of the public interest is reversible error. The courts have encouraged the agencies to provide for competition in "their" industry, to the extent feasible under the mandate of Congress and the nature of the industry.

In encouraging agencies to apply antitrust concepts to their statutory mandate, the courts are promoting a national policy which does more than avoid intruding too deeply into the regulatory domain. This policy also tries to make up for a basic deficiency of the antitrust laws. The antitrust laws are quite effective at eliminating the threats to a normally competitive market from firms which realize that their profits can be increased if the firms in the industry cooperate and act as joint monopolists. The overt conspiracy to fix prices,[78] boycott other firms for anticompetitive purposes,[79] divide competitive markets,[80] maintain resale prices,[81] tie

77. 390 U.S. at 244. The Court explained that the "Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient jusitification for it exists." *Id.* at 245.

78. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Pacific & Arctic Ry. & Navig. Co., 228 U.S. 87 (1913); Pennsylvania Water & Power Co. v. Consolidated Gas, Elec., Light & Power Co., 184 F.2d 552 (4th Cir. 1950); United States v. Maryland & Va. Milk Producers Ass'n, 179 F.2d 426 (D.C. Cir. 1949); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

79. United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Evening News Publishing Co. v. Allied Newspaper Carriers, 263 F.2d 715 (3d Cir. 1959); Paramount Pictures, Inc. v. United Motion Picture Theatre Owners, 93 F.2d 714 (3d Cir. 1937); England v. Pan Am. World Airways, Inc., 1970 Trade Cases (CCH) ¶ 73,205 (S.D.N.Y. 1970).

80. United States v. General Motors Corp., 384 U.S. 127 (1966); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Butchart v. United States, 295 F. 577 (9th Cir. 1924). While agreements between competitors to allocate territories are per se violations of the Sherman Antitrust Act, restrictions placed on distributors by manufacturers which have the effect of allocating territories, are not per se violations of the antitrust laws, but rather must be dealt with under the rule of reason. Continental T.V. v. G.T.E. Sylvania, 433 U.S. 36 (1977). The court noted in *Continental T.V.* that the primary concern of the antitrust laws is to preserve interbrand competition among manufacturers of the same generic product. 433 U.S. at 51 n.19. *See generally* ABA Antitrust Section, Monograph 2, Vertical Restrictions Limiting Intrabrand Competition (1977).

81. United States v. Schrader's Sons, 252 U.S. 85 (1920); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911); B.V.D. Co. v. Isaac, 257 F. 709 (6th Cir.

the sale of monopolized products to sales of competitive products,[82] and pursue other devices to eliminate competition can be dealt with by a court. In such cases, the government or private parties, encouraged by treble damages provisions, can prove to a court that such an unlawful conspiracy exists and the court can then enjoin the future operation of the conspiracy or void contracts made pursuant to the conspiracy.[83] In addition, the court can award substantial damages to victims of a conspiracy, thereby depriving the conspirators of their gain as well as punishing them. Courts can also levy heavy fines and prison terms for criminal violations.[84]

Courts are less facile however, in dealing with antitrust problems where the anti-competitive result stems from the very nature of the industry. Courts have found it quite difficult to restructure an entire industry to promote competition.[85] Under

1919). Until 1975, resale price maintenance was permitted in those states which had enacted state fair trade laws. *See* Miller-Tydings Act, ch. 690, Title VIII, 50 Stat. 693 (1937). However, Congress repealed this Act in order to end what the Senate Judiciary Committee called "legalized price fixing" which permitted "competing retailers to have identical prices and thus eliminate price competition between them." S. REP. NO. 466, 94th Cong., 1st Sess. 1 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1569-70; Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

82. 15 U.S.C. § 14 (1976). *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947); Lee Nat'l Corp. v. Atlantic Richfield Co., 308 F. Supp. 1041 (E.D. Pa. 1970). The courts have been willing to consider economic justifications for tie-ins where the seller neither enjoys a monopolistic position in the "tying" product market nor restrains a substantial volume of commerce in the tied product. Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969); United States v. J.I. Case, 101 F. Supp. 856 (D. Minn. 1951).

83. The United States, states acting on their own behalf or parens patriae, and private individuals, as well as foreign nations can recieve treble damages for losses caused by violations of the antirust laws. 15 U.S.C. §§ 15, 15a, 15c (1976). Courts are empowered to enjoin violations of the antitrust laws, *id.* § 4. Courts can void contracts in violation of the antitrust laws, United States v. National Lead Co., 332 U.S. 319 (1947), and any goods traveling in interstate or foreign commerce and the subject of a conspiracy to violate § 1 of the Sherman Act may be seized and condemned by the United States. 15 U.S.C. § 6 (1976).

84. The criminal penalties for violating §§ 1, 2 or 3 of the Sherman Act are imprisonment for a maximum of three years and a fine of up to one million dollars for a corporation and one hundred thousand dollars for any other person. 15 U.S.C. §§ 1, 2, 3 (1976).

85. *Compare* Standard Oil Co. v. United States, 221 U.S. 1 (1910) *with* United States v. Grinnel Corp., 384 U.S. 563 (1966) *and* United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1953). As Judge Rose explained in United States v. American Can Co., 230 F. 859 (D. Md. 1916):

> I am frankly reluctant to destroy [by ordering dissolution] so finely an adjusted industrial machine as the record shows the defendant to be. . . . It is, of course, not suggested that this court should or could undertake the regulation of defendant's business. Courts have no such power and no fitness for its exercise. . . . It is to be hoped that, before any occasion to act

section 2 of the Sherman Act,[86] which forbids any person from monopolizing, courts have faced incredible problems merely investigating a vast industry. The complex problems of industrial organization are not easily resolved by the generalist article III judge in a trial setting.[87] The difficulties would only be compounded in a case where a jury was given the task of fact finding. The lengthy Alcoa litigation, which stretched on for twenty years, amply illustrates this problem.[88] Likewise, the International Business Machines[89] or American Telephone and Telegraph[90] prosecutions, which commentators confidently assert will last a decade, demonstrate the problems which a district court faces in trying to analyze

> upon the power reserved [to order dissolution] shall arise, Congress will substitute some other method than dissolution for dealing with the problems which arise when a single corporation absorbs a large part of the country's production capacity in any one line.

Id. at 903-04.

86. 15 U.S.C. § 2 (1976).

87. *See* Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973), where the Court required the antitrust plaintiff to resort to the Commodity Exchange Commission while his court action was stayed due to the complexity of the interrelationship between the Commodity Exchange Act and the antitrust laws.

88. In United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945), the government filed its complaint on April 23, 1937, naming 63 defendants, in the United States District Court for the Southern District of New York. The action came to trial on June 1, 1938, and concluded on August 14, 1940, after 40,000 pages of testimony were taken. The district judge delivered an oral opinion from September 30 to October 9, 1941, and final judgment was entered on July 23, 1942, dismissing the complaint. 44 F. Supp. 97 (S.D.N.Y. 1941). *See also* 1 F.R.D. 1 (S.D.N.Y. 1939); 2 F.R.D. 224 (S.D.N.Y. 1941). Appeal was taken directly to the Supreme Court where four Justices disqualified themselves and a quorum was lacking to hear the appeal. 320 U.S. 708 (1943). Congress then provided for certification of the case to the Court of Appeals for the Second Circuit: Act of June 9, 1944, ch. 239, 58 Stat. 272 (1944) (now codified as 28 U.S.C. § 2109 (1976)). The Supreme Court certified the case to the court of appeals, 322 U.S. 716 (1944), where it was decided on March 12, 1945, 148 F.2d 416 (2d Cir. 1945). The district court's decision was reversed and further proceedings were held in the district court on the remedy. 91 F. Supp. 333 (S.D.N.Y. 1950). *See also* 1947 Trade Cases (CCH) ¶ 57, 572 (S.D.N.Y. 1947); United States v. Caffey, 164 F.2d 159 (2d Cir. 1947), *rev'd*, 334 U.S. 258 (1948); United States v. District Court for S. Dist. of N.Y., 171 F.2d 285 (2d Cir. 1948). After the remedial decision was entered, it was supplemented by a consent decree. 1954 Trade Cases (CCH) ¶ 67, 745 (S.D.N.Y. 1954). The case was finally dismissed in 1957 Trade Cases (CCH) ¶ 68, 755 (S.D.N.Y. 1957), 20 years after initial decision.

89. United States v. International Business Machines, Civil Action No. 69 Civ. 200 (S.D.N.Y., filed January 17, 1969). As of January 17, 1979, this case had dragged on for 10 years and 598 days of trial. IBM was presenting its 12th defense witness after the government presented its case with 52 witnesses and 3,593 pieces of evidence. IBM has offered, so far, 4,998 pieces of evidence. Current participants in the litigation confidently expect the case to celebrate its 20th anniversay. 897 ANTITRUST & TRADE REG. REP. (BNA) (A-24) (January 18, 1979). *Cf.* Withrow & Larm, *"Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L.Q. 1 (1976).

90. United States v. American Tel. & Tel. Co., No. 74-1698 (D.D.C., filed November 20, 1974). *See generally* Note, *A.T. & T. and the Antitrust Laws*, 85 YALE L.J. 254 (1975).

an entire industry and then attempting to restructure it. When an industry is oligopolistic, courts have simply been unable to deal with the structural problems which deter competition.[91]

A court feels far more comfortable in requiring an agency, which is already presumed to be an expert in the operations of the industry, to consider anticompetitive problems. In this way, the agency's jurisdiction is preserved.[92] Likewise, the agency can adapt the antitrust rules to the special needs of its industry. The agency can encourage competition in some sectors of the industry while constantly watching for the abuses of competition which concerned Congress. Thus, although courts have applied the antitrust laws directly to regulated industries, until Congress acts to eliminate the regulatory agency or drastically prune its jurisdiction, the agencies will be left to accommodate the goals of the antitrust laws through regulation. This does not mean, however, that the antitrust laws have no role to play in regulated industries.

III. THE ROLE OF THE ANTITRUST LAW IN REGULATED INDUSTRIES

IMPLIED IMMUNITY FROM THE ANTITRUST LAWS

In the previous chapter this article explored the role of competition in carrying out the goals of regulatory statutes. From that perspective, it was clear that competition played a role in reaching the goals of those statutes. In some industries competition is a viable alternative to regulation but Congress has chosen to regulate the industry to some degree, as opposed to allowing it to operate in a completely free market environment.[93] In other industries competition is not viable and monopoly is the natural result of the free market.

In some industries, free competition and full enforcement of the antitrust laws can occur without conflict with the regulatory regime. Enforcement of safety laws in a specific industry, for example, should not clash with the enforcement of the antitrust laws. In other cases, the regulator's role in actions of concern to antitrust

91. Kramer, *Economic Concentration and the Antitrust Laws*, 1975 WASH. U. L.Q. 165 (1975); O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. LEGIS. 687 (1976); Note, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 COLUM. L. REV. 615 (1940).

92. *See* note 185 *infra*.

93. When the operation of the antitrust laws cannot be reconciled with the scheme for regulating a particular industry, the antitrust laws must give way. United States v. American Tel. & Tel. Co., 427 F. Supp. 57 (D.D.C. 1976); Gas Light Co. v. Georgia Power Co., 313 F. Supp. 860, (M.D. Ga. 1970), *aff'd*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

law is limited. Thus, the Federal Maritime Commission ("FMC") is limited to approving and immunizing agreements between ocean carriers that requires continuing supervision under the Shipping Act of 1916. Therefore, mergers between shipping lines are subject to the antitrust laws.[94] In other situations, while a regulatory agency is required to approve a transaction, the goals of the regulatory statute do not conflict with the goals of the antitrust laws. In this way, approval by the FCC of an exchange of television stations did not grant the parties to the transaction immunity from the antitrust laws.[95] Approval from the Commission only meant that the transaction did not conflict with the goals of the Communications Act of 1934.[96]

Likewise, in *Otter Tail Power Co. v. United States*,[97] the Court refused to find an implied immunity from the antitrust laws for an electric power company which had attempted to prevent the growth of competition in the retail distribution of electric power in its service area. The Court found that the fact that the Federal Power Commission ("FPC") could order interconnection between power companies did not immunize a considered refusal to interconnect voluntarily from the scrutiny of an antitrust court.[98] The Court looked to the legislative history of the Federal Power Act[99] and concluded that Congress had not intended to insulate electric power companies from the operation of the antitrust laws. On the contrary, Congress indicated an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. The Court concluded that when commercial relationships "are governed in the first instance by business judgment

94. Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973). Section 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1976) required certain agreements between ocean carriers to be filed with the FMC. These agreements generally pertain to rate setting through cartels known as carrier conferences. If the Commission finds that these agreements comply with the Shipping Act they are immunized from the antitrust laws. *See generally* Hill, *The Diminishing Power of the FMC in the Aftermath of* Seatrain, 9 TEX. INT'L L.J. 359 (1974); Comment, *The Doctrine of Primary Jurisdiction: Was It Inverted?*, 2 PEPPERDINE L. REV. 190 (1974).

95. United States v. Radio Corp. of America, 358 U.S. 334 (1959). *See generally* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

96. 358 U.S. at 339-46.

97. 410 U.S. 366 (1973). In *Otter Tail*, the electric utility was charged with monopolization under § 2 of the Sherman Act by using its monopoly power in the cities in its service area to foreclose competition, gain a competitive advantage, or destroy a competitor. The Federal Power Act gave the Federal Power Commission authority to order interconnections between utilities but did not give the Commission power to order wheeling. The district court ordered both interconnecting and wheeling subject to the approval of the FPC. The Supreme Court affirmed.

98. *Id.* at 375-77.

99. 16 U.S.C. § 824a(b) (1976).

and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws."[100]

In other situations, the transaction being questioned in the antitrust action is inexorably intertwined with the functioning of the regulatory statute. In one such situation the Court refused to grant injunctive relief requested by the Justice Department which would have forced Pan American World Airways to divest itself of Panagra.[101] The Court noted that the Civil Aeronautics Board ("CAB") had the power to either grant the relief demanded by the Justice Department (upon the Board's request) or immunize the relationship, thereby placing it beyond the scrutiny of the antitrust laws. Congress had entrusted this problem to the CAB and granted the Board the authority to end anticompetitive conduct that the Board did not feel should be immunized under the Federal Aviation Act of 1958.[102] Hence, there was no reason for the antitrust court to interfere.[103]

100. 410 U.S. at 374.

101. Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963). While injunctive relief may not be appropriate, the Court has permitted damages to be levied where an agreement could have been immunized by the FMC but was never filed with that agency. The Court noted that the Commission could not retroactively approve an agreement. Damages in the case where the agreement was not filed would promote the goals of the Shipping Act and the antitrust laws by encouraging conferences to file their agreements with the Commission, as required by law, and discourage price-fixing without immunity. *Compare* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) (damages available) *with* Far East Conference v. United States, 342 U.S. 570 (1952) (injunctive relief not available, *see* note 103 *infra*.). However, in other situations, the Court has permitted injunctive relief but forbidden the award of damages because it would interfere with the proper functioning of the regulatory system. *Compare* Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (injunctive relief against unlawful price-fixing by railroads would not affect the ability of the ICC to determine whether a rate was just and reasonable) *with* Keogh v. Chicago & Nw. R.R., 260 U.S. 156 (1922) (award of damages in antitrust suit for unlawful price-fixing by railroads would be an effective rebate to shipper in violation of the Interstate Commerce Act). The chief consideration is whether the remedy would seriously interfere with the workings of the regulatory scheme.

102. Under § 411 of the Federal Aviation Act of 1958, 49 U.S.C. § 1381 (1976), the CAB could determine whether an air carrier was engaged in unfair methods of competition. On the other hand, under § 414 of the Act, the Board could immunize the relationship between Pan American and Panagra from the antitrust laws. 49 U.S.C. § 1384 (1976) (amended by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 30, 92 Stat. 1705 (1978)).

103. *See also* Far East Conference v. United States, 342 U.S. 570 (1952). In *Far East Conference* the Court refused to consider whether the practice by the shippers in the conference to charge lower rates to shippers who agreed to do business only with conference members violated the Sherman Act as an exclusive dealing arrangement. The Court held that this practice should be initially considered by the FMC. The Court, on review of a decision of the FMC, held that this practice violated the Shipping Act of 1916. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 496-

The fact that the agency was not explicitly granted the power to immunize a transaction does not mean that an antitrust suit would not interfere with the regulatory system as Congress envisioned it. Thus, an arrangement between competing brokers which restricted the growth of a secondary market in mutual funds was immunized from attack under the Sherman Act in *United States v. National Association of Securities Dealers*.[104] The Court concluded that Congress had contemplated this very type of arrangement challenged by the Justice Department in section 22(f) of the Investment Company Act of 1940.[105] In this case the Court found that there was immunity even though neither the Investment Company Act nor the Commission explicitly approved the type of arrangement involved here.[106]

The Court has also refused to permit antitrust challenges where the transaction in question was under the continuous supervision of a regulatory agency. In *Hughes Tool Co. v. Trans World Airlines*,[107] the Court held that the control of TWA by a subsidiary of Hughes Tool Company was immunized by the CAB from the antitrust laws because of the Board's continuing direct supervision of the relationship between the two corporations. Even when an agency, under a mandate from Congress, ends a practice prospectively, the continuous involvement of the agency with the problem under scrutiny in the antitrust case may immunize the practice from the antitrust laws.[108]

Regulation can run the gamut from safety regulation or disclosure requirements, where conflict with the antitrust laws is minimal, to pervasive regulation such as that exercised by the ICC over railroads or the FCC over telecommuncations. The extent to

99 (1958). Congress, three years later, amended the statute to specifically permit this practice. Act of October 3, 1961, Pub. L. No. 87-346, § 1, 75 Stat. 762 (1961) (now codified as 46 U.S.C. § 813(a) (1976)).

104. 422 U.S. 694, 720-22 (1975).

105. 15 U.S.C. §§ 80a-22(f) (1976).

106. 422 U.S. at 744, 746.

107. 409 U.S. 363 (1973).

108. Gordon v. New York Stock Exch., 422 U.S. 659 (1975). In *Gordon*, the plaintiff sued for damages resulting from the policy of setting fixed brokerage commissions followed by the New York Stock Exchange. The Court noted the continued consideration and toleration by the Securities and Exchange Commission ("SEC") of this practice culminating in an order requiring the Stock Exchange to end fixed commission rates. Congress, in 1975, severely limited the ability of the Commission to permit fixed commissions. Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 4, 89 Stat. 97 (1975) (now codified as 15 U.S.C. § 78f(e) (1976)). Professors Areeda and Turner believe that the Court was reluctant to impose treble damages when a practice had been accepted by the industry and regulators for many years. The damages were not necesary to end the practice; the Commission had already ordered the practice to be discontinued. 1 P. AREEDA & D. TURNER, ANTITRUST LAW 142 (1978).

which competition has been replaced by regulation differs. The Court, in considering various regulatory schemes has found that congressional intent in establishing regulatory controls over various industries differs widely.[109]

EXPLICIT IMMUNITY FROM THE ANTITRUST LAWS

Where competition is a viable alternative to regulation, the most frequent problem which arises is the extent to which members of the industry can confer on rates and services. The most basic per se rule of the antitrust laws is that competitors do not sit around a table in the proverbial smoke-filled room to discuss rates and services. Where there is a natural monopoly, that presents no problem; a monopolist has no competitors to be concerned with. In a competitive industry the pricing strategy of a regulated firm is often constrained by the actions of competitors as much as by the regulatory agency. However, the per se rule against price-fixing has been applied without regard to any claimed need of the industry to be able to agree on rates.[110] The Supreme Court categorically rejected the argument that excessive competition in the petroleum industry justified price-fixing. Nor was the fact that price-fixing resulted in a fair and reasonable price a defense to the charge that the firms conspired to fix prices. The Court bluntly informed the defendants in *United States v. Socony-Vacuum Oil Co.*[111] that the Sherman Act

> has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. *If such a shift is to be made it must be done by the Congress.* Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the

109. *Compare* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Federal Power Act not designed to displace competition) *and* United States v. Radio Corp. of America, 358 U.S. 334 (1959) (regulation of radio and TV broadcasting under the Communications Act not designed to displace competition) *with* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963) (CAB can promote policies which would violate the antitrust laws if there were no immunity) *and* United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975) (Investment Company Act of 1940 and Maloney Act of 1938 displace competition in the secondary brokerage market for mutual funds).

110. A group boycott by securities exchanges, which would be a per se violation in an unregulated industry, was analyzed by the Second Circuit under the rule of reason. Jacobi v. Bache & Co., 520 F.2d 1231, 1237-39 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

111. 310 U.S. 150 (1940).

Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.[112]

While the Sherman Act may not consider excessive, destructive, or ruinous competition as an excuse for price-fixing, Congress has established regulatory edifices in the railroad, airline, ocean shipping, and motor carrier industries in part to eliminate excessive competition.[113]

Even in cases where the industry is regulated, the Court has not accepted the argument that rate agreements should be permitted because of excessive competition.[114] *United States v. Trans-Missouri Freight Association*[115] is illustrative. There, the Supreme Court held that an agreement between various western railroads to establish reasonable rates, rules and regulations on all freight traffic and to maintain those rates by agreement was unlawful.[116] The railroads argued that they were regulated under the Act to Regulate Commerce, which did not proscribe such agreements, and therefore should not be enjoined from making such agreements under the Sherman Act. The Court noted that the Act to Regulate Commerce did not authorize any agreement between railroads to set rates nor had the ICC attempted to approve the agreements in issue.[117] The regulatory statute did not furnish "a complete and perfect set of rules and regulations" to govern all

112. *Id.* at 221-22 (emphasis added).

113. *See, e.g.*, 2 A. KAHN, THE ECONOMICS OF REGULATION 172-250 (1971).

114. At the time *Trans-Missouri Freight Ass'n* was decided railroad regulation was exceedingly limited. ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479 (1897).

115. 166 U.S. 290 (1897). In *Trans-Missouri Freight Ass'n*, the railroads established an organization which would set rates on traffic in the Western United States. The organization was designed to end the rate wars which had been experienced during the late nineteenth century. The agreement provided for the establishment of rates by majority vote of the members and for retaliation against members who lowered their rates without good cause.

116. *Id.* at 341.

117. The Supreme Court interpreted the Act to Regulate Commerce to empower the Commission only to adjudge an existing rate to be unlawful and award shippers damages. The Act did not allow the Commission to order a railroad to reduce its rate for the future. ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479 (1897). Thus, the Commission's power was not extensive enough to allow it to substitute regulation for the workings of the marketplace. In other cases, the Court has noted that the regulating agency's powers were not pervasive enough to substitute for competition. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (FPC regulation of the electric industry); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (Comptroller of the Currency's regulation of bank mergers not pervasive); Silver v. New York Stock Exch., 373 U.S. 341 (1963) (SEC was without authority to review enforcement of Exchange rules); United States v. RCA, 358 U.S. 334 (1959) (FCC regulation of television not pervasive); United States v. Borden Co., 308 U.S. 188 (1939) (Secretary of Agriculture's regulation of the milk industry is not pervasive). Likewise, the courts have been leary of immunizing industry activities that were not directly approved by the regulator but were simply not challenged by the regu-

cases dealing with railroads. The railroads argued that their industry was unique; it was an industry in which competition, if allowed to follow its natural course, would result in relentless rate wars ending in the bankruptcy of the railroad industry. The solution, according to the railroads, was to agree on reasonable rates which would cover the railroads' expenses and afford a fair profit. The Court responded:

> Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no place; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.[118]

The Court refused to exempt the railroad industry from the antitrust laws merely because the railroads were regulated by the ICC. This refusal to exempt an industry from the antitrust laws merely because it was regulated has been consistently followed by the Court.

With a strong hint from the Supreme Court in *Socony-Vacuum* and with the unwillingness of the Court to imply immunity automatically from regulation, regulated industries have requested and often received explicit immunity from Congress for their activities. The Clayton Act itself contains an exemption for agricultural organizations and labor unions.[119] The exemption for agricultural producers cooperatives from the antitrust laws was expanded in 1922 because of the depression in the agricultural industries.[120] There

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lator. *Compare* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) *with* Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973).

118. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 339 (1897). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Even though the Court held that railroad conspiracies to fix rates were in violation of the antitrust laws, the need to coordinate rates over an interconnected rail network resulted in continued use of rate agreements between railroads. *See* 13 ICC ANN. REP. 12-20 (1899). The Justice Department attacked the rate bureaus in the 1940's as being unlawful under the antitrust laws. United States v. Association of Am. R.Rs., 4 F.R.D. 510 (D. Neb. 1945). *See* G. DAVIS & C. SHERWOOD, RATE BUREAUS AND ANTITRUST CONFLICT IN TRANSPORTATION 9-33 (1975); Daggett, *Railroad Traffic Associations and Antitrust Legislation*, 38 AM. ECON. REV. 452 (1948). These suits were stopped during World War II because of antitrust immunity granted to the railroads by the War Production Board. 57 ICC ANN. REP. 49 (1943). In 1948, Congress empowered the ICC to give railroad rate conferences immunity from the antitrust laws. Carriers' Rate Bureau (Reed-Bulwinkle) Act, ch. 491, 62 Stat. 472 (1948) (codified at 49 U.S.C. § 10706 (as recodified in 1978), *see* note 2 *supra*).

119. 15 U.S.C. § 17 (1976). For a discussion of the role of antitrust law in labor policy, see Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 6 J.L. & ECON. 152 (1963); Winter, *Collective Bargaining and Competition: The Application of the Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

120. Capper-Volstead Act of 1922, ch. 57, 42 Stat. 388 (1922) (now codified as 7

is good reason to believe that Congress, in the Capper-Volstead Act, intended to give farmers the ability to price-fix to a limited extent in order to increase the prices farmers received for their produce.[121] The Secretary of Agriculture was given the authority to control undue price increases. While increasing farm income by reducing competition and allowing the price of farm products to rise to about the level competition sets may not be economically efficient, Congress is not required to use the most efficient method of increasing farm income. Congress enacted the Fisherman's Cooperative Marketing Act in 1934[122] to provide fisherman with a similar exemption to that granted farmers in the Capper-Volstead Act.

Numerous other limited explicit exemptions from the antitrust laws have been created. The McCarran-Ferguson Act[123] exempts insurance from the antitrust laws, with certain exceptions, to the extent the industry is regulated by state law. This legislation was enacted after the Supreme Court reversed the dismissal of an indictment charging insurance companies with price-fixing.[124] Congress also enacted the Reed-Bulwinkle Act,[125] the Newspaper Preservation Act,[126] and the Bank Merger Act[127] in response to Court decisions applying the antitrust laws to the railroads, newspaper, and banking industries.

EXEMPTIONS FROM THE ANTITRUST LAWS IN THE TRANSPORTATION INDUSTRY PERMITTING RATE AGREEMENTS

In the transportation industy, Congress provided the regulatory agencies with the authority to approve rate agreements between competing carriers. In the trucking and railroad industries rate bureaus operate under antitrust immunity granted by the ICC under the authority of the Reed-Bulwinkle Act.[128] This statute was

U.S.C. § 291 (1976)). *See generally* Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73 (1963).

121. 62 CONG. REC. 2276 (1922).

122. Fishermen's Cooperative Marketing Act, ch. 742, 48 Stat. 1213 (1934). The Secretary of Interior has the power to disband the association under certain circumstances. Neither Secretary has used his authority under these two statutes to disband a cooperative. 1 P. AREEDA & D. TURNER, *supra* note 108, at 179 n.3.

123. 15 U.S.C. § 1012 (1976).

124. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

125. 49 U.S.C. § 10706 (as recodified in 1978), *see* note 2 *supra*. This statute was enacted as a reaction to Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) and antitrust prosecutions brought by the Justice Department.

126. 15 U.S.C. §§ 1801-1804 (1976). This statute was enacted as a reaction to United States v. Citizen Publishing Co., 394 U.S. 131 (1969).

127. 12 U.S.C. § 1828c (1976). This statute was enacted as a reaction to United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

128. Now enacted as Act of Oct. 17, 1978, Pub. L. No. 95-473, § 10706, 92 Stat. 1337, 1377-80 (to be codified in 49 U.S.C. § 10706, *see* note 2 *supra*).

enacted after the Justice Department and the State of Georgia challenged railroad rate bureaus under the antitrust laws. The Reed-Bulwinkle Act was enacted in order to clarify the legal status of these associations.[129] Rate bureaus are comprised of carriers operating in a region of the country. In the motor carrier industry there are also bureaus consisting of specialized carriers such as household goods movers. The bureaus, among other activities, agree on rates for various commodities moving between various points in the country. Carriers, through rate bureaus, also agree on the conditions under which a rate applies.[130]

The Reed-Bulwinkle Act was passed because Congress agreed with the carriers, shippers, state regulators, labor unions, the Office of Defense Transportation, and the ICC that there was a need for railroad rate bureaus. The House Committee on Interstate and Foreign Commerce explained that "[d]ue to the necessity of devising practical means of dealing with matters requiring joint action by two or more railroads, there have grown up among the railroads . . . a large number of joint operations."[131] The basic need for rate bureaus in the railroad industry results from the nature of railroading. A railroad company can serve directly only those points which are connected by its track. Therefore, a large portion of railroad traffic must move over the lines of two or more railroads from origin to ultimate destination. This requires that the railroads participating the movement agree on the rates and service to be offered the shipper. Usually these railroads are competitors; often competing for the same traffic via alternative routes in which they participate. Some antitrust immunity, therefore, is required to allow the industry to function efficiently.

The House Committee that reported the Reed-Bulwinkle Bill also believed that rate bureaus were necessary in order to allow regulated carriers to comply with the requirements of the Interstate Commerce Act. Over the course of the sixty-one years from the passage of the Interstate Commerce Act to the passage of the

129. H.R. REP. No. 1100, 80th Cong., 1st Sess. (1947), *reprinted in* [1948] U.S. CONG. SERV. 1844, 1845-54 [hereinafter cited as 1948 Hearings]. The House Committee stated that Congress was not expressing any position on the merits of any of the then pending challenges to the rate bureaus under antitrust laws. *Id.* at 1847 n.1. In United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), and United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), the Court enjoined the operation of two rate bureaus as conspiracies in violation of the Sherman Act. However, at that time, railroad regulation was exceedingly limited. *See* ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479 (1897).

130. For a discussion of rate bureau operations, see Souby, *Operation of Railroad Rate Organizations Under Section 5 of the Interstate Commerce Act*, 31 I.C.C. PRAC. J. 977 (1964).

131. 1948 Hearings, *supra* note 129, at 1845.

Reed-Bulwinkle Act the Commission had established a formidable rate structure. The Commission's basic philosophy in rate cases has been that: "[t]he rates here in issue, like all other individual rates, are parts of an integral whole. A change in one rate frequently necessitates like changes in competitive rates in order to avoid the unjust discrimination and undue prejudice and preference which are forbidden by . . . [the Interstate Commerce] act."[132]

Rate bureaus today are an integral part of the rate setting mechanism in the railroad and motor carrier industries. They provide a system by which the complex rate structure that balances the interests of various localities and shippers can be kept operating. Given the incredible complexity of the nation's economy, this structure can only be maintained by the rate bureau. The ICC, from its inception, has worked to preserve this structure and thereby preserve the competitive relationship between shippers and receivers to the extent that these relationships are determined by transportation costs.[133]

The Justice Department opposed the initial grant of antitrust immunity by the Reed-Bulwinkle Act and has continued to oppose the immunity which allows rate bureaus to operate.[134] Joined by the FTC, they believe that the rate structure which is preserved by the bureaus is economically inefficient. Under their approach to the problem, rate relationships may be stable but the rates are higher because the carriers in a rate bureau tend to agree on a rate that allows most of the carriers competing for the traffic to make a profit. The carriers deny that the bureau mechanism is economically inefficient, noting that any carrier can change its rates without going through the rate bureau process.[135] The carriers also point out that the railroads are quite competitive and that a railroad will not hold up a rate on a route which it could serve at a more profitable, lower rate. It is impossible to prove whether the rate bureaus result in economic inefficiency. As long as there is regulation which requires tariffs, which considers rate relation-

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132. Summer & Co. v. Erie R.R., 262 I.C.C. 43, 49 (1945). *See generally* D. COCKLIN, ECONOMICS OF TRANSPORTATION 27-48 (7th ed. 1972).

133. *See, e.g.*, Investigation of Railroad Freight Rate Structure, 345 I.C.C. 71-409 (1974); Investigation of the Railroad Freight Rate Structure — Paper & Products, 345 I.C.C. 2092-549 (1977).

134. The Reed-Bulwinkle Act was enacted over President Truman's veto. The veto message reflected the position of the Department of Justice. *See* Pearce & Clearwaters, *Rate Bureaus and the Railroad Revitalization and [Regulatory] Reform Act of 1976 — Truman Revisited*, 43 I.C.C. PRAC. J. 482 (1976).

135. Under the Interstate Commerce Act each member of a rate bureau must be permitted to file rates by independent action. 49 U.S.C. § 10706 (as recodified in 1978), *see* note 2 *supra*.

ships between points to be important, and which severely restricts the ability of railroads to abandon lines which are unprofitable, there will be a need for a rate bureau system, immune from the antitrust laws, in which prices are agreed upon by competing carriers.

In the railroad industry, Congress has indicated that even with the relaxation of regulation there is a continuing need for some rate bureau immunity to allow railroads to cooperate in serving traffic which moves over multiple lines. When Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 in an attempt to reduce railroad regulation, it expressed continuing approval of the rate bureau concept.[136]

The earliest exemption from the antitrust laws for agreements between competitors is contained in the Shipping Act of 1916.[137] The Shipping Act was designed to encourage the use of ocean carrier conferences which would stabilize ocean carrier rates and prevent predatory practices. Carriers urged Congress to grant this immunity in order to allow carriers to get together in conferences and agree on reasonable rates.[138] Congress recently strengthened this statute by increasing the sanctions against predatory pricing by carriers.[139] The amendment was passed in reaction to the below-cost pricing of various government-owned shipping lines. These firms engage in this type of behavior for non-economic reasons, including earning Western currency and national prestige.[140] Likewise, this nation has a long history of subsidizing the construction and operation of U.S. flag ships as part of the national defense effort.[141] Thus, there is a national policy of preserving the United States merchant marine even though it might not be the most efficient operation in the maritime industry. Presumably, predatory practices by these foreign lines operating between the United States and foreign nations would be subject to the prohibitions of the Sherman Act against attempts to monopolize through the use of below-cost pricing.[142] However, the Shipping Act was passed under the assumption that we could not impose our anti-

136. S. REP. NO. 499, 94th Cong., 1st Sess. 15 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 28-29. Restrictions were placed on railroad bureaus to further encourage competition. Railroad Revitalization and Regulation Reform Act of 1976, Pub. L. No. 94-210, § 202(b), 90 Stat. 35 (1976).

137. 46 U.S.C. §§ 801-842 (1976).

138. *See* Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635 (1965).

139. Ocean Shipping Act of 1978, Pub. L. No. 95-483, 92 Stat. 607 (1978).

140. S. REP. NO. 1260, 95th Cong., 2d Sess. 2-4 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5299-301.

141. I. HEINE, THE U.S. MERCHANT MARINE, A NATIONAL ASSET (1976). *See* the Declaration of Policy in the Merchant Marine Act of 1936, 46 U.S.C. § 1101 (1976).

142. *See, e.g.*, Sabre Shipping Corp. v. American President Lines, 285 F. Supp.

trust laws on foreign shipping lines and that other nations would dictate the rates U.S. flagships could charge.[143] Under conference agreements approved by the FMC competing shipping lines may lawfully agree on the rates to be charged. These agreements are designed to prevent rates from falling below costs because of predation or excessive competition and to insure stability in the shipping industry. However, the Commission's authority to regulate rates is very limited. Stratagems such as dual rates encourage shippers to use shipping lines that belong to a conference.[144] Independent lines do exist and compete in the United States shipping trade. However, Congress has basically chosen to limit competition in the industry in favor of stability and higher profits for ocean carriers.

THE ROLE OF ANTITRUST LAW IN BLOCKING ANTICOMPETITIVE MERGERS BETWEEN REGULATED INDUSTRIES

The courts have had a continuing role in promoting competition in regulated industries by limiting anticompetitive mergers. In *Northern Securities v. United States*,[145] the Supreme Court enjoined the formation of a holding company (which consolidated the Great Northern Railway, the Northern Pacific Railway, and the Chicago, Burlington & Quincy Railway) on the ground that it was a conspiracy in restraint of trade for the three competing railroads to consolidate. In *Northern Securities*, which was decided before the antitrust rule of reason was accepted,[146] the Court held that this combination was a "direct" restraint of trade and therefore, was condemned by the Sherman Act.[147] The ICC supported this position holding that:

> It was contrary to public policy, as well as unlawful, for railways to acquire control of parallel and competing lines. This policy is expressed in the Federal laws and in the

949 (S.D.N.Y. 1968), *cert. denied*, 407 F.2d 173 (2d Cir. 1969), *cert. denied*, 395 U.S. 922 (1969).

143. *Investigation of Shipping Combinations Under H.R. Res. 587 Before House Comm. on the Merchant Marine & Fisheries*, 62d Cong., 1st Sess. 416 (1913).

144. 46 U.S.C. §§ 814-818 (1976). The Commission may disapprove any rate which is "so unreasonably high or low as to be detrimental to the commerce of the United States." *Id.* § 817(b)(5). Minimum rates by government-owned shipping are regulated under the Ocean Shipping Act of 1978, Pub. L. No. 95-483, 92 Stat. 607 (1978) (to be codified in 46 U.S.C. § 817(c)).

145. 193 U.S. 197 (1904).

146. Standard Oil Co. v. United States, 221 U.S. 1 (1910).

147. 193 U.S. at 356. A number of railroad mergers were attacked under the antitrust laws before Congress enacted the Transportation Act of 1920. *See generally* United States v. Southern Pac. Ry., 259 U.S. 214 (1922); United States v. Union Pac. R.R., 226 U.S. 61 (1912).

> constitutions and laws of nearly every State in the Union . . . . Competition between railways as well as between other industries is the established policy of the nation.[148]

In the Transportation Act of 1920,[149] Congress instructed the ICC to prepare a consolidation plan which would produce a limited number of competitive systems with approximately equal earning potential. The Commission's consolidation plan was to (1) preserve competition as much as possible, (2) maintain existing routes and channels of trade, and (3) develop systems of approximately equal earning power under a uniform level of rates.[150] Where a proposed merger was consistent with the consolidation plan, it could be approved by the Commission and the merger immunized from the antitrust laws.[151] The determination of whether a merger was pro- or anti-competitive was shifted from the courts to the Commission.[152] Even when Congress repealed the provision of the Interstate Commerce Act providing for a consolidation plan, in favor of a public interest standard,[153] the Supreme Court held that the Commission must consider anti-competitive effects in measuring the public interest.[154] Congress has also provided immunity from the antitrust laws for meetings of competing railroads held under the auspices of the Secretary of Transportation to discuss unification or consolidation projects.[155]

In *United States v. Philadelphia National Bank*[156] the Court held that the antitrust laws applied to national bank mergers even though the Comptroller of the Currency approved the merger, after taking into account the affect of the merger on competition. The Court examined the Bank Merger Act of 1960,[157] under which the Comptroller approved the merger, and concluded that the Act

148. *In re* Consolidations and Combinations of Carriers, Relations Between Such Carriers, and Community of Interests Therein, Their Rates, Facilities and Practices, 12 I.C.C. 277, 305 (1907).

149. Transportation Act of 1920, ch. 91, § 407, 41 Stat. 456 (1920).

150. *Id. See generally* Phillips, *Railroad Mergers: Competition, Monopoly, and Antitrust*, 19 WASH. & LEE L. REV. 1 (1962).

151. *See* United States v. Lowden, 308 U.S. 225 (1939).

152. The courts under the antitrust laws and the ICC under the Interstate Commerce Act did not always arrive at the same result. *Compare* Northern Sec. v. United States, 193 U.S. 197 (1904) *with* Great N. Pac. Ry. Acquisition, 162 I.C.C. 37 (1930), *and compare* United States v. Southern Pac. Ry., 259 U.S. 214 (1922) *with* United States v. Southern Pac. Ry., 290 F. 443 (D. Utah 1923).

153. Transportation Act of 1940, ch. 722, § 7, 54 Stat. 898 (1940). *See generally* Conant, *Railroad Consolidations and the Antitrust Laws*, 14 STAN. L. REV. 489 (1962); Helmetag, *Railroad Mergers: The Accommodation of the Interstate Commerce Act and Antitrust Policies*, 54 VA. L. REV. 1493 (1968).

154. McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944).

155. 49 U.S.C. § 1654(d) (1976).

156. 374 U.S. 321 (1963).

157. Act of May 13, 1960, Pub. L. No. 86-463, 74 Stat. 129 (1960).

was not designed to place a comprehensive structure of economic regulation on banking. Rather, Congress intended to allow competition to operate in the banking industry subject to certain controls to prevent unsound banking practices. Congress then amended the Bank Merger Act to provide a procedure for bank mergers to be challenged under the antitrust laws even after the Comptroller of the Currency approved the merger.[158] Under the amended statute, the Attorney General could challenge any approved merger within thirty days of approval of the merger by the Comptroller. The Bank Merger Act provides for de novo review of the merger by the district court.[159] The antitrust court first determines if the merger will offend the antitrust laws. If the merger would violate the antitrust laws, the bank must then show that the merger is justified by benefits to the convenience and needs of the community. In applying this test the Supreme Court emphasized the importance of preserving competition. The result of the amended Bank Merger Act may be more effective enforcement of the antitrust laws.

Likewise, Congress enacted a special statute to allow newspaper joint operating agreements as a reaction to the Supreme Court's decision in *Citizen Publishing Co. v. United States*,[160] holding that a newspaper joint operating agreement in which subscription and advertising rates were fixed and profits pooled was unlawful. The newspaper retained separate editorial and reporting staffs. The Court also rejected the defense that one of the newspapers would have gone out of business if there had not been a joint operating agreement. The Newspaper Preservation Act permits a failing newspaper company to join a financially healthy paper in a joint operating agreement which would preserve separate editorial and reporting staffs of the two papers while eliminating competition for advertising. In order to obtain immunity, the agreement must be approved by the Attorney General.[161] However, the statute's definition of a failing company is not significantly more liberal than that developed by the Court in merger cases. In addition, newspapers considering an agreement can receive a definitive ruling as to whether they qualify for the failing company defense.[162]

In the area of mergers the antitrust laws has attempted to preserve competition. Congress, however, in many cases, has given

158. 12 U.S.C. § 1828 (1976).
159. United States v. Third Nat'l Bank in Nashville, 390 U.S. 171 (1968).
160. 394 U.S. 131 (1969).
161. 28 C.F.R. § 48 (1978).
162. *Id.*

the responsibility of weighing the advantages of competition against other national policies to regulatory agencies. However, in one case, Congress has assigned the task of weighing these interests to the courts. In the area of merger activity, Congress, itself, has taken an active hand in providing mechanisms to balance the policy in favor of competition against various other national policies.

DIVESTITURE IN REGULATED INDUSTRIES

While the antitrust laws have a significant role in preventing anticompetitive mergers, they also play a role in eliminating monopolies involving natural monopolies.

Courts, regulators, and Congress have struggled with the problems of when to require a monopoly to divest a portion of its business because of anticompetitive considerations. In *Cantor v. Detroit Edison Co.*,[163] the Court implied that the spread of regulated monopolies into competitive industries would be subject to antitrust scrutiny. In 1974, the Justice Department brought suit under the antitrust laws against American Telephone and Telegraph Company ("AT&T").[164] The government requested the court to find that AT&T had monopolized the telephone equipment industry. The requested remedy was divestiture of the telephone equipment manufacturing subsidiary, Western Electric. The Justice Department also asked the Court to consider ordering a breakup of Western Electric into two or more competing telephone equipment manufacturing companies in order to encourage competition.[165] While this suit has proceeded in court the FCC has acted to increase competition in the telephone equipment market through less extreme methods. Using the Federal Communica-

163. 428 U.S. 579 (1976). In *Cantor*, the Court held that the "state action" doctrine, *see* Parker v. Brown, 317 U.S. 341 (1943), did not immunize an electric utility regulated by the State of Michigan from attack under the antitrust laws when the electric company distributed free light bulbs. Cantor accused the utility of restraining trade by tying the sale of electricity and light bulbs together. The Court did not address the merits of the antitrust claim. *See also* Foremost Int'l Tours v. Quantas Airways, 379 F. Supp. 88 (D. Hawaii 1974), *aff'd*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

164. United States v. American Tel. & Tel. Co., No. 74-1698 (D.D.C., filed November 20, 1974). *See also* 427 F. Supp. 57 (D.D.C. 1976). For a general summary, see 4 TRADE REG. REP. (CCH) ¶ 45,074.

165. *See* 4 TRADE REG. REP. (CCH) ¶ 45,074. The Justice Department tentatively requested divestiture of a portion of the Long-Lines Department of AT&T from the local operating companies. The government had attempted to force divestiture of Western Electric but settled for a consent decree which provided that Western Electric would only sell equipment to AT&T and its subsidiaries for use in providing common carrier service. United States v. Western Elec., 1956 TRADE CASES (CCH) ¶ 68,246 (D.N.J. 1956).

tions Act, the Commission has forced AT&T to allow telephone customers to connect equipment manufactured by other companies than Western Electric to the telephone network.[166]

The Department of Justice and the FCC both believe that vertical integration of the equipment manufacturing and operating companies has stifled competition in the equipment manufacturing industry.

While admitting that telephone companies may be natural monopolies in the local transmission and switching system, these agencies do not believe that the same economics of scale exist in the telephone equipment manufacturing industry.[167] As long as telephone equipment is compatible with the telephone network and switching system, different manufacturing companies can produce the equipment. The FCC has tried to bring competition into the telephone equipment industry by forcing AT&T to allow customers to use equipment not manufactured by Western Electric. The Justice Department is trying to achieve the same result by forcing AT&T to divest Western Electric. Through the use of different tools both agencies are trying to bring competition to the telephone equipment industry. While the antitrust remedy would separate the manufacturing and operating industries, the Commission's orders will encourage new entry by providing a market for telephone equipment.

Congress has also provided an administrative procedure to force divestitures in the utility industry. The Public Utility Holding Company Act of 1935[168] was designed to eliminate electric or gas utility holding companies which controlled properties larger than could be justified by operating economies. The SEC was instructed to take such action as was necessary "to limit the operations of the holding-company system . . . to a single integrated public utility system."[169] *SEC v. New England Electric System*,[170] the Supreme Court explained that

> [c]ompetitive advantages to be gained by a [dissolution of a holding company controlling a gas and an electric utility company] are difficult to forecast. The gains to competition might well be in the public interest and might well offset the estimated loss in economies of operation resulting from a separation of the gas properties from the utility

166. Telerent Leasing Corp., 45 F.C.C.2d 204, 215 (1974), *aff'd sub nom.* North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir. 1976).

167. *See Hearings on H.R. 12323 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. (1976).

168. Public Utility Holding Company Act, 15 U.S.C. § 79 (1976).

169. *Id.* § 79k.

170. 384 U.S. 176 (1966).

> system. This is a matter for Commission *expertise* on the total competitive situation. . . .[171]

From 1938 through 1965, the Commission extensively reorganized the electric and gas utility industries. In 1940, there were twelve registered holding companies, each of which operated in more than ten states; in 1959, there were none.[172] Natural monopoly is generally accepted by economists as an acceptable reason for regulating an industry.[173] However, even in natural monopoly industries, both antitrust law and the use of competition can be used to reduce prices, encourage innovation, and improve service.

THE ROLE OF ANTITRUST LAW IN PREVENTING EXCLUSIONARY PRACTICES

The antitrust laws have been used to end a number of exclusionary practices by various regulated industries. In *United States v. Pacific & Arctic Railway*[174] an antitrust suit ended a concerted refusal to deal. In *Pacific & Arctic Railway*, a railroad held a monopoly on traffic moving from Skagway, Alaska, to various points in Alaska and the Yukon. The Justice Department indicted the railroad and two steamship companies for violation of sections 1 and 2 of the Sherman Act and the provisions of the Interstate Commerce Act forbidding discrimination between connecting carriers. According to the indictment, two steamship lines serving the Seattle-Vancouver to Skagway route agreed with the railroad that the latter would only concur in joint rates with these two lines. In the absence of joint rates, any traffic routed by shippers over other steamship lines would travel at higher rates. The indictments state that the agreements between the railroad and two steamship lines

> were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska and obtaining a monopoly of the traffic by engaging not to enter

171. *Id.* at 184-85.
172. 25 SEC ANN. REP. XXV, XXVII (1959).
173. One commentator compared telephone equipment to electric appliances which can be plugged into the electric power grid. As long as the appliances are designed to be compatible with the grid (*e.g.*, designed for 120 volt alternating current). Note, *Competition in the Telephone Industry: Beyond* Telerent, 86 YALE L.J. 538, 545-46 (1977).
174. 228 U.S. 87 (1913).

into agreements with the independent lines.[175]

The Court held that this was sufficient to charge a violation under the Sherman Act.

Under both common law and under the Act to Regulate Commerce, the railroads are required to provide through routes[176] and not to discriminate between connections.[177] Thus, railroads are required to interchange traffic with all lines which serve the interchange point and cannot prefer one connecting company. This promotes competition between the connecting lines. To illustrate this point, assume that railroad *1* has a monopoly from points *A* to *B* and three lines, railroads *2*, *3* and *4*, serve points *B* to *C*. If railroad *1* were not required to treat its connections without discrimination, it could funnel all traffic over one of its connections. If the traffic from *A* to *C* comprised a large portion of the total traffic moving from *B* to *C*, railroads *3* and *4* would go out of business and the monopoly would have spread to the route from *B* to *C*. The pursuit of monopoly powers through agreements between connecting carriers to prefer one carrier over another violates both the antitrust laws and the Interstate Commerce Act.

In *Otter Tail Power Co. v. United States*,[178] the district court had found that Otter Tail had refused to sell power at wholesale to proposed municipal systems in communities where its franchise was about to expire or "wheel" power to municipal systems from other electric generating companies. Otter Tail also instituted or supported litigation against municipalities which voted to establish municipal electric power systems in order to prevent or delay their establishment.[179] Otter Tail's actions[180] were solely to prevent municipal power systems from eroding its monopolistic position[181] and not due to any engineering problems. The Court held that such use of monopoly power to destroy threatened competi-

175. *Id.* at 104.

176. A railroad "through route" exists where traffic moves from one railroad's line to a connecting line in a continuous movement on a single bill of lading. Thompson v. United States, 343 U.S. 549, 556-57 (1952).

177. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 10703, 92 Stat. 1337, 1372-73 (to be codified in 49 U.S.C. § 10703, *see* note 2 *supra*). *See* Denver & R.G.W.R.R. v. Union Pac. R.R., 351 U.S. 321 (1956).

178. 410 U.S. 366 (1973).

179. Otter Tail Power Co. argued that this litigation was immune from attack under Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). However, the Court remanded the case to the district court to determine whether the litigation was a sham merely designed to harass municipal power companies. *Cf.* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (sham exception to the *Noerr-Pennington* Doctrine).

180. Wheeling is the process where one power company carries power for a second company's customers.

181. 410 U.S. at 379.

tion was an attempt to monopolize in violation of section 2 of the Sherman Act.[182] The Court noted that the FPC had the authority to order Otter Tail to interconnect with municipally owned utilities and sell power wholesale.[183] However, the Court noted that the essential thrust of the Federal Power Act was to encourage *voluntary* interconnections of power companies. The Court found that the Federal Power Act was designed to maintain competition to the maximum extent possible and that there was no intent in the legislative history to insulate electric power companies from the operation of the antitrust laws. The FPC could order interconnection when necessary or appropriate in the public interest.[184] However, the FPC, while it had to take into account antitrust considerations, was not bound by those considerations. The result is that the antitrust courts and the FPC have concurrent jurisdiction to order interconnection.[185]

Likewise, the Federal Communications Act empowers the FCC to order telephone companies to interconnect.[186] It can readily be seen that a small telephone company is completely dependent on its ability to interconnect with the Bell System, which

182. *Id.* at 380. *See also* Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289 (D. Colo. 1969).

183. 16 U.S.C. § 824a(b) (1976). *See* Elbow Lake v. Otter Tail Power Co., 40 F.P.C. 1262 (1968), *aff'd*, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

184. 410 U.S. at 373.

185. Under the decree affirmed by the Supreme Court, Otter Tail was required to sell electric power to existing or proposed municipal electric power systems at compensatory rates and subject to terms and conditions filed with and subject to the approval of the FPC. The net result of the decree was that the authority granted to the FPC was exercised by the courts. The expert agency could not order interconnection without first finding that the interconnection would not impair Otter Tail's ability to serve its own custumers. Under the decree, interconnection was required without reference to the provisions of the Federal Power Act. The remedy granted in this case removed the limitations on interconnection that Congress felt were desirable. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 382-95 (1973) (Stewart, J., dissenting). *See generally* Note, *Regulation, Competition, and Your Local Power Company*, 18 UTAH L. REV. 785 (1974); Note, *Otter Tail and Its Import for Regulated Utilities*, 9 WAKE FOREST L. REV., 407 (1973).

186. The FCC is empowered to order interconnection between common carriers under its jurisdiction. 47 U.S.C. § 201 (1976). The Commission has used this authority to require interconnections between telephone companies and specialized carriers. The result is that a customer of the specialized carrier can use local telephone service to transmit to the specialized carrier's office and from the specialized carrier's office in the city where the message is destined to the ultimate destination. The specialized carrier is thereby directly competing with the long distance service offered by AT&T. *See* Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); Wewer, *Recent Federal Actions Affecting Long Distance Telecommunications: A Survey of Issues Concerning the Microwave Specialized Common Carrier Industry*, 43 GEO. WASH. L. REV. 878 (1975); *Resale and Sharing of Private Line Communications Services: A.T.&T. Restriction and FCC Regulation*, 61 VA. L. REV. 679 (1975).

controls access to the vast majority of the nation's telephone network.[187] Likewise, the Federal Energy Regulatory Commission has the power to require electric utilities to interconnect and provide power to another utility.[188]

The Court's continuing attack on arrangements whereby a monopolist could in effect exclude a competitor from access to the market can also be seen in *United States v. Terminal Railroad Association*.[189] There the Supreme Court held that a number of railroads monopolized traffic in St. Louis by purchasing all means of access to the city and restricting access by other railroads. The Court recognized that it was desirable under many circumstances to consolidate terminal companies in order to serve the public more efficiently by transferring cars from different railroads to shippers throughout the city. The Court concluded that, "in ordinary circumstances, a number of independent [railroad] companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use."[190] However, where it was physically impossible to construct competing terminal companies, the right of independent railroad companies to construct a terminal company which excluded competitors had severe anticompetitive effects. The Court explained that

> [t]he "physial or topographical condition peculiar to the locality," which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion . . . to use its facilities.[191]

The Court found that where the terminal railroad placed its nonowners at a severe disadvantage in serving the city's shippers, the result was an unreasonable restraint of trade and commerce. In order to remedy this constraint, the Justice Department urged dissollution of the terminal company. However, the Court recognized that a unified terminal system resulted in distinct operating economies. Therefore, the Court concluded that it would not be an illegal restraint under the antitrust laws if a proper terminal

187. Until the 1920's it was quite common for a person to have two telephones; one to connect to the telephone company serving the local area and the other to interconnect with AT&T's long distance service. AT&T often forced local telephone companies to merge with it by refusing to interconnect. M. IRWIN, THE TELECOMMUNICATIONS INDUSTRY 68 (1971).

188. 16 U.S.C. § 824a(b) (1976).

189. 224 U.S. 383 (1912).

190. *Id.* at 405.

191. *Id.*

association was created acting as the impartial agent of every line which needed to use its instrumentalities.[192] If such an impartial agent were created, the Court concluded that a unified terminal company "will amply vindicate the wise purpose of the [antitrust] statute, and will preserve to the public a system of great public advantage."[193]

Eight years later, Congress enacted section 3(5) of the Interstate Commerce Act which empowered the ICC to force any terminal facility to grant access to non-owning carriers.[194] Such an order can be issued when the Commission finds it to be in the public interest, practicable, and that it will not substantially impair the ability of the railroad owning or entitled to the use of the terminal facilities to handle its own business.[195] Thus, the ICC was given the power to remedy a situation which the Supreme Court had found to be inherently anticompetitive.

CONCLUSION

This article has examined a few ways in which competition has been encouraged in regulated industries. The courts have forced regulatory agencies and regulated industries to at least note that the encouragement of competition is one of this nation's fundamental policies. While regulatory agencies exist to compensate for imperfections in the market, Congress has not completely rejected competition as an important factor in any privately-owned industry.[196] While this article describes the ways in which Congress, the courts, and the regulators have acted to encourage competition in regulated industries, there can be no doubt that regulation, to some extent, substitutes for and limits free competition. As the role of competition grows in an industry, either through Congressional legislation, regulatory action, or judicial interpretation of

192. In this case the Court mandated joint ownership by a number of railroads which are normally in competition. The combined use of terminal properties by railroads had been sanctioned by Congress as early at 1875. *See* Act of March 3, 1875, ch. 173, 18 Stat. 510 (1875). For each company to build its own lines to shippers would be just as inefficient as two telephone companies connecting wires to each house in a city. Therefore, the Court permitted one unified terminal company to continue in existence, but forbade that company from discriminating between connecting railroads.

193. 224 U.S. at 411.

194. Transporation Act of 1920, ch. 91, § 405, 41 Stat. 479 (1920), now enacted as Act of Oct. 17, 1978, Pub. L. No. 95-473, § 11103, 92 Stat. 1337, 1419-20 (to be codified in 49 U.S.C. § 11103, *see* note 2 *supra*).

195. Section 3(5) allows the ICC to look at a "St. Louis Terminal situation" to see if the remedy applied by the Supreme Court in *Terminal Railroad* is desirable.

196. *See* S. 382, 96th Cong., 1st Sess. (1979) (bill to amend the Clayton Act to require federal agencies to consider antitrust and procompetitive policies).

statutes the role of the antitrust laws will grow. However, if competition is to be encouraged in a regulated industry the antitrust enforcement machinery and regulatory machinery cannot work at complete cross-purposes. Rather, through administrative policy changes, judicial interpretation of the regulatory statute, or legislative amendment, there must be a change in regulatory emphasis to allow the competition to grow into an effective force.