Regulated Motor Carriers and the Antitrust Laws

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Regulatory activities in recent years have repeatedly involved conflicts, or at least confrontations, with antitrust policies. Although most regulated industries must face these issues in the context of their respective governing statutes and agencies, concentration on developments with respect to motor carrier regulation has been notable. This industry is currently the favorite nominee for an experiment in deregulation, largely due to its low entry requirements and the substantial number of firms which, if no longer regulated, would "probably come as close to the model of pure competition as is possible in the real world." This article will explore the background of motor carrier regulation, its relationship to antitrust policies and enforcement, and proposals for change.

I
LEGISLATIVE HISTORY

Commercial trucking was almost unknown in 1920 and was ignored in the Transportation Act of 1920, which adjusted existing railroad

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2 The President's Council of Economic Advisers recently specified consideration of deregulation as "a matter of urgent national priority." PRESIDENT'S COUNCIL OF ECONOMIC ADVISERS, ANNUAL REPORT 127-28 (1971). The 1970 Report of the same group stated that "regulation should be narrowed or halted when it has outlived its original purpose" (PRESIDENT'S COUNCIL OF ECONOMIC ADVISERS, ANNUAL REPORT 108 (1970)), and Mr. McLaren has expressed the Antitrust Division's opinion that "regulation of surface transportation has done just that." McLaren, supra note 1, at 9.


4 Ch. 91, 41 Stat. 456 (codified in scattered sections of 49 U.S.C.); see J. FILCAS, YELLOW IN MOTION 1-10 (2d ed. 1972), offering a case in point.
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regulation to the financial consequences of government operation during the war years and a post-war Depression. This legislation first introduced the concept of transportation consolidation and exemption from the antitrust laws. Only rail carriers were affected, and the Interstate Commerce Commission was directed to develop a national plan to encourage structural simplification.

Continued economic difficulties in farm areas in the 1920's led to passage of the Hoch-Smith Resolution in 1925, which directed the ICC to improve free movement of agricultural products "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service . . . ." This legislative mandate resulted in limitations on rate increases. Further pressures from shippers during the initial years of the Depression led Congress to enact the Transportation Act of 1933, again directing the Commission to ensure the "lowest cost consistent with the furnishing of . . . service." However, that directive "proved inadequate to ensure sufficient rail revenues" from movement of the bulk commodities peculiarly suited to rail transportation.

The solution to the railroad predicament in the 1930's appeared to be an improved rate structure for high value, short-haul goods. However, the ICC faced the phenomenon of a new, fast, flexible alternative for the movement of these products by truck. It was clearly in the interest of the Commission and its rail protectorate to secure the regulation of motor carriers as long as railroads had to operate with politically dictated rates that did not reflect cost-of-service pricing.

It should not be assumed that trucking interests were wed to the ICC at the point of a shotgun; quite the contrary was true for

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7 Id.
9 Ch. 91, 48 Stat. 211 (codified at 49 U.S.C. §§ 5, 5a, 15a, 15b, 19a (1970)).
11 A. Friedlaender, supra note 8, at 21.
12 The following analysis of the events leading to the enactment of the Motor Carrier Act, ch. 498, 49 Stat. 543 (1935) (codified at 49 U.S.C. §§ 301-27 (1970)), is drawn from
the larger firms. The 1920's had witnessed a classic case of complete competition. There was only minimal state regulation, and unhindered entry into the market encouraged so-called wildcat operators.

By 1931 many of the more influential operators had organized the American Trucking Associations as a national counterpart of the existing bus industry groups, intending to join those groups in seeking to promote uniform regulation to eliminate the ruinous competitive practices which prevailed. Although existing state associations formed the nucleus of the ATA, it had become clear that state by state variations were impractical to achieve the desired goals.

The private promotion of the desire for federal regulation paralleled three other developments: (1) a succession of post-1926 bills and hearings, (2) the increased concern of the ICC, and (3) the personal pressure applied by Joseph B. Eastman, then Chairman of the ICC and later Federal Coordinator of Transportation. The Commission presented its study of motor transportation to Congress in 1931 in support of its argument for expanded jurisdiction. The argumentative section of the report, "Regulation or Unrestricted Competition?" emphasized the unfairness to regulated commerce, particularly the railroads, which stemmed from continued nonregulation of motor carriers. This attitude was probably characteristic of biases present in the Commission at that

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13 Even such state regulation was narrowly circumscribed with respect to interstate commerce by the Supreme Court's decision in Buck v. Kuyckendall, 267 U.S. 307, 315-16 (1925) (states may not regulate interstate commerce with the object of restricting competition).


15 The American Transit Association and the National Association of Motor Bus Operators.

16 Generally, the disagreement within the ATA focused on whether to seek a new motor carrier agency or to encourage expansion of the ICC. See Staff of Senate Comm. on Commerce, supra note 14, at 40-41.


19 Id. at 98-95. The theme of unfairness to the regulated portions of an industry developed here was further noted in the Attorney General's Report on the Antitrust Laws as a common cause for broader regulation. The Attorney General's National Committee to Study the Antitrust Laws, Report 269 (1955).
The railroads were being hurt by the low marginal profit rates that truck and bus lines were then forced to maintain in order to survive. The shippers themselves—presumably an important segment of the “general public” to be benefited—voiced opposition to the proposed regulation. The National Industrial Recovery Act of 1933 offered the prospect of a genuine bonanza in the form of limitations on competition without the “public benefit” restrictions of most statutory regulation. Reversing its pro-ICC stance, the ATA spearheaded the formation of a trucking code; it “was an opportunity to get regulation self-imposed and Government enforced.” Although the code was adopted by the ATA board of directors, the operation of the scheme had barely evolved when the NIRA was declared unconstitutional.

This brief experience reduced intra-industry opposition to regulation (at least among those of influence), allowing the choice between the ICC and a new agency to be faced squarely. The decision was made to seek amendment of the Interstate Commerce Act. The ATA thereby made its third shift in function during its short life: from trade organization to code administrator to lobbyist. The Emergency Railroad Transportation Act of 1933 provided for a Federal Coordinator of Transportation, whose responsibilities included studying “means . . . of improving transportation conditions throughout the country.” From the time of Chairman Eastman’s

20 When he was talking with ATA members, ICC Chairman Eastman candidly admitted this bias as a natural result of a 45-year relationship with the railroads: “You may think that the ICC is old, hidebound, and railroad oriented. Maybe it is, but not to the extent that it cannot undertake a new job.” Staff of Senate Comm. on Commerce, supra note 14, at 43.

21 The shippers met with the response that “[p]ublic demand should not be confused with public need or what is in the public interest.” L. Flynn, supra note 18, at 97.

22 Ch. 90, 48 Stat. 195. The Act provided for the formation of the National Recovery Administration to superintend the adoption and enforcement of industry codes which were designed to coordinate competition. The purpose of the statute was to spur industrial and commercial recovery from the Depression through joint planning.


24 Staff of Senate Comm. on Commerce, supra note 14, at 41.

25 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Furthermore, since most small operators did not belong to the ATA, the code’s provisions were open to charges of discrimination.

26 One of its founders prefers the phrase “legislative committee actively seeking regulation.” Staff of Senate Comm. on Commerce, supra note 14, at 42.

27 Ch. 91, 48 Stat. 211 (expired 1936).

28 Id., at 216.
appointment it became inevitable that motor carrier regulation would be recommended and that it would follow the ICC's familiar railroad format. The ICC's Section of Research, which was established to develop the means of improvement, was intermodal in approach. In March 1934, its report and recommended legislation, known as the Eastman bill, were transmitted to the Senate, where they formed the basis of the Motor Carrier Act.

Within fifteen years of the birth of the motor carrier industry, ICC regulation of interstate trucking was a reality. But it was regulation with a unique New Deal rationale. The original Interstate Commerce Act was designed, among other things, to control the excesses of natural monopoly—in effect to fill a void where competitive principles did not apply to restrict prices and to increase supply because of the nature of the business. Conversely, the Motor Carrier Act represented a conscious decision to eliminate open and natural competition. The Federal Coordinator of Transportation's reports outline the three principal bases for this approach: protection of the railroads, stabilization and consolidation of the trucking industry, and support of organized labor through the elimination of owner-operators.

It was obvious that the Motor Carrier Act and its proponents were directly contradicting the antitrust principles previously adopted as national policy. Commissioner Eastman's concern with the "coordination" of railroad and motor carrier transportation was formally incorporated into the Transportation Act of 1940, in which, subsequent to the extension of regulation to motor carriers, Congress reaffirmed the goal of voluntary consolidations of carriers within modes and the separation of transportation policies from antitrust policies. The 1940

29 Federal Coordinator of Transportation, supra note 23.
33 There are some who think that the thing to do is to let down the bars and allow the competitors to fight it out to the finish. This would, of course, require practical abandonment of railroad regulation, leaving redress of grievances to the courts. The eventual result might be a kind of coordinated system of transportation, achieved through survival of the fittest, but the greater competitive strength of the railroads would be likely to distort the results. The fact is that this plan of free-for-all competition has never worked successfully, either here or elsewhere. It has been tried and found wanting.
Federal Coordinator of Transportation, supra note 23, at 23.
Act added the National Transportation Policy as a preamble to each Part of the Interstate Commerce Act:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act . . . so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system . . . .

With the adoption of these guidelines, Congress created a centrally planned transportation sector at the heart of an intentionally unplanned economy. The result was to be an artificial allocation of transportation resources and a rate structure reflecting traditional commodity-mode categories rather than the most efficient movement of goods.

II

STATUTORY PROVISIONS

The Motor Carrier Act\(^38\) added Part II\(^37\) to the Interstate Commerce Act to subject motor carriers to regulation similar to that applied to railroads. The Transportation Act of 1940\(^38\) amended sections of Part I\(^39\) to consolidate a number of provisions for motor carriers and other modes. Through these amendments, the Commission was given authority to regulate fully all common and contract motor carriers moving in interstate or foreign commerce,\(^40\) subject to exceptions for certain regulations as to specified transportation uses,\(^41\) and to establish safety requirements for private carriers.\(^42\)


\(^{36}\) Ch. 498, 49 Stat. 543 (1935).


\(^{38}\) Ch. 722, 54 Stat. 898.


\(^{40}\) Id. §§ 302, 304.

\(^{41}\) For example, school buses, taxicabs, and farm vehicles. Id. § 303(b).

\(^{42}\) Id. § 304(a)(3).
Section 5(1) of Part I of the Interstate Commerce Act prohibits any contracts, agreements, or combinations between regulated common carriers for the pooling or division of traffic, service, or earnings, unless the Commission finds after a hearing that such pooling or division "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition."

Commission approval is required pursuant to section 5(2) for any two or more regulated carriers to consolidate or to merge; jointly to purchase, lease, or operate another carrier; or jointly to acquire control of another carrier. An exception is made in the case of such transactions by motor carriers whose combined gross operating revenues do not exceed $300,000 annually. Commission approval is also required before a single regulated carrier may acquire control of another carrier, before a person not a carrier may acquire control of two or more carriers, or before a person not a carrier but controlling any carrier may acquire control of any additional carrier.

Control may be acquired through ownership of stock "or otherwise," as construed in general by section 1(3)(b) of the Act to include actual as well as legal control, whether maintained or exercised through or by reason of the method or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

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43 Id. § 5(1).
44 Id. § 5(2)(a)(i).
45 Id. § 5(10).
46 Id. § 5(2)(a)(i). Several subsidiary carriers may in effect be acquired, however, without § 5(2) authorization if they are acquired as an integrated "system." See Woods Industries, Inc.—Control—United Transports, Inc., 85 M.C.C. 672 (1960). But see General Movers Corp.—Control—Martin Van Lines, Inc., 101 M.C.C. 748 (1967), aff'd sub nom. Smyth v. United States, 293 F. Supp. 387 (W.D. Wash. 1968) (non-carrier may not purchase two separate carriers in single transaction without prior authorization, even when those carriers form integrated transportation system).

Control is also equated by the Act with "management in a common interest of any two or more carriers" (49 U.S.C. § 5(4) (1970)), and it is deemed by the statute to be accomplished in a transaction:

(a) if such transaction is by a carrier, and if the effect of such transaction
Commission approval of consolidations, mergers, and acquisitions follows an application and notification to the parties, to the governor of each affected state, and to the joint board for the affected states, with opportunity provided for each to be heard. Although the statute clearly contemplates regular approvals whenever the proposed transactions "will be consistent with the public interest," the Commission may modify an application and may condition its approval.

Section 5(4) declares illegal any unapproved direct or indirect control transaction, and the Commission is granted investigatory authority to discover violations. Commission orders, which may be supplemented as necessary, are enforceable by the Commission in United States district courts. Section 8 provides for damages and attorney's fees to any person injured by a violation of section 5; under section 9 the injured party may pursue his remedy either in a district court or by a complaint to the Commission. Section 10 provides for criminal penalties against a carrier; section 5(7) extends these sanctions to individuals for control violations.

is to place such carrier and persons affiliated with it, taken together, in control of another carrier;
(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier; [or]
(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

49 U.S.C. § 5(5) (1970). The requisite degree of affiliation is defined by § 5(6) as a relationship of a person to a carrier by reason of which "it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier." Id. § 5(6).


Failure to comply with a condition may not automatically eliminate the antitrust immunity extended by the Commission's conditioned approval. See Hefler v. International Air Transp. Ass'n, 1970 Trade Cas. 73,190 (S.D.N.Y.).


50 Id. § 5(2)(b).

51 Id. The joint board is chosen pursuant to § 205 of the Act. 49 U.S.C. § 305 (1970).


54 Id. § 5(8). See Greyhound Lines, Inc. v. United States, 308 F. Supp. 1033 (N.D. Ill. 1970) (§ 5(9) empowers ICC to supplement acquisition orders, even if supplemented orders incidentally affect a carrier's certificate).


56 Id. § 8.

57 Id. § 9; see Ellingson Timber Co. v. Great N. Ry., 1968 Trade Cas. 72,506 (D. Ore. 1968), aff'd, 424 F.2d 491 (9th Cir.), cert. denied, 400 U.S. 957 (1970).


59 Id. § 5(7). Section 5(1) makes each day of a pooling violation a separate offense for carriers. Id. § 5(1).
Section 5(11) relieves the participants from application of the antitrust laws, at least for approved transactions, by means of this elaborate pooling and control approval system:

[A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws [both state and federal] . . . .

In the absence of a statutory exemption, control transactions would normally be subject to section 7 of the Clayton Act and would thereby be prohibited whenever the effect "in any section of the country" was "to tend to create a monopoly." However, section 7 itself contains exempting language:

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . under any statutory provision vesting such power in such Commission . . . .

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60 Id. § 5(11). This exemption extends not only to participation in the transaction but also to the preliminaries, including any alleged conspiracy. See Interstate Investors, Inc. v. Transcontinenal Bus Sys., Inc., 310 F. Supp. 1053 (S.D.N.Y. 1970). As to exemption from state law, see Seaboard Air Line R.R. v. Daniel, 333 U.S. 118 (1948).

An ambiguity exists on the statute's face as to whether unapproved transactions are also immune from antitrust attack. The quoted language relieves only those persons participating in "approved or authorized" transactions. But that same subsection provides that "[t]he authority conferred by this section shall be exclusive and plenary" (49 U.S.C. § 5(11) (1970)), and it is unclear whether this provision relates to the Commission's authority to enforce the entire section by orders and court actions, as previously mentioned, or whether it relates only to the subsection language immediately succeeding the quote which exempts a participating or resulting corporation in an approved transaction from any necessity to obtain state approval. The former interpretation would mean that such transactions within ICC jurisdiction would never be subject to antitrust attack by third parties; the latter would suggest a limited exemption which the Commission could grant or deny. In the case of a denial by a failure to approve, the Commission could proceed against the parties to a control transaction or pool, and third party plaintiffs could also challenge them. The Commission has consistently held that there is no exemption until formal approval. See ICC v. Baltimore & O.R.R., 160 I.C.C. 785, 791 (1950); ICC v. Baltimore & O.R.R., 152 I.C.C. 721, 799-40 (1929); Transcontinental Bus Sys., Inc. v. Greyhound Corp., 104 M.C.C. 524, 555 (1968). The Supreme Court has held similarly in construing another regulatory statute. United States v. Borden Co., 308 U.S. 188, 198 (1939) (Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (codified in scattered sections of 7 U.S.C.)).


This language remained in the section even following its amendment in 1950, well after the adoption of the ambiguous exempting language of section 5 of the Interstate Commerce Act. The implication is that section 7 continues to apply to transactions which are not expressly authorized by the ICC.

It is apparent that a carrier may be involved in an acquisition or merger that would not be considered a control transaction within the meaning of section 5 of the Interstate Commerce Act, but might fall within the ambit of section 7 of the Clayton Act. Even in this case, however, jurisdiction to enforce section 7 against a regulated carrier is vested in the ICC. Section 11 of the Clayton Act establishes an elaborate hearing procedure with an opportunity for intervention by the Attorney General and any other person showing good cause; however, only the Commission may actually issue a complaint in a section 11 proceeding, restricted only by the statutory provision that it "shall issue" upon finding "reason to believe" that a violation has been committed. Thus, even to the extent that unapproved control transactions and other section 7 transactions involving regulated carriers are subject to section 7, a private third party must rely upon an ICC hearing rather than an action filed in a district court. The only exception to this procedure is the suggestion in the proviso to section 16 of the Clayton Act that the government may be able independently to obtain injunctive relief.

64 This could occur, for example, in a transaction involving an acquisition of multiple carriers by a holding company (see note 47 supra), in an acquisition by one carrier of a noncontrol interest in another carrier (see United States v. Navajo Freight Lines, 339 F. Supp. 554 (D. Colo. 1971)), or in a conglomerate merger involving only one carrier. Clayton Act § 11, 15 U.S.C. § 21 (1970).
65 Id; see Denver & R.G.W.R.R. v. United States, 387 U.S. 469 (1933). The role played by the Antitrust Division in these proceedings is outlined in Zimmerman, Carrier Mergers and the Relevance of Antitrust, 34 ICC PRACTITIONERS' J. 958 (1967).
Violations of sections 2 (Robinson-Patman Act price discriminations) and 3 (tying) of the Clayton Act by a regulated carrier are subject to the same section 11 procedure as are section 7 violations. However, the nature of a carrier's business makes it unlikely that those provisions of the antitrust laws would often be relevant. Furthermore, since all government Robinson-Patman cases are in fact brought by the Federal Trade Commission, which cannot proceed against a regulated carrier, the likelihood of such cases is further diminished.

A number of horizontal agreements other than pooling arrangements, control transactions, price discriminations, and tying restrictions may conceivably violate antitrust policies. The most obvious are agreements regarding rates, fares, and related considerations, which would otherwise probably be held illegal per se pursuant to section 1 of the Sherman Act. Section 5a, added to Part I of the Interstate Commerce Act in 1948, expressly sanctions such horizontal agreements, other than pooling arrangements within the scope of section 5. Provided that any agreement between carriers relating to rates, fares, classifications, divisions, allowances, or charges (including compensation for the use of facilities and equipment) is in "furtherance of the national transportation policy," and involves only carriers of one class, the Commission is directed to approve such agreement. This such actions; it has been additionally held that § 11 does not confer exclusive jurisdiction upon a regulatory agency. United States v. W.T. Grant Co., 345 U.S. 629 (1953). This result is confirmed by the legislative history of § 11. See S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950). But cf. section III(A) infra (discussion of primary jurisdiction).

70 "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970).
71 49 id. § 5b.
72 Act of June 17, 1948, ch. 491, 62 Stat. 472 (codified at 49 U.S.C. § 5b (1970)). The Reed-Bulwinkle bill, as this legislation was known, was a direct reaction to the decision of the Supreme Court in Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). The Court distinguished its earlier decision in Keogh v. Chicago & N. Ry., 260 U.S. 156 (1922), to the effect that a private party cannot attack ICC-approved rates, on the ground that even if the rates themselves were lawful, an injunction could issue to prohibit a conspiracy between carriers to achieve agreed rates since the agreement was not subject to ICC sanction.
73 Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.
74 The following are considered separate classes: (1) motor carriers; (2) water carriers and freight forwarders; and (3) railroads, express companies, and sleeping-car companies. Id. § 5b(4). However, interclass agreements are permissible for joint rates and through routes. Id.
75 Id. § 5b(2).
has the effect of granting an exemption from the antitrust laws to all parties to the agreement.\textsuperscript{75} Unlike the situation with respect to transactions falling within section 7 of the Clayton Act,\textsuperscript{76} the antitrust laws clearly do apply to unapproved agreements of the kind covered by section 5a.\textsuperscript{77}

Combinations and conspiracies to monopolize in violation of section 2 of the Sherman Act\textsuperscript{78} are not specifically dealt with by the Interstate Commerce Act other than to the extent that the specific combinations and agreements previously discussed are immunized.\textsuperscript{79} Unilateral monopolization and attempts to monopolize as such are also ignored by the Act.\textsuperscript{80}

The remaining major prohibition of the antitrust laws is section 8 of the Clayton Act,\textsuperscript{81} which forbids interlocking directorates between competitors. Interestingly, this section, on its face, is not enforceable against railroads, which were subjected four years after the passage of the Clayton Act to the special interlocking directorate provisions of section 20a(12) of the Interstate Commerce Act.\textsuperscript{82} However, there is a

\textsuperscript{76} See notes 61-69 and accompanying text \textit{supra}.


\textsuperscript{78} Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor .... 15 U.S.C. § 2 (1970); cf. Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936) (discriminatory privileges given by carriers are not illegal under Sherman Act unless symptoms or incidents of conspiracy).

\textsuperscript{79} See notes 60-61 and accompanying text \textit{supra}.

\textsuperscript{80} See Marnell v. United Parcel Serv. of America, Inc., 260 F. Supp. 391 (N.D. Cal. 1966) (motion to stay denied), \textit{decided on the merits}, 1971 Trade Cas. ¶ 73,761 (N.D. Cal.); notes 98-99 and accompanying text \textit{infra}.


particular ambiguity as to the effect of section 8 of the Clayton Act on motor carriers. At the time regulated carriers were excluded from the coverage of section 8, motor carriers were not regulated, and when the Motor Carrier Act was passed, Congress did not incorporate the section 20a(12) provision into Part II of the Interstate Commerce Act. Thus, if regulated motor carriers were not subject to the section 8 prohibition, their directorates would be entirely unrestricted. On the other hand, if motor carriers were within section 8, enforcement would be in accordance with the procedures previously noted for section 7 allegations.

III
Exemption Doctrines

The problems of statutory construction of express exemptions and the exclusive jurisdiction of the ICC are not the only grounds for argument in determining a motor carrier's exposure under the antitrust laws. Three judicial doctrines are also relevant to this determination: (1) primary jurisdiction, (2) the Noerr-Pennington doctrine, and (3) the Parker v. Brown doctrine.

A. Primary Jurisdiction

The doctrine of primary jurisdiction concerns the threshold question facing a court as to whether it should consider a pending matter or should defer the initial determination to an administrative agency. In simplest terms, the impact of primary jurisdiction is merely a matter of priorities, a consideration necessarily present in any judicial action raising issues which may also properly be considered in a proceeding before a regulatory agency. This view of the doctrine emphasizes administrative expertise and the benefits a court derives in deferring to agency jurisdiction before passing upon specialized questions.

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84 The Clayton Act § 10 requirement of bidding on transactions involving director or management interlocks would still apply, 15 U.S.C. § 20 (1970). Section 10 has been considered by the courts on only six occasions. A good review of its requirements may be found in the last of those cases, Klinger v. Baltimore & O.R.R., 432 F.2d 506 (2d Cir. 1970).
85 See notes 63-64 and accompanying text supra.
87 See, e.g., Far East Conference v. United States, 342 U.S. 570 (1952) (dual shipping rate); cf. Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959) (exculpatory clauses in shipping contracts). It has been recently pointed out that when the issue is one of construction of the antitrust laws, as opposed to the principal regulatory responsibilities of an agency, "the courts of the United States [rather than the agencies]
These assumptions have proven deceptive in many instances. Reliance upon agency "expertise" has tended to obfuscate the existence of parochial bias in some situations. The theory of judicial "benefit," originally founded upon the anticipation of Commission advice to the court on complicated and mysterious problems, has instead almost become equated with the recent preoccupation with docket control and case dispositions. A dismissal of a pending matter on the ground of primary jurisdiction easily avoids what in most cases promises to be an extended trial on the merits.

Another rationale for awarding primary jurisdiction to an agency has been to prevent inconsistency in the enforcement of the agency's regulatory responsibilities. Such an approach to the doctrine underestimates the expertise of the courts in resolving factual disputes and their ability to construe regulatory statutes together with other applicable law. Both of these activities may in fact provide valuable assistance and enlightenment to the agencies, and court decrees may be fashioned so as to avoid or limit troublesome inconsistencies.

The significance of the primary jurisdiction doctrine in the antitrust context arises from the inherent tension between antitrust and ICC goals. Clearly, a change in forum for the initial proceeding effectively changes the ground rules and may consequently affect the ultimate outcome. Furthermore, any change involves considerable delay.


89 Although the Commission must consider competitive effects in its interpretation of "the public interest," "it is clear that ... the most relevant consideration is the national transportation policy, not the antitrust laws." United States v. Navajo Freight Lines, 339 F. Supp. 554, 557 (D. Colo. 1971); see McLean Trucking Co. v. United States, 321 U.S. 67, 83-86 (1943). But see Latin America/Pac. Coast S.S. Conference v. FMC, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 75,995, at 92,135-37 (D.C. Cir. May 10, 1972), cert. denied, 41 U.S.L.W. 3220 (U.S. Oct. 24, 1972) (commissions and courts should not have different attitudes in enforcing the same laws) (dictum); Symposium, "Regulated Industries and Antitrust," 32 ANTITRUST L.J. 215, 239-41 (1966).

including the possible dismissal of a pending case,\textsuperscript{91} and may therefore make a court action impractical, if not impossible.\textsuperscript{92}

ICC preemption of original jurisdiction can have three legal effects on a judicial proceeding. First, the mere initiation of an ICC investigation may cause a court to defer to the agency, even without an initial Commission determination of jurisdiction or a statutory approval of the alleged violation.\textsuperscript{93} Second, an opportunity is created for the Commission to approve unconsidered transactions and agreements pursuant to sections 5 and 5a of the Interstate Commerce Act and thereby to grant immunity to previously vulnerable arrangements.\textsuperscript{94} Third, the doctrines of collateral estoppel and res judicata may apply to prohibit different conclusions in subsequent court actions,\textsuperscript{95} even in the absence of an express exemption.

The invocation of the doctrine of primary jurisdiction in a motor carrier context is based on several grounds. The nature of the issue is foremost, and the impact of the doctrine turns upon whether the issue is one uniquely within the Commission's expertise. The scope of motor


\textsuperscript{92} See also Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 431, 496-99 (1957).


\textsuperscript{95} Cf. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Seaboard Lines, Inc. v. Pennsylvania R.R., 207 F.2d 255 (3d Cir. 1953). Justice Harlan implicitly recognized this principle in United States v. Western Pac. R.R., 352 U.S. 59 (1956), where he quoted Professor Jaffe: "The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects' of commercial relations." \textit{Id.} at 65, quoting Jaffe, Primary Jurisdiction Reconsidered, 102 U. PA. L. Rev. 577, 583-84 (1954). The estoppel effect is probably appropriate in the event that a party originally makes his complaint to the ICC pursuant to §§ 5(7) and 13 (49 U.S.C. §§ 5(7), 13 (1970)); this result is specifically required by § 9 for damage actions, where an ICC or court option is provided to the claimant and the alternative is barred once he has elected his forum. See note 57 supra. But the statute does not by its terms so restrict actions for injunctive relief (which may be brought only by the government), and the courts have judicially created the § 9 effect without providing an option, comparable to that in § 9, to bring an action in a district court.
carrier regulation has been construed so broadly in a recent decision that virtually any antitrust matter is within the purview of the Commission. In United States v. Navajo Freight Lines, the district court dismissed the government's Clayton Act section 7 complaint, which averred a likely decrease in competition resulting from activities allegedly not amounting to statutory control, after concluding that

the doctrine [of primary jurisdiction] is properly applied where there is a clear possibility that the agency may immunize precisely that conduct which is the basis of the antitrust complaint, or where the agency . . . is entrusted with enforcement of the antitrust laws themselves, even though its immunizing powers do not extend precisely to the conduct in question.

Such an approach virtually eliminates all trial court jurisdiction and restricts the already limited antitrust enforcement available under the statutes.

The opposite conclusion had been previously reached on a private monopolization complaint in Marnell v. United Parcel Service of America, Inc. There the court held that the regulatory scheme of the Interstate Commerce Act was not "all pervasive" and that the ICC was not empowered to deal with the "essential ingredients" of the conduct alleged. This conclusion can be distinguished from Navajo in that, as previously noted, the ICC does have concurrent statutory jurisdiction over the Clayton Act sections 7 and 8 violations alleged, as in Navajo, while it has no jurisdiction directly to enforce section 2 of the Sherman Act, which formed the basis of the Marnell complaint. Marnell can

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97 Id. at 561 (dictum). But cf. note 204 infra.
99 Id. at 404. Plaintiff charged defendant with monopolistic practices by maintaining a unique and indispensable service in making, inter alia, C.O.D. deliveries and free deliveries for merchants.
100 Jurisdiction to enforce does not necessarily include authority to exempt or immunize. See Pan American World Airways v. United States, 371 U.S. 296 (1963), where the Court dismissed a government Sherman Act complaint on the ground that the Civil Aeronautics Board had responsibility for enforcing a statutory provision (Federal Aviation Act § 411, 49 U.S.C. § 1381 (1970)) similar to § 5 of the Federal Trade Commission Act (15 U.S.C. § 45 (1970)), even though the CAB could not "approve" and thereby exempt activities violating that standard. This finding approaches a determination of exclusive rather than primary jurisdiction. With respect to other agencies in other cases, however, the Court has rejected the argument that a regulatory scheme is so "pervasive" as to displace completely the antitrust laws. See California v. FPC, 369 U.S. 482 (1962); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (FCC); United States v. Borden Co., 308 U.S. 188 (1939) (Dep't of Agriculture). Significantly, that view has been applied to the Interstate Commerce Act by lower courts. See Denver Union Stockyards Co. v. Denver Live Stock Comm'n Co., 404 F.2d 1055, 1059 (10th Cir. 1969), cert. denied, 394 U.S. 1014 (1969). See also Atlantic Coast Line R.R. v. Riss & Co., 267 F.2d 657 (D.C. Cir. 1958). In Riss
also be distinguished from *Navajo* on the ground that ICC approval of a carrier's rates may not statutorily grant an exemption from charges of unilateral monopolization in the use of those rates, while it is conceivable that Commission action in *Navajo* could immunize the carrier from the precise section 7 charge in the government's suit.

The *Navajo* opinion details an analogy between ICC and Civil Aeronautics Board jurisdiction and is thereby able to place reliance upon the decision in *Pan American World Airways v. United States*\(^\text{101}\) as to the pervasiveness of the immunity effect under the statutes. It is regrettable that the *Navajo* court used language, albeit dicta, that went beyond previous standards for use of the doctrine.\(^\text{102}\) It is also difficult to understand why even the second legal issue in *Navajo* (legislative intent concerning the application of section 8 to motor carriers) was deferred to the Commission.\(^\text{103}\) An appeal was filed and dismissed\(^\text{104}\)

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\(^{101}\) 371 U.S. 296 (1963). *But see Breen Air Freight, Ltd. v. Cargo, Inc.*, 1971 Trade Cas. ¶ 73,775 (S.D.N.Y.), narrowly construing the immunity granted by a *prior* CAB authorization and denying primary jurisdiction.

\(^{102}\) *See* text accompanying note 97 *supra*.

\(^{103}\) *See also* notes 81-85 and accompanying text *supra*. A recent opinion reviewing a Federal Power Commission proceeding has proposed a novel twist which could be relevant in the motor carrier-antitrust area: so far as antitrust issues are concerned, the agency "may even, indeed, defer its disposition pending determination of relevant court litigation . . . . This would be in effect a reverse application of the doctrine of primary jurisdiction, a doctrine that has been appropriately referred to as supple and flexible." *LaFayette v. FPC*, 1971 Trade Cas. ¶ 73,730, at 91,053 (D.C. Cir.).

\(^{104}\) *Notice of appeal filed sub nom.* Garrett Freightlines, Inc. v. United States, 40 U.S.L.W. 3362 (U.S. Feb. 1, 1972) (No. 950), appeal dismissed, 405 U.S. 1035 (1972). Ironically, the appeal was filed by the company which was the object of its competitor's control effort and a nominal defendant, and the Department of Justice urged the Court to dismiss, apparently acquiescing in the ICC's primary jurisdiction. The government's motion to affirm explained this reversal in terms of the Commission's investigation commencing only after the filing of the complaint in the district court which, under the circumstances, was "appropriately instituted" in the face of agency inaction. Motion of the United States to Affirm, at 5 (filed March 14, 1972) (on file at the *Cornell Law Review*). However, the implication that the purpose of a court action is to spur Commission proceedings is questionable in view of the Department's ability to initiate an investigation by direct approach to the ICC. *Cf.* text accompanying notes 66-68 *supra*.

Other courts have recently disagreed on the applicability of the primary jurisdiction doctrine in comparable regulatory contexts. The Seventh Circuit applied the doctrine to affirm the dismissal of a private Sherman Act complaint against the Chicago Mercantile Exchange. *See Ricci v. Chicago Mercantile Exch.*, 414 F.2d 713 (7th Cir. 1971), *cert. granted*, 405 U.S. 953, *motion to reconsider denied*, 405 U.S. 984 (1972). The Second Circuit, however, expressly declined to follow that lead in denying a motion to stay in an action against
on a procedural ground, thereby failing to shed any light on these issues.

The position of the ICC in primary jurisdiction disputes is one generally shared by every regulatory agency. It is, to be blunt, a question of pride masquerading in terms of professionalism, thoroughness, experience, and responsibility. A more cynical view would suggest a desire to extend a protective blanket over constituents. This natural tendency was perhaps most recently exhibited by Securities and Exchange Commission Chairman Casey's recommendation that securities antitrust problems be referred by the federal courts to his Commission. The response of Senator Harrison A. Williams, Chairman of the Senate Securities Subcommittee, ironically points up one of the traditional problems of the transportation industry: "Without the spur provided by diligent application and enforcement of the antitrust laws, the incentives to modernization and efficiency through the operation of competitive forces . . . would be greatly reduced."
B. The Noerr-Pennington Doctrine

The Noerr-Pennington doctrine is a judicially fashioned exemption from the antitrust laws. Whereas the exempting effect of primary jurisdiction is a secondary consequence of other judicial priorities, the purpose of the Noerr-Pennington principle is the frank recognition of an immune area of possible anticompetitive activity.

In 1961 the Supreme Court announced in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." The Court extended this holding to the conclusion that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."

The apparent rationale for this policy was a combination of the constitutional right to petition the government and the government's inherent authority to restrain competition through legislation and law enforcement. This justification for certain concerted actions by competitors was expressed more clearly four years later in *United Mine Workers of America v. Pennington,* where the Court rejected a test based on good faith:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Thus, the primary purpose for seeking governmental action might be either to obtain a legitimate regulation or restriction (for example, safety) with anticompetitive side effects or to achieve the elimination of a competitor. The latter was clearly the case in the Pennington situation.

Some commentators feel that the presence of formalized regulatory controls somehow compensates for the opportunities provided by the Noerr-Pennington doctrine for joint action by competitors; this opinion manifests a narrow reading of the cases to apply only in regulated contexts. The doctrine is, however, particularly potent in a regu-

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109 Id. at 135.
110 Id. at 136.
111 381 U.S. 657 (1965).
112 Id. at 670.
113 See id. at 669-70.
114 See, e.g., Costilo, *The Scope of the Noerr-Pennington Doctrine,* 34 AntiTRUST L.J. 141, 151-54 (1967).
latory scheme in which there is an identifiable agency with specific authority to control competitive relationships. Given the efficacy of the doctrine in this context, it is therefore not surprising to find a number of decisions fitting within the latter framework.\footnote{See, e.g., Association of W. Rys. v. Riss & Co., 299 F.2d 133 (D.C. Cir. 1962) (efforts by railroads, railroad associations, and a public relations firm to influence legislative and administrative action to destroy or hamper trucking competition did not violate Sherman Act); A.B.T. Sightseeing Tours, Inc. v. Gray Line N.Y. Tours Corp., 242 F. Supp. 365 (S.D.N.Y. 1965) (allegation in complaint that bus companies had engaged in lobbying activities to enact legislation to hinder competition was not within scope of Sherman Act and was subject to motion to strike); Baltimore & O.R.R. v. New York, N.H. & H.R.R., 196 F. Supp. 724 (S.D.N.Y. 1961) (claim that plaintiffs had propagandized and influenced ICC to promulgate favorable rulings on per diem rental rates did not preclude enforcement of rental agreements made pursuant to rulings).}

For a variety of considerations, it seems more appropriate to restrict the exemption as it pertains to efforts encouraging administrative interference and to provide slightly more leeway for legislative lobbying.\footnote{See, e.g., Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872 (D.N.J. 1967); United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966).} First, lobbying as a practical matter requires concerted effort; second, legislation is commonly one step further removed from actual restraint than is administrative action; and third, the diversity of legislators’ viewpoints may well necessitate a more meritorious argument to achieve a favorable decision than would be required to convince a less disinterested or perhaps even favorably disposed agency. This view may amount to a judgment that legislation is inherently political, while agency regulation should ideally be apolitical. But surely, political participation, recognized as such, should be more squarely within the Noerr-Pennington sphere. The Court stated in Noerr that the antitrust laws must be limited to regulation of “business activity,” and cannot extend to “political activity.”\footnote{365 U.S. at 137 (dictum); cf. Barnett, Joint Action by Competitors To Influence Public Officials: Antitrust Exemption or Trap?, 24 Bus. Law. 1097 (1969).} It has recently recognized that the right to petition, underlying legislative political activity, also “governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts.”\footnote{California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (dictum).} However, this recognition should not detract from the realization that the degree of politics involved in a citizen’s relationship with the legislative, executive, administrative, and judicial branches of government should proceed across that spectrum in a
sharply declining order of magnitude. Hopefully, the application of the Noerr-Pennington doctrine will diminish in similar proportions.\textsuperscript{110}

There is reason to believe the courts have recoiled from the havoc loosed by Noerr-Pennington. The Noerr opinion itself excepted "sham" appeals to government action in situations where there "is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."\textsuperscript{120} This "sham" exception has been used in a variety of dissimilar cases to avoid application of the doctrine.

In George R. Whitten, Jr., Inc v. Paddock Pool Builders, Inc.,\textsuperscript{121} a summary judgment for the defendant was reversed in a treble damage action on the ground that Noerr-Pennington did not apply to a competitor's business relations with "public officials engaged in purely commercial dealings"\textsuperscript{122} rather than with policy makers. In Paddock Pool the parties were competitors seeking to sell swimming pools to public bodies, most of whom retained architects to prepare bid specifications. The First Circuit held that one competitor's efforts to obtain architectural adoption of specifications qualifying only the products of that competitor did not "rise to the dignity of an effort to influence the passage or enforcement of laws."\textsuperscript{123} Paddock Pool seems to read into the sham rule most dealings with the government in its proprietary capacity.\textsuperscript{124}

In Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150,\textsuperscript{125} the Ninth Circuit rejected a labor union's assertion of a Noerr-Pennington defense to a private conspiracy action. The court reversed a judgment on the pleadings for defendant and held that protected com-

\textsuperscript{110} It is a hopeful sign that the Court has not adopted an early suggestion to ground the doctrine on the first amendment right to freedom of speech. See The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 199 (1961); cf. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514-15 (1972), where the Court distinguished first amendment cases. Such an approach would hold out little prospect of judicial self-limitation of the doctrine's application.

\textsuperscript{120} 365 U.S. at 144.

\textsuperscript{121} 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970).

\textsuperscript{122} 424 F.2d at 33.

\textsuperscript{123} Id. at 32.

\textsuperscript{124} Dealing with governmental entities as potential customers or business associates is decidedly different from seeking regulatory relief or assistance from the government in its law-making capacity. The Paddock Pool court did not allow the label "government" to refute a single business transaction. Id. at 32-33. See also Twin City Sportservice, Inc. v. Charles O. Finley & Co., 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 74,450, at 92,798 (N.D. Cal. Aug. 16, 1972). But see United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966), which the government did not appeal.

\textsuperscript{125} 440 F.2d 1096 (9th Cir.), cert. denied, 404 U.S. 826 (1971).
munications could not include threats, intimidation, and coercion of public officials. There can be no argument that such tactics are legitimate appeals to governmental discretion or valid "political activity" which should be immunized as a matter of policy.

A third variation on the sham exception is the knowing presentation or communication of false information to induce governmental action. In *Woods Exploration & Producing Co. v. Aluminum Company of America*, the Fifth Circuit may have expanded the sham exception to include all false or misleading representations on the theory that such information can only be intended to thwart effective decision making by abusing the administrative process. Such an interpretation of the *Woods* holding would run counter to the explicit language in *Noerr* that "deception, reprehensible as it is," is still within the scope of the immunity. The petition for certiorari in *Woods* unsuccessfully attempted to establish this apparent conflict.

Another approach taken toward restrictive application of the *Noerr*-Pennington doctrine has been to distinguish existing decisions. This has the effect of allowing the exception only under certain limited conditions and works to prevent greater expansion of the doctrine. The Ninth Circuit followed this course in *Trucking Unlimited v. California Motor Transport Co.*, in its reversal of the district court's dismissal of the complaint for failure to state a claim upon which relief could be granted. The complaint alleged a conspiracy of motor common carriers jointly to oppose before the California Public Utilities Commission, the ICC, and the courts all applications for the issuance, transfer, or registration of operating rights by actual and potential competitors. Although the court of appeals recognized the applicability of the sham exception to the facts alleged, it based its conclusion

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126 440 F.2d at 1099.
127 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (antitrust immunity unjustified when gas producers filed false reports with state railroad commission so as to reduce production allowables of other producers).
128 365 U.S. at 145. The "falsehood" expansion of the sham exception was explicitly rejected by the Federal Trade Commission in early 1971 in a negative response to a request for an investigation of a deceptive advertising campaign. See BNA ANTITRUST & TRADE REG. REP., No. 504, March 16, 1971, at E-1. The FTC's letter to the complainant stated:

> Even assuming a wrongful motive . . . and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity . . . .

Id. at E-2.
129 Petitioner's Brief for Certiorari at 20-21.
130 432 F.2d 755 (9th Cir. 1970), rev'g 1967 Trade Cas. ¶ 72,298 (N.D. Cal.). The Supreme Court affirmed the court of appeals on other grounds, 404 U.S. 508 (1972).
131 1967 Trade Cas. ¶ 72,298, at 84,799.
primarily upon a construction of the doctrine which denied its application to
judicial and administrative adjudicative processes . . . . It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication . . . .

Although the Supreme Court affirmed _Trucking Unlimited_, it did so on the alternative ground that the plaintiff-respondent might be able to meet the sham exception on remand for trial. Justice Douglas's opinion brushed away the adjudicatory argument in four sentences, stating in part:

It would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

The concurring opinion of Justice Stewart is even more explicit in its reliance on the sham theory.

The Supreme Court opinion in _Trucking Unlimited_ did not consider either the proprietary function rationale of _Paddock Pool_ or the coercion premise of _Teamsters Local 150_. But it did treat the false information concept in a curious way, over the protest of two

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134 404 U.S. at 510-11.
135 [T]he respondents are entitled to prove that the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy "an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."

136 See text accompanying notes 121-24 _supra_.
137 See text accompanying notes 125-26 _supra_.
concurring Justices, who pointed out that allegations of false information did not appear in the complaint. After rejecting the primary basis for the Ninth Circuit decision, the Court modified that rejection with the gratuitous statement that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." In sum, the adjudication distinction of Noerr was not totally cast aside, and the false information aspect of the sham exception was not totally accepted. As a result, the Court may well have to consider these problems again.

Trucking Unlimited did establish one principle firmly. The Noerr-Pennington doctrine is, as suggested in the language of Noerr, subject to a sham exception when the appeal to a governmental body is not intended to invoke the governmental process to achieve a desired result indirectly but, rather, is intended to interfere directly with the competitor's business. In Trucking Unlimited the conspirators did not seek regulatory restriction on competition; instead they sought to prohibit access by competitors to regulatory agencies—a practical necessity—by greatly increasing the cost of successful prosecution of an application by a competitor. This conduct was condemned.

C. Parker v. Brown

In Parker v. Brown, the Supreme Court announced that the antitrust laws were not designed to restrain state action. Parker involved a raisin growers' private marketing program adopted pursuant to a California statute establishing market and price controls. Although the state legislation in question paralleled the federal Agricultural Adjustment Act, which was in derogation of statutory antitrust policies, the opinion did not dwell on this narrow point. Nor did it emphasize

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139 Id. at 517 (Stewart & Brennan, JJ., concurring).
140 Id. at 513.
141 Curiously, by the simultaneous denial of certiorari in the Woods case (404 U.S. 1047 (1972)) at the time of announcement of the Trucking Unlimited decision, the Court avoided an immediate examination of this ambiguity. It is obvious that the Court was conscious of the possible interrelationship, for the ambiguity was noted in questions from the bench at oral argument. See BNA ANTITRUST & TRADE REG. REP., No. 538, Nov. 16, 1971, at A-2 to A-5.
142 See note 120 supra.
143 See also United States v. American Natural Gas Co., 206 F. Supp. 908 (N.D. Ill. 1962). Trucking Unlimited has been cited in a subsequent decision turning on joint action (to obtain state enforcement of a licensing law) as clearly supporting an exemption in the absence of "misuse or corruption of the legal process." Semke v. Enid Automobile Dealers Ass'n, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 78,892, at 91,708 (10th Cir. March 15, 1972).
144 317 U.S. 341 (1943).
145 Id. at 350.
the fact that the California law imposed a regulatory scheme. Rather, the Court acknowledged that California's prorate program would violate the Sherman Act if fostered by individuals, and indeed that the federal government could, under the commerce power, prohibit programs such as California's. However, the Court held that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." \(^{146}\)

The *Parker* doctrine is the natural complement to the *Noerr-Pennington* doctrine. The latter immunizes the seeking of governmental action; the former immunizes the governmental action itself.\(^{147}\) It is of course possible for a situation to involve only one of the doctrines. An incipient inducement of governmental action involves only a *Noerr-Pennington* issue, and an unsolicited governmental action benefiting a competitor involves reliance solely on *Parker*. But the usual case, where a competitor has been successful in obtaining some beneficial governmental involvement in a competitive relationship, will raise both issues.

Under the *Parker* doctrine, the opportunities open to a regulated competitor such as a carrier are evident. For ICC regulation the doctrine is not directly applicable;\(^{148}\) the same result is achieved through federal statutory exemption and primary jurisdiction. But most carriers remain to a degree subject to state public utilities commission regulation and other state control. The *Parker* doctrine provides at a minimum the equivalent of federal statutory exemption for state laws.

In two recent cases, regulated utilities successfully invoked the doctrine in defense to private actions by competitors. The Fifth Circuit in *Gas Light Co. v. Georgia Power Co.*\(^{149}\) applied the traditional version

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\(^{146}\) Id. at 350-51.

\(^{147}\) The broad language of *Parker*, akin to sovereign immunity, has been seized upon in subsequent antitrust actions by a proliferation of defendants seeking to come under the umbrella of a government or public authority. *See*, e.g., *International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 74,094, at 92,534-35 (D. Hawaii July 14, 1972) ("approval" of merger by state public utilities commission does not cloak merger with immunity).

\(^{148}\) *See* *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). In *Hecht* the court did consider the merits of the "state action" issue even though the administrative body involved was a creature of Congress and not a state agency. This distinction was entirely ignored in *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,878, at 91,661-62 (S.D. Tex. Feb. 24, 1972), where the defendants unsuccessfully argued for immunity under a federal milk marketing order.

of the doctrine to immunize promotional programs which had previously been approved by orders of the state regulatory agency. However, in Washington Gas Light Co. v. Virginia Electric & Power Co., the Fourth Circuit went well beyond previous notions of exemption by finding state action in implied consent through failure of a state agency to consider the challenged practice. The scope of this expansion of Parker is highlighted by the revelation that seven years after commencement of the utility’s program, which was challenged in the private case, the state regulatory commission had prohibited further activities in its first consideration of the practices. The court chided the plaintiff for its failure to protest to the agency earlier and announced that the Parker doctrine applies to all violations “within the ambit of regulation,” whether or not regulation occurs. Clearly, the Virginia Electric decision equating state action with administrative acquiescence or even ignorance stretches Parker to the breaking point.

The Fifth Circuit panel in the Georgia Power case distinguished the prior holding of another panel of that court in Woods Exploration & Producing Co. v. Aluminum Company of America, which had refused to apply the Parker doctrine to a state commission’s orders controlling natural gas production. The Woods holding presented two propositions. First, it contradicted the Virginia Electric position by stating that all private action within a state regulatory framework is not ipso facto state action, even where state remedies specifically apply 

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151 438 F.2d at 252.

Ideal if the Exchange had exercised its own regulatory powers by establishing rules in respect to odd-lot differentials, I would assume arguendo that review of such rules might be beyond the powers of this court. But the Exchange, by its own admission, failed to establish any rules or regulations with regard to odd-lot differentials. To put the matter bluntly, it is unlikely that this failure or “benign acquiescence” can be considered to constitute regulation mandated by the Act.

Id. at 91,852.
153 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972).
to the defendant's conduct. Second, in light of a finding that defendants supplied false information to a regulatory body, the court refuted the presumption of state action: "[D]efendants' conduct here can in no way be said to have become merged with the action of the state since the Commission neither was the real decision maker [because it had to rely on defendants for its operative data] nor would have intended its order to be based on false facts." The Georgia Power panel did not embrace the first aspect of the Woods holding but maintained its neutrality by finding it unnecessary to go as far as Virginia Electric. The absence of allegations of falsehood in Georgia Power was considered distinction enough.

Another decision squarely in conflict with the spirit of Virginia Electric and distinguished on its facts by Georgia Power is George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., where the First Circuit refused to exempt the action of a public official or agent when that action served to undermine the purpose of state law. In Paddock Pool the defendant engaged in an elaborate program to have experts hired by public bodies include the defendant's unique specifications in bid terms adopted by those public bodies. Even though the act of recommendation was that of a quasi-official and the act of promulgation of the anticompetitive requirement was that of a governmental unit, the court found both acts to be inconsistent with the underlying purpose of the bidding law authorizing the actions. Because that law's purpose was consistent with the antitrust laws, the Parker doctrine was inapplicable since the state action was not intended to diminish competitive standards. The Paddock Pool court would recognize as within the ambit of the Parker doctrine only government action which "deliberately attempts to provide an alternate form of public regulation."

Whether challenged activities constitute genuine state action is essentially a factual inquiry to be determined on a case by case basis. Although the emphasis on particular facts may vary, most decisions are basically efforts to determine whether the pattern is state action with ancillary private participants or "individual action masquerading

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154 432 F.2d at 1295. But see Okefenokee Rural Elec. Memb. Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954). The status of false information under the Noerr doctrine may be somewhat higher than it appears to be for Parker doctrine purposes. See text accompanying notes 127-29, 138-41 supra. One court has attributed this shift in standards to the "First Amendment overtones" of Noerr. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 29 n.4 (1st Cir. 1970). But see note 119 supra.


156 See notes 121-24 and accompanying text supra.

157 424 F.2d at 30.
as state action." The degree of antitrust zeal of a court will usually show in its examination of the facts and the weight accorded to each in the balance.

A point more fundamental to the allowance of an exemption than the mere finding of state action was raised in *Hecht v. Pro-Football, Inc.* Where entirely legitimate state action does in fact exist, the inquiry should not end with an assumption of immunity under *Parker v. Brown*, but should proceed to consider whether the state action may continue without contravening federal antitrust laws, which, under the federal commerce power, constitutionally take precedence over state legislation. The original state action in *Parker* was impliedly authorized by another federal statute. It may well be that *Parker v. Brown* authorizes an exemption only for state actions consistent with auxiliary federal policies or those regulating areas specifically allocated to state control. The distinction between private action and governmental action for exemption purposes probably involves a second and more subtle distinction between governmental action and constitutionally permissible governmental action. A simple use of labels will not suffice.

**IV**

**Exemptions in Action**

Through the statutory and judge-made exemption structure, regulated carriers have been provided a considerable area in which to maneuver subject only to the exercise of ICC and, in some respects, state agency discretion. That freedom from antitrust constraints—and from antitrust enforcers, both public and private—is all the more valuable because of the concomitant protection from natural competitive restrictions. The ICC and state agencies control not only the antitrust reins but also the impact of competitive factors such as new entry, internal expansion over new routes, consolidation of carriers, diversification of carrier business, common ownership between carrier modes, and rates. Manifestly, under the current state of the law, the exercise of agency discretion and the standards for review of that discretion will determine the competitive atmosphere of the motor carrier industry.

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Other government and private efforts, not including legislative proposals, have not often been successful; they have at most been minor irritants to the industry.

An examination of the history of ICC policies is not encouraging for those urging a resurrection of competitive incentives. A study of judicial review is even more sobering in view of the anticipation aroused by the much heralded devotion of the courts to competition and the antitrust laws as our economic keystones. Instead of such devotion, one finds persistent deference to the Commission and casual lip service paid to antitrust doctrine as an element of the public interest. The most accessible area in which to explore these developments is that of Interstate Commerce Act section 5 control proceedings. These proceedings involve the exercise of considerable Commission discretion. They are often of sufficient magnitude to require an elaboration of the Commission's views and judicial review, and they are readily recognizable as merger and acquisition transactions otherwise squarely within the prohibitions of, *inter alia*, sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act.

The approach of the ICC and the Supreme Court after the last significant legislative action in 1940 is best exemplified in the Court's 1944 decision in *McLean Trucking Co. v. United States*. The Commission had approved an application to consolidate eight motor carriers over the objections of the Antitrust Division and a competing motor carrier, among others. The competitor challenged that approval, and one of the issues before the Court was whether "due weight" had been given to antitrust policies.

The combination of carriers in *McLean* eliminated direct competition between them over more than a third of their route-miles; the resulting motor carrier became the largest in the country at that time. The Court realized that "no other single motor carrier [would] compete with it throughout its service area." In its approval of the application, the ICC had expressed a clear intention to encourage such consolidations to conform trucking to its railroad model.

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161 See notes 34-35 & 39 and accompanying text supra.
163 321 U.S. at 71.
164 The legislative history of section 5 indicates a clear Congressional intent to encourage unifications, particularly of railroads. In view of the national transportation policy, as declared in the act, it can not be supposed that Congress intended that the motor-carrier industry, a coordinate and competing form of transportation, should not also be permitted to grow through consolidations, or that the mere size of the consolidated company should, of itself, be sufficient to warrant denial. Considering the much greater number of motor carriers of prop-
The Court refused to disapprove, by recognizing a distinction in the statutory history for application of section 5 to railroads and to motor carriers, the ICC's application of the same theory to two different modes of transportation. The opinion conceded in a footnote that "[a]uthorization of consolidation of rail carriers stems historically from circumstances different from those impelling the authorization of consolidation of motor carriers," and "[t]his difference in origins is not entirely to be ignored simply because the same provisions of § 5 now govern both motor carrier and rail carrier consolidations." Nonetheless, there was no recognition that this difference might be incorporated into the provision of the National Transportation Policy directing regulation so as to "preserve the inherent advantages of each" mode.

Having reached the conclusion that motor carriers were to be economically treated as fledgling railroads, the Court made its now classic pronouncement on the Commission's role:

Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commission power to control such developments. . . . Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

...
In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission. . . .

Justice Douglas's dissenting plea, that the Court exercise restraint in the motor carrier area until otherwise ordered by Congress, was ignored. 169

The ICC and its constituents quickly realized what the Court had done for the motor carrier industry. Illustrative is the development of the Allied Van Lines system. In 1942 a group of several hundred motor carriers of household goods applied to the Commission pursuant to section 5(1) for authority to pool their intercity business and to constitute Allied as their joint agent to conduct that business. That application was denied. 170 After the McLean decision in January 1944, a new application was filed patterned after the McLean transaction. In Allied Van Lines, Inc.—Purchase—Evanston Fireproof Warehouse, 171 the Commission approved the consolidation of 325 household goods carriers and related operations through an exchange of shares with Allied.

This turnabout is even more revealing when viewed in the light of intervening circumstances. The Antitrust Division, which had opposed both ICC applications, had filed a Sherman Act action between the first and second applications of the carriers, alleging violations of sections 1 and 2. A consent decree entered in that matter in 1945 prohibited most of the consolidating carriers from, among other things, entering into any combination with each other. 172 This decree did not occasion any pause in the Commission's conclusion; it noted that "[i]t is well settled that if we approve and authorize a transaction under section 5, the parties to the transaction, by virtue of the application

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168 321 U.S. at 86-87 (footnotes omitted).
169 Douglas warned that a pattern of consolidation will have been approved which will allow the cartel rather than the competitive system to dominate this field. History shows that it is next to impossible to turn back the clock once such a trend gets under way. 321 U.S at 94-95 (dissenting opinion). History has shown that his prediction was correct. See Jacobs, supra note 12, at 88-92.
171 40 M.C.C. 557 (1946).
172 For a discussion of this unreported case, see id. at 585-86.
of section 5(11), are relieved from the prohibitions of the antitrust laws to the extent of their authorized participation."

In approving the Allied merger, the ICC spent most of its analysis weighing improved operating efficiencies against the impact on competitors. These factors continued to be the predominant considerations in later proceedings; attention to shippers' views has been noticeably skimpy. Even in its evaluation of impact on competing carriers, the Commission appears to employ a "squeaky wheel gets the grease" rule. This emphasis was deplored by Commissioner Arpaia in his dissent in *Transcon Lines—Purchase—B & M Express, Inc.* The majority had placed considerable weight on the lack of vigorous opposition, while the dissenting opinion urged the assumption of a more difficult burden of proof by the applicant. The majority's attitude has normally prevailed.

The next major Supreme Court review of carrier exemptions came in 1959. Having determined in *McLean* that motor and rail carriers are subject to essentially the same standards, the Court affirmed the ICC's approval and a three judge district court's affirmance of a disputed railroad control transaction in *Minneapolis & St. Louis Railway Co. v. United States.* The district court's initial review rejected the proposition that the Commission should have weighed any violations of the antitrust laws against pro-public interest findings. It held that only "the effect of the acquisition on competing carriers and the possible curtailment of competition" needed consideration, rather than whether the acquisition would have in any way violated an antitrust statute in the absence of an exemption.

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173 Id. at 587 (citing *McLean*).
175 75 M.C.C. 693, 701 (1959) (dissenting opinion).
177 *But see Watson-Control*, 57 M.C.C. 745, 758 (1951).

The court read *McLean* to have decided that

[It is not the function of the Commission to determine whether the acquisition of Western by these two railroads will violate the antitrust laws. The Commission has not attempted to do so and can make no definitive decision as to whether or not the contemplated transaction will result in a restraint of trade or a monopoly which is forbidden by law.]

*Id.* at 899. The scope of review of the narrow ICC equation was also quite limited:
The Supreme Court did not take a position on whether the district court's "reasons and legal conclusions" were all correct. Nor did it repeat the lower court's analysis. Instead it concentrated on extensive quotation from its opinion in McLean. Consequently, it remained undetermined whether the McLean conclusion that "there can be little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws" also meant that the Commission could be impervious to those laws as guides to the effect of a transaction on competition and to the competitive factors to be examined.

The ambiguity with regard to required Commission findings was eliminated in Seaboard Air Line Railroad Co. v. United States. A three judge district court had reversed an ICC approval of a merger application on the ground that in the face of an allegation of a violation of section 7 of the Clayton Act, the Commission had failed to examine the relevant product and geographic markets required for a traditional section 7 analysis. The court distinguished McLean since that decision had involved a Sherman Act challenge over which the ICC has no jurisdiction, whereas it has express authority to enforce the Clayton Act. The court held that the Commission must make antitrust findings "in terms of criteria that have been developed by Congress and the courts."

The Supreme Court negated in clear terms the requirement imposed by the district court. The case was remanded with directions for review limited to "[w]hether the Commission has confined itself within

Since Congress has empowered the Commission, and not the courts, to determine whether the acquisition of control of one carrier by another or by others is consistent with the public interest, the determination of the Commission may not be set aside unless it can be said that there is no rational basis for it.... That this Court would or might have arrived at a different conclusion, had it had the duty and responsibility of deciding the controversy between the applicants, is of no consequence.

It must be remembered that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly.

Id. at 897 (footnotes omitted).

180 361 U.S. at 194.

181 321 U.S. at 84-85.


185 Id. at 22.

186 "We believe that the District Court erred in its interpretation of the directions [of] this Court ...." 382 U.S. at 156,
the statutory limits upon its discretion and has based its findings on substantial evidence . . . ’” 187 Thus hobbled, the district court was constrained to reject the modified argument of the plaintiffs that, although the ICC could not be forced to make a section 7 finding, it must still employ “modern sophisticated antitrust analysis” as part of its evaluation of the public interest. 188 Although the court felt that there was value in applying rational economic concepts, “one of the things that the Supreme Court told us when it vacated our first decision in this case . . . [was that] while rational economic principles contained in antitrust cases may aid us in pinpointing the danger areas, we may not require the ICC to travel to its conclusions only by this route.” 189 The Supreme Court previously cautioned against loading the public interest scales in favor of the antitrust factor, 190 but the result in Seaboard amounted to taking that factor from the scales altogether.

On remand, the Antitrust Division unsuccessfully sought to raise a new point, arguing that the National Transportation Policy favoring carrier consolidations was intended to assist only financially weak lines, and that where a merger involves healthy competitors the economies of scale involved should never outweigh the loss of competition in the public interest equation. This attempt to analogize past ICC section 5 approvals (and judicial affirmances) to the “failing company” defense recognized in traditional antitrust circles 191 was avoided by the court’s finding that the merging carriers in Seaboard were not financially healthy. 192

The point was again raised in United States v. Interstate Commerce Commission, 193 better known as the Northern Lines cases, which involved a merger of two large, prosperous, directly competing rail carriers. The combination had been repeatedly proposed over the years, 194 but it was not until 1967 that it was approved on terms accept-

187 Id. at 157.
189 Id. at 1003.
able to the parties. The final effort was successful only after reconsideration by the Commission of its initial disapproval where, by a six to five vote, it "concluded that the proposed merger plan did not afford benefits of such scope and importance as to outweigh the lessening of rail competition in the Northern Tier." Following its review of additional evidence in a reopened proceeding—none of which altered the record on decreased competition—the ICC reversed its original conclusion. This history highlights the obvious. The competitive impact element is not the controlling factor in the Commission's determination. Given even a serious decline in competition as a result of a transaction requiring section 5 approval, manipulation of the other "public interest" factors will ordinarily determine the outcome.

The Antitrust Division reasserted its "failing company" argument in the Northern Lines cases in the following manner:

The Department contends that under the statute when a proposed merger will result in a substantial diminution of competition between two financially healthy, competing roads, its anticompetitive effects should preclude the approval of the merger absent a clear showing that a serious transportation need will be met or important public benefits will be provided beyond the savings and efficiencies that normally flow from a merger.

Again, as in Seaboard, the Division interpreted the legislative history of the Transportation Act of 1920—which encouraged consolidation—in terms of the promotion of absorption of weak carriers by stronger ones during financially perilous times. It sought to explain the Transportation Act of 1940 as only a slight modification of the scheme to limit such consolidations to those which were voluntary rather than ICC promoted.
This argument is an especially pregnant one for motor carrier purposes. Although it represented the only hope for somewhat limiting further rail mergers, it offered the prospect of wide application to the trucking industry, which is generally healthy and growing. There would be few failing companies, and anticompetitive combinations would face a substantially higher public interest burden of proof. The contrast with the floundering financial status of railroads suggests the value of a rule which would distinguish between the economic realities of the two modes of transportation in the application of the same statute. The Court, however, rejected the Antitrust Division's argument.

The courts have now abdicated any serious role in examining control transactions or reviewing the propriety of an extension of antitrust immunity to the participants. The issue before the courts is reduced to little more than whether the Commission's conclusions are supported by substantial evidence. It has become virtually impossible for a plaintiff, whether the government, a competitor, a shipper, an employees' organization, a shareholders' committee, or a state or local community, to reverse an ICC-approved combination on antitrust grounds. The Commission is receptive to proposals for consolidation.

The Transportation Act of 1940 relieved the Commission of formulating a nationwide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness...


"We find no basis for reading the congressional objective as confining these mergers to combinations by which the strong rescue the halt and the lame." 396 U.S. at 509.


Since the Court's Seaboard reversal, another standard for review has been religiously recited—the Commission's observance of the statutory limits upon its discretion (see text accompanying note 187 supra). But the interpretation placed on the statute makes this question irrelevant to antitrust considerations. See Consolidated Freightways Corp.—Control—S. Plaza Express, Inc., 104 M.C.C. 194, 220 (1967), where the Commission reversed its hearing examiner and granted approval to a consolidation on the ground that preservation of competition is significant only to the extent that it furthers the National Transportation Policy.

The amount of attention given to the particular facts of each case by the Commission is open to question. At least one commentator has suggested its opinions are deceptive on that score. See Hale, supra note 174, at 398.

205 But see Southern Pac. Co.—Control—Western Pac. R.R., 327 I.C.C. 387 (1965); discussed in Lindahl, supra note 5, at 64-67.
and once ICC approval has been granted it continues to insulate the parties in perpetuity. Finally, little or no restraint can be imposed through proceedings which do not involve the Commission.

V
PROPOSALS FOR CHANGE

After eighty-five years it is probably too late to expect any material change in the industry-oriented outlook of the ICC. Over the last fifty years the Commission has abandoned its original view of competition as an independent value to be promoted along with reliable, safe, economical transportation services. Stare decisis has effectively closed the door on judicial revival of a competitive philosophy. This state of affairs is directly attributable to the short-sightedness of Depression era legislators; in fairness, the Commission and the courts have been following rather clear statutory instructions. These mandates are economically and historically unsound as applied to the trucking industry. Legislation created this situation; new legislation can change it.

Motor carriers are the most obvious candidates for experiment. The goal implicit in most proposals for change by antitrust advocates is to move toward a decrease in the regulatory incidents of entry into and exit from the industry and of operation of a truck line, in phased steps calculated to provide time for shippers to adjust and to minimize the economic displacements which are inevitable when support is removed from an artificial economic structure.

The logical and most cautious first step in such a process is amendment of the statutes regulating surface transportation to place a renewed emphasis on competitive values within a regulated context. This proposal is sometimes misleadingly referred to as deregulation, while in reality it recognizes a continued interim reliance upon regulatory controls of the industry parameters. A subsequent step would be further amendment to eliminate particular regulatory responsi-

207 See notes 92-95 and accompanying text supra.
208 For a recent summary of the structure of the industry, see Jacobs, supra note 12, at 88-92. This posture has served to increase advance opposition from entrenched trucking interests to current government proposals. See generally N.Y. Times, March 25, 1971, at 55, col. 4.
209 See notes 217-56 and accompanying text infra for a discussion of this type of amendment in terms of a pending legislative proposal.
bilities and requirements, such as control of entry or rate making.\textsuperscript{210} A third and final step would be the elimination of all, or most, specific transportation regulation.\textsuperscript{211}

The first of these changes has been seriously promoted periodically since President Kennedy's Transportation Message to Congress in 1962.\textsuperscript{212} The program advanced at that time had the firm support of Professor Donald Turner, then Assistant Attorney General in charge of the Antitrust Division.\textsuperscript{213} The underlying theory has bipartisan appeal, and Richard W. McLaren, Professor Turner's successor in the Nixon Administration, has continued to promote the concept of legislative change.\textsuperscript{214}

Renewed efforts to prepare a plan for presentation to Congress commenced in January 1971 with the invitation of the Antitrust Division for debate within the bar and regulated industries.\textsuperscript{215} In February, the President's Council of Economic Advisers emphasized the need for the development and implementation of a new program.\textsuperscript{216}


\textsuperscript{211} See generally H. KOLSEN, THE ECONOMICS AND CONTROL OF ROAD-RAIL COMPETITION (1968); Joy, Unregulated Road Haulage: The Australian Experience, 16 OXFORD ECON. PAPERS 275 (1964).

\textsuperscript{212} J. KENNEDY, THE TRANSPORTATION SYSTEM OF OUR NATION, H.R. DOC. No. 384, 87th Cong., 2d Sess. (1962). That Message stated in part:

Some carriers [railroads] are required to provide, at a loss, services for which there is little demand. Some carriers [motor carriers] are required to charge rates which are high in relation to cost in order to shelter competing carriers. Some carriers are prevented from making full use of their capacity by restrictions on freedom to solicit business or adjust rates. Restraints on cost-reducing rivalry in ratemaking often cause competition to take the form of cost-increasing rivalry—such as excessive promotion and traffic solicitation, or excessive frequency of service. . . .

No simple Federal solution can end the problems of any particular company or mode of transportation. On the contrary, I am convinced that less Federal regulation and subsidization is in the long run a prime prerequisite of a healthy intercity transportation network.

\textit{Id. at 2.}


The bipartisan appeal of this plea was reemphasized in July 1972 when the Democratic Party Platform was adopted with a plank, entitled "Toward Economic Justice," calling for, \textit{inter alia}, adjustment of "rate-making and regulatory activities, with particular attention to regulations which increase prices for food, transportation and other necessities." \textit{Reprinted in} 118 CONG. REC. S11,575 (daily ed. July 24, 1972).

\textsuperscript{215} See McLaren, \textit{supra} note 1, at 13.

\textsuperscript{216} PRESIDENT'S COUNCIL OF ECONOMIC ADVISERS, ANNUAL REPORT 127-28 (1971). The Joint Economic Committee of Congress concurred with the administration's recommenda-
On November 5, 1971, the Secretary of Transportation forwarded to Congress a proposed bill entitled "Transportation Regulatory Modernization Act of 1971." That proposal was filed as S. 2842 and H.R. 11826 and referred to the Subcommittee on Surface Transportation of the Senate Committee on Commerce and to the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, respectively, where hearings are now in progress.

S. 2842 reflects the caution generally observed when there is tampering with established interests. Since it proposes several changes without disturbing the regulatory environment, it should be classified as a step one proposal. It does not, however, deal with all step one opportunities for improvement, and it is subject to the criticism that, if passed, it will not serve as an adequate basis for a move to the second step of eliminating particular regulations.

Three of the problem areas addressed by the bill are relevant to motor carriers: rates, rate bureaus, and entry. The first and third elements affect the competitive climate of the industry; the second determines whether competition will be operative as a practical matter. The draftsmen characterized the bill as an attack on "the most immediate and pressing issues in surface transportation regulation within the context of the present regulatory system." In light of that expressed intention, the failure to revise the control provisions of Interstate Commerce Act section 5 is curious. Although the explanation naturally includes a measure of political realism, the draftsmen may have had a covert rationale. In Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co., the Commission approved a merger despite clear monopoly elements because, in its opinion, it could
control abuses of monopoly power through its rate regulation. The rate freedom provided by S. 2842 may well alter the public interest balance in future section 5 proceedings and may mitigate the necessity of addressing that section directly.

A. Rate Making

Control of rates was established to meet three objectives. The first was to prevent excessive prices and discrimination resulting from monopoly situations. The increase in intermodal competition has lessened this concern. The second was to ensure adequate profits for reinvestment. The advanced stage of railroad consolidation and the end of wildcat trucking have stabilized financial performance somewhat, yet it is clear that reasonable minimum rates cannot be relied upon to maintain full rail services. The third objective was to maintain certain uneconomic services in recognition of the reliance by persons anticipating continued regulation. The only solution to this momentum aspect is to make rate changes gradual or, again, to provide adjustment subsidies. The present allocation of excess charges from fixed rates for other services to cover losses incurred for particular unremunerative services is a form of forced subsidy by shippers making preferable economic decisions, and this silent transfer does not distribute the burden of a political decision on an equitable basis.

The rate problem is largely a creation of the slight correlation between costs and prices. The inelasticity imposed by rate regulation prohibits an efficient allocation of resources. S. 2842 seeks to amend sections 216(d), (e), (g), and (i) of the Interstate Commerce Act to

\[222\] Id. at 167. See also notes 182-90 and accompanying text supra.


\[224\] Some restrictions on entry and expansion in the motor carrier industry may be necessary to compensate railroads for floating trucking rates, but only government subsidy of railroads for short-haul commodities and long-distance passenger service will compensate for the loss of rate protection. Extensive financing proposals are contained in pending bills. S. 2841, 92d Cong., 1st Sess. (1971); S. 2362, 92d Cong., 1st Sess. (1971). Such subsidies would provide two beneficial results: the burden of maintaining uneconomic capacity demanded by the public interest would be shared, and the actual cost would be more readily ascertainable to determine whether the public interest can justify the expense.

\[225\] S. 2842, 92d Cong., 1st Sess. § 206 (1971) would repeal the portion of 49 U.S.C. § 22 (1970) which provides for preferential rates for the carriage, storage, or handling of property for federal, state, and municipal governments. The present provision is effectively a reverse public subsidy, exacting excess amounts from a portion of the shipping public and thereby indirectly benefiting all of the public.

\[226\] 49 U.S.C. §§ 316(d), (e), (g), (i) (1970).
create "zone of reasonableness" rate making.\textsuperscript{227} Notably, this would not terminate or even decrease the structure of regulation per se; rather, it would create new regulatory standards and increase the range of management discretion within which regulatory controls would not apply. Furthermore, retention of minimum rate regulation at the prescribed level would avoid undue preferences for favored shippers, would prevent predatory pricing to injure competitors, and would require pricing decisions which generate some contribution to fixed costs, thereby encouraging continued investment. The statutory prohibitions on rate discrimination would not be affected. Maximum rates would only be restricted when there is no clear competition; otherwise rates would be presumed to be competitive. No such presumption would apply to alternative service offered only by another motor carrier, presumably because of the oligopolistic possibilities for price leadership.

Rate making impetus would clearly be on the carriers. The power of the ICC to suspend a proposed rate would be retained, but it could be exercised only upon complaint, and only where the complainant alleges direct injury, has no alternative remedy, and is likely to sustain his complaint.\textsuperscript{228} These are the traditional grounds for granting a preliminary injunction.

S. 2842 proposes a gradual transformation to soften the displacement expected from rate freedom. No carrier would be permitted to

\textsuperscript{227} S. 2842, 92d Cong., 1st Sess. § 304 (1971) (proposed amendment to 49 U.S.C. § 316(i) (1970). The boundaries of the zone are (1) minimum rates at compensatory levels, that is, exceeding variable costs for providing specific services, and (2) maximum rates where there is no "alternative, effective, and competitive" service by another mode, in which case a rate may not exceed 150\% of the fully allocated cost (including a reasonable return on investment) for that service. If intermodal competition existed there would be no ceiling on the zone. \textit{Id.} The Commission would be prohibited from finding any rate within the zone to be unjust or unreasonable. \textit{Id.} (proposed amendment to 49 U.S.C. § 316(d) (1970)).

Chairman Stafford's testimony on the bill on behalf of the ICC opposed setting rate limits by statute. He stated that such ratemaking "always has existed" (statement of G. Stafford 16, at Hearings Concerning Surface Transportation Legislation Before the Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess. (March 28, 1972) (on file at the \textit{Cornell Law Review})), and he noted that "flexibility in ratemaking is an 'absolute necessity.'" \textit{Id.} at 19. Yet he also urged "that reasonableness is a question of fact calling for the exercise of this Commission's informed judgment." \textit{Id.} Such a conception is directly opposed to competitive principles which seek to determine reasonableness through a process devoid of imposed judgment.

The Department of Transportation, not the ICC, would promulgate accounting standards to determine the relevant costs in calculating the zone of reasonableness. S. 2842, 92d Cong., 1st Sess. § 304 (1971) (proposed amendment to 49 U.S.C. § 316(i)(6) (1970)).

\textsuperscript{228} S. 2842, 92d Cong., 1st Sess. § 304 (1971) (proposed amendment to 49 U.S.C. § 316(g) (1970)).
alter any rate by more than twenty percent in each of the first two years after enactment.229

B. Rate Bureaus

The current statutory provisions for horizontal rate agreements were outlined above in section II.230 Through antitrust immunity, rate bureaus consisting of competing carriers are encouraged to develop rates jointly. That concerted activity is balanced by the Commission's responsibility to review and approve the proposed rates. Creation of a zone of reasonableness for rates without the need for approval thus necessitates an alternative public assurance of fairness on rates charged. S. 2842 adopts the traditional assurance of unilateral rate decision making by substituting antitrust penalties for agency review.231

Under the provisions of the bill, existing section 5a232 would be amended and incorporated into a new Part VI of the Interstate Commerce Act.233 The immunity granted by section 5a would be expressly narrowed to exclude any agreement, discussion, or voting (1) on a single carrier's movements or (2) that includes as a participant any carrier not physically participating in the joint or interline movement under consideration.234 Also excluded would be agreements for joint consideration or action opposing another carrier's rates.235 The bill would subject this joint action "to such antitrust laws as may be applicable."236 The draftsmen have explained that this language is intended to continue the Noerr-Pennington exemption to the extent it may be applicable,237 but the Antitrust Division has expressed its opinion that "agreements among carriers which permit them collectively to challenge the independent rate action of a particular carrier" are "subject to the full remedies of the antitrust laws" under the bill.238 It is unclear whether this interpretation is derived from a construction of the language of S. 2842 or from an overzealous reading of Trucking Un-

229 Id. § 602(a).
230 See text accompanying notes 70-77 supra.
231 See text accompanying notes 240-45 infra.
234 Id. (proposed Interstate Commerce Act § 602(12)).
235 Id. (proposed Interstate Commerce Act § 602(7)).
236 Id.
237 Letter from James M. Beggs, supra note 217, at 7.
limited v. California Motor Transport Co.\(^{239}\) Hopefully, this matter will be clarified in the legislative history.

The bill provides for an interesting antitrust enforcement scheme. The need for ICC investigation is reduced by a requirement that copies of all writings pertaining to joint agreements and notices of all meetings be submitted to the ICC; further, a representative of the Commission may attend any meeting.\(^{240}\) Antitrust actions challenging agreements may be brought by the government in the district courts,\(^{241}\) presumably under the Sherman Act. Private plaintiffs, however, are restricted to actions for single damages, costs, and attorneys’ fees on complaints filed with the ICC based on horizontal agreements.\(^{242}\) A final judgment in a government action is given prima facie effect in the private action,\(^{243}\) as it is for normal private antitrust enforcement,\(^{244}\) and the standard antitrust four year statute of limitations is applicable, with tolling.\(^{245}\)

The bill does not affect the continued use of the antitrust laws to the extent they previously applied, including private treble damage actions.\(^{246}\) Instead, it opens the area of concerted carrier pricing activities to the increased restraint of antitrust principles. It is unclear why the private enforcement procedure is so awkwardly designed, but the implicit answer is that the carriers remain both politically influential and more comfortable with the Commission than with the courts. Possibly to prevent unwarranted industry predictions of disaster and confusion, the Antitrust Division took the unusual step of preparing and announcing antitrust guidelines under the proposed rate bureau amendments.\(^{247}\)

\(^{239}\) 432 F.2d 755 (9th Cir. 1970), aff’d, 404 U.S. 508 (1972); see notes 130-31 and accompanying text supra.

\(^{240}\) S. 2842, 92d Cong., 1st Sess. § 501 (1971) (proposed Interstate Commerce Act § 602(12)).

\(^{241}\) Id. (proposed Interstate Commerce Act § 602(13)).

\(^{242}\) Id. (proposed Interstate Commerce Act §§ 602(13), 603-04).

\(^{243}\) Id. (proposed Interstate Commerce Act § 602(13)).


\(^{246}\) See Statement of R. McLaren, supra note 238, at 17; Letter from James M. Beggs, supra note 217, at 7.

\(^{247}\) (1) The purpose of the bill is to place increased reliance upon individual carrier initiative in rate making. However, insofar as the actual printing and mailing of tariffs are concerned, carriers would be free to arrange for the provision of these mechanical services by rate bureaus or independent printing firms as they elect. (2) All single line carriers or carriers participating in joint routes who desire to meet rates lowered by a competitor in the same mode could do so upon one day's publication, provided that the ICC has not suspended the original rate action. The reduction of rates to meet competition shall not be suspended.
As with the rate provisions, the rate bureau changes would be phased into effect. Approved agreements in effect on or before the date unless the rates of those carriers meeting competition do not cover the variable cost of providing the service. (3) In cases other than those described in guideline 2, tariff changes applicable to single line service would be preceded by 30 days notice to affected shippers. Affected shippers may then individually contact and present their views to the carrier proposing the change. Also, under the conditions set forth in guideline 4, affected shippers may jointly present their views to the carrier. (4) While no antitrust immunity is provided shippers, so long as the joint activity is not predatory or anticompetitive against or among competitors and the latter are not unreasonably denied access to the joint association, shippers may join together to request a carrier to initiate lower rates. (5) In view of the provision under the bill that antitrust immunity shall not extend to agreements that permit carriers to engage in joint action on single line movements or agreements that permit any carrier not physically participating in a joint line or inter-line movement to take collusive action with respect to that movement, general rate increase proposals would be prohibited. Also, "cooperative committees" and "executive consideration" among or by carriers of different regions would, for the same reasons, be prohibited. Similarly, no rate bureau shall be allowed to issue rate advisory or rate interpretations of tariffs for "uniform" tariff action, nor shall any carrier be allowed to delay action on a joint rate docket by another carrier or carriers to allow "further study" of such docket. Agreements among rate bureaus to allow one rate bureau to delay action pending joint consideration by another rate bureau would be prohibited. Finally, rate bureaus shall not be allowed to process car-service rates or rules or any terminal rates or rules which do not involve joint line rates and which would unreasonably restrain commerce. (6) Antitrust immunity which may have been previously conferred by Section 5a of the Interstate Commerce Act for agreements authorizing a rate bureau to protest the independent rate action of any one carrier or group of carriers, is removed by the bill. To the extent the antitrust laws are applicable in this area, this feature of the bill will permit their operation, including treble damage suits by injured parties. (7) No rate bureau agreement could permit the establishment of any procedure which would unduly delay publication of tariffs desired by individual carriers. Such activity would be inconsistent with the intent of that provision of the bill discussed in guideline 6. (8) Upon demand of a shipper affected by the joint action of carriers, the ICC shall make available for inspection and copying by the shipper, all correspondence and writings of any kind filed by the carrier in connection with such joint action. (9) Affected shippers may request the ICC to send a designated representative of the ICC to attend joint meetings of a bureau conducted pursuant to the new statute. (10) Reasonable and nonexclusive standardmaking by carriers shall be permitted. (11) Nothing in the Act is to be construed to diminish the applicability of the antitrust laws to transportation as it now exists; rather, as noted above, the intent of the bill is to broaden antitrust coverage.


It is interesting to note that the promulgation of guideline 10 parallels the FTC's recent concern with the problems of manufacturers standards for engineering and performance and its sympathy with "the growing interest in the development of plans for self-regulation which will avoid the strictures of the antitrust laws." FTC Advisory Op. File No. 713 7002, 1 TRADE REG. REP. ¶ 1718.20, at 2917-9 (1972).

The guidelines were first introduced in the Senate subcommittee hearings as a part of Mr. McLaren's testimony. See Statement of R. McLaren, supra note 238, at 18-19. Acting Assistant Attorney General Walker B. Comegys, McLaren's successor as head of the Antitrust Division, introduced them in the House subcommittee hearings as part of his testimony on May 2, 1972. Statement of W. Comegys at Hearings Concerning Surface Trans-
of enactment would not be automatically affected.\textsuperscript{248} There is, however, an ambiguity in the bill concerning whether the Commission's authority to revise approvals is only prospective or whether it is expected to embark on a program of modification of existing agreements.\textsuperscript{249}

C. Entry

The third motor carrier problem area addressed by S. 2842 concerns the easing of restrictions on entry into the industry and internal expansion by existing lines. Freedom of entry was directly contrary to the National Transportation Policy goal of consolidation and simplification. Stringent enforcement of this phase of regulation has effectively dampened the competition which is possible within the current statutory framework and has eliminated the element of potential competition.\textsuperscript{250} Limitations on internal expansion have two significant anticompetitive effects: the incentive to grow is decreased and merger is encouraged.

Most motor carriers may be expected to oppose vigorously this aspect of the bill,\textsuperscript{251} for it contains a triple threat. First, it will impose an additional variation of the competitive discipline which rate freedom will also create. Carriers' business decisions will have to be based upon considerations of actual competitors' actions as well as those of marginal and new competitors on the edge of the market who could be attracted to enter by abnormally high profits. Second, the bill will probably affect the uniqueness of the services performed by private and contract carriers because of increased flexibility in common carriers' routes and commodities. Third, and perhaps most important, it threatens seriously to depreciate the most valuable asset owned by many small common carriers, and one for which larger consolidated common carriers usually paid dearly—the certificate of public convenience and necessity.

Noncompetitive inducements to reducing entry restrictions include the need for speedy expansion of motor carrier services to com-

\textsuperscript{248} S. 2842, 92d Cong., 1st Sess. § 603 (1971).
\textsuperscript{249} Compare id. § 603 with id. § 501 (proposed Interstate Commerce Act § 602(11)).
\textsuperscript{250} See Hale, supra note 174, at 390-95.
\textsuperscript{251} The Commission has also asserted its opposition. Chairman Stafford has specifically mentioned the threat that "[w]ithout the protection and encouragement afforded by our existing regulatory policies regarding entry, transportation would revert to the law of the jungle, and survival of the fittest." Statement of G. Stafford, supra note 227, at G-4. This, of course, is precisely the goal of the legislation.
pensate for the anticipated acceleration of rail abandonment,\textsuperscript{252} and the need to accommodate shifts from rail transportation following the imposition of compensatory minimum rates.\textsuperscript{253}

Title III of S. 2842 would revise the criteria for the issuance of common and contract carrier certificates to preclude a denial based upon an adverse effect on existing carriers, unless the total quantity and quality of service available to the shipping public would decrease.\textsuperscript{254} Again, the change in standards would be gradual. Existing common carriers could apply immediately for extended certificates.\textsuperscript{255} After six months from the date of enactment, existing common carriers could apply to eliminate any commodity, point, and route limitations in their current certificates which were imposed solely to prevent a diversion of traffic from another carrier.\textsuperscript{256} Only after two years could a new applicant rely upon the new standard.\textsuperscript{257}

CONCLUSION

Motor carrier regulation has questionable parentage. The legislative history reveals that trucking was regulated with a backward look at railroads instead of a forward projection toward maximizing motor carrier opportunities and efficiencies. Particularly notable in this development was the sub silentio assumption that regulation would require antitrust exemption. The policy to ignore obvious differences between the modes as to competitive opportunities and financial risks was never explained. The decision was made to conform an entirely new industry to the model of one that was mature but sluggish and, in many respects, failing. This lack of foresight was common to both Congress and the ICC.

The judicial system has been complacent in the face of these trends. The courts have placed considerable confidence in the ability of

\textsuperscript{252} S. 2842, 92d Cong., 1st Sess. § 202(a) (1971), would provide a completely new procedure for railroad abandonment involving objective standards based on volume of traffic and anticipated costs.

\textsuperscript{253} S. 2842, 92d Cong., 1st Sess. §§ 201(b), 205 (1971), would provide for railroad rate determinations similar to those for motor carriers discussed in notes 226-27 and accompanying text supra.

\textsuperscript{254} Id. § 301.

\textsuperscript{255} Id. § 302.

\textsuperscript{256} Id. § 301. The ICC has correctly pointed out that in this instance the phasing is unnecessarily discriminatory because within two years "the certificated carriers might well have the opportunity to expand their operations into all the profitable markets and effectively preclude new carriers from commencing suitable competitive operations." Statement of G. Stafford, supra note 227, at G-8.
the Commission properly to resolve interpretations of the statutes, and case law has further encouraged both carrier-agency cooperation and isolation of carrier activities from antitrust restraint. It is not the function of the judiciary to flaunt congressional priorities, but skepticism as to legislative intent is warranted in cases of serious diversion from other fundamental legislative goals.

Regulation has a natural tendency to expand and perpetuate.\textsuperscript{258} This phenomenon is probably accelerated for regulation which is imprudently conceived insofar as it attracts support from vested interests which are unwilling to evaluate proposals solely on their merits. Surface transportation, particularly the motor carrier industry, is currently in the position of choosing between the temporary comfort of the status quo and the endorsement of structural change to promote continued vitality, modernization, and efficiency. Change within a highly regulated context is based upon extraneous considerations and economic guesswork;\textsuperscript{259} deregulation would force change adapted to long-term economic needs. The warning sounded by President Kennedy in 1962 is even more appropriate today:

If direct and decisive action is not taken in the near future, the undesirable developments, inefficiencies, inequities, and other undesirable conditions that confront us now will cause permanent loss of essential services or require even more difficult and costly solutions in the not-too-distant future.\textsuperscript{260}

The trucking industry should carefully consider pending and future legislative proposals affecting the industry with a view toward encouraging increased competition and decreased regulation.

\begin{itemize}
\item \textsuperscript{258} See Loevinger, \textit{supra} note 105, at 117.
\item \textsuperscript{259} In a recent address, Bruce B. Wilson, Deputy Assistant Attorney General, noted another persistent regulatory failing:

There is another problem that seems to plague any scheme for extensive economic regulation. And that involves the inability of a government bureaucrat sitting in Washington, to make decisions about new changes in the industry he regulates. Time after time industry must wait months, and in some instances years, for the regulatory commission to decide how it will handle a new service and what the price and other characteristics of that service should be. This seems to occur not only in areas of overall policy guidance but also in the day-to-day adjudicatory processes of the regulatory agencies.

\item \textsuperscript{260} J. Kennedy, \textit{supra} note 212, at 2.
\end{itemize}